Constitutional Crisis, Security and Democratic Resilience

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EDITORS' PREFACE

The essays collected in this volume are the outcome of the scientific activities carried out within the framework of the PNRR-TNE International Mobility Programme "Assessing Constitutional Crisis Impact and Security" (IMP-ACCTS), Project Proposal TNE23-00057, funded by the European Union under the NextGenerationEU initiative and coordinated by the Universities of Siena, Cagliari, Milano-Bicocca, and Salento.

The contributions were first presented and discussed across five events: the Summer School on *Security and Constitutionalism* (Siena, Pontignano, and San Gimignano, 19-24 July 2025), the Summer School on *Constitutional Crises* (Como, Milano, 19-25 October 2025), the Winter School on *Constitutional Crisis and Cyber Security* (Siena, Pontignano, and Monteriggioni, 22-28 February 2026), the Winter School on *Constitutional Crises* (University of Milano-Bicocca, 1-4 March 2026), and the Final Workshop on *Constitutional Crisis and Cyber Security: Institutions, Rights and Global Challenges* (University of Cagliari, 5-6 March 2026).

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INTRODUCTION

Mario Perini

This volume is one of the outcomes of the International Mobility Programme – Assessing Constitutional Crisis impacT and Security (IMP-ACCTS), a transnational educational initiative developed within the Italian PNRR framework for Transnational Education. Its significance, however, does not lie only in the institutional setting from which it originated. The project was conceived, from the outset, not as a mere framework for mobility, but as a structured academic enterprise intended to foster a stable network of research and teaching around a field of inquiry that has become increasingly central to contemporary systems: the relationship between constitutional crisis and security in present-day legal orders.

The project proposal identifies clearly this objective. IMP-ACCTS was designed to combine student and staff mobility with advanced training activities, intensive courses, workshops, and a shared digital infrastructure, so as to produce not only a quantitative increase in academic exchange, but also a qualitative strengthening of comparative and interdisciplinary cooperation. In this respect, the present collection should not be regarded as a fortuitous compilation of essays. It is, rather, the written outcome of a broader scientific endeavour, one that brought together Italian universities and foreign partner institutions to reflect, from different constitutional angles, on the forms, causes, and consequences of contemporary crises.

The institutional architecture of the project is itself revealing. IMP-ACCTS was built around three principal pillars: general student mobility, general staff mobility, and advanced skills activities centred on the themes of constitutional crisis and security. The selection of these themes was not incidental. As the proposal makes clear, they were chosen precisely because of their capacity to cut across disciplinary boundaries and to generate a durable field of comparison among legal systems marked by different political traditions, constitutional experiences, social cleavages, and geopolitical constraints. The underlying assumption was therefore methodological before being substantive: constitutional law can still offer a meaningful account of present-day instability, but only if it is willing to confront the institutional and material conditions within which constitutional categories operate.

This assumption appears particularly well founded in the present historical context. Constitutionalism now functions under pressures that no longer fit comfortably within the classical grammar of the exception. Crisis, in many democratic systems, no longer appears only in the form of a dramatic rupture, a coup, or the formal suspension of legality. More often, it emerges through gradual and overlapping phenomena: executive expansion without explicit authoritarian breakdown, recurring legislative incapacity, technological opacity, geopolitical dependence, institutional fragmentation, and the routinization of extraordinary powers. In parallel, security has progressively ceased to be a category confined to military

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defence or public order. It increasingly extends to fields that, until recently, might have appeared conceptually distinct from it: labour relations in the digital environment, surveillance architectures, the protection of minorities, the integrity of legal communication, technological governance, and even the cognitive conditions of democratic self-determination.

It is against this background that the contributions collected in this volume should be read. Several chapters return to the more classical terrain of emergency powers and institutional stress. Yet they do so without reproducing the older and simpler opposition between normality and exception. Valeria Piergigli revisits the constitutional regulation of emergency powers in Europe and warns against the conceptual inflation by which structural or chronic difficulties are casually redescribed as "emergencies". Paolo Zicchittu, in turn, approaches constitutional crisis as a structural category internal to modern constitutionalism and reconstructs the role played by the Italian Constitutional Court in preserving legality and institutional continuity within a system marked less by rupture than by persistent strain. Giorgio Cataldo introduces a further dimension by bringing geopolitical asymmetry into constitutional analysis, showing how the pursuit of security is shaped when the State acts under conditions of structural dependence. Omer Kleinman carries the discussion into the digital domain and argues that traditional emergency models have become increasingly inadequate in the face of cyber warfare and hybrid threats. Yoav Dotan, finally, examines the Israeli experience and shows how judicial review in matters of national security cannot be understood apart from the broader crisis of judicial autonomy and democratic backlash.

Taken together, these chapters suggest a broader conclusion. Emergency is no longer a marginal doctrine situated at the outer boundary of constitutional law. It has become one of the central points at which contemporary democracies negotiate legality, legitimacy, effectiveness, institutional resilience, and the limits of public power.

The volume, however, does not reduce security to the language of emergency powers. This is one of its principal merits. Other contributions show that the constitutional meaning of security is far wider and more complex. Chiara Doria reconstructs the right to disconnect through a constitutional perspective that treats security not merely as protection from external harm, but as a condition for the effective protection of the person in the digital age. Selma Metiljević-Lončarić addresses secret surveillance under Article 8 ECHR and shows that the tension between privacy and security cannot be adequately understood without close attention to legality, procedural safeguards, and forms of independent oversight. Boaz Segal explores the deterrent potential of tort law in the fight against terrorism, thereby shifting the focus from public-law exceptionalism to private-law mechanisms of accountability. Matteo Gerlini, in the nuclear field, examines the evolution of IAEA safeguards and argues that contemporary security risks must be addressed through the management of the interface between verification and protection. Milena Marzovilla reconstructs the role of the CSCE/OSCE and reminds us that, within the European tradition, security and human rights were never conceived as separate normative universes. Igor Mirjanić adds a further and particularly revealing perspective by examining tax secrecy and cybersecurity, namely the vulnerability of taxpayer data in an age of digitalized administration and AI-enhanced threats; in so doing, he shows that confidentiality, institutional trust, and fiscal legality must now be read as part of the broader constitutional grammar of security. Željka Piljagić, for her part, turns to the institutional resilience of Bosnia and Herzegovina in the face of cyber threats, making clear that cyber insecurity is not merely a technical problem but a direct function of constitutional fragmentation, divided jurisdictions, and incomplete securitization. Xhei Çeliku comple-

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ments this line of inquiry from the Albanian perspective, analysing the relationship between cybercrime and personal data protection and showing how legal harmonization with GDPR standards has become a crucial index of constitutional and institutional resilience.

This broader understanding of security deserves emphasis. Contemporary constitutional discourse is often tempted to identify security with concentration of powers and institutional acceleration. Much in this volume points in the opposite direction. Security, within a constitutional democracy, is often secured precisely through limitation, review, legal accountability, and the thickening of guarantees rather than their suspension.

A further set of chapters pushes the inquiry beyond institutional crisis in the narrow sense and toward the deeper conditions of constitutional order. Edin Škrebo revisits constitutional identity in Bosnia and Herzegovina and examines whether it may serve as a pacifying and integrative category within a deeply fragmented post-conflict order. Bujar Taho critically analyses the case law of the European Court of Human Rights on Roma claims and argues for a dignitarian corrective to culturalist forms of adjudication that risk reproducing, rather than overcoming, structural marginalization. Era Buçpapaj turns to a theme often neglected in constitutional scholarship, namely constitutional translation, and shows that in multilingual legal orders translation is not a merely technical service but a component of governance infrastructure itself. Jovan Malešević interrogates the limits of liberal constitutionalism in the face of algorithmic power. Nicolò De Perto examines neurotechnologies and asks whether existing constitutional categories remain adequate to protect cognitive autonomy and the free formation of political will. Vincenzo Tondi della Mura, finally, situates current constitutional tensions within the wider re-emergence of political theology and the weakening axiological confidence of Western democracies. To these reflections must now be added Lejla Hasanović's analysis of the "humanization" of companies under the European Convention on Human Rights, which complicates any easy distinction between market actors and constitutional subjects by examining the conditions under which legal persons may appear as bearers of rights and victims before the Strasbourg Court. Claudio Cacciapaglia, in turn, brings into the volume the phenomenon of greenwashing, analysed as a constitutional problem at the intersection of environmental protection, consumer autonomy, and technological regulation, with artificial intelligence presented not merely as a source of risk but also as a possible antidote to deceptive environmental communication.

What unites these contributions is not a single doctrine, nor a uniform definition of constitutional crisis. Their unity lies elsewhere. Each, in its own way, shows that constitutional instability today is not exhausted by formal emergencies, governmental deadlock, or explicit constitutional breakdown. It may also arise where the semantic, symbolic, technological, and social conditions of constitutional authority begin to shift beneath the surface of formal legality.

This, then, is the deeper coherence of the volume. The essays gathered here do not merely describe national experiences. They contribute to a common inquiry into how constitutional orders endure, adapt, justify themselves, and sometimes falter when confronted with pressures that are at once familiar and unprecedented. The project proposal presented the dissemination of a shared European constitutional heritage among non-EU partners as one of the expected impacts of IMP-ACCTS. The present book gives that aspiration a more demanding meaning. Constitutional heritage, if it is to remain a living resource, cannot be transmitted as a fixed canon. It must be tested against conflict, translated across contexts, and re-elaborated in light of the changing forms of power and vulnerability that define the present.

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The chapters that follow should therefore be read neither as isolated national reports nor as self-contained doctrinal exercises. They form part of a broader comparative reflection on constitutionalism under pressure. Their common lesson is not entirely reassuring, but it is intellectually valuable. Constitutional law still matters decisively in times of crisis and insecurity. It does so, however, only on the condition that it does not imagine itself as a self-sufficient technique. At its best, constitutional reasoning remains persuasive when it is historically informed, institutionally grounded, comparatively oriented, and capable of confronting the material transformations through which crisis and security are now being redefined.

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CONSTITUTIONAL TRANSLATION AS GOVERNANCE INFRASTRUCTURE: RISK, AUTHORITY, AND RESILIENCE IN MULTILINGUAL CONSTITUTIONAL ORDERS

Era Buçpapaj

Keywords: Constitutional Translation; Governance Infrastructure; Multilingual Constitutionalism; Constitutional Resilience; Legal Interpretation; Emergency Powers.

1. *Introduction*

Constitutional crises often appear as conflicts over power, procedure, or emergency competence, yet they frequently begin as conflicts over meaning. Institutions dispute what a clause permits, forbids, or requires; who has the power to act; and whether a deadline, threshold, or review mechanism has been respected. In multilingual settings, or in systems that circulate relied-upon translations of a single authentic constitutional text, such disputes are intensified because the operative text may not be identical across linguistic versions.

This paper argues that constitutional translation should be analysed not as a merely technical service but as governance infrastructure. It is infrastructural because institutions, courts, officials, journalists, diplomats, and the wider public rely on translated constitutional materials to communicate, justify, contest, and implement constitutional authority. Once translation is understood in this way, two implications follow. First, translation variance must be recognised as a potential source of institutional risk. Second, quality assurance and version governance become matters of constitutional resilience rather than mere linguistic housekeeping.

The argument is conceptual and doctrinal rather than empirical. It draws on multilingual legality in European Union law, bilingual interpretation in Canada, general international law on authenticated treaty texts, emergency-law safeguards in human rights law, and practical guidance from legal-translation and publication regimes. Its aim is not to deny the inevitable open texture of constitutional language. Rather, it is to identify those translation shifts most likely to matter in crisis-sensitive settings and to specify governance controls capable of reducing avoidable translation-driven instability.

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2. *Constitutional Translation as Governance Infrastructure*

Multilingual legal orders have long recognised that language is part of legality. In European Union law, where legislative acts exist in multiple authentic languages, the Court of Justice has insisted that no single language version may be treated as exclusively authoritative and that interpretation may require comparison across versions in light of context and purpose. A similar principle appears in treaty law: where a treaty has been authenticated in two or more languages, each text is equally authoritative, and divergences must be reconciled through principled interpretation rather than through a simple preference for one wording.[1]

These doctrines show what happens when multilingual authority is fully acknowledged. Cross-language comparison becomes an ordinary part of legality. Constitutional translation in many states, however, operates in a different register. There may be one formally authentic constitutional language, while translations are circulated for transparency, administration, judicial information, diplomatic communication, or legal assistance. Even when such translations are labelled as non-binding, they may still function as what can be called a shadow text: a version with no formal legal force that nonetheless shapes practical understanding because it is the text that actors can access and use most easily.

This distinction between authority and circulation is decisive. A translation may be formally subordinate and yet institutionally powerful if it becomes the version cited in parliamentary papers, media reporting, donor communications, or public guidance. Skoma-Lux underscores the governance significance of publication conditions: the Court linked enforceability to proper publication in the relevant official language and warned that uncontrolled reliance on non-authoritative language material would undermine legal certainty. Once circulation is taken seriously, translation can no longer be treated as ancillary to legality. It becomes part of the architecture through which constitutional authority is made visible and operational.[2]

The infrastructure perspective is especially important in crisis-sensitive texts. Constitutional clauses on emergency powers, electoral timetables, government formation, judicial review, derogation, or rights limitation are not ordinary passages. They contain the operators through which exceptional powers are activated, constrained, reviewed, or terminated. A small shift in those operators can affect not only semantic nuance but also the perceived legality and legitimacy of governmental action. In this sense, translation belongs to constitutional security understood institutionally: the capacity of a constitutional order to preserve legality, coordinated authority, and public trust under stress.[3]

3. *Authority Regimes, Crisis Texts, and Translation Risk*

A useful starting point is to distinguish among authority regimes. In a multiple-authentic-language regime, constitutional or quasi-constitutional texts are authoritative in more

[1] Court of Justice of the European Union, Case 283/81; United Nations, *Vienna Convention on the Law of Treaties* (United Nations Treaty Series 1155:331, 1969), art. 33.

[2] Court of Justice of the European Union, Case C-161/06 (Skoma-Lux sro v Celní ředitelství Olomouc, December 11, 2007).

[3] Venice Commission, *Respect for Democracy, Human Rights and the Rule of Law during States of Emergency: Reflections* (Strasbourg: European Commission for Democracy through Law, 2020), CDL-AD(2020) 014, paras. 5-7, 121.

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than one language. Belgium provides the clearest illustration in the present discussion: its Constitution is drafted in Dutch, French, and German, and multilingual legality is built into the formal structure of the text itself. In such systems, divergence is managed through comparison and reconciliation as an ordinary feature of legal interpretation.[4]

A second model is the single-authentic-language regime with relied-upon translations. Here one language version retains formal legal authority, but translated texts circulate widely for access, administration, or international engagement. Swiss federal English translations offer a disciplined information-only model: they are available for use, yet their non-authentic status is made explicit. The Albanian legal-assistance context illustrates a related disclaimer model. For example, EURALIUS's English translation of Law No. 96/2016 states that the text is unofficial, is provided for information purposes only, and does not confer rights or obligations separate from legislation formally adopted and published in Albanian.[5]

A third possibility is a hybrid regime in which translations are institutionally important but their status is communicated inconsistently. This is the most precarious configuration because authority signals become blurred precisely when users need them most. If several portals host different translations, if update routines are unclear, or if the same document is described at different times as official, unofficial, or merely informative, translation variance can acquire strategic value in public contestation.

Risk is not created by multilingualism alone. It arises from the interaction of three variables: the formal status of language versions, the crisis sensitivity of the text, and the degree of practical uptake. Crisis sensitivity matters because some textual zones are far more consequential than others. Provisions on emergency declaration, duration, renewal, publication, promulgation, notification, counter-signature, rights limitation, or judicial access carry legality-critical operators. Uptake matters because a translation that is frequently cited by institutions, courts, media, or international actors can shape outcomes even where its formal legal status is weak. Translation-induced constitutional risk can therefore be defined as the probability that a translation difference will either plausibly alter legal effect or materially alter perceived meaning and legitimacy under public contestation.

4. *High-Impact Translation Shifts in Crisis-Sensitive Texts*

Not every linguistic difference matters equally. The most serious risks cluster around a limited number of operator zones in which translation variance can redistribute discretion, alter thresholds, or weaken legal certainty.

First, modality and negation are high-impact carriers of legal force. The difference between may, must, shall, may not, and must not is not stylistic. It marks the distinction between permission, obligation, and prohibition. In crisis governance, such differences can expand or contract discretion around emergency declarations, institutional appointments, dissolution powers, or rights restrictions. European institutional drafting and translation guidance treats

[4] Belgian House of Representatives, *The Belgian Constitution* (English translation; updated following the constitutional revision of 17 March 2021, 2021).

[5] Swiss Confederation, *Federal Constitution of the Swiss Confederation of 18 April 1999 (SR 101)* (unofficial English translation, 1999); EURALIUS, *Law No. 96/2016 on the Status of Judges and Prosecutors in the Republic of Albania* (unofficial English translation, 2016).

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these forms as legally sensitive precisely because modal language structures legal effect rather than merely dressing it in grammar.[6]

Second, temporality and procedural architecture are equally delicate. Expressions such as immediately, without undue delay, within x days, no later than, expires unless, or continues until define when extraordinary powers begin, how long they endure, and when oversight must intervene. In emergency governance, temporality is itself a safeguard. Human rights derogation law makes this plain: exceptional measures must be strictly required, exceptional, and temporary, and the restoration of normal legality remains the governing objective. A translation that loosens a fixed deadline into a more elastic formulation can therefore weaken the temporariness that legitimises emergency power in the first place.[7]

Third, competence boundaries and validating steps are vulnerable to seemingly minor shifts. Active and passive voice, actor labels, threshold terms, and sequencing markers can blur which institution must act, which procedure is mandatory, and which formal step makes an act legally effective. Here publication doctrine becomes crucial. Skoma-Lux shows that legal certainty is not separable from publication discipline: if enforceability depends on the correct public presentation of the text, then translated constitutional materials that obscure publication status or validating steps can feed institutional uncertainty.[8]

Fourth, rights limitation and derogation architecture contains operator chains that are exceptionally sensitive to dilution. Intensifiers such as strictly, conditionals such as only if and provided that, and structured tests of necessity and proportionality are designed to constrain exceptional power. The phrase strictly required in Article 15 ECHR and Article 4 ICCPR is a case in point. Recasting it as merely necessary is not an innocent lexical variation; it risks lowering the justificatory threshold attached to emergency action.[9]

Fifth, definitions and referential chains stabilise constitutional meaning across instruments. Defined terms, threshold formulas, and cross-references tie constitutions to implementing laws, decrees, court decisions, and explanatory texts. If translation destabilises a defined term or breaks a referential chain, the legal system loses internal coherence precisely where coordinated action is most needed. This is why legal translation scholarship has long treated definitional precision and systematic consistency as central rather than incidental values.[10]

[6] European Parliament, Council of the European Union, and European Commission, *Joint Practical Guide for Persons Involved in the Drafting of European Union Legislation* (Luxembourg: Publications Office of the European Union, 2015); European Commission, *English Style Guide: A Handbook for Authors and Translators in the European Commission* (Brussels: Directorate-General for Translation, 2025).

[7] Council of Europe, *Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights)* (European Treaty Series No. 5, 1950), art. 15; United Nations, *International Covenant on Civil and Political Rights* (United Nations Treaty Series 999:171, 1966), art. 4; United Nations Human Rights Committee, *General Comment No. 29: States of Emergency (Article 4)* (CCPR/C/21/Rev.1/Add.11, 2001), paras. 2 and 4, p. 2.

[8] Court of Justice of the European Union, Case C-161/06.

[9] Council of Europe, *Convention for the Protection of Human Rights and Fundamental Freedoms*, art. 15; United Nations, *International Covenant on Civil and Political Rights*, art. 4; United Nations Commission on Human Rights, *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights* (E/CN.4/1985/4, 1984), paras. 48-51.

[10] Cao Deborah, "Legal Terminological Issues in Translation," in *Translating Law*, edited by Deborah Cao (Clevedon: Multilingual Matters, 2007), 53-82; Engberg Jan, "Word Meaning and the Problem of a Globalized Legal Order," in *The Oxford Handbook of Language and Law*, edited by Peter M. Tiersma and Lawrence M. Solan (Oxford: Oxford University Press, 2012), 175-86.

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Finally, authority labelling and circulation are themselves a category of risk. A translation does not become harmless merely because it carries a disclaimer somewhere in small print. Users need clear and repeated signals indicating whether a text is authentic, officially issued but non-authentic, or purely informational. Where such labelling is unstable, non-authoritative texts can circulate as if they were controlling ones. The problem is not simply misunderstanding. It is that competing actors may selectively mobilise whichever version best supports their position, thereby intensifying contestation over the meaning of the constitution itself.

5. *Governance Controls for Constitutional Resilience*

If constitutional translation is governance infrastructure, it requires governance controls. Those controls should be proportionate, risk-based, and capable of functioning under time pressure.

The first control is institutional ownership. A constitutional system that routinely publishes or relies on translations needs a clearly identified institutional owner for translation governance. Responsibility cannot remain dispersed between ad hoc translators, isolated ministries, or uncoordinated portals. Ownership is necessary to establish status rules, publication routines, correction pathways, and accountability for updates.

The second control is risk-based prioritisation. Not every text requires the same intensity of review. Governance effort should concentrate on crisis-sensitive segments and on operator zones with the greatest potential to alter legal effect or legitimacy: modality, negation, temporal operators, thresholds, competence verbs, and rights-limitation tests. A risk-oriented posture is more realistic than uniform maximalism and is better suited to periods of institutional stress.

The third control is controlled terminology and phraseology. Institutions should maintain bilingual or multilingual termbases and phrase banks for legality-critical formulations, especially those attached to emergency activation, oversight timing, derogation thresholds, and publication status. The point is not stylistic homogenisation. It is functional stability. Where the same operator carries the same legal burden across documents, its translation should not vary casually from one text to another.

The fourth control is independent revision. ISO 17100 treats revision by a competent person other than the translator as a core process requirement, and this four-eyes logic provides a sensible baseline for constitutional texts with high circulation or crisis relevance. Where a segment bears directly on competence allocation, rights limitation, or time-sensitive oversight, targeted legal review should be added to linguistic revision. The aim is not to constitutionalise a private-sector standard but to adapt its disciplined workflow to legality-critical public communication.[11]

The fifth control is version governance. A translation regime is only as reliable as its ability to show which text is current, which changes have been made, and where the authoritative source is located. Version governance therefore requires a canonical publication location, visible version dates, stable identifiers, a retained correction trail, and a public note clarifying the status of superseded versions. European publication practice offers practical models of such traceability through controlled identifiers and corrigendum routines.[12]

[11] International Organization for Standardization, *ISO 17100:2015 Translation Services - Requirements for Translation Services* (Geneva: ISO, 2015); International Federation of Translators, *ISO 17100 - FAQs for Freelance Translators* (FIT, 2020), 2.

[12] European Union, *Council Regulation (EU) No 216/2013 of 7 March 2013 on the Electronic Publication*

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The sixth control is a crisis-mode protocol. Because crisis texts are often translated and circulated rapidly, the essential controls must be specified in advance rather than improvised under stress. At minimum, crisis-mode publication should preserve controlled terminology for high-impact operators, independent revision for crisis-sensitive segments, unambiguous status labelling across every dissemination channel, and a rapid correction mechanism if divergence is discovered after release. Acceleration may be unavoidable; the removal of essential safeguards is not.

6. *Implications for Multilingual Constitutional Orders*

The framework developed here does not seek to eliminate constitutional indeterminacy. Constitutional language cannot be made mechanically precise in every context, nor should it be. The objective is narrower and more realistic: to prevent translation variance from becoming an avoidable amplifier of constitutional conflict. That objective has different institutional implications depending on the authority regime.

In multiple-authentic-language systems, the priority is disciplined reconciliation. Divergences are inevitable and must be addressed through established methods of comparison, contextual interpretation, and reasoned reconciliation. Governance therefore centres on documentation, transparency, and the routine normalisation of cross-language interpretive work.

In single-authentic-language systems with relied-upon translations, the priority is status clarity and controlled circulation. Here, the greatest danger is often not formal doctrinal contradiction but operational drift: the gradual emergence of a shadow text that becomes authoritative in practice without being recognised as such in law. Institutions that depend on translations for openness, administration, or international communication must therefore strengthen status labelling, review discipline, and version control in proportion to real-world uptake.

This paper also has a broader implication for constitutional scholarship. Translation should not be relegated to the margins of comparative constitutional law or emergency-law analysis. It is a medium through which constitutional authority is transmitted and contested. Once this is acknowledged, constitutional resilience must include not only substantive safeguards and procedural design but also the governance of the texts through which those safeguards and procedures are communicated.

This conceptual frame has limits. It does not claim exhaustive empirical validation across jurisdictions, nor does it collapse all translation variance into constitutional risk. Its contribution is diagnostic and design-oriented: it identifies the types of shifts most likely to matter and the institutional controls most likely to reduce avoidable harm. That is an appropriate level of ambition for the present contribution, whose purpose is to sharpen the terms of analysis and to provide a framework for future comparative study.

7. *Conclusion*

of the Official Journal of the European Union (Official Journal of the European Union L69/1, 2013); European Union, "About the Official Journal," in *EUR-Lex* (accessed January 27, 2026).

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Constitutional translation matters most when constitutional time accelerates. During emergencies, contested elections, government-formation crises, or intense public disputes, institutions and publics often rely on translated constitutional materials in order to determine what may be done, by whom, for how long, and under what constraints. In those conditions translation is not external to constitutional governance. It is one of the infrastructures through which legality is practised and recognised.

Treating translation as governance infrastructure helps clarify both the problem and the solution. The problem is not multilingualism as such, but the interaction between authority regimes, crisis-sensitive operator zones, and patterns of practical uptake. The solution is not an impossible aspiration to eliminate every ambiguity, but a disciplined governance posture: clear status labelling, risk-based prioritisation, controlled terminology, independent revision, auditable version governance, and crisis-mode publication protocols.

A constitutional order that invests in these controls does not guarantee consensus over meaning. It does, however, reduce the likelihood that avoidable translation variance will distort legal effect, weaken legitimacy, or intensify institutional conflict at the very moment when constitutional resilience is most needed.

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BEYOND GREENWASHING: ARTIFICIAL INTELLIGENCE AS A TOOL FOR ENVIRONMENTAL AND CONSUMER PROTECTION

Claudio Cacciapaglia

Keywords: Greenwashing; Artificial Intelligence; Consumer Protection; Environmental protection; Sustainability.

Summary: 1. Introduction. – 2. Greenwashing: Phenomenological Framework and Consequences. – 3. Constitutional Implications of Greenwashing. – 4. European and Italian Regulatory Response. – 5. AI as an Antidote to Greenwashing. – 6. Conclusions.

1. *Introduction*

The growing social attention to environmental protection issues, emphasized by the 2022 constitutional reform which amended Article 9 of the Italian Constitution, has led many companies and organizations to assign a central role to environmental communication within their corporate strategies, informing the market of the progress achieved in their environmental performance, even though, at times, the actual results are modest, if not entirely absent.

In this context, the phenomenon commonly referred to as 'greenwashing', or environmental window-dressing, emerges. It consists of a set of statements disseminated by companies, organizations, or institutions aimed at creating a misleadingly positive image of their environmental impact, with the purpose of diverting public attention from the negative effects that their activities, products, and behaviors have on the environment.

The practice of greenwashing can therefore mislead stakeholders, such as investors, regulators, or the public, by exaggerating, omitting, or falsely claiming the environmental benefits of products, corporate activities, or projects. This may include presenting a product as 'green' or 'sustainable' without adequate evidence, as well as selectively disclosing favorable information while concealing environmentally harmful activities.

In order to counter this phenomenon, and thus to implement the needs of environmental protection and consumer protection – expressed, the latter, in Article 169 TFEU – the intervention of European Union institutions and the Italian legislator becomes essential. The decree introduces key definitions such as "environmental claim" and "sustainability label", in order to promote product durability and ensure informed and sustainable purchasing decisions, aligning national legislation with European standards.

At the same time, advances in artificial intelligence make it possible to address the challenges related to the detection of greenwashing. As highlighted in the literature, the complex-

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ity and nuanced nature of the phenomenon render manual analysis not only time-consuming but also potentially subject to interpretative bias. By contrast, AI enables the identification of patterns and trends that are not immediately visible to human analysts, providing systematic and scalable support for monitoring activities.

A central role is played by Natural Language Processing (NLP) techniques, which allow the automated analysis of large volumes of textual data. In particular, these techniques are used to examine the language employed in corporate sustainability reports, identifying environmental sentences, claims, and their corresponding tone (sentiment). The adoption of NLP has progressively expanded in recent studies on greenwashing, as it enables the detection of inconsistencies between corporate communication and actual behavior.

This paper aims to analyse the phenomenon of greenwashing from a legal perspective, with particular regard to its constitutional implications and its impact on the protection of the environment and consumers. From this standpoint, the paper seeks, on the one hand, to reconstruct the European and national regulatory framework designed to address misleading environmental commercial practices, in light of the renewed constitutional framework; on the other hand, to examine the potential role of artificial intelligence technologies as tools to support the identification and monitoring of such phenomena. The objective is to assess whether, and to what extent, the integration of legal regulation and technological innovation may contribute to enhancing informational transparency, reducing informational asymmetries, and ensuring a more effective protection of the fundamental rights at stake.

2. *Greenwashing: Phenomenological Framework and Consequences*

The issue of climate change and, more broadly, environmental, social, and governance (ESG) factors, also in light of the decisions adopted at the international level and within the institutions of the European Union, has become a highly topical matter, capable of significantly affecting market dynamics.

In recent decades, consumers have developed an increasing awareness and sensitivity toward these issues, showing a greater tendency to orient their behaviour and consumption choices toward goods and products perceived as more consistent with ESG criteria, particularly with regard to environmental and social sustainability.

While, on the one hand, the objectives of sustainable development have contributed positively to shaping the conduct of economic operators and citizens, on the other hand they have also fostered the emergence of risks related to unfair practices. In such cases, references to these objectives – and in particular to environmental and/or social sustainability – take on a merely instrumental and superficial character, serving exclusively the purpose of profit maximization.[1]

To describe this phenomenon, the term ‘greenwashing’ has been introduced, referring to situations in which statements, communications, or actions relating to environmental sustainability do not reflect – except to a very limited extent compared to what is implied – the actual level of sustainability of a process, product, or corporate policy.

Historically, the term emerged in the United States in the late 1970s and is commonly

[1] Friedman Milton, “The Social Responsibility of Business is to Increase its Profits,” in *The New York Times Magazine* (September 13, 1970).

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attributed to the environmentalist Jay Westervelt, who in 1986 used it to describe unfair or misleading commercial practices, particularly in marketing, directed at consumers and based on explicit references to the characteristics and performance, including environmental ones, of products, services, or activities. The expression 'greenwashing' derives from the term 'whitewashing', used in the real estate sector to indicate the practice of covering surfaces with a coat of paint to conceal defects and deterioration, making properties appear new for sale or rental. More specifically, the concept derives from the combination of 'green', in its ecological meaning, and 'whitewash', understood as concealing or masking reality.[2]

In this perspective, greenwashing consists in the dissemination of statements or information that are likely to mislead consumers, investors, and other market participants, as they are aimed at constructing a positive image of a company or product in relation to sustainability issues. However, such an image ultimately proves to be distorted or untruthful and is pursued solely to obtain an economic advantage.

The development of international regulation on sustainability and ESG factors – particularly the environmental dimension – has further encouraged the spread of commercial claims emphasizing the "green" features of products or activities, often in the absence of adequate evidence or guarantees supporting such claims.

Greenwashing therefore takes the form of advertising communications that promote the environmental and social qualities of certain products, which subsequently prove to be false or misleading. In essence, greenwashing practices are primarily oriented toward the creation of reputational capital and the strengthening of organisational legitimacy within the institutional context. These objectives are pursued through specific symbolic communication techniques. Among these, so-called decoupling refers to the separation between economic growth and negative environmental impacts, presenting economic development as achievable while reducing resource consumption, pollution, and ecological degradation. Another technique is attention deflection, whereby companies or organisations divert attention from their harmful environmental or social practices by emphasizing marginal or unrelated sustainability initiatives, thereby creating the appearance of environmental commitment and avoiding criticism of their core activities.[3]

For instance, one may consider claims suggesting that a product complies with European and national objectives concerning ecological transition and carbon emission reduction, thereby implying that purchasing such a product contributes to combating climate change. Similarly, products may be advertised as recyclable or durable, presenting them as consistent with circular economy principles and economic sustainability, in a perspective of waste reduction, even where such claims are not substantiated.

Alongside these environmental forms of greenwashing, there is also a tendency to accompany product marketing with an emphasis on social characteristics, social initiatives, or ethical commitments related either to the product or to the company offering it, such as the protection of animals or children's rights.

In this sense, greenwashing may be understood as a phenomenon capable of simultaneously eroding multiple layers of constitutional protection.

[2] Kim Jaemin F., "Attention, Action, and Greenwashing in Family-Influenced Firms? Evidence from Polluting Industries," *Organization & Environment*, 2 (2017): 16 ff.

[3] Lagasio Valentina, "Measuring Greenwashing: The Greenwashing Severity Index," *SSRN Electronic Journal*, 7 (2023): 33 ff.

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By distorting environmental information, it weakens its effectiveness; by manipulating consumer perception, it affects the functioning of the market; and by relying on deceptive communication strategies, it undermines the dignity and autonomy of individuals.

The constitutional relevance of greenwashing therefore lies not only in its economic impact, but also in its ability to reshape the normative balance between market freedoms and the fundamental principles of the Italian Constitution.

3. *Constitutional Implications of Greenwashing*

It is evident that greenwashing represents a paradigmatic example of how market practices, when built around misleading environmental narratives, can endanger constitutionally relevant interests. Far from being confined to the sphere of unfair commercial practices, greenwashing operates as a distortion mechanism that undermines effective environmental protection, conflicts with the principle of freedom of economic initiative, and compromises the consumer's ability to freely determine their contractual choices, thereby hindering the full development of the human person.

First of all, it must be considered that environmental protection has progressively acquired a central role within the legal system. This evolution has been significantly strengthened by the 2022 constitutional reform, which amended Article 9 of the Italian Constitution, explicitly recognising the protection of the environment, biodiversity, and ecosystems (also in the interest of future generations) as a fundamental principle.[4]

The environment has thus come to be qualified not as the object of a subjective legal position, but rather as an objective constitutional value of primary importance.

In this respect, it is also necessary to note the evolution brought about by Constitutional Law No. 3 of 2001, which introduced into Article 117 of the Italian Constitution the wording "protection of the environment and the ecosystem" (para. 2, letter s). The current framework now adds a reference to 'biodiversity' and adopts a plural understanding of 'ecosystems', thereby suggesting a relationship of composition rather than separation between them and the environment. This represents a step forward compared to the original conception of the Constituent Assembly, which tended instead to conceive nature as a set of 'monuments'.[5]

Our Constitution has transitioned from the group of 'silent constitutions' to that of 'revised environmental constitutions', in contrast to a majority of 'environmental constitutions' which, since their original formulation have expressly included environmental protection among their fundamental principles.

However, the recognition of the constitutional value of the environment is not new: constitutional case law had long established it through the interpretation of the combined provisions of Articles 9 and 32 of the Constitution (thus starting from a 'subjectivation' of the environment). The well-known judgments no. 210 and no. 329 of 1987 had, in fact, classified the environment, as an intangible good, among the fundamental rights of the person, identi-

[4] Lamberti Armando, "Ambiente, sostenibilità e principi costituzionali: questioni aperte e prospettive alla luce della legge cost. 1/2022," *Nomos - Le attualità nel diritto*, 3 (2023): 4 ff.

[5] It should be recalled that the text approved by the First Subcommittee of the Commission for the Constitution on 30 October 1946 provided as follows: "Historical, artistic and natural monuments, regardless of ownership and wherever located within the territory of the Republic, are under the protection of the State".

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fying its constitutional foundation within the prefigured system of values (and, in particular, in the aforementioned Articles 9 and 32, interpreted systematically).

It is certainly no coincidence that the Constitutional Court, in judgment no. 210/1987, defined environmental protection as a "fundamental right of the individual and a fundamental interest of the community".

The need to ensure full and effective protection of the environment has been considered of primary importance. Such primacy translates into its "non-subordination to any other constitutionally protected value, including economic ones".[6]

This statement makes it possible to clearly understand the rationale underlying the constitutional legislator's amendment of Article 41 of the Constitution. The new wording of Article 41 introduces an additional limitation – twofold in nature, relating to both health and the environment – on the freedom of private economic initiative, supplementing the existing limits of social utility, safety, freedom, and human dignity; it represents a valid legal basis to justify a strong commitment by Italian institutions within the EU framework, aimed at contributing to the ecological transition of the European economy through new forms of 'shared multilevel planning'.

This intervention, consistent with the principle of 'do no significant harm', which underlies, inter alia, the "Next Generation EU" initiatives and the National Recovery and Resilience Plan, reiterates the traditional conception of the environment as a limiting factor. This classical interpretation, grounded in a conflict-based relationship with other constitutional values, tends to emphasise the antagonistic nature of this interest.

A further element emerges from the third paragraph, where the notion of *limite-limes* is revisited in its dual Latin meaning, combining the idea of a 'boundary' with that of a 'path' open to new horizons. The provision whereby the law is required to establish programs and controls oriented toward environmental protection acquires a particular guiding function, which, in a sense, goes beyond the traditional view that human activities must merely take ecological requirements into account, and instead outlines a new conception in which the environment itself is recognised as having a potential for 'development'.[7]

From the amended Article 41 of the Constitution, it is also possible to derive the indication of an implicit constitutionalization of the principle of sustainability, within a perspective that aligns with the main international documents (starting from the well-known Brundtland Report of 1987), which embrace a 'triple' conception of sustainability understood as: environmental sustainability, the capacity to preserve the quality, renewability, and availability of natural resources; economic sustainability, understood as the ability to ensure economic efficiency and to generate income and employment; social sustainability, namely the ability to guarantee quality of life and conditions of human well-being linked to security, health, education, democracy, participation, transparency and justice.

This constitutional recognition, although not explicit, can also be inferred from the aforementioned 'interest of future generations', insofar as the constitutionalization of future generations implicitly recovers the entire body of principles related to sustainability, establishing that the use of resources must also take into account those who come after us. And this is not a self-evident principle within a constitution that originated in a context of an industrial economy oriented toward growth.

[6] Constitutional Court, Judgment No. 151 of 1986.

[7] Santini Giulio, "Costituzione e ambiente: la riforma degli artt. 9 e 41 Cost.," *Forum di Quaderni Costituzionali*, 2 (2021): 461 ff.

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It follows that the balancing between economic and environmental interests does not translate into a simple weighing of opposing values, but rather into a structural redefinition of the boundaries of economic activity itself. In this perspective, for example, in the field of industry and plants of strategic national interest, the Constitutional Court has addressed the issue of constraints on private economic initiative, stating that the balancing of the interests at stake "must be carried out without allowing the unlimited expansion of one of the rights, which would become a 'tyrant' over other constitutionally recognised and protected legal positions, which, taken as a whole, express the dignity of the person" (judgment no. 85 of 2013). The balancing exercise must therefore comply with criteria of proportionality and reasonableness, so as to allow neither the absolute prevalence of one of the values involved nor the total sacrifice of any of them, thus ensuring a unitary, systemic and non-fragmented protection of all the constitutional interests involved (judgments no. 63 of 2016 and no. 264 of 2012).

Although this reasoning was developed with reference to the opposition between economic and productive needs and the protection of health, it can easily be extended to environmental protection.

The environment is among those values that, in order to be fully respected, require the widespread dissemination of information, knowledge, and awareness within society. As an integral part of the environment, biodiversity, and ecosystems, human beings must be consciously engaged, so as to translate into practice, in the concreteness of everyday conduct, the good practices necessary for the preservation and improvement of their respective balances.

Environmental protection, therefore, goes beyond a purely naturalistic dimension and encompasses broader cultural, educational, and social values.[8] As such, it presupposes the availability of accurate, transparent, and verifiable information capable of enabling informed choices at both the individual and collective level.

Within this framework, greenwashing directly compromises the constitutional dimension of environmental protection by spreading misleading or scientifically unfounded information. The systematic circulation of deceptive environmental claims undermines the very conditions under which environmental protection can be effectively pursued, also affecting the orientation of public policies.[9] This distortion becomes particularly problematic when environmental narratives are strategically constructed to simulate compliance with sustainability standards while concealing environmentally harmful practices. In such cases, the or-

[8] Chiucchi Michela S. and Giuliani Marco, *Introduzione alla sostenibilità* (Turin: Giappichelli, 2023): 18 ff.

[9] Particular importance must be attached to the reference to Article 191 TFEU: "(1) The Union's policy on the environment shall contribute to pursuing the following objectives: preserving, protecting and improving the quality of the environment; protecting human health; promoting the prudent and rational utilisation of natural resources; and promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change. (2) Union policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Union. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay. In this context, harmonisation measures answering environmental protection requirements shall include, where appropriate, a safeguard clause allowing Member States to take provisional measures, for non-economic environmental reasons, subject to a procedure of inspection by the Union. (3) In preparing its policy on the environment, the Union shall take account of: – available scientific and technical data, – environmental conditions in the various regions of the Union, – the potential benefits and costs of action or lack of action […]".

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dering function of the principle of sustainability (in its social implications) as a constitutional parameter for the legitimization of economic activity is undermined.

Moreover, an economic activity based on misleading environmental communication cannot be regarded as constitutionally legitimate, as it is clearly liable to conflict with the principles of fair competition (as expressly provided for in the Civil Code) and, for that very reason, to restrict the economic freedom of others; it also stands in further contrast with the principle enshrined in Article 4 of the Italian Constitution, according to which "every citizen has the duty to carry out, according to their abilities and choices, an activity or function that contributes to the material and spiritual progress of society."

Focusing on the recipients of misleading information, it must be emphasized that greenwashing affects the consumer's freedom to make autonomous and informed contractual choices, insofar as decision-making processes are seriously compromised when based on distorted representations of environmental sustainability. These informational asymmetries, which also constitute a form of market failure, not only generate a systematic imbalance between economic operators and consumers but also hinder the full development of the human personality, which is even more capable of being expressed within the market, in the exercise of one's contractual choices.

Particularly relevant is the reference to decision 794/09 of the Sezioni Unite of Corte di Cassazione, which, in relation to EU consumer law, affirmed that rules on misleading advertising – although originally aimed at protecting the proper functioning of the market – have progressively evolved toward safeguarding specific consumer interests, identifying certain rights as fundamental. These include, first and foremost, the consumer's right to freely determine their choices regarding the selection and use of products, namely "to take a commercial decision that they would not otherwise have taken" (Article 21 of the Consumer Code, paragraph 2), as well as the right to health, which is constitutionally protected and expressly recognised among the fundamental rights of consumers. Indeed, "a commercial practice is considered unfair where, concerning products capable of endangering the health and safety of consumers, it omits such information in a way that induces consumers to disregard normal standards of prudence and vigilance." Consequently, the compensability of non-material damage resulting from the violation of the consumer's right to self-determination is expressly recognised, grounded in Article 2 of the Consumer Code,[10] which identifies as fundamental the consumer's rights to adequate information and correct advertising, as well as the conduct of commercial practices according to principles of good faith, fairness, and loyalty.

In this sense, greenwashing may be interpreted as a phenomenon capable of simultaneously eroding multiple layers of constitutional protection.

The European Green Deal aims to place significant emphasis on the environment as a value to be protected within the framework of the new European economic constitution, with a view to correcting the functioning of the market and the ordinary pro-competitive rules governing it, thereby pursuing an important social objective that would otherwise be disregarded by economic actors.

[10] Consumers and users are recognised as holding the following fundamental rights: a) to the protection of health; b) to the safety and quality of products and services; c) to adequate information and to fair advertising; c-bis) to the conduct of commercial practices in accordance with principles of good faith, fairness and loyalty; d) to consumer education; e) to fairness, transparency and equity in contractual relationships […] (Consumer Code, Article 2).

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4. *European and Italian regulatory response*

The centrality of the issue under analysis helps to explain the strong tendency of EU institutions to increasingly engage with sustainability, particularly environmental sustainability, as well as their growing focus on regulatory measures capable of effectively addressing the phenomenon of greenwashing and guiding both citizens and businesses toward proper conduct and best practices.[11]

Beyond the general provisions adopted by the United Nations (UN Agenda) and the European Union in support of environmental protection and sustainable development,[12] the issue of combating and mitigating greenwashing can be identified, directly or indirectly, in a range of legislative acts, policy interventions, and sources of EU secondary law, alongside the very recent intervention of the Italian legislator with Decree-Law no. 30/2026.

A fundamental starting point is Article 169 of the Treaty on the Functioning of the European Union (formerly Article 153 TEC), which expressly provides that:

In order to promote the interests of consumers and ensure a high level of consumer protection, the Union shall contribute to protecting the health, safety, and economic interests of consumers, as well as promoting their right to information, education, and organisation in order to safeguard their interests.

From the perspective of secondary legislation, reference must be made to Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 on unfair business-to-consumer commercial practices in the internal market (which amended Council Directive 84/450/EEC and Directives 97/7/EC, 98/27/EC, and 2002/65/EC of the European Parliament and of the Council), as well as to Regulation (EC) No 2006/2004. These instruments provide for sanctions against business practices aimed at promoting or selling products in a way that significantly misrepresents their characteristics, thereby inducing the average consumer to take a commercial decision that they would not otherwise have taken. The practices targeted by EU legislation may be either aggressive or misleading (for example, where technical information about a product is vague or deceptive). Directive 2005/29/EC, in particular, includes in an annex a list of practices that are always prohibited, the so-called 'blacklist'.

A further and very recent development in the field of unfair commercial practices, following the aforementioned directives, is represented by Directive (EU) 2024/825 of the European Parliament and of the Council.[13] This directive introduces highly significant measures specifically concerning consumer choices regarding sustainable products and can be regarded as a key legislative reference in combating greenwashing. Its overall objective is to address

[11] Parguel Beatrice, "Can evoking nature in advertising mislead consumers? The power of 'executional greenwashing'," *International Journal of Advertising*, 2 (2015): 11 ff.

[12] "Environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development" (Article 11 TFEU). "A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development" (Article 37 of the Charter of Fundamental Rights of the European Union).

[13] In this sector, the support of the European Environment Agency (EEA) is fundamental: it was established by Council Regulation (EEC) No. 1210/90 of 7 May 1990 (on the establishment of the European Environment Agency and the European Environment Information and Observation Network) and has been operational since 1994, with its headquarters in Copenhagen.

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non-transparent sustainability labels, misleading information about the environmental or social characteristics of products, and practices related to premature obsolescence.

A first important set of provisions concerns environmental and social claims. Consumers must not be misled about the characteristics of a product, such as its durability, reparability, recyclability, or its environmental and social qualities along the production chain. For this reason, environmental, social, and circularity aspects are included among the main characteristics of a product. Consequently, if a company provides false or ambiguous information regarding these aspects, the practice may be considered misleading. Social characteristics, as clarified in the directive, include, for example, fair working conditions, adequate wages, workplace safety, respect for human rights, equal treatment, inclusion, diversity, and animal welfare.

Particular attention is given to climate-related environmental claims. Such claims are deemed lawful only if supported by concrete commitments, clear and publicly accessible objectives, verifiable data, and a realistic implementation plan with adequate resources. Furthermore, these plans must be subject to third-party verification, ensuring periodic monitoring and making the results accessible to consumers. In essence, it will no longer be permitted to create or use 'green' or 'sustainable' logos without a transparent, controlled, and credible system behind them. Certification must be carried out by an independent body. Where a label suggests that a product has a positive or less harmful environmental impact, it will be considered an environmental claim and must comply with the relevant rules.

For example, generic claims such as 'eco-friendly', 'green', 'environmentally friendly', or 'climate-friendly packaging' would not be permitted, whereas a precise statement indicating that 100% of the energy used in production comes from renewable sources would be acceptable, provided it is accurate and demonstrable.

A particularly important provision introduces an absolute prohibition on claiming that a product has a neutral, reduced, or positive climate impact when such claims are based exclusively on offsetting greenhouse gas emissions outside the product's value chain.

It is also prohibited to attribute an environmental quality to an entire product when it actually applies only to a limited part of it. For instance, it would be misleading to describe a product as 'made with recycled material' if only its packaging is recycled, or to present an entire company as sustainable when only a marginal part of its activity meets such criteria.

Another practice targeted by the directive is the promotion of irrelevant characteristics as if they constituted a competitive advantage. Examples include advertising bottled water as 'gluten-free' or paper as 'plastic-free,' which do not represent meaningful added value but may mislead consumers into perceiving the product as superior.[14]

The rationale of the directive is grounded in the idea, already expressed in the European Green Deal, that consumers must be placed in a position to make informed purchasing decisions based on reliable, comparable, and verifiable information, thereby actively contributing to the green transition. This need has also been reaffirmed in the New Circular Economy Action Plan, the New Consumer Agenda, and the Green Deal Industrial Plan, all of which emphasise the importance of combating greenwashing and increasing transparency regarding environmental characteristics, product durability, and carbon footprint.

[14] On this point, see the communication devoted to the review of Community environmental policy, entitled "Communication from the Commission of 27 January 2005-2004 Environmental Policy Review [COM(2005) 17 - Official Journal C 98 of 23 April 2004])", in which the Commission aims to pursue the needs of environmental and health protection.

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Evidence collected by the Commission shows a significant prevalence of greenwashing: many environmental claims are vague, ambiguous, or insufficiently substantiated, while enforcement authorities often report a lack of sufficient evidence to verify their accuracy. This is compounded by low levels of consumer trust, partly due to the difficulty in understanding whether claims refer to the entire product, only certain components, the company as a whole, or a specific phase of the product lifecycle.

The key objectives of the directive can be summarized along three main lines. First, it aims to increase the level of environmental protection and accelerate the transition toward a circular, clean, and climate-neutral economy within the European Union. Second, it seeks to protect consumers and businesses from greenwashing by enabling consumers to effectively contribute to the green transition through informed purchasing decisions based on credible environmental claims and reliable labels.[15] Third, the directive aims to improve legal certainty regarding environmental claims and to ensure a level playing field within the internal market, strengthening the competitiveness of economic operators investing in environmental sustainability and creating cost-saving opportunities for those operating across borders.

The Italian legal system has implemented Directive (EU) 2024/825 through Legislative Decree No. 30 of 20 February 2026, thereby reforming the Consumer Code by introducing new definitions and additional information obligations concerning commercial communication practices of businesses. The aim is to curb the pathological phenomenon of greenwashing and, consequently, to enhance the protection of consumers and the environment, including with regard to future generations.

Among the most significant innovations is the introduction into the Consumer Code[16] of specific concepts such as environmental claim, generic environmental claim, sustainability label, and certification scheme. In particular, an environmental claim is defined as any communication, including graphical or symbolic representations, that states or suggests that a product, brand, or economic operator has a positive or less harmful impact on the environment, or that its environmental performance has improved over time. A generic environmental claim, on the other hand, is defined as one that is not accompanied, within the same communication medium, by a clear and evident specification.

The strengthening of anti-greenwashing measures is particularly evident in the list of practices considered inherently misleading. These include the use of sustainability labels that are not based on a certification scheme or are not established by public authorities. It is also prohibited to make generic environmental claims without being able to demonstrate a recognized level of environmental excellence relevant to the claim. Similarly, environmental claims referring to an entire product or to the activity of a trader are prohibited where they concern only a specific or limited aspect.[17]

[15] These principles had already been established in the 1998 Aarhus Convention. Citizens, in fact, as the primary actors in the process of change, have the opportunity to actively contribute to the promotion of sustainable development. Public administrations must therefore commit to raising awareness and providing information, as well as activating procedures that enable citizen participation.

[16] Article 21 of the Consumer Code now provides that a commercial practice is considered misleading also when it misleads the consumer regarding environmental characteristics, or when the formulation of an environmental claim relating to future environmental performance does not include clear, objective, publicly available, and verifiable commitments.

[17] Bolognini Cobianchi Aldo, *Comunicare la Sostenibilità. Oltre il Greenwashing* (Milan, Hoepli, 2022): 28 ff.

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Particularly noteworthy is the prohibition on claiming that a product has a neutral, reduced, or positive environmental impact (directly affecting expressions such as 'carbon neutral' or similar) where such claims are based exclusively on offsetting mechanisms and not on actual data relating to the product's life cycle.

The decree also places emphasis on aspects such as durability, reparability, recyclability, and, more generally, product circularity. These elements are now expressly included among the main characteristics of a product for the purposes of assessing misleading practices. Furthermore, in product comparison services, when environmental, social, or circularity-related information is provided, relevant information must also include the comparison methodology, the products and suppliers involved, and the procedures adopted to keep the data up to date.

For producers, the message is clear: environmental claims can no longer be generic, suggestive, or based on unverifiable assertions. It is necessary to ensure the reliability of the certifications referred to, to pay greater attention to the validation of claims, and to increase the level of information provided to consumers regarding product durability, reparability, and updates.

5. *AI as an Antidote to Greenwashing*

The analytical framework developed to examine the phenomenon of greenwashing has been structured through an analysis of its origins, its effects on consumer rights and on the environment, as well as the responses of European and Italian institutions. The next step consists in assessing how such practices may be identified through the use of Artificial Intelligence tools in sustainability reporting.

First of all, it is necessary to describe the characteristics of Artificial Intelligence, understood as the ability of machines to perform cognitive functions typical of human beings, such as perception, reasoning, learning, and problem-solving.[18] AI is capable of interacting with the surrounding environment through the input of external data: it learns from experience, analyzes information, identifies recurring patterns, and makes decisions with limited human intervention.

Among the technologies that fall within the broader category of AI, it is possible to include Machine Learning, Deep Learning, and Natural Language Processing. Machine Learning is capable of examining large volumes of data, identifying patterns, and generating predictions or recommendations. Deep Learning represents an advanced form of machine learning, capable of processing different types of data and operating through neural networks structured across multiple layers, similarly to the human nervous system. Natural Language Processing, on the other hand, enables computer systems to understand, interpret, and generate natural language, including through the analysis of meaning and emotions expressed in texts.[19]

It should also be emphasized the role of AI in sustainability reporting.

The sustainability report is a document that communicates a company's performance in

[18] Kaplan Jerry, *Le persone non servono: Lavoro e ricchezza nell'era dell'intelligenza artificiale* (Rome: Luiss University Press, 2019): 32 ff.

[19] Petrucci Livia, "Quando l'intelligenza artificiale parla: assistenti vocali e sanità digitale alla luce del nuovo regolamento generale in materia di protezione dei dati," *BioLaw Journal Rivista di BioDiritto*, 2 (2020): 425-476.

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terms of environmental, social, and economic responsibility, informing stakeholders about initiatives and results related to sustainability. It is evident that AI allows for the rapid and effective examination of large volumes of textual data, such as those contained in sustainability reports, automatically identifying potential signals of greenwashing. Compared to human analysis, these tools ensure greater speed and reduce the risk of interpretative errors, although human intervention remains necessary in more complex evaluative processes.[20]

Among the tools employed, Machine Learning makes it possible to recognize recurring patterns in data and to identify linguistic indicators, the tone of language, and possible inconsistencies in sustainability-related content. For example, an excessive use of ESG-related terms may reflect an exaggerated or constructed representation of environmental commitment.

Natural Language Processing constitutes a further fundamental tool, as it enables the automatic analysis of texts and the interpretation of language used in corporate documents. In addition, Deep Learning, through neural networks, is capable of processing large volumes of textual data, identifying linguistic patterns, tone variations, and contextual inconsistencies associated with greenwashing practices.

Last December, the Advertising Standards Authority (ASA),[21] the independent body responsible for overseeing the correctness of commercial communications in the United Kingdom, published a number of emblematic decisions: several advertising campaigns by major fashion brands were censured for the improper use of environmental claims, identified through digital monitoring systems based on artificial intelligence. These algorithms made it possible to continuously analyze a vast amount of online content, detecting potentially misleading or insufficiently substantiated 'green' claims.

Among the cases examined by the ASA were Nike, Lacoste, and Superdry. In the case of Nike, the British authority found that the expression "sustainable materials", used without clear and verifiable indications regarding the actual characteristics of the products, could mislead consumers into making purchasing decisions based on unproven assumptions. A similar assessment was made with regard to Lacoste, which had disseminated generic messages about allegedly "sustainable" clothing, while in the case of Superdry, the objection concerned the presentation of an entire product line as combining style and sustainability, whereas such features applied only to certain items.[22]

The Italian Authority for Communications Guarantees (Agcom) has increased its cooperation with the Institute of Advertising Self-Regulation (IAP). The latter has long been carrying out monitoring activities on social media through AI-based tools, in line with practices adopted within European self-regulatory systems coordinated by the European Advertising Standards Alliance.

Furthermore, in the new FinTech Notebook, CONSOB presented a prototype developed with the support of the University of Trento and a team of researchers combining

[20] Kotzian Peter, "Applying Machine Learning and Artificial Intelligence to CSR-Compliance: A Conceptual Framework with Illustrations," *SSRN Electronic Journal*, 2 (2021): 22 ff.

[21] In 2021 the ASA and CAP launched a Climate Change and the Environment (CCE) project, to respond to the ongoing climate crisis and take action to ensure that environmental claims in advertising are not misleading or irresponsible.

[22] Delmas Magali A. and Burbano Vanessa C., "The Drivers of Greenwashing," *California Management Review*, (2011): 64 ff.

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financial and technological expertise. The objective is to detect potentially misleading messages disseminated by European green bond issuers by analyzing data collected between 2013 and 2023.

This tool uses artificial intelligence techniques to identify environmental statements in texts, assess their communicative tone, and highlight possible discrepancies between declared objectives and actual outcomes. Such an approach may enhance transparency and strengthen investor confidence in the sustainable finance market. The most significant elements of the study underline that, in the context of the growing diffusion of sustainable finance and the expansion of the green bond market, greenwashing represents one of the main challenges to the credibility of financial instruments aimed at the ecological transition. In this sector, greenwashing may take various forms, including the use of vague or unverifiable environmental claims, the strategic selection of favorable information (cherry-picking), the omission of relevant data, or the presentation of environmental objectives not supported by concrete actions. In this context, the manual analysis of sustainability information is becoming increasingly complex, both due to the large volume of available data and the ambiguous and often strategic nature of ESG communication.

In response to these challenges, there has been growing interest in the use of artificial intelligence, particularly Natural Language Processing (NLP) techniques and large language models (LLMs), as tools for detecting and monitoring greenwashing. These technologies enable the systematic analysis of large amounts of textual documentation, such as sustainability reports, investor disclosures, corporate communications, or marketing materials, in order to identify environmental statements, assess their content, and detect potential inconsistencies or risk signals.

One of the main advantages of NLP lies in its ability to automatically extract relevant information from complex texts. Through classification techniques and semantic analysis, AI models can identify sentences or statements related to environmental issues, distinguish between different types of ESG disclosures, and analyze the sentiment of the language used in corporate communications. In this way, it is possible to identify recurring communication patterns, detect overly optimistic or vague statements, and compare communication content with objective indicators of environmental performance.

Recent literature highlights the increasing use of advanced language models, such as BERT (Bidirectional Encoder Representations from Transformers) and its specialized variants. In particular, models such as ClimateBERT and ESGBERT have been developed to analyze texts related to climate change and ESG issues. These models are trained on large, domain-specific datasets and are capable of capturing complex semantic relationships within the language used in financial and environmental documents. ClimateBERT, for example, is designed to analyze public and corporate discourse on climate change, while ESGBERT focuses on the analysis of ESG information in financial and corporate documents.

In the context of green bonds, such tools may be used to develop automated greenwashing alert systems. The study proposes a prototype of such a system based on NLP techniques, designed to analyze sustainability reports of green bond issuers in the European market. The system combines pre-trained language models with lexical analysis tools based on specialized dictionaries, in order to identify environmental statements, detect references to the United Nations Sustainable Development Goals (SDGs), and assess the tone of sustainability-related communications.

More specifically, the system operates through three main analytical components. First,

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it uses NLP models to identify and classify environmental sentences within the analyzed documents, distinguishing between descriptive statements, future commitments, and claims relating to environmental outcomes. Second, it applies sentiment analysis techniques to evaluate the tone of communication, identifying rhetorical excesses or particularly emphatic formulations that may indicate a communication strategy aimed at artificially enhancing the perception of sustainability. Third, through a proprietary dictionary linked to the SDGs, the system analyzes statements related to the sustainable development objectives declared by issuers, verifying the consistency between proclaimed objectives and the actual content of the analyzed documents.

This approach makes it possible to develop indicators useful for signaling potential misalignments between communication and substantive content, providing supervisory authorities with a preliminary tool to identify cases requiring further investigation. The objective is not to replace human analysis, but to support supervisory activities through automated tools capable of rapidly detecting suspicious linguistic patterns or informational inconsistencies.

The use of AI in combating greenwashing also falls within the broader development of SupTech (Supervisory Technology), namely technological tools used by regulatory and supervisory authorities to improve the effectiveness of oversight activities. AI-based SupTech solutions allow for the automation of sustainability information analysis, reduce manual workload, and improve the consistency and timeliness of checks. In a context where the volume of ESG information is rapidly increasing, such tools may strengthen the ability of authorities to identify emerging risks and verify compliance with declared sustainability standards.

Despite these potential benefits, the use of artificial intelligence to combat greenwashing entails significant challenges. First, model accuracy depends on the quality and representativeness of the training data, while the language used in sustainability reports is often ambiguous and strategic, making it difficult to distinguish between genuine and misleading statements.

Second, AI systems may produce false positives or false negatives, either flagging legitimate claims as suspicious or failing to detect actual greenwashing practices, and this is further complicated by limited model interpretability, which does not always make it possible to understand the reasons behind specific classifications.

Further risks arise from so-called ‘algorithmic hallucinations’,[23] namely interpretative errors or incorrect inferences based on incomplete or poorly structured data, which are particularly problematic in the context of greenwashing, where the burden of proof requires solid technical and documentary evidence that cannot be replaced by automated assessments.[24]

For these reasons, an integrated approach is required, whereby AI is used as a supporting tool rather than a substitute for human judgment, thus ensuring data quality and standardization, while also providing for human oversight mechanisms and appropriate procedural safeguards, including the possibility for companies to exercise their right of defense.

The challenges determined by the advent of artificial intelligence lead the jurist to question which categories and legal instruments can be suitable to address them, also with regard

[23] In 2022, Meta withdrew the demo of its Galactica model after it provided users with incorrect and biased information.

[24] D’Aloia Antonio, *Intelligenza artificiale e diritto*: *Come regolare un mondo nuovo* (Milan: Franco Angeli, 2021): 45 ff.

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to the forms of regulation, especially the European one, oriented to a balance between the economic interest relating to the development of a European digital market and that of protecting the democratic values of the European legal system and the fundamental rights and freedoms of individuals. This is a balance of a constitutional nature, from which emerges the attempt to adapt the European constitutional framework to the new digital reality. In this sense, Italian law n. 132/2025,[25] which entered into force on 10 October 2025, represents the first comprehensive attempt by the Italian legislator to regulate the use of AI, integrating it with the European framework of the AI Act and with the principles of accountability, transparency, and human oversight. Specifically, accountability obligations are directed along three fundamental lines: documenting the decision-making processes in which AI is involved; verifying the quality and source of the data; ensuring effective human control over every automated outcome.

6. *Conclusions*

The emerging framework is clear: the renewed constitutional framework calls for the pursuit of the "environmental sustainability of one's own actions". Within this context, communicating sustainability without solid foundations is no longer merely a reputational risk, but a potential source of harm to the environment, consumer rights, and the functioning of the market. Investing in transparency, verifiable data, and informational rigor is not only a matter of regulatory compliance, but also a strategic choice. It has been demonstrated that being genuinely 'green' constitutes a concrete driver of sales and productive growth, making credibility a true competitive asset.

In this context, artificial intelligence is destined to play an increasingly important role both in Italy and across the European Union, strengthening consumer protection and helping to distinguish companies that are genuinely committed to sustainability from those that merely simulate it. In an economy that is progressively more attentive to environmental criteria, technology risks becoming the decisive tool for separating authentic strategies from purely communicative shortcuts.

In the fight against greenwashing, artificial intelligence cannot be conceived as an infallible decision-maker; rather, it should be understood as a constant and extremely rapid digital monitoring tool, capable of detecting elements that are not immediately perceptible to humans due to the volume, speed, and complexity of data. It follows that the final decision must remain firmly in the hands of human judgment, grounded in scientific evidence, clear legal rules, and principles of proportionality. Only in this way can technology strengthen trust in the sustainability market, rather than undermine it.

The delegation of fundamental decisions to AI systems could, in fact, represent not only a practical risk, but also a threat to the fundamental values of participatory democracy and human autonomy. In the face of these challenges, there emerges the need for a balanced approach that recognizes both the transformative potential of artificial intelligence and its

[25] Among the most relevant provisions: Art. 13 - AI and intellectual professions: AI may be used as a "support tool", but it cannot replace intellectual work, which must remain predominant and attributable to a natural person; Art. 15 - AI and Justice: Only the judge may interpret and apply the law, assess the evidence, and decide the case. AI may be used to simplify work or organize services, but not to make decisions.

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intrinsic limits. Rather than viewing AI as a substitute for human judgment, it should be conceived as a support tool that enhances our decision-making capacities without replacing them.

What is at stake is not only the accuracy of environmental communication, but also the very credibility of the ecological transition, the protection of consumer rights, and the effective freedom of economic initiative.

Let us consider an apparently surreal scenario: if we were to ask an advanced artificial intelligence system to determine the optimal solution to address the climate crisis, an algorithm designed to maximize efficiency might conclude, through a cold cost-benefit analysis, that the elimination or drastic reduction of the human population represents the most effective option for reducing carbon emissions and pollutants. This 'solution,' although it might emerge as mathematically optimal according to certain parameters, completely ignores the moral, social, and human complexity of the issue, thereby demonstrating the dangerous gap that can arise when fundamental decisions are delegated to systems lacking ethical understanding.

Legitimate decisions in a democratic society, a fortiori when they involve primary interests, must emerge through inclusive and transparent deliberative processes in which citizens can participate as autonomous and rational subjects.

In order for sustainable development to be achieved, it is necessary that, in addition to technological, scientific, and cultural development, the attention of everyone be directed toward maintaining the healthy balance that exists between the biosphere and ecosystems, that is, the environment.

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CONDITIONED STATE AND SECURITY. SOME PRELIMINARY CONSTITUTIONAL REMARKS

Giorgio Cataldo

Keywords: Security; Geopolitics; Asymmetry; Conditionality; Emergency.

1. *Security and Emergency in the Conditioned State: a Conceptual Framework*

In the very last years, constitutional scholarship returned to emphasising the benefits to be drawn from an engagement with geopolitical analysis.[1] Among other aspects, it was argued that constitutions may "convey geopolitical imaginaries", just as, conversely, it may be "the principles, categories and institutions of constitutional law that are instrumentalised, if not manipulated, in order to be placed at the service of geopolitical agendas".[2]

From this perspective, it does not seem far-fetched to inquire into a specific angle of the issue. This one concerns the modalities of pursuit of security by the State in light of the asymmetry of the conditions characterising it – understood as the set of political, economic, and infrastructural preconditions capable of affecting and influencing, in a differentiated manner, the capacity to respond to crises. This is a domain in which geopolitical categories and constitutional categories intertwine, inviting reflection on the manner in which a State's concrete condition[3] – defined by interdependence, power relations with other States or with private power actors – affects the pursuit of constitutionally significant interests.[4]

[1] See, *e.g.*, Ibrido Renato, *Geopolitica costituzionale. Una introduzione* (Bologna: Il Mulino, 2025), Guazzarotti Andrea, edited by, "Geopolitica e Costituzione," *Diritto costituzionale*, 1 (2025), Passaglia Paolo, *Geopolitica e diritto. Un legame trascurato* (Milan: Franco Angeli, 2026), Tondi della Mura Vincenzo, "Political Theology and Constitutionalism: The New Knots of an Unresolved Conflict. Preliminary Notes", *in this Book*.

[2] Ibrido Renato, *Geopolitica costituzionale. Una introduzione*, 39-41.

[3] Mangiameli Stelio, "Imperi e Stati e le nuove relazioni internazionali," *Diritto e società*, 2 (2022): 308 ff.

[4] Evidence of the usefulness of this plane of inquiry emerges, for example, in the constitutional approach to war and, more generally, to foreign and defence policy – domains in which the nexus between the constitutional vision and the geopolitical dimension, emblematically expressed by Article 11 of the Constitution, manifests itself in a twofold perspective: on the one hand, as an orientation of public choices towards the pursuit of peace according to a formal canon of equality between States; on the other, as an expression of the State's

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It can already be intuited, therefore, that in this particular angle of the issue it is not only constitutions that convey geopolitical imaginaries, and nor merely the constitutional law categories that are instrumentalised in the service of certain geopolitical visions or projects. It seems, rather, equally possible that political actors may find themselves in a situation of having to pursue constitutionally protected functions and interests in light of the geopolitical condition in which the legal order is placed.

The question is, moreover, lent particular urgency by the current era, in which the pursuit of security is increasingly foregrounded by political agendas in light of the now chronic character[5] of the emergency situations – armed conflicts, economic crises, energy shocks, climate disruptions, and so on – that are coming to define the entire globe and, in particular, the Western part of it.

From the mutual relationship between the constitutional and the geopolitical spheres,[6] even on the plane of emergency and security the different levels of inquiry may reveal distinct perspectives and margins of action while at the same time presenting significant interconnections.

At the constitutional level, an emergency is understood as a functional (but temporary) crisis of institutions[7] that legitimises the adoption of derogatory measures affecting protected interests and principles.[8] In this scenario, constitutional law (in particular, through a rigid constitution) operates as a counterweight and guarantee, limiting the public powers potential hypertrophy through the canons of proportionality and reasonableness.[9]

At the geopolitical level, this dynamic finds a specular counterpart in the State's position on the global chessboard. It has been argued that "great power" States (even like States with an imperial dimension)[10] orient their action towards hegemonic affirmation, in terms of "glory", even at the cost of economic sacrifices; conversely, States in conditions of structural asymmetry – including "middle powers" – tend to pursue their security and survival through

concrete position on the international stage, including in light of asymmetries in power relations, within which Italy would conceive of itself as a "middle power". See Ibrido Renato, "Perché l'articolo 11 della Costituzione è il prodotto di un attore geopolitico razionale," *Rivista AIC*, 4 (2025): 195 ff.

[5] As noted by Galli Carlo, *Democrazia, ultimo atto?* (Turin: Einaudi, 2023), 117, "The issue is precisely time, the duration of the emergency, which is prolonged by the succession of waves of ever-new emergencies; the emergency deformation of constitutional procedures – sometimes patent, sometimes concealed – represents a continuous erosion of legal certainty". On endemic emergencies, see, among constitutional scholars, Ruggeri Antonio, "Le trasformazioni istituzionali nel tempo dell'emergenza," *Consulta online*, 1 (2021): 238 ff.

[6] On the influence of the geopolitical factor, see a passage from Constitutional Court Judgment No. 192/2024, para. 4.3, in relation to Article 116 of the Constitution: "Since this constitutes a derogation from the ordinary allocation of functions, it must be justified and reasoned with specific reference to the characteristics of the function and to the context (social, administrative, geographical, economic, demographic, financial, geopolitical, and otherwise) in which the devolution occurs, so as to highlight the advantages – in terms of effectiveness and efficiency, equity and accountability – of the solution chosen". At para. 4.4, the Court adds: "the transformations that have occurred at the geopolitical and geoeconomic level have had strong repercussions on trade policies, which are increasingly intertwined now with the security needs of global value chains, now with aspects concerning power relations between States, thereby attracting them into the sphere of foreign policy, which falls within the exclusive competence of the State".

[7] Pizzorusso Alessandro, "Emergenza, stato di," in *Enciclopedia delle scienze sociali*, III (Rome: Istituto della Enciclopedia italiana, 1993), 551 ff. More recently see Piergigli Valeria, *Diritto costituzionale dell'emergenza* (Turin: Giappichelli, 2023).

[8] Pinna Pietro, *L'emergenza nell'ordinamento costituzionale italiano* (Milan: Giuffrè, 1988).

[9] De Minico Giovanna, *Costituzione. Emergenza e terrorismo* (Naples: Giappichelli, 2016), 85 ff.

[10] Mangiameli Stelio, "Imperi e Stati e le nuove relazioni internazionali," 314-15.

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economic regulation and stability.[11] For the constitutional scholar, this distinction grounded in pure *Realpolitik* deserves to be considered and reread. It highlights structural constraints that, while remaining within the field of study of democratic systems alone,[12] directly condition the modalities and purposes of public intervention.

And it is no coincidence that, on the relationship between the democratic order and security – a domain around which the activation of emergency powers often revolves – the literature dwelt on the multidimensionality of the latter concept. Security assumes a position subordinate to (and limited by) constitutional provisions, no longer exhibiting, as was previously the case, the typical features of a mere defensive-repressive manifestation of public powers.[13] Yet, as it concerns the pre-existence – *salus Rei publicae*[14] – of the State, security is a preliminary condition of a legal order, and only the latter's characteristics may orient it towards a particular direction,[15] for example in guaranteeing the conditions necessary for the enjoyment of rights by individuals and the community.[16] In relation to the typically repressive, classical dimension, that of prevention may be grafted on and become predominant, and alongside it stands that of the protection of rights and interests. What is important to emphasise, however, is that these various dimensions continue to coexist.

2. *A Structurally Dependent State: Italy's Energy Conditionality as a Case-study*

The Italian context presents itself as a particularly useful field of observation for the purposes of the question, for several orders of reasons. First, because the Italian State is directly involved in the Western area in which the various crises and emergencies – economic, financial, environmental, health-related, energy-related, and military – produced or are continuing to produce their effects in a sustained manner: both directly and indirectly. Second, because Italy finds itself, for reasons that are initially natural, historical, and political, and then legal and economic, in a condition of structural dependence on other actors and dynamics, both of a public and of a private nature. Third, because, as a consequence, its approach to crises and emergencies unfolds in essentially regulatory terms, seeking to combine the guarantee of rights with economic stability: consider the 2012 constitutional reform that introduced the principle of balanced budget.[17]

In bringing the legal dimension (the sphere of the *ought*) into relation with the real (the sphere of the *is*), the Italian condition pertains to factors which determine a series of consequences for how the State is able to approach problems in its dealing with other States and other forms of power, and how it perceives, more generally, its own sphere of operation in guaranteeing security.

In any event, the strong relationship between the legal and the real dimensions requires,

[11] Fabbri Dario, "La temporanea illusione dell'economicismo," *Limes*, 2 (2020): 153 ff.

[12] Ibrido Renato, *Geopolitica costituzionale. Una introduzione*, 42-43.

[13] Giupponi Tomaso F., *Le dimensioni costituzionali della sicurezza* (Bologna: Bonomo Ed., 2010), 20 ff.

[14] Luciani Massimo, "Il segreto di Stato nell'ordinamento nazionale," *Gnosis*, 2 (2011): 15.

[15] Giupponi Tomaso F., *Le dimensioni costituzionali della sicurezza*, 23 ff.

[16] Ruotolo Marco, "La sicurezza nel gioco del bilanciamento," *Associazionedeicostituzionalisti.it*, (2009): 45.

[17] Grasso Giorgio, *Il costituzionalismo della crisi. Uno studio sui limiti del potere e sulla sua legittimazione al tempo della globalizzazione* (Naples: Editoriale scientifica, 2012).

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first of all, that the former seek resonance in the latter (since law must lay down rules, establish norms, and regulate situations on the basis of the needs dictated by the concreteness of social life), without however arriving at an uncritical reception of all demands.[18] For this reason, in having to reckon with reality, regulation must take stock of what reality offers.

And the concrete reality of facts varies from case to case, from place to place. One recalls the observation of Giuseppe Guarino,[19] according to whom the geographical and natural characteristics of a State profoundly affect its growth potential, since a territory may present highly variable morphological configurations, ranging from a complete absence of sea access to an extensive coastline with rivers and lakes, and may be endowed with natural resources of various kinds – including mineral deposits, raw or precious materials, landscape attractions, historical and cultural heritage, and specific features susceptible to economic valorisation – with the consequence that two States broadly equivalent in terms of size and gross domestic product may find themselves in radically different conditions of future development precisely by reason of their respective peculiarities.

The centrality of the data offered by reality, including the territorial dimension relating to the exercise of State power,[20] inevitably reflects upon the critical situations which that power is called upon to address. The approach to emergency intervention may therefore vary depending on the structural condition in which the State finds itself.

These aspects can be better grasped by developing the analysis in the energy field. Energy is a central element in geopolitical analysis, encompassing issues such as the interconnection of different countries, the unequal global distribution of deposits, the divergent structural capacity for domestic production among individual States, and the strong participation of private companies pursuing their own goals and influencing markets and prices.[21] The recent period demonstrates how the energy problem – concerning the guarantee of supply, sustainability, self-sufficiency, and so on – represents both one of the principal preconditions and one of the most significant consequences of events, particularly armed conflicts, of a global nature.

Energy, indeed, is among the factors capable of triggering conflict, not infrequently concealed behind declared and moralistic motivations of a humanitarian nature.[22] Equally, it presents itself as a problem of a consequential and systemic nature, by virtue of the typical causal chain linking apparently distinct phenomena: damage to infrastructure, obstacles to transnational transport, the imposition of tariffs and price increases – to limit oneself to the most immediately apparent effects.

Thus, energy assumes relevance in the form of "energy security", which might be defined as the capacity to guarantee, in a stable and continuous manner, access to adequate, diversified, and affordably priced energy sources, while at the same time ensuring that potential external shocks – geopolitical, economic, or infrastructural – do not compromise the func-

[18] Luciani Massimo, *Ogni cosa al suo posto* (Milan: Giuffrè, 2023).

[19] Guarino Giuseppe, *Il governo del mondo globale* (Florence: Le Monnier, 2000), 70; Id., *L'uomo-istituzione* (Rome-Bari: Laterza, 2005), 53-54.

[20] Massa Pinto Ilenia, "Territorio e potere," in *Enciclopedia del diritto*, *I Tematici*, V (Milan: Giuffré, 2023), 1211 ff.

[21] Högselius Per, *Energy and Geopolitics* (London: Routledge, 2019).

[22] Schmitt Carl, "Il concetto di 'politico'," in *Le categorie del 'politico'*, edited by Gianfranco Miglio and Pierangelo Schiera, translated by Pierangelo Schiera (Bologna: Il Mulino, 1972), 139.

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tioning of the legal order and the continuity of economic and social life.[23]

Within this framework, the sectoral (though broad) subject of energy replicates the general distinction regarding the different types of approach adopted by States based on their structure and their political, geographic, and geomorphological capability.

For great powers, energy may – even only in part – serve as a lever of legitimation, control, and domination. Consider the recent paradigm of "Energy Dominance" as the cornerstone of the United States political administration: the goal is not merely self-sufficiency – even at the expense of other interests such as climate and, more broadly, the environment and ecosystem – but also the assertion of hegemony at the global level, for example by weakening the export capacity of other competitors and tying imports to other States.[24]

For States in conditions of asymmetry, by contrast, largely opposite features may be discerned. The Italian case is exemplary.

What changes is the modality of the pursuit of security, once again through the relationship between the factual and geopolitical dimension and the formal, legal-constitutional one. Italy finds itself in a condition of asymmetry and dependence both by nature and by choice. At the naturalistic level, pertaining, so to speak, to the *is*: if one situates the energy transition process (at least) within a medium-to-long-term perspective,[25] on the more immediate paths, those of fossil fuels, Italy is not in a position to guarantee self-sufficiency, primarily due to the limited presence of deposits within its territory. At the decision-making level, pertaining instead to the *ought*: a whole series of principles and regulations preclude indiscriminate territorial exploitation – the prohibition on nuclear energy; the protection and sustainability of the environment, ecosystem, and biodiversity; competition and adequate equality of chances of market access;[26] and the limited possibilities for State intervention in anti-competitive terms derived from European law. In other words, the environmental prescriptions limiting the activities of prospecting, extraction, and collection of energy resources are intertwined with the obligation to assign the relevant mining licences through procedures in conformity with the principles of transparency, competition, and equal market access.

These factors, both factual and legal, progressively placed Italy in a condition of dependence on imports. Dependence on imports and the binding force of the framework of principles and interests that have been assumed as objects of protection outline an interventionist framework presenting recurring features. Not power but regulation characterises the response to the continuous demands posed by political and energy crises. This determines a modality of intervention aimed at orienting energy security towards a precise direction.

Without any claim to exhaustiveness, intervention typically revolves around the definition of a balance between interests that differs from the ordinary one but within the strict and proportionate limits of necessity. Among many examples, consider the original prohibition of mining activities on the territorial seabed, expressly justified on grounds of environmental pro-

[23] See International Energy Agency, *World Energy Outlook 2022* (Paris: IEA, 2022), 2: "Energy security is not just about having uninterrupted access to energy, but also about securing energy supplies at an affordable price".

[24] Vakhshouri Sara, "'Energy dominance' reconsidered: From domestic abundance to global strategic leverage", in *Atlanticcouncil.org* (March 10, 2026).

[25] Amato Massimo, "Autonomia geopolitica è transizione energetica. E viceversa," *Fuoricollana*, 5 (2022); Ranci Pippo, *Energia. Governare la transizione* (Florence: Passigli, 2023), 21.

[26] See Directive 94/22/EC and Court of Justice of the European Union, Judgment of 13 January 2022, *Regione Puglia*, Case C-110/20.

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tection, which following the Russian-Ukrainian conflict has been reduced from twelve to nine miles.[27] Furthermore, intervention is essentially one of economic regulation, but once again with the aim of not departing too far from the general principles of the sector: among many examples, the aforementioned reduction of the prohibition on offshore extraction was not followed by a procurement programme in terms of nationalisation or monopoly, but rather by the opening of a call for expressions of interest from already active operators, aimed at intensifying and expanding existing extraction projects, with the objective of concluding long-term contracts for the purchase of mineral resources at capped prices.[28] Finally, intervention privileges the dimension of energy security as an instrument for guaranteeing rights.[29]

In sum, the Italian approach, marked by structural constraints and systemic dependencies that are difficult to circumvent,[30] must be read through the lens of a commitment to social cohesion[31] calling upon those actors most easily able to withstand the effects of the crisis – notably operators in the energy sector[32] – to fulfil the duty of solidarity, for the benefit of households and small and medium-sized enterprises which, conversely, are most severely affected. Through the operationalisation of the principles enshrined in Articles 2 (solidarity) and 3(2) (substantive equality) of the Constitution within the domain of economic regulation – specifically by means of Article 41(2) and (3) of the Constitution – measures such as price controls, bill discounts, and incentives contribute to guaranteeing security of supply, with particular regard to the energy needs of the most vulnerable segments of the population.[33]

3. *Asymmetric Conditionality in Practice: Constitutional Court Order No. 21/2025*

The implications of the (asymmetric) condition of dependence are particularly apparent, among various examples, in one specific act of the Constitutional Court: Order No. 21 of 2025. This act provides an occasion for reflecting on the contours and characteristics of a potentially persistent autonomous space for State emergency intervention in the field of security.

In this Order, by which the Constitutional Court initiated a preliminary reference before

[27] See Art. 6(17) of the Consolidated Environmental Act, Legislative Decree of 3 April 2006, No. 152 (Environment Act): "For the purposes of protecting the environment and the ecosystem, within the perimeter of marine and coastal areas protected on any basis for purposes of environmental protection […] the activities of exploration, prospecting and extraction of liquid and gaseous hydrocarbons at sea are prohibited […]. The prohibition is likewise established in the sea zones situated within nine miles from the coastal baseline along the entire national coastline and from the external perimeter of the aforementioned protected marine and coastal areas" (version as amended by Art. 2(4) of Decree-Law of 17 October 2024, No. 153).

[28] See Art. 16 of Decree-Law of 1 March 2022, No. 17, so-called 'Energy Decree'.

[29] *Ex multis*, see Nacci Maria Grazia, "Un primo bilancio del gasdotto Trans-Adriatic Pipeline (TAP) e il governo dell'energia tra Stato e Regioni," *Le Regioni*, 4 (2023): 887-88.

[30] Giorgini Pignatiello Giacomo, "Emergenza energetica, principio di solidarietà e comunità energetiche rinnovabili: dalla disciplina euro-unitaria agli ordinamenti italiano e Spagnolo," *DPCE online*, 4 (2025): 2138.

[31] Tondi della Mura Vincenzo, "Se l'Italia diventa un Paese solo per ricchi: "l'orrendo e occulto veleno" dell'errore da scongiurare," *Astrid Rassegna*, 13 (2025): 15-16.

[32] Among others, see, *e.g.*, Constitutional Court Judgements No. 10/2015, para. 6.4 and No. 111/2024, para. 7.1.3.

[33] Cataldo Giorgio, "La tutela sociale dei bisogni energetici nel tracciato costituzionale sul contrasto alla povertà," *Rivista AIC*, 4 (2025): 539 ff.

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the EU Court of Justice,[34] the subject matter was the provision on a solidarity contribution on windfall profits introduced, for the year 2023, by the Italian Legislator (Article 1, paragraphs 115 to 119, Law of 29 December 2022, No. 197) in respect of various companies operating in the energy sector, with a view to counteracting the effects of the Russian-Ukrainian conflict on energy prices.

The question arose in relation to the EU regulatory framework from which the National provision had drawn its inspiration. The reference is to Regulation 2022/1854/EU, "on an emergency intervention to address high energy prices", adopted on the basis of Article 122(1) TFEU and identified as a "rapid and coordinated response […] at Union level" (Whereas 6) to the events of that period. The Regulation, among the various measures introduced, provided in Article 14 for this form of contribution, directing it at a limited circle of subjects operating in the initial phase of the production process and engaged in 'activities in the field of the extraction, mining, refining' (Article 2, Nos. 17 and 19), the so-called 'upstream sector'. By contrast, the Italian Legislator broadened the class of addressees, including those in the so-called 'downstream sector', involved in the final and retail phase of the supply chain.

Hence the doubts as to the legitimacy of the National Legislation, raised in relation to Articles 11 and 117(1) (in relation to EU law) and to Articles 3 and 53 of the Constitution (in relation to the principles of equality, proportionality, reasonableness, and fiscal capacity).

The pivotal point of the Constitutional Court's reasoning, from which the appropriateness of referring the matter to the Luxembourg judges was derived, concerns to a large extent the possibility for Member States – as permitted by Article 14 of the Regulation itself – of substituting the solidarity contribution provision with equivalent measures, provided they are directed towards analogous and consistent objectives. About this possibility, the Judges of the *Consulta* hinted at an extensive interpretation, under which equivalence need not necessarily pertain to the addressee subjects but may also generally relate to the impact on higher profits.

The Italian Court thus considered two (alternative) hypotheses for resolving the problem: a formal one and a substantive one.

The first hypothesis, the formal one, adheres strictly to the European prescription, such that the State's departure from the limits it provides could give rise to a distortion of the internal market and therefore an incompatibility of the National rule.[35]

The second hypothesis, the substantive one, identifies in the concrete situation in which the Italian State found itself a decisive element for a different interpretation of the relationship between the European provision and the National one. This is, without any shadow of doubt, the hypothesis most strongly supported by the Court, since – to quote its own words – there are "various and significant indications that might speak, on the contrary, in favour of the referability of the challenged national provisions to those of Union law".[36]

It is precisely in this second perspective that the Court placed emphasis on the concrete "peculiarities of the National energy context", given that "Italy is among the Member States most dependent on natural gas in the National energy mix […] and, consequently, in that same year, the increase in the price of gas itself […] and of electricity for end consumers was

[34] Buzzacchi Camilla, "Sovranità fiscale dello Stato e contribuzione di solidarietà a traino dell'Europa: il rinvio pregiudiziale della Corte costituzionale, ordinanza n. 21 del 2025," *Osservatorio*, *AIC* 4 (2025): 210 ff.

[35] Constitutional Court, Order No. 21/2025, para. 10.1.

[36] *Ibid.*, para. 10.2.

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among the highest recorded in Europe, notwithstanding the National interventions in support of businesses and households".[37] To the problem of energy prices, the Court then associated the inevitable inadequacy of Italian territory to provide supply guarantees, by reason of the scarcity of resources "to finance the measures for the protection of businesses and households considered necessary by the Union itself to address the exceptional crisis situation".[38] And it is by no means secondary to note the emphasis placed on the fact that, prior to the sanctions, Italy's principal importer of hydrocarbons had been precisely the Russian Federation, to a greater extent than other Member States.[39]

Following this line of reasoning, another passage of the Order proves useful, in which the Constitutional Court, in outlining a possible argumentative path aimed at interpreting the notion of equivalent measure broadly, highlighted two further profiles.

The first concerns the legal basis of the Regulation, the already cited Article 122(1) TFEU. On a careful reading, this provision states that, "Without prejudice to any other procedures provided for in the Treaties, the Council, on a proposal from the Commission, may decide, in a spirit of solidarity between Member States, upon the measures appropriate to the economic situation, in particular if severe difficulties arise in the supply of certain products, notably in the area of energy". Under this provision, according to the Court, the EU intervention, being of an emergency nature, could not call for strict harmonisation measures but would, on the contrary, leave intact the power of States to adopt further measures with the sole constraint of not obstructing the single market.[40]

This profile makes it possible to establish a logical nexus with the centrality held by the condition in which each individual Member State finds itself. Among other aspects, it would be this condition that might render necessary the recourse to measures that are more stringent (and of wider scope) than the European framework, while fully respecting the *ratio* informing it. This steers the Court – while deferring to the European judge every definitive assessment – towards the following conclusions: first, "that the choice to impose the equivalent measure on further subjects who also benefited from windfall profits during the energy crisis is linked to the peculiarities of the National energy context and responds to the regulation's ultimate aim of financing National measures aimed at contributing to the affordability of energy"; second, that "the broadening of the class of addressees carried out by the National Legislator in order to capture windfall profits could be deemed, in the National economic and energy context, an equivalent measure or, in any case, a manifestation of the general competence of Member States in the field of direct taxation exercised in compliance with the

[37] *Ibid.*

[38] *Ibid.*

[39] As the Court observed, "That crisis, as emerges from the same recitals, was triggered not only by the increase in consumption resulting from the end of the pandemic and the exceptionally high temperatures recorded during the summer of 2022, which led to a growth in demand for electricity for cooling, but also and above all by the reduction in gas supply on the part of Russia following the invasion of Ukraine, and this in a well-known situation of Union dependence on supplies from Russian sources" (Constitutional Court, Order No. 21/2025, para. 8.1). Among various reports, see Panzeri Davide *et al.*, "Il panorama energetico italiano dopo l'invasione russa dell'Ucraina", in *Eccoclimate.org* (September 21, 2023): 5 ff. See also, among the studies, Nicotra Ida Angela, "Guerra e crisi energetica. Per l'Unione europea gli esami non finiscono mai," *Istituzioni del Federalismo*, 1-2 (2022): 37-38.

[40] Constitutional Court, Order No. 21/2025, para. 10.2.

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principle of solidarity and the objectives of the regulation".[41] Hence the question: whether the regulation precludes the adoption of an equivalent National measure that encompasses an extension of the class of the solidarity contribution addressees.

The Order assumes relevance in the part in which it implies – quite clearly, even if not stated outright – the weight of the condition of structural asymmetry that characterises the Italian legal order, whose peculiarities therefore constitute an indispensable interpretive criterion in the case under examination.

Following the Court's reasoning, the EU intervention, although displaying an emergency character in the same manner as the National one, tends inevitably to present itself as a second-level source. Indeed, while aimed at alleviating the energy and economic needs of households and businesses, it revolves, under the Treaty provision, at least in the first instance, around a spirit of solidarity between States. This is the same solidarity evoked by Article 194 TFEU, equally in the context of the principles governing energy matters.[42] The Regulation may thus be understood in its function of coordinating the subsequent implementing interventions of the Member States, providing a framework and reinforcing their legitimation to adopt measures that are provisionally derogatory and divergent from the ordinary balancing of interests, rights, and freedoms pursued for security purposes.

Further supporting this argument, one cannot overlook the classification of the solidarity contribution as a fiscal measure – pertaining, that is, to one of the typical manifestations of State power and, as such, to an exclusive competence of the Member States.[43] The absence of powers of direct tax imposition on the part of the Union serves to confirm the mediated nature of European intervention.

It is precisely the logical path aimed at identifying in the European source a mediated and coordinative function that leads to corroborating the rejection – as contemplated by the Constitutional Court – of the more incisive (both conceptually and materially) function of harmonisation, which as such would instead be directed at making uniform and rendering homogeneous the norms of the individual Member States.

Notwithstanding its highly technical character, the subject matter of the proceedings and even the extensive interpretive hypothesis surrounding the notion of equivalent measure open up considerations of general significance, in which the factor of the Italian State's structural asymmetry plays an important role.

Following the overall reconstruction advanced here, the needs dictated by the peculiar National context provide the premises for identifying not an overlap between the National rule and the EU one – from which the incompatibility of the former would follow – but rather an articulated relationship. In particular, two interpretive keys might be proposed.

The first one, horizontal, would see the National rule as substantially decomposable into two parts: one adhesive to the European rule and therefore receptive of it (insofar as it imposes the contribution on upstream operators); one purely internal (insofar as it extends the contribution to downstream operators). The second interpretive key, multi-level, would see in the National rule a typical expression of emergency intervention that is grafted onto

[41] *Ibid.*

[42] Villani Susanna, "Considerazioni sul principio di solidarietà energetica nel quadro giuridico dell'UE," *Federalismi.it*, 5 (2023): 118 ff.

[43] See Buzzacchi Camilla, "Sovranità fiscale dello Stato e contribuzione di solidarietà a traino dell'Europa," 216, 222-23.

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the sphere of operation of the European measure, which in turn responds to a particular aim of solidarity, without thereby being exhausted by it and without being disproportionate in relation to it.

The two interpretive keys do not appear to be alternative but rather complementary. They disclose the possibility of safeguarding an entirely internal component of the National rule, which, following the Court's reasoning, is justified by the peculiarities of the State's conditions and is grafted onto – but is not to be confused with – the EU regulation.

4. *The Conditioned State as an Emergency Actor: some Final Observations*

Regardless of the outcome of the preliminary reference, the Order – also in relation to the hypothesis advanced by the Constitutional Court – is of interest because it discloses a number of considerations to be traced regarding the possible role of the conditioned State in the management of emergencies.

Almost paradoxically, one might venture, in general terms, the provocation that the condition of dependence, of middle power status, or however one chooses to define it, functions as a built-in *bridle* against the possibility of aggressive manifestations of power, disposing instead – however peculiar – of regulatory instruments aimed at the guarantee of security.

At the particular level, then, the Order renders visible an inescapable datum to emerge: the homogeneity and horizontality that characterised the EU sanctions produced differentiated and asymmetric repercussions on individual Member States, linked to their respective original degree of dependence on supplies. Correspondingly, this reading reveals the constitutional relevance that, in the regulation of emergencies, is assumed by the condition of structural asymmetry in which a State may find itself *vis-à-vis* the dynamics of global interdependence.

The hypothesis of an entirely National component within the EU implementing Legislation – also by virtue of the peculiar argumentative approach offered by the Court – allows the inference that the State retains and maintains a capacity for derogatory-emergency normative intervention.

The reservation of a sphere of operation for the State on account of its specific needs and beyond the European normative framework confirms emergency as a domain still typically belonging to the State, as the power-duty to restore order and neutralise danger – albeit within the system of guarantees and controls founded on constitutional rigidity.

All of this leads to a twofold observation.

On the one hand, it has been possible to observe how the condition of asymmetry influences the concrete modality (and the concrete possibilities) of intervention for emergency purposes. At the level of presuppositions, dependence on factors and dynamics that escape the State's unilateral control may itself constitute the source of emergency risk, as an expression of a systemic vulnerability that is activated by external events – armed conflicts, economic crises, infrastructural disruptions – to which the State finds itself in a position of substantial exposure. At the level of the modalities of response, the same condition orients and favours the morphology of intervention: the absence of a capacity for unilateral projection – both in fact and with respect to internal and external legal constraints – consolidates emergency action around the instruments proper to the rule of law dynamic, such as market regulation, proportionate balancing of interests and rights, and the redistribution of the fiscal

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burden. It follows that security, in this context, tends to be articulated primarily in its social and rights-guaranteeing dimension: not the solely vertical affirmation of power, but also the protection of the minimum conditions of access to essential goods for the most exposed segments of the National community.

On the other hand, the condition of asymmetry does not entail the abandonment of the State's power-duty to intervene, for it is confirmed as a structural element of the State's very existence, imposing itself by reason of the peculiarity and centrality of the needs of the National context. Though conditioned, this intervention constitutes a peculiar way of pursuing an objective inherent in the State's function: security of supply, which even in such mediated forms is configured as an expression of the *salus Rei publicae*.

For this reason, from the peculiarities of each individual National context follows the enduring appropriateness of this domain as a political space in which, within the democratic circuit, it is possible to proceed to the composition (through selection and balancing) of the needs of the community affected by the crisis, giving concrete effect to the duty of solidarity that involves all components of the social, political, and economic fabric.

In conclusion, it is indeed true that, among the effects of contemporary constitutionalism, the idea of an emergency governed exclusively (and univocally) by the State sometimes may represent an abstract and anachronistic concept. The very integration of the Italian State within a broader normative framework such as that of the European Union entails that the latter is called upon to activate instruments of an emergency nature capable of affecting the social and economic arrangements of Member States. These instruments, however, are consistent with the still non-State nature of the Union and are correlated to its limited – though broad – functions and competences, which do not substitute for the subjectivity of Member States but are placed in a subsidiary relationship thereto.

The openness of the State legal order does not seem, therefore, to entail the complete disappearance of any possibility of emergency intervention. The specific and peculiar territorial and infrastructural characteristics that distinguish individual States confirm the enduring need for a diversification of individual regulatory frameworks, proportionate to specific needs, and recognise a residual space for the adaptation and modulation of emergency measures. This, even when those emergency measures are functional to guaranteeing the effectiveness of the objectives pursued at the supranational level.

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CYBERCRIME AND THE SECURITY OF PERSONAL DATA IN ALBANIA: THE ROLE OF LAW NO. 9887/2008 AND THE HARMONIZATION WITH GDPR STANDARDS

Xhei Çeliku

Keywords: Cybercrime; Personal Data Protection; Cybersecurity Law; Privacy Protection.

1. *Brief Overview of Cybercrime Trends in Albania*

In recent years, the incidence of cybercrimes in Albania has risen, largely due to increased technology usage and greater exposure of data to online threats. Cyber attacks have targeted not only individuals and businesses but also state institutions, resulting in heightened risks to personal and institutional data.

Albania has experienced sophisticated cyber attacks targeting national institutions, including government services and critical online platforms. These incidents have raised significant concerns regarding the security of personal data and the operational integrity of state institutions. The attacks have resulted in the unauthorized disclosure of sensitive information to the public, underscoring the urgent need to enhance personal data protection and ensure individual safety.

The cyber attack that took place in Albania in 2022 was a clear indicator of the ever-increasing need to strengthen capacities to prevent these situations. The investigations of the Prosecutor's Office of Tirana for the cyber attack of 2022 in Albania had an international character, saying that it was suspected that the cyber attack came from outside the territory of the Republic of Albania. The Prosecutors Office of Tirana registered criminal proceedings for cyber attacks against the portal *e-Albania* in July 2022 and then for the attack on the TIMS system (*Total Information Management System*), which regulates entry and exit at the border. The investigation included criminal offenses such as interference in computer systems and misuse of equipment. Tirana Prosecutor's Office requested the seizure of data and online sites in three countries as part of the investigation.[1]

In recent years, the protection and confidentiality of private correspondence, which often contains both personal and private data, has become an increasingly sensitive issue. Rapid technological advancements have necessitated a reconceptualization of what constitutes private correspondence. Beyond traditional forms such as paper letters or fixed-line telephone

[1] "The Tirana Prosecutor's office requests the security of data and online sites in three countries" (Press release), in *Pp.gov.al* (July 19, 2022).

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conversations, new communication methods – including email, chat, and electronic mailing – now require consideration within the framework of private correspondence.

The right to respect the secrecy of correspondence, as it has found sanction in the Constitution and in international instruments for the protection of fundamental rights and freedoms, extends its protection only to correspondence exchanged by natural persons. Official correspondence held by various public administration institutions or correspondence held by private legal entities during the exercise of activities of a professional or commercial nature cannot enjoy special protection based on this right.

Within legal doctrine, it has been argued that "every communication constitutes correspondence involving thoughts, feelings, goals, data, or news directed to one or more specifically identified individuals, as distinct from conversations conducted in each other's presence".[2] The sole criterion for classifying a communication as private is the demonstration that it occurred between clearly identified parties.[3] Normative interventions aimed at including legal persons or data managed by legal entities continue to present challenges to current criminal legislation.

2. *Role of Law No. 9887/2008 and Institutional Enforcement*

Law No. 9887/2008 'For the Protection of Personal Data' demonstrates Albania's significant progress in safeguarding personal data and aligning its legislation with the European Union acquis. A notable innovation is the law's explicit protection of sensitive data, defined as information concerning a natural person's origin, race or ethnicity, political opinions, union membership, religious or philosophical beliefs, criminal convictions, as well as health and sexual life data.[4]

Furthermore, the establishment of national institutions dedicated to personal data protection and cyber security reflects an active commitment to upholding these rights.

3. *Commissioner for the Right to Information and Protection of Personal Data in Albania*

The institution of the Commissioner for the Right to Information and Protection of Personal Data has operated in the Republic of Albania since 2008, establishing an independent authority responsible for the protection and supervision of personal data. Subsequent amendments to the law regulating the Commissioner's functions have consistently aimed to ensure institutional independence and to expand the Commissioner's powers.

According to the legislation in force[5] the commissioner is organized as a public legal entity and serves as an independent supervisory authority responsible for monitoring and overseeing the implementation of personal data protection laws. The law stipulates that the Commissioner must act with complete independence in the performance of duties and exercise of powers, without being influenced directly or indirectly, and without seeking or receiving instructions.

[2] Mascia Alberto, "Diritti della personalità," in *Famiglia e persone*, I, edited by Rita Rossi (Turin: UTET Giuridica, 2008), 116.

[3] Antolisei Francesco, *Manuale di diritto penale. Parte speciale*, I (Milan: Giuffrè, 2008), 251.

[4] Article 3(4), Law No. 9887/2008 'For Personal Data Protection', amended.

[5] Law No.124/2024 'For the Protection of Personal Data'.

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The independence of the Commissioner is further reinforced by the election process, which requires selection by a majority of all members of the Assembly, based on a proposal from the Council of Ministers, for a seven-year term with the possibility of re-election. All public institutions and private entities are obligated to cooperate with the Commissioner by providing all necessary information for the fulfillment of official duties and by promptly reporting on the implementation of recommendations after the expiration of established deadlines.

The right to file a complaint[6] regarding the decision-making of the Commissioner is provided both when an interested entity disagrees with the decision and when the Commissioner has not acted on complaints. The Administrative Court is designated as the competent authority for appeals against the Commissioner's decisions or inaction.

According to the 2024 report[7] presented to the Assembly of the Republic of Albania, the Commissioner for the Right to Information and Protection of Personal Data administered 939 complaints. The report further indicates that the Commissioner imposed approximately 68 administrative sanctions for violations of the law on personal data protection, including fines against entities that breached data processing and protection regulations. The rise in both complaints and violations suggests growing public awareness among Albanian citizens regarding personal data protection. Additionally, the institutional response demonstrates the effective implementation and enforcement of the law.

4. *Cyber Security Agency*

Due to the increasing risk of cyber attacks, the protection of data has become a central focus of institutional policies, leading to the establishment of new agencies dedicated to cyber security. In the Republic of Albania, the sector has been reorganized and strengthened through the creation of state institutions and the implementation of an updated legal framework designed to safeguard national security and the interests of information technology users, while adhering to European Union standards. The Cyber Security Agency is a key institution in this domain.

The National Agency for Cyber Security serves as the central state institution in Albania responsible for supervising and implementing cyber security measures nationwide. Its primary objectives include enhancing the security of electronic services, information systems, and critical infrastructures, as well as coordinating incident responses and fostering a sustainable cyber ecosystem. The legal framework[8] also emphasizes the agency's coordinating role, particularly as a point of contact for international cooperation on cyber security issues.

This approach establishes standards for international cooperation, facilitates investigations, and supports the prevention of cyber attacks, many of which have cross-border implications. The cyber security law is the primary legal instrument defining the national framework for cyber security policies and institutional responsibilities. It prioritizes the protection of critical and important information infrastructures, outlines incident reporting procedures, and coordinates preventive and responsive measures at the national level. The

[6] Article 87, Law No. 124/2024 'For Personal Data Protection'.

[7] Commissioner for the Right to Information and Personal Data Protection, *Raporti Vjetor 2024*, in *Idp.al*, 2024.

[8] Law No. 25/2024 'For Cyber Security'.

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law also incorporates European Union standards and serves as a foundation for the national cyber security strategy.

5. *Legal Frameworks for the Incrimination of Criminal Offenses in Cyberspace*

In Albania, the legal framework addressing cybercrime and the protection of personal data is defined by several key legislative documents. These laws collectively regulate criminal conduct in digital environments and ensure the protection of individual privacy. Implementation of these regulations in cases involving cyber attacks and data privacy violations is overseen by authorities including the Prosecutor's Office, the Police, and the Commissioner for the Protection of Personal Data.

The Criminal Code of the Republic of Albania offers explicit legal protection for personal data, especially when such data are processed through computer systems. These offenses are addressed in Chapter VIII, titled "Criminal offenses against authority and public order".[9]

Unauthorized access to computer systems is classified as a criminal offense,[10] recognized as a socially dangerous act and punishable by up to three years of imprisonment. The relevant provision criminalizes both unauthorized entry and exceeding authorized access to a computer system or its components by violating security measures. This offense is considered formal, meaning it is prosecutable even if no actual harm or misuse of information occurs, as well as in cases where an individual exceeds their authorized access to information.

Interference with computer data is also established as a criminal offense[11] targeting actions such as damaging, distorting, altering, erasing or suppressing unauthorized computer data.

These offenses are punishable by up to three years of imprisonment. The relevant provisions criminalize not only unauthorized access but also the manipulation, alteration, or destruction of data, including personal data, thereby compromising the accuracy and reliability of information.

Interference with computer systems is also criminalized[12] under the CCRA, establishing liability for individuals who intentionally create obstacles to computer systems by damaging or altering data without authorization. This offense is considered high risk and carries a penalty of up to seven years of imprisonment. Such illegal actions are intended to render systems unusable. The link to personal data is significant, as these offenses can compromise the availability of personal data and restrict lawful access by individuals and institutions.

6. *Conclusion*

Albania has undertaken significant efforts to adopt relevant legislation and establish institutions responsible for monitoring compliance with standards and protecting personal data. The Albanian legislature has introduced specific provisions in the criminal code addressing various forms of computer crime. However, these provisions are currently dispersed across

[9] Articles 293/a - 293/c, Criminal Code of the Republic of Albania.
[10] Article 192/b, Criminal Code of the Republic of Albania.
[11] Article 293/b, Criminal Code of the Republic of Albania.
[12] Article 293/c, Criminal Code of the Republic of Albania.

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different sections of the code, reflecting the organizational principle based on the legal object affected by each offense. The absence of a dedicated chapter for these offenses presents an ongoing challenge. Consolidating these provisions into a separate law could enhance both the effectiveness and practical implementation of measures against computer crime.

The responsibility for monitoring personal data protection and preventing cybercrimes should not rest solely with specialized institutions. Instead, safeguarding personal data and preventing cyber attacks should be objectives for all institutions. Achieving these goals requires ongoing national and international cooperation. Since cybercrimes are inherently transnational, attacks frequently originate from developed countries and are often perpetrated by individuals with advanced technical expertise.

In order to be prepared in this aspect, continuous training and large investment in human resources as well as computer systems are seen as necessary. Many government platforms in the framework of the E-government have gone through the online proviTo address these challenges, ongoing training and substantial investment in both human resources and computer systems are essential. The transition of many government platforms to online service delivery within the e-government framework increases the risk that cyberattacks may compromise not only individual data but also state security.

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NEUROTECHNOLOGIES, COGNITIVE AUTONOMY AND THE RESILIENCE OF DEMOCRATIC PRINCIPLES. THE EMERGENCE OF NEURORIGHTS

Nicolò De Perto

Keywords: Constitutional Crisis; Neurotechnologies; Neurorights.

1. *Introduction: looking beyond the Law*

The growing capacity of neurotechnologies to access, direct, or condition individual cognitive processes calls for a reflection on the resilience of the fundamental categories of democratic constitutionalism. In a framework in which traditional guarantees have been developed around the body, personal liberty, and freedom of thought, it is necessary to ask whether they are adequate to address new forms of interference in the mental sphere, or whether it is instead necessary to develop specific protections, now generally associated with the category of 'neurorights'.

The answer to this question, which is clearly constitutional in nature, requires looking beyond the boundaries of law, in order to understand what neurotechnologies are and how, from a physical point of view, they affect the individual.

The term 'neurotechnologies' refers to the set of "devices and procedures used to access, monitor, investigate, assess, manipulate and/or emulate the structure and function of the neural systems of natural persons".[1] In concrete terms, this notion includes both highly invasive technologies, such as brain implants, deep brain stimulation, and implantable neural interfaces, and non-invasive tools with potentially widespread use, such as wearable EEG sensors, eye-tracking devices, and the detection of physiological parameters correlated with cognitive and emotional states. It may therefore be said that neurotechnologies are a varied set of techniques, united by the impact of technology on neural data.

The rapid expansion of the field is the result of the convergence of two main processes: (a) progress in applied neuroscience; and (b) integration with machine learning and artificial intelligence techniques, which make it possible to extract relevant information from neural signals that are intrinsically noisy and probabilistic.

[1] Organisation for Economic Co-operation and Development (OECD), *Recommendation of the Council on Responsible Innovation in Neurotechnology*, OECD/LEGAL/0457, 2019.

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From a functional point of view, neurotechnologies may be grouped into three macro-categories:[2] (1) neuro-detection (*recording/monitoring*); (2) neuromodulation (*stimulation/intervention*); and (3) brain-computer interfaces (*BCIs*).

These developments help to redefine the center of gravity of legal debate: neurotechnologies are not merely new medical devices, but tools capable of affecting constitutionally sensitive interests such as freedom of thought, the formation of the will, personal identity, and human dignity. This opens an important line of reflection on their possible impact regarding articles 2, 3, 13, 21, and 48 of the Italian Constitution, as well as Articles 7, 8, and 11 of the Charter of Fundamental Rights of the European Union.

Traditionally, neurotechnologies have developed within clinical and research settings, areas governed by established principles such as informed consent, proportionality of risk, and ethical-scientific oversight. In this respect, reference should be made to the Oviedo Convention of 1997 and the 2013 Declaration of Helsinki. In recent years, however, these technologies have gradually moved into commercial and everyday applications, which are marked by fragmented legal regulation.

In these contexts, new types of data emerge, often referred to as *neurodata*, capable of revealing deep information about an individual's mental states, which are not always consciously controllable.

In light of these premises, this paper adopts as its working hypothesis that cognitive autonomy is not merely an individual interest, but a structural requirement of constitutional democracy: without guaranteeing a minimum standard of inner freedom and authenticity in deliberation, popular sovereignty is weakened, and the right to vote risks losing its character as a free and secret act, becoming instead the outcome of a hetero-directed or manipulated choice.

2. *Neurotechnologies and the Resilience of Constitutional Rights and Guarantees*

Mental processes and their related neurological correlates, historically regarded as impenetrable and inherently private, can now be monitored, interpreted, and sometimes technologically influenced. This development breaks down the classical boundary between the individual's inner and outer dimension, making it necessary, at the very least, to update legal paradigms and assess whether current safeguards are effective in protecting fundamental rights in an age of unprecedented 'visibility' of thought.

Leading scholars in the field of law and ethics, above all Ienca and Andorno, observe that this premise, although never absolute, has long functioned as a practical assumption of legal systems: the mind was 'a last refuge' of self-determination, difficult to penetrate without the subject's cooperation.[3] Contemporary neurotechnologies – neuroimaging, neurostimulation, BCIs, and consumer devices – undermine this structure, because they make realistic forms of access to, collection of, and manipulation of neural information on a scale no longer confined to the clinic or the laboratory.

The legally relevant point is not only the 'strong' idea of a complete reading of thought, but rather the qualitative leap from 'proxy' to 'direct access'. Violations of mental privacy

[2] Ienca Marcello and Andorno Roberto, "Towards new human rights in the age of neuroscience and neurotechnology," *Life Sciences, Society and Policy*, 13, 5 (2017): 4 ff.

[3] *Ibid.*, 1.

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existed even before, through interrogations or tools such as the polygraph; however, they affected mental life indirectly, through external indicators (language, behaviour, physiological indices), and with a level of accuracy often insufficient to support robust inferences. Likewise, threats to integrity and identity could arise from drugs or hypnosis, but with limited selectivity over neural processes. Neurotechnology, by contrast, allows a significantly higher and more targeted degree of access and modulation: this is where the 'disruption' of the current ethical and legal framework becomes structural rather than merely incremental.

This transformation interacts with a further variable: the entry of neural computation into the infosphere. In other words, the problem is that, once collected, neurodata are often transferred to apps, clouds, or repositories: they thus become exposed to the same vulnerabilities (reuse, data brokers, secondary access, attacks) that characterize any digital data, without the existence of specific safeguards proportionate to their sensitivity.

At the level of fundamental rights, the primary point of tension is to be found in Article 13 of the Italian Constitution. In our legal system, personal liberty represents the first right expressly characterized as inviolable, placed as a foundational value of the person and of democratic principles; although the social context in which the Constitution entered into force led this protection to be understood from an eminently physical point of view, constitutional case law has gradually provided an extensive interpretation of the provision in question.

Indeed, in its literal wording, the provision does not merely prohibit detention, personal inspection, and personal search, but extends its scope to "any other restriction of personal liberty", allowing it only through a statutory reserve and a judicial reserve. The textual element therefore shows that personal liberty is not guaranteed solely through a merely material reference but rather considers personal liberty as a complex good in which integrity, self-determination, and the protection of human dignity converge.

This perspective is reflected in the case law, including Constitutional Court judgment no. 30 of 1962, according to which "the guarantee of habeas corpus must not be understood only in relation to the physical coercion of the person, but also in relation to the impairment of moral freedom when such impairment entails the total subjection of the person to the power of another", and judgment no. 99 of 1980, according to which Article 13 "does not concern voluntarily assumed obligations that do not entail any legal degradation and do not in any way injure the dignity of the person".[4]

It may therefore be argued that the limits established by Article 13 of the Constitution, although capable of protecting the inner dimension of the person as well, do not extend indiscriminately to every legal constraint imposed on the addressee of a measure, but become relevant only where there is the exercise of a coercive power capable of affecting one's self-possession and reducing the individual to the passive object of an imposition.

It is therefore necessary to ask whether, and to what extent, the mental interference resulting from a distorted use of neurotechnologies may be considered harmful to the right in question; in other words, to what extent it is possible to speak of 'neuro-bodily freedom' and of its possible violations.

Personal liberty, referred to above, is not the only freedom affected by the advent of

[4] *I Diritti fondamentali nella Giurisprudenza della Corte costituzionale,* Report prepared on the meeting between the delegation of the Italian Constitutional Court and the Constitutional Tribunal of the Republic of Poland (Warsaw, 2006), 21 ff.

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neurotechnologies; reference may likewise be made to the principle of freedom of expression under Article 21 of the Constitution.

To understand the scope of the issue, one may recall Conti, according to whom "constitutional scholars have always studied freedom of expression without knowing how thought is formed, which is a problem for theologians, philosophers and now, neuroscientists".[5]

The interpretation that the Constitutional Court has given to this freedom is that it must be understood as a safeguard of democracy, assisted by the clause of inviolability (under Article 2 of the Italian Constitution), which takes the form of the immediate and direct recognition of a subjective right.[6] This reconstruction is closely linked to the general interest of the community in receiving pluralistic, reliable, and properly accessible information. From this perspective, as already pointed out by Loiodice, freedom of information is not exhausted and does not find expression in the mere act of informing, but also includes the dimension of becoming informed, understood as the acquisition of news and elements of knowledge necessary to form an informed opinion.[7]

This interpretation takes on particularly significant features during electoral periods;[8] in judgment no. 112 of 1993, the Court indeed stated that the founding principles of our State "They require that our democracy be based on free political opinion and be capable of developing through the equal participation of all in the formation of the general will".

However, according to important scholarship, it is not enough that information simply circulates; it must also be organized in such a way as to make a critical understanding of knowledge truly possible and to prevent public opinion from being reduced to a mere object of demonstrative or manipulative solicitations.[9]

Here too, therefore, it is necessary to ask whether this right, considering these technological innovations, may still be considered strong enough to 'withstand the impact'.

Particularly interesting on this point is the reconstruction proposed by legal scholarship[10] regarding the relationship between the principle of freedom of expression (Article 21 of the Constitution) and the limits on economic activity (Article 41 of the Constitution) when propaganda is carried out through third parties, external to the political group concerned. In

[5] Conti Gian Luca, "Il condizionamento dell'opinione pubblica in campo politico ed economico," *Rivista AIC*, 3 (2025): 419.

[6] Constitutional Court, Judgment No. 112/1993.

[7] Loiodice Aldo, *Contributo allo studio sulla libertà d'informazione* (Napoli: Jovene, 1969), 23 ff.

[8] Pitruzzella Giovanni, "Parole e potere. Libertà d'espressione, hate speech e fake news," in *Parole e potere. Libertà d'espressione, hate speech e fake news*, edited by Giovanni Pitruzzella, Oreste Pollicino, Giuseppe Stefano Quintarelli (Milan: Egea, 2017), 67 ff., in which the author discusses the concept of the *filter bubble*. By this expression, the author refers to the phenomenon whereby the personalization algorithms used by digital platforms select and rank content in a manner that is increasingly consistent with the preferences, interests, and orientations already expressed by the user. This mechanism limits exposure to heterogeneous information and encourages the consumption of content that conforms to pre-existing beliefs. The result is a reinforcement of cognitive biases and a reduction in engagement with differing positions. Closely connected to this process is the notion of the *echo chamber*, which describes a communicative environment in which opinions and representations of the world tend to be reproduced and confirmed in a circular way. In this sense, algorithmic mediation contributes to the construction of highly individualized informational ecosystems.

[9] Tondi della Mura Vincenzo, "Riflettendo sull'informazione e la democrazia dopo «Wikileaks»: l'indagine penale ai tempi di «Dagospia»," *Rivista AIC*, 3 (2012): 7 ff.

[10] Giunta Concetta, "L'espressione del pensiero politico: comunicazione, propaganda, pubblicità," *Federalismi.it*, 14 (2025): 32 ff.

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other words, the question is what constitutional limits safeguard such activity when the communication company – which may also use neurotechnologies – does not itself adhere to the ideas being disseminated. It is therefore necessary to reflect on the constitutional protection of 'political advertising' and of neural interference for entrepreneurial purposes, which may be reconstructed in different ways.

A first interpretation[11] leads to the conclusion that this form of propaganda does not fall within the guarantees of Article 21 of the Constitution, since it is mainly covered by Article 41, that is, by the freedom of economic initiative, and is therefore closer to commercial advertising than to freedom of expression. In the opposite direction, however, one may argue that propaganda does not lose its nature as an expression of thought merely because it is disseminated for commercial purposes, so that the protections of Article 21 should remain fully intact even in the presence of economic interests.

However, both of these extreme solutions may be considered unsatisfactory, and a third interpretative option may be proposed.[12]

According to this approach, political advertising must in any case be regarded as a form of expression and therefore protected by Article 21 of the Constitution; at the same time, when it is carried out in an entrepreneurial form, its economic exploitation may also be subject to the limits set by Article 41, provided – it must be stressed – that such limits are justified by the protection of constitutionally relevant interests and comply with the criteria of suitability and proportionality.

From this perspective, the guarantee of voting freedom and of the voters' right to receive the information necessary to form their opinion may fall within the concept of social utility and justify restrictions aimed not at the content of the political message as such, but at certain aspects of the economic activity that enables its dissemination, such as electoral marketing or the conduct of advertising service providers and Internet Service Providers. The concluding point, therefore, is that one cannot directly strike at the content of a fundamental freedom through the regulatory powers governing private economic activity, but one may, within certain limits, restrict the entrepreneurial methods through which that content is disseminated.

Closely connected with the topic of neurotechnologies is the issue of neuromarketing, a term introduced by Ale Smidts in 2002 to indicate the application of neuroscience to the study of consumer behaviour. It is based on the use of neuroscientific tools to understand and influence decision-making processes by acting on emotions, cognitive biases, and implicit memories.[13]

From this perspective, neuromarketing has been described as an advanced form of persuasion, potentially capable of affecting contractual freedom and the subject's decisional autonomy. The issue takes on even greater constitutional relevance when persuasion turns into manipulation, that is, into a hidden form of influence that limits the recipient's capacity for self-determination.

Although these persuasive techniques originally developed for commercial purposes,

[11] D'Ippolito Guido, "Comunicazione politica on line: dal messaggio politico commercializzato alle sponsorizzazioni sui social network," *Media Laws*, 1 (2020): 177 ff.

[12] Caterina Edoardo, "La comunicazione elettorale sui social media tra autoregolazione e profili di diritto costituzionale," *Osservatoriosullefonti.it*, 3 (2021): 1396 ff.

[13] Implicit memories are unconscious and non-verbalizable memories that influence our behaviour and performance (basic examples include riding a bicycle or playing a musical instrument).

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their adaptability to a wide range of social contexts soon led to their use in social and political fields as well; in the latter case, reference is made to 'political' or 'electoral neuromarketing'.

The extension of neuro-cognitive analysis and manipulation techniques to the political context raises issues of primary democratic importance. Le Bon had already described voters as "crowds guided by the unconscious". Later studies in political psychology and neuroscience have confirmed that voting is often determined more by emotional factors than by rational evaluations.[14]

In other words, according to the scholarship that has examined this phenomenon, the choice of candidate depends less on critical reasoning based on electoral proposals than on the persuasive power of the political actor.

However, the use of neurotechnologies marks a qualitative discontinuity with the traditional 'art of politics': they make it possible not only to persuade, but also to predict, profile, and systematically direct electoral behaviour through the analysis of cognitive and emotional data and the personalization of political messages. In this regard, one may also distinguish such practices from classic pre-election polls. Polls may be defined as statistical surveys conducted on a representative sample of voters, generally through questionnaires, in order to estimate voting intentions, political orientations, and opinions regarding candidates or parties. Their defining feature lies in the production of a statistical probability of electoral orientation. This method differs from the collection and analysis of neural data, which, by its very nature, presents a significantly higher degree of accuracy.

These risks alter the democratic process, transforming political competition into a form of "engineering of consent"[15] based on informational asymmetries and opaque practices of influence. In such a scenario, the protection of democracy cannot be limited to the formal guarantee of the right to vote but must also extend to the protection of the individual's cognitive and decisional autonomy.

The profiling of the consumer-voter and the possibility of modulating political messages based on acquired neurodata create tension with a further founding principle of the domestic

[14] Meola Franca, "Tecnologie digitali e neuro-marketing elettorale. A proposito di una possibile regolamentazione delle nuove forme di propaganda politica," *Costituzionalismo.it*, 1 (2020): 101 ff.

[15] Bernays Edward L., *The Engineering of Consent. The Annals of the American Academy of Political and Social Science*, (Norman: University of Oklahoma Press, 1955), 113 ff. Closely connected to this issue is the role played by large private companies that control content-distribution systems and user-profiling mechanisms. Although the case concerns in particular the use of social networks, it may be useful to recall the episode that involved Italy in September 2019. On that occasion, the platform Facebook decided to remove the national pages of the political movement CasaPound Italia and of subjects connected to it, considering that the published content violated the terms of use of the social network. That decision was later challenged before the Tribunal of Rome in order to obtain the reactivation of the pages, on the assumption that it also caused serious harm to the movement's image. In upholding the application, the judge held that such a decision could affect the principle of political pluralism, significantly limiting the possibility of participating in active political life. Quite apart from any political assessment, which is expressly avoided here, the case clearly shows the concrete nature of the problem: large private operators may unilaterally affect the processes through which political will is formed, sometimes excluding certain subjects altogether from public discourse, and at other times reducing their visibility through the algorithmic mechanisms governing the circulation of content. The case referred to therefore provides a particularly useful example for further examining the power exercised by digital platforms over political pluralism and, more generally, over the actual conditions for the functioning of democracy. See Stegher Giuliaserena, "Da cittadini elettori a cittadini consumatori: osservazioni sull'importanza di regolare le campagne elettorali sui social media," *Nomos - Le attualità nel diritto*, 1 (2023): 19 ff.

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democratic order, enshrined in Article 48 of the Constitution. Neurotechnologies, insofar as they make it possible to influence, monitor, or alter decision-making processes, risk affecting the very features of voting, which the Constitution requires to be personal and equal, free and secret.

The issue may be further developed on the basis of a premise already made available by constitutional case law (among many, see Constitutional Court judgment no. 43 of 3 July 1961) and by a significant part of legal scholarship,[16] albeit naturally without confronting the language and risks specific to today's neurotechnologies.

Indeed, Article 48 of the Constitution does not appear to exhaust its safeguarding function in the final moment of the electoral act alone, that is, in the instant when the voter formally expresses his or her preference. The features of the personal, equal, free, and secret vote do not, in fact, appear merely as external attributes of the procedure, but rather as constitutional qualities of the democratic process as a whole, capable of extending also to the prior phase in which political will is formed.

Such a reading is even more necessary today if one considers that advanced profiling technologies, microtargeting, and, prospectively, neurocognitive interference, do not affect only the final act of voting, but also the process that precedes it, namely that internal and often opaque segment in which preferences, orientations, and intentions take shape.

From this perspective, a first essential point of arrival is represented by judgment no. 96 of 1968, in which the Constitutional Court stated that the guarantee of the secrecy of the vote "also amounts to a guarantee of freedom and is therefore absolutely non-derogable".[17] This formulation retains significance that goes beyond the specific case decided.

Indeed, secrecy is not described by the Court as a merely technical or organizational requirement, functional to the orderly conduct of electoral operations, but as a direct safeguard of the voter's freedom. It is precisely this connection that makes it possible to overcome a merely material conception of the secret ballot, according to which constitutional protection would be exhausted in the non-discoverability of the ballot once cast. If secrecy amounts to freedom, then it already operates upstream, protecting the subject from the risk of pressure, control, expectation of verification, or, more subtly, from the possibility that his or her choice may be formed under the threat that others could know it. It follows that voting freedom cannot be referred exclusively to the moment of its external expression but must also concern the conditions that make a genuinely personal decision possible. From this point of view, any technique capable of making the individual's voting intention predictable, inferable, or steerable affects, at least potentially, the same constitutional good that the Court has regarded as absolutely non-derogable.

Another interesting aspect concerning the interpretation of the provision in question is the reference to the "genuineness" of the vote.[18] From a definitional point of view, the term genuine means something natural, not altered, and therefore the genuineness of the vote must be understood as referring not to a formally and merely valid act, but to the authentic expression of an undistorted will. It may therefore be said that the constitutional guarantee is not exhausted by the outward correctness of the collection of consent but also concerns

[16] Rospi Mimma, "La tutela della segretezza del diritto di voto e l'evoluzione della democrazia," *Gruppo di Pisa*, 3 (2015): 12 ff., who observed that part of the reflection on voting rights has traditionally focused almost exclusively on the moment in which the will is expressed, while neglecting its formation within the decision-making process.

[17] Constitutional Court, Judgment No. 96/1968.

[18] Constitutional Court, Judgment No. 43/1961.

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the substantive quality of the process from which that consent originates. A vote may be formally secret at the moment it is expressed and yet fail to be fully genuine, where the will supporting it has been formed in a context altered by opaque practices of influence, by particularly strong informational asymmetries, or by personalized techniques exploiting the voter's cognitive vulnerabilities. The category of genuineness therefore makes it possible to introduce into constitutional discourse a qualitative dimension of suffrage, which proves especially useful precisely in the presence of technologies capable of affecting not the electoral act in itself, but the cognitive and informational environment within which it matures.

The supranational level also offers elements capable of strengthening this reconstruction. The European electoral heritage, as developed by the Venice Commission, makes clear that free suffrage includes two distinct yet complementary aspects: the free formation of the voter's opinion and the free expression of that opinion. In the Commission's more recent documents, devoted to digital technologies and artificial intelligence in electoral processes, it is further stated that the voter's freedom to form an opinion includes the right to be properly informed, the right to private online browsing, and the right to confidential communication on the internet.[19] This element is especially valuable because it shows that the protection of suffrage is no longer conceived in exclusively punctual terms, that is, limited to the moment of casting the vote, but also extends to the cognitive and informational environment in which political choice is formed. Hence the plausibility of an interpretation of Article 48 of the Constitution that does not stop its protection at the secrecy of the final act alone, but also extends to the protection of voting intention, when the latter becomes the object of systematic collection, inference, or manipulation.

There thus emerges the need to redefine the classical standards designed to safeguard the democratic order so as to include within them the neural dimension, elevating it to an essential pillar of individual dignity. The current debate marks the beginning of a new frontier of law, where inner freedom is no longer a given, but a value that must be actively defended. As will be shown, the issue is no longer whether risks to fundamental rights exist, but rather how such rights are to be protected.

3. *Neurorights: between Conceptual Autonomy and Evolving Interpretative Perspectives*

At this point, the central issue of the research appears to be whether the current constitutional and supranational legal framework can be considered sufficiently structured to guarantee the protection required in relation to such an impactful phenomenon, or whether there is instead a need to introduce new rights capable of providing more specific and adequate responses to the technological development of neuroscience. It is therefore necessary to ask whether there is a substantial need, and not merely a dogmatic one, to introduce new rights, namely so-called neurorights.

Two different approaches emerge on this point.

According to the first, the introduction of new rights appears not only unnecessary but even harmful; in this sense, it is argued that the real risk is an inflation of rights.[20]

According to the supporters of this view, human rights are the result of political struggles and careful reflection, and for some of them full implementation is still far from being

[19] European Commission for democracy through law, Venice commission, Strasbourg, 10 December 2024.
[20] Belisario Giacomo, "Neurodiritti: nuovi diritti o diritti già esistenti?," *Federalismi.it*, 6 (2024): 83 ff.

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achieved. Therefore, new rights do not seem necessary in order to protect against the risks connected with neurotechnologies.

A further version of this approach is offered by Gusmai, who proposes the use of the concept of 'neurolimits' instead of 'neurorights', especially where the conflict concerns the classic relationship between authority and liberty. In substance, according to this view, there is no need to create a new subjective legal position; rather, it would be sufficient to interpret existing rights of freedom in a deeper and more up-to-date way, deriving from them a duty of abstention on the part of the State. From this perspective, neuroscience does not necessarily find new rights but rather shows why public powers must stop before what cannot be standardized: individual conscience, moral identity, neurobiological configuration, and personal self-determination. The difference, the author insists, is not merely terminological: speaking of new rights means expanding the catalogue of rights; speaking of neurolimits means strengthening the constitutional barrier against interference by power. Moreover, it is also important to note the way in which Gusmai constructs the legal technique of his proposal. He does not always argue that the Constitution must be amended. On the contrary, in many cases he considers a historical-evolutionary interpretation of the constitutional text to be sufficient, one capable of expanding the spaces of liberty already derivable from the current legal order. The recourse to neurolimits serves precisely this purpose: not to invent rights out of nothing, but to read existing rights in a more demanding way in light of new knowledge about the functioning of the mind and the constitutional value of conscience. Only in particular cases, especially where private and technological powers are involved, as in the case of Neuralink mentioned by the author, may it make more sense to speak of neurorights in the strict sense.[21]

In support of this view, it is argued that the existing Charters, at both national and supranational level, already contain structurally strong legal foundations; the positive legal framework can therefore provide the necessary answers to the issues concerning the protection and preservation of the brain and the human mind. Indeed, several existing human rights are potentially relevant and applicable with regard to the use of neurotechnologies.

With regard to mental integrity, for example, there are already several rights that guarantee its protection, among which the right to physical and psychological integrity is especially relevant whenever the substance of the brain is harmed. In this respect, reference may be made to Article 3 of the Charter of Nice, which expressly states that everyone "has the right to respect for his or her physical and mental integrity".

Moreover, the case law of the European Court of Human Rights[22] on this point has also established that private life must be understood as including a person's psychological condition. It should also be recalled that, at times, the ECtHR refers to the right to 'moral' and 'psychological' integrity, but the case law nevertheless suggests that mental, psychological, and moral integrity are interchangeable concepts. The European Network of Independent Experts on Fundamental Rights, established by the European Commission, considers the right to mental integrity under Article 3(1) of the Charter of Nice to be "a fairly broad right".[23]

From the perspective of the Italian constitutional system, reference has already been

[21] Gusmai Antonio, "Possibilità cognitive e orizzonti costituzionali: qualche coordinata di neurolaw su coscienza, libertà e creazionismo giudiziario," *Federalismi.it*, 6 (2024): 133 ff.

[22] Among others, European Court of Human Rights, Section II, 8 July 2003, *Sentges v. The Netherlands*.

[23] EU Network of Independent Experts on Fundamental Rights, *Commentary of the Charter of Fundamental Rights of the European Union* (2006).

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made to the limits imposed by Article 13 of the Constitution, as reconstructed over time by legal scholarship and case law.

Ultimately, although the value of the aim of giving positive legal recognition to new categories of values must be acknowledged, this proposal appears to rest on ambiguous notions both on the theoretical-legal level and with regard to the interests to be protected. As concerns the first point, the category of subjective right would be extended so as to include, beyond rights properly so called, also mere expectations and de facto interests; as concerns the second point, namely the interests to be protected, reference is made to a series of elements – psychic or psychological continuity, brain processes or neuronal substrates, free will, conscience, or cognitive liberty – which cannot easily be subsumed under a single theoretical perspective.[24] In other words, one must ask whether what is being protected is the neural structure, mental life, cognitive self-determination, or a synthesis of these different dimensions.[25]

On the contrary, the proposal put forward by Ienca and Andorno, among others,[26] is not a simple rhetorical extension of the catalogue of rights.

The authors explicitly address the objection concerning the inflation of rights and refer to criteria of quality – the importance of the protected interest, the seriousness and recurrence of the threat, systemic coherence, and precision in defining obligations and duties – in order to argue that, in the field of neurotechnology, threats to fundamental interests emerge which justify a targeted updating of the human rights framework. In this sense, neurorights are presented as a response to 'standard threats' to urgent individual interests, made realistic by new technical capacities.

From a strictly constitutional perspective, the issue does not appear to have been the subject of specific treatment; therefore, recourse to an evolutionary or creative interpretation of existing law would risk proving an insufficient safeguard against the phenomenon of psychological manipulation. Such a gap would expose the protection of inviolable rights to a danger of deterioration of incalculable proportions.[27]

According to this reconstructive approach, it is possible to identify four categories of neurorights.[28] The proposed theoretical framework is structured around a conceptual grid based, first of all, on cognitive liberty, understood as a manifestation of the principle of mental self-determination. This legal construct has a dual nature: a positive dimension, understood as the faculty to use neurotechnologies to modulate one's own mental states, and a negative dimension, which establishes protection against their coercive and non-consensual use. Although legal scholarship, for reasons of legal certainty, tends to privilege this negative dimension (*ius excludendi alios*), it must be observed that, if considered in isolation, it is not sufficient to cover the full range of risks, since violations of the cognitive sphere may also occur in the absence of overt coercion or below the threshold of the subject's awareness.

[24] Cirillo Francesco, "Neurodiritti: ambiguità della "libertà cognitiva" e prospettive di tutela," *Consulta online*, 2 (2023): 690 ff.

[25] Zito Luigi, "Neurotecnologie: cenni sulla dimensione biogiuridica dei «neurodiritti»," in *Aequitas Magazine. Rivista di Cultura e Diritto "Ius est ars boni et aequi"* (July 25, 2024).

[26] Yuste's proposal, which gives substance to the *Neurorights Initiative at Columbia University*, identifies five neurorights: mental privacy, personal identity, free will, fair access to mental enhancement, and protection against algorithmic bias. This approach can also be found on the website *Neurorightsfoundation.org*.

[27] Colletti Elisa, "L'era dei neurodiritti: il ruolo del giurista," *Dirittifondamentali.it*, 3 (2025): 110 ff.

[28] Ienca Marcello and Andorno Roberto, "Towards new human rights in the age of neuroscience and neurotechnology."

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Closely connected to cognitive liberty is the concept of mental privacy, which raises the protection of 'internal' information to a stage prior to its externalization in acts or words. The rule aims to protect not only neural data as such (*brainwaves*), but also its capacity to generate information, including elements removed from the subject's voluntary control. The rationale of this protection differs from traditional privacy, since the protected legal interest is not limited to the confidentiality of data already placed into circulation, but rather concerns the safeguarding of the person's last informational threshold within the digital ecosystem. In this regard, it is significant that a violation may also occur through secondary access to databases or cloud infrastructures, irrespective of any simultaneous physical intrusion into the cerebral substrate.

Proceeding with the analysis, the third theorized neuroright is the right to mental integrity, whose configuration requires going beyond the traditional assimilation to the concept of mental health. In the neurotechnological field, such integrity must be understood as protection against unauthorized intrusions involving access to or manipulation of neural signals, resulting in physical or psychological harm. For this legal construct to become actionable, three constitutive elements must be present: the actual manipulation of neural signalling, the absence of informed consent, and the existence of harmful consequences. This normative construction responds to the need to regulate complex scenarios, such as brain-hacking in the cycles of brain-computer interfaces (BCIs), where the risk goes beyond mere data confidentiality and concerns the direct alteration of neural computation.

Finally, this theory identifies the principle of psychological continuity, aimed at preserving personal identity understood as the diachronic coherence of preferences, habits, and personality traits. This right protects neural substrates from unconscious and non-consensual modifications, distinguishing itself from mental integrity insofar as the violation may arise even in the absence of clinically perceptible 'damage'. In this case, the injury affects the very structure of personality and the subject's ability to recognize themselves as the same individual over time. In cases of brainjacking or abusive neuromodulation, for example, the manipulation of impulses and emotions, even without causing organic injuries *stricto sensu*, would amount to a violation of the subject's psychological continuity.

Taken together, these four neurorights form a conceptual family: cognitive liberty acts as the 'substrate' (just as freedom of thought supports other freedoms), but mental privacy, mental integrity, and psychological continuity are necessary to cover risks not reducible to coercion alone and to protect the mental dimension in all its functions: informational, volitional, and identity-related.

In conclusion, an open debate emerges between the need to establish new neurorights and the effectiveness of existing safeguards. Although the current legal framework appears to provide solid foundations for the protection of the mind, it remains to be assessed whether technological evolution will require a more specific adaptation of legal rules in the future. The comparison between these positions therefore suggests the need for constant monitoring of the relationship between law and neuroscience.

4. *The Affirmation of Neurorights from a Comparative Perspective*

In the debate on neurorights, the legal systems that can so far be regarded as the most clearly 'recognizing' have followed two complementary paths: on the one hand, the constitutional or para-constitutional choice to affirm a special duty to protect brain activity and the

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person against invasive uses of neurotechnologies; on the other, the classification of neural data as a category of 'ultra-sensitive' data, subject to stricter rules on consent, purpose limitation, security, and the prohibition of reuse.

The most frequently cited case is Chile, the first country to introduce a 'neuroprotection' clause into its Constitution: through Law No. 21.383 (October 2021), Article 19(1) of the Chilean Constitution was amended to establish that scientific and technological development is at the service of human beings and must be carried out with respect for life and for physical and mental integrity, thus imposing stronger safeguards against interventions and treatments capable of affecting the mental sphere and, prospectively, brain activity and the information derived from it.

This "recognition" did not remain a dead letter. It in fact gave rise to a legislative and interpretative agenda aimed at transforming constitutional principles into operational guarantees, such as informed consent, transparency, governance of neural data, and limits on consumer devices. Above all, it found an initial judicial testing ground in the case of *Girardi Lavín v. Emotiv Inc.* (Supreme Court, 9 August 2023),[29] often referred to as one of the first decisions in the world in which a supreme court qualifies neural data as personal data of exceptional sensitivity and links their protection to dignity, mental integrity, and 'mental privacy'. In brief, the dispute arose from the use of a headset (*Emotiv Insight*) capable of collecting signals of electrical brain activity. The Court emphasized the typical risks connected with neural data, such as re-identification, hacking, unauthorized reuse, commodification, and profiling, and imposed safeguard measures, including clear information on data processing, effective and revocable consent, and technical protections, which, although framed within a constitutional remedy, operate as minimum standards for the market of non-clinical devices.

In the Chilean case, moreover, the constitutional reform was accompanied, in order to implement the protection mandate, by a specific bill devoted to the "protection of neurorights and mental integrity" and to the regulation of the research and development of neurotechnologies. The basic idea is to build a differentiated regime for different uses, namely therapeutic or medical, research, and commercial uses, and to lay down conditions of lawfulness and public control over devices and treatments affecting neural activity, without discouraging innovation but raising the level of protection whenever the object concerned is the brain and the information it produces. In this sense, Chile offers a 'two-level' model: (a) a constitutional clause expressly connecting techno-scientific progress with the protection of mental integrity; and (b) implementing legislation intended to translate that connection into procedures, such as risk assessments, consent requirements, purpose limitations, security standards, and, potentially, supervisory bodies.

Alongside Chile, a second form of recognition, less grounded in hard law but still politically significant, is that of the autonomous community of Cantabria, which is preparing to protect brain activity. Through a pioneering bill on digital health, this Spanish region is presenting itself as Europe's legislative laboratory,[30] addressing the challenges posed by neurotechnologies and by the decoding of neural processes. Cantabria's response is clear: neural data are health data.

This classification is not merely a technical choice, but an act of civic protection that extends the highest guarantees of medical privacy to any information extracted from the brain, regardless of whether it is collected in a hospital or through a commercial device.

[29] Delfino Duilia, "Dati neurali: il Cile sancisce la loro tutela e li equipara ai dati sensibili," in *www.filodiritto.com* (2023).

[30] Serrani Lavinia, "Un progetto di legge della Cantabria guida l'Europa nella protezione dei neurodiritti: le implicazioni per il lavoro nell'era delle neurotecnologie," in *Bollettino ADAPT,* (July 21, 2025).

The core of the reform lies in the regulation of Artificial Intelligence applied to health. The law provides for the creation of a regional register of algorithms, an initiative that imposes the highest level of transparency regarding the nature of the data used, the possible biases inherent in the code, and the clinical validation of the results.

Within this framework, the citizen is no longer a passive subject of automated diagnoses but holds the right to challenge algorithmic decisions and to demand human intervention and supervision at all times, thus preventing the risk of a 'medicine without doctors'. The deepest impact of this legislation, however, may be felt in employment contexts. The introduction of wearable devices to monitor employees' stress, attention, or fatigue opens troubling scenarios of psychophysical surveillance. Cantabria's law acts as a preventive shield: by classifying neural data as protected and prohibiting algorithmic discrimination, it establishes that the worker's mind is an inviolable domain.

In an age of digital transition in labour, this approach reaffirms that productive efficiency can never come at the expense of freedom of thought and individual self-determination. According to the Regional Minister of Health, César Pascual Fernández, the aim is to trigger a process leading to common standards throughout Spain and, later, throughout the European Union. Cantabria therefore represents the first European attempt to translate neurorights into a comprehensive law capable of balancing technological innovation with the fundamental protection of human dignity.

5. *Conclusions*

It therefore seems necessary to try to bring the different threads of the discussion back together, not so much in order to offer fixed and definitive answers, but rather to map the uncertainties that neurotechnological development projects onto the contemporary legal horizon. The analysis carried out so far suggests that the interaction between law and neuroscience cannot be reduced to a mere question of updating legal rules or regulating new devices. Rather, it appears to challenge the very foundations on which legal modernity has been built, and in particular the idea of a rational acting subject, whose inner determinations remain inaccessible until the moment in which they are expressed outwardly.

The first issue that emerges with some urgency concerns the permeability of the mental sphere. If the constitutional tradition, both in Italy and in Europe, has built a system of guarantees primarily aimed at protecting the individual from physical coercion or limitations on freedom of speech, the arrival of instruments capable of monitoring and potentially directing neural processes seems to require a change of perspective.

We may be facing the need to move the defensive line of the legal order: no longer, or not only, to protect action and communication, but also to safeguard that prior and silent phase in which intention is formed. It remains to be seen whether the current legal framework, based on the distinction between acts and thoughts, is sufficiently resilient to accommodate this need, or whether it instead risks leaving unprotected what is most inward, namely the mind, now made technologically accessible.

Within this framework, the issue of political consent and electoral dynamics becomes especially important. As already noted, political neuromarketing techniques and strategies of influence based on cognitive biases raise doubts that affect the very substance of the democratic method. Article 48 of the Constitution, in guaranteeing the freedom of the vote, im-

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plicitly assumes that such freedom is the result of a conscious deliberative process developed within a pluralistic but transparent informational environment. However, if technological interference were to act at a preconscious level, bypassing the citizen's critical judgment, one may ask whether voting remains an act of 'sovereignty' or whether it instead degenerates into a mere conditioned reflex. This does not mean imagining dystopian scenarios of total control, but rather reflecting, with caution, on the degree of decisional autonomy that the legal order considers necessary for the validity of political participation. It is possible that future democratic legitimacy will depend not only on the freedom of choice, but also on the integrity of the process through which choice is formed.

From the point of view of legal protection, the debate remains open between two interpretative options, which do not necessarily exclude one another. On the one hand, there is the path, suggestive but complex, of recognizing new *ad hoc* 'neurorights', such as the right to mental privacy or cognitive liberty. This path would have the advantage of clearly identifying the new legal interests at stake, but it also carries the risk of excessive fragmentation of the legal framework. On the other hand, there is the possibility of an evolutionary reinterpretation of existing constitutional guarantees.

In particular, Articles 13 (personal liberty) and 21 (freedom of expression) of the Constitution could be interpreted broadly so as to include the neural dimension. Personal liberty would thus be understood not only as *habeas corpus*, but also as the inviolability of one's deep psychophysical integrity. Correspondingly, freedom of thought would come to include the right not to be subject to manipulative interference in the formation of ideas.

However, a merely defensive approach may prove incomplete. Neurotechnologies offer extraordinary therapeutic opportunities and possibilities for improving quality of life, which cannot be sacrificed in the name of a technophobic fear. The challenge for legal scholars therefore seems to lie in the search for a dynamic balance. Such a balance should allow scientific and technological development, while at the same time setting insurmountable limits for the protection of human dignity. From this perspective, concepts such as informed consent may require a radical reconsideration. One must ask whether consent given for a neurotechnological treatment can truly be regarded as informed if the subject is not fully able to foresee the impact that such technology will have on their own perception of self.

Looking ahead, it seems likely that the protection of fundamental rights in the age of neuroscience will require an effort of hybridization between different fields of knowledge.

Constitutional law, if it is to continue performing its protective function, will probably have to open itself more fully to dialogue with cognitive science, bioethics, and computer science. Only through a deep understanding of the mechanisms of the mind and of the potential of algorithms will it be possible to develop legal categories that truly reflect reality, thus avoiding the double risk of an excessively rigid regulation that stifles innovation, or, on the contrary, a legal vacuum that leaves the individual at the mercy of private powers of influence.

In conclusion, the question that these pages leave to common reflection concerns not only technology, but also the legal anthropology on which our coexistence is based. If democracy is the government of opinion, then protecting the formation of opinion from hidden intrusions and neural manipulation may no longer be an option, but rather a condition for the survival of the rule of law. No claim is made here to have traced a definitive path, but the hope is to have shown that the protection of mental integrity represents, in all likelihood, the new frontier of civil rights, a field on which the ability of liberal democracies to remain faithful to their promises of freedom and equality, even in the twenty-first century, will be tested.

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THE RIGHT TO DISCONNECT THROUGH THE LENS OF SECURITY: A CONSTITUTIONAL READING

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Keywords: Right to Disconnect; Security; Remote Work; Digital Transformation

1. *Introduction*

The present contribution stems from the awareness that digital technology has profoundly transformed the organisation of work. However beneficial such transformation has proven – in terms of flexibility, productivity and new opportunities[1] – it has simultaneously and progressively blurred the boundary between working time and personal life. More specifically, the contemporary worker, as a result of the process of the dematerialisation of the workplace,[2] is reachable at any time and from any location, such that rest periods risk becoming – as has been observed – an increasingly "limited and anachronistic" notion.[3]

Against this backdrop, the following reflections on the right to disconnect are concerned not exclusively with the range of instruments available for the protection of this emerging right, but rather, from a constitutional law perspective, with the place of this legal position within the fullest protection of the person envisaged by the Italian Constitution. This approach proceeds from the conviction that the pervasive digital connectedness of the individual renders it both necessary and urgent to restore the constitutional dimension of work to a position of centrality in legal discourse.

Such a perspective calls for an adequate methodological framework. At the conceptual level, the interpretation proposed here is grounded in the category of security, understood in a twofold sense: on the one hand, security in a static sense, as protection of the individual's

[1] Pasquarella Valentina, "Work-life balance: esiste un modello italiano di «conciliazione condivisa» dopo il jobs act?," *Rivista italiana di diritto del lavoro,* 1 (2017): 41; Timellini Caterina, "Il diritto alla disconnessione nella normativa italiana sul lavoro agile e nella legislazione emergenziale," *Lavoro, Diritti, Europa*, 4 (2021): 7.

[2] Preteroti Antonio, "Ambiente digitale e benessere: la disconnessione come diritto della personalità e strumento di tutela della dignità umana," *AmbienteDiritto.it*, 3 (2023): 2.

[3] Bellomo Stefano, "Forme di occupazione «digitale» e disciplina dell'orario di lavoro," *Federalismi.it*, 19 (2022): 167.

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physical and mental integrity; on the other, in a dynamic sense, as an instrument for the promotion of the human person and their dignity.[4] As will become apparent, it is precisely this dual dimension that allows the right to disconnect to be framed not merely as a defensive right nor as a straightforward application of Article 36, paras. 2 and 3 of the Italian Constitution – which protects daily, weekly, and holiday rest – but as a fundamental precondition for the full development of the person in the digital age.

To this end, the analysis begins by mapping the current state of the art on the right to disconnect at both the Italian and European level, so as to situate the constitutional reading proposed in the broader regulatory landscape. It then interrogates the relationship between disconnection and the constitutional right to work, before examining the right to disconnect through the lens of security. Some concluding remarks will then draw together the threads of the argument.

2. *The Right to Disconnect in the European Union and in Italy*

Before turning to the core of the analysis, it is necessary to briefly reconstruct the current state of play regarding the recognition of the right to disconnect in Europe and in Italy.

At the level of positive law, the picture is fragmented and of limited effectiveness.[5] Within Europe, a number of legal systems – France being the first in 2016, followed by Spain, Belgium, and Ireland – have already regulated the right to disconnect, albeit with considerably different scope and intensity. Some countries have indeed provided for it across all forms of employment, others only in the context of agile work; others still have imposed the relevant obligations solely on undertakings above a certain headcount. This variation itself reflects the absence of any shared qualification of disconnection as a right.

It was in this context that, on 21 January 2021, the European Parliament adopted a resolution containing recommendations to the Commission on the right to disconnect.[6] Situated within the broader framework of the digital transition, the right to disconnect was therein qualified as a 'fundamental right' requiring uniform regulation across Member States. For this reason, the Parliament called on the Commission to submit a proposal for a directive and to "include the right to disconnect in its new occupational health and safety strategy".

This soft law instrument – anticipated by the 2020 Framework Agreement on Digitalisation concluded by the European social partners, and later complemented by a 2022 agreement aimed at laying the groundwork for a shared directive on remote work[7] – has not yet been followed by binding legislation. Nevertheless, it has represented a significant step towards more systematic regulation of the phenomenon, contributing to heightened attention to the issue of disconnection within individual Member States.

[4] The term "security" is used here in a broad sense, encompassing both its protective dimension – concerned with the physical and mental integrity of the individual – and its promotional dimension – oriented towards the full development of the human person and their dignity. The latter dimension partially overlaps with what in English is more commonly rendered as "safety". On the distintiction of this two dimension, Giupponi Tomaso Francesco, "Sicurezza e potere," in *Enciclopedia del Diritto*, *I Tematici, Potere e Costituzione* (Milan: Giuffrè, 2023), 1151; Ruotolo Marco, "La sicurezza nel gioco del bilanciamento," *Astrid Rassegna,* (2001): 1 ff.

[5] Calderara Dario, *Garanzia della disconnessione nel rapporto di Lavoro* (Turin: Giappichelli, 2024), 5 ff.

[6] 2019/2181(INL)

[7] Zoppoli Irene, "Il diritto alla disconnessione nella prospettiva europea: una road map per le parti sociali," *Federalismi.it*, 1 (2023): 292 ff.

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In Italy, two legislative proposals were introduced in 2024 with the aim of overcoming the limitations of the existing regulation, which remains confined to the specific context of agile work ('lavoro agile') under Law No. 81 of 22 May 2017.[8] Within that framework, agile work is defined as "a mode of execution of the subordinate employment relationship established by agreement between the parties, including through forms of organisation by phases, cycles, and objectives and without strict constraints of working time or place of work, with the possible use of technological tools to carry out work activities" (Article 18). The law accordingly entrusted the parties' agreement with the dual task of determining rest periods and establishing "the technical and organisational measures necessary to ensure the worker's disconnection from technological work equipment" (Article 19).

This initial and limited form of protection was subsequently reinforced by Decree-Law No. 30 of 13 March 2021 – containing urgent measures to address the spread of COVID-19 and to support workers with minor children engaged in distance learning or quarantine – converted into Law No. 61 of 6 May 2021. The pandemic, by rendering recourse to agile work both necessary and widespread,[9] significantly accelerated its normative development. In particular, Article 2(1-ter) provides that "workers performing their activity in agile mode are entitled to disconnect from technological devices and IT platforms, in compliance with any agreements signed by the parties and without prejudice to any agreed periods of availability", further specifying that "the exercise of the right to disconnect, necessary to safeguard rest periods and the worker's health, shall not have repercussions on the employment relationship or on remuneration".

These provisions have, however, attracted widespread criticism. The objections are twofold: on the one hand, agile work does not exhaust all forms of work susceptible of being performed remotely;[10] on the other, the instrument chosen by the legislator to render the right effective, namely the agreement between the parties, risks becoming a source of conflict between subjects who inevitably represent opposing interests.[11]

The legislative proposals A.C. No. 1961 (submitted in July 2024) and A.S. No. 1290 (submitted in November 2024) seek to address these shortcomings through a series of corrective measures. Both texts – in line with the European Parliament's Resolution – define the right to disconnect as "the right not to receive communications outside ordinary working hours, unless there are justified emergencies, to be remunerated as overtime". Their primary objective is to extend the personal scope of this right to all workers, including the self-employed, whilst removing from individual agreements between employer and employee the power to determine the rules governing disconnection. The proposals further provide for specific information obligations and sanctions in the event of non-compliance, reaffirming that the exercise of the right must not have repercussions on the employment relationship or on remuneration.

[8] Scholarship has highlighted how this represented "a first tentative step towards bringing Italian legislation into the digital age". Allamprese Andrea and Pascucci Francesco, "La tutela della salute e della sicurezza del lavoratore «agile»," *Rivista Giuridica del Lavoro*, 2 (2017): 315. On the limitations of such an intervention, see also Altimari Marco, "L'effettività del diritto alla disconnessione: una sfida per il diritto del lavoro," *Rivista italiana di informatica e diritto*, 2 (2021): 67.

[9] Timellini Caterina, "Il diritto alla disconnessione nella normativa italiana sul lavoro agile e nella legislazione emergenziale," 26 ff.

[10] Calderara Dario, "Spunti in tema di lavoro a distanza e diritto alla disconnessione," *Federalismi.it*, 20 (2025): 162 ff.

[11] Timellini Caterina, "Il diritto alla disconnessione nella normativa italiana sul lavoro agile e nella legislazione emergenziale," 12.

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Despite the growing relevance of the issue, these legislative proposals are still pending before the labour committees and have not yet been scheduled for debate, reflecting a deeper uncertainty about the nature of the right itself. What is needed, therefore, is a shift in perspective: from the question of which instruments are available to the question of what values are at stake.

3. *The Constitutional Framework of Work and the Right to Disconnect*

To identify the values at stake in the right to disconnect is to return to the Italian constitutional framework of work itself – a framework that reveals, on closer examination, a depth and complexity that the prevailing instrumental debate has sometimes obscured: work as a founding value of the republican order, an individual freedom deserving of protection in all its forms, and a social right whose exercise must be compatible with the requirements of human dignity.

The reading must begin with the meaning that work assumes in Article 1 of the Constitution, by virtue of the "will to found the Republic on a profoundly egalitarian and even universalistic element, on an irreducibly human datum".[12] The value of work underpinning the republican order thus appears as the expression of a choice to place at the foundation of the nascent Republic "the human condition in its contemporaneity",[13] thus breaking the "line of continuity with the past" and defining "the worldview of the new democratic-republican order".[14]

Precisely from this foundational dimension of work emerges a first decisive implication for the present analysis: the need to interpret work in light of the historicity of the society to which the Constitution is addressed[15] – and thus, today, to reflect on a condition in which human action is constantly intertwined with the digital dimension, giving rise to a new form of *vita interactiva*[16] that progressively displace the Arendtian *vita activa*.[17] The impact of technology, both on the enjoyment of fundamental rights and on social relations, accordingly requires a "concrete and contextualised protection of the person".[18] The concept of work must therefore be continuously updated, even as it remains – in one form or another – "connected to a condition of subordination destined to be removed".[19]

This foundational dimension of work is inseparable from its nature as a sphere of personal freedom,[20] a dimension that finds its most direct constitutional expression in Article 4 of the

[12] Luciani Massimo, "Radici e conseguenze della scelta costituzionale di fondare la repubblica democratica sul Lavoro," *Argomenti di Diritto del Lavoro*, 3 (2010): 634.

[13] Ferrara Gianni, "I diritti del lavoro e la costituzione economica italiana ed in Europa," *Costituzionalismo.it*, 3 (2025): 1.

[14] Salazar Carmela Maria Giustina, "Alcune riflessioni su un tema démodé: il diritto al lavoro," *Politica del Diritto*, 1 (1996): 6.

[15] On which, extensively, Grossi Paolo, *L'invenzione del diritto* (Bari-Rome: Laterza, 2017).

[16] Montani Pietro, *Vita interactiva. Da homo sapiens all'universo digitale* (Turin: Einaudi, 2025).

[17] The reference is to Arendt Hannah, *The Human Condition* (Chicago: University of Chicago Press, 1958). In Arendtian thought, work constitutes a fundamental element of the human condition – that is, of the *vita activa*.

[18] Apostoli Adriana, *L'ambivalenza costituzionale del lavoro tra libertà individuale e diritto sociale* (Milan: Giuffrè, 2005), 13.

[19] Lavagna Carlo, *Istituzioni di diritto pubblico* (Turin: Utet, 1979), 495.

[20] Mazziotti Manlio, "Lavoro (dir. cost.)," in *Enciclopedia del Diritto*, XXIII (Milan: Giuffrè, 1973), 340.

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Constitution. Whilst explicitly qualifying work as both a right and a duty,[21] this provision has been read by the Constitutional Court primarily as enshrining a "fundamental right of personal freedom, expressed in the choice and manner of carrying out one's work activity".[22] From this perspective, the individual in the workplace "does not merely receive remuneration in exchange for performance, but affirms and develops their personality within the complex of relationships and values that the world of work expresses".[23] Work is, in this sense, an "expression of the value attributed to the person"[24] – a dimension that cannot be reduced to its economic or productive coordinates alone. Article 4 must therefore be credited with establishing an indissoluble constitutional link between work, personal identity, and human dignity.[25]

It is precisely in light of this dimension of freedom – encompassing 'access to work', its 'retention', and its 'proper performance'[26] – that the risks associated with technological transformation become more apparent, as the boundaries of working life grow increasingly blurred and the time, place, and modalities of work grow ever more fluid. In this context, the dimension of freedom of work acquires renewed significance, emerging with particular force when technology risks unduly compressing the individual's sphere of self-determination.

The freedom-related dimension of work examined above does not, however, exhaust its constitutional significance. Work also reveals an essential social dimension – one that fundamentally redefines its nature: no longer an activity aimed solely at the accumulation of property, as in the bourgeois individualist vision, but a "means for the material and spiritual progress of society".[27] In this sense, work is not merely an economic fact, but a social fact[28] and, more precisely, a social right. Thus, in addition to constituting a "dimension of the person, inherent to their dignity", work also represents "a contribution to a better existence in the concreteness of life".[29]

It follows that the significance of work is not confined to the individual and private sphere, but necessarily assumes a collective dimension, emerging as an essential instrument of inclusion in the *res publica*.[30] As Mortati observed, work constitutes "a necessary factor for the reconstitution of a new spiritual unity", presupposing "a new type of connection between community and State"[31] – and it is precisely this connective function that links the individual dimension of work to the broader programme of substantive equality set out in Article 3, para. 2 of the Con-

[21] On the topic, recently, Cavino Massimo, *Diritto costituzionale del lavoro* (Naples: Editoriale Scientifica, 2025).

[22] Italian Constitutional Court, decision no. 45 of 1965, *Considerato in diritto*, para. 3.

[23] Italian Constitutional Court, decision no. 60 of 1991, *Considerato in diritto,* para. 6.

[24] Cariola Agatino, "Art. 4," in *Commentario alla Costituzione*, edited by Raffaele Bifulco, Alfonso Celotto and Marco Olivetti (Turin: Utet, 2006), 4.

[25] In this sense, relevant is the «particular value that the Constitution attributes to work (Arts. 1, first paragraph, 4 and 35 Const.), in order to achieve a full development of the human personality», Italian Constitutional Court, decision no. 194 of 2019, *Considerato in diritto*, para. 13.

[26] Lavagna Carlo, *Istituzioni di diritto pubblico*, 496.

[27] Flick Giovanni Maria, "Lavoro, dignità e Costituzione," *Rivista AIC*, 2 (2018): 5.

[28] Prosperetti Ugo, "Lavoro (fenomeno giuridico)," in *Enciclopedia del Diritto*, XXIII (Rome: Treccani, 1973), 327.

[29] Grossi Paolo, *Oltre la legalità* (Bari-Rome: Laterza, 2020), 86.

[30] Cantaro Antonio, "La costituzionalizzazione del lavoro. Il secolo lungo," in *I diritti sociali e del lavoro*, edited by Giuseppe Casadio (Rome: Ediesse, 2006), 63.

[31] Mortati Costantino, "Art. 1," in *Commentario alla Costituzione, Art. 1-12*, edited by Giuseppe Branca (Bologna: Zanichelli, 1975), 10.

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stitution. For this reason, rights connected to work cannot be regarded as purely individual rights: they are "'bridge rights' between individual interests and the collective interest of the community of workers, often even of the entire national community".[32]

This social dimension of work is not extraneous to the question of disconnection: on the contrary, it suggests that the protection of the worker's time and autonomy is a precondition for the genuine exercise of that participative function which the Constitution assigns to work. And yet, this dimension remains largely overlooked in the prevailing debate, which has tended to focus primarily on the negative effects of continuous connectivity on workers' physical and mental health – an aspect also emphasised by the International Labour Organization[33] – whilst the broader social significance of disconnection has received comparatively little attention.

4. *Disconnection through the Lens of Security*

This narrowing has shaped both the scholarly debate and the institutional response. Scholarship and institutions, including at the European level,[34] have devoted particular attention to security in the strict sense – concentrating especially on the employer's obligation to adopt measures addressing the risks of hyper-connectivity as the correlative duty of the right to disconnect.[35] Whilst such attention is undoubtedly warranted, it risks reducing the right to disconnect to an instrument oriented exclusively towards the prevention of harm.

What a constitutionally grounded reading must bring to the fore is, by contrast, the broader notion of security linked to the individual's realisation within society and to what has been described as an "orderly and balanced social coexistence".[36]

The two dimensions – the individual one and the 'social' one – far from being separate compartments, are connected by a relationship of mutual presupposition: the protection of psycho-physical integrity is a necessary condition for the worker to fully participate in social life and contribute to collective progress; conversely, only a context not governed by the logic of constant connectivity – which easily translates into forms of workaholism and chronic overwork – can effectively ensure the protection of the individual as a condition for their full personal realisation.

It is precisely in light of this twofold dimension of security that the Italian constitutional order proves particularly revealing. Security, in addition to constituting the subject matter

[32] Cantaro Antonio, "La costituzionalizzazione del lavoro. Il secolo lungo," 71.

[33] International Labour Organization, *Revolutionizing Health and Safety: The Role of AI and Digitalization at Work* (Geneva: International Labour Office, 2025).

[34] Reference is made, in this regard, to Case C - 55/18, *Federación de Servicios de Comisiones Obreras (CCOO) v Deutsche Bank SAE*, in which it was held that «the law of a Member State that, according to the interpretation given to it by national case-law, does not require the employer to measure the duration of time worked, is liable to render the rights enshrined in Articles 3, 5 and 6(b) of that directive meaningless by failing to ensure, for workers, actual compliance with the right to a limitation on maximum working time and minimum rest periods, and is therefore incompatible with the objective of that directive, in which those minimum requirements are considered to be essential for the protection of workers' health and safety», para. 59.

[35] Apostoli Adriana, "Nuovi lavori e nuove tecnologie," *Rivista AIC*, 2 (2025): 496.

[36] Di Raimondo Marco, *Ordine pubblico e sicurezza pubblica. Profili ricostruttivi e applicativi* (Turin: Giappichelli, 2010), 4.

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of concurrent legislative powers in the field of the 'protection and security of work' (Article 117, para. 3), finds expression, in its individual dimension, in job stability (Article 4) and in the protection of work in all its forms (Article 35), but also in the close relationship between workers, dignity, remuneration, and limits on working time (Article 36). Its collective dimension, by contrast, emerges from the system of social protection and welfare (Articles 37 and 38), from the requirement that private economic initiative be carried out in compliance with social utility and without causing harm to health, the environment, safety, freedom, and human dignity (Article 41), and from the duty to perform an activity or function that contributes to the material or spiritual progress of society, placed within the solidaristic perspective of social transformation set out in the Constitution (Article 4, para. 2).

The question of the constitutional foundation of the right to disconnect must therefore be reformulated in the terms once indicated by the framers of the Constitution. If the objective is the effective participation of all workers in the political, economic, and social organisation of the country – as required by Article 3, para. 2 of the Constitution, in a *promotional* conception – it is difficult to conceive of this goal being achieved in a condition where the individual is constantly absorbed by the working dimension.

In light of the reconstruction carried out, the right to disconnect thus appears to be, in some way, already rooted in the constitutional framework. It is therefore necessary to consider the ways in which this right can be construed even in the absence of explicit legislative regulation.

The appropriate starting point is the most general of these provisions, namely Article 35 of the Constitution, which protects work "in all its forms and applications"[37] and functions as a general provision with respect to the more specific provisions that follow. It is worth noting that this provision was retained in the draft constitutional text – notwithstanding a suppressive amendment tabled during the debates – on account of its 'far-sightedness': Constituent Assembly Member Ghidini had argued that this "statement of principle" could not be regarded as merely repetitive of Article 1, observing that the instruments and forms of protection of work regulated by the subsequent articles are "not exhaustive": "for this reason, a provision of a general character, enabling the legislator of tomorrow to introduce other forms of protection".[38]

Article 35 is therefore designed to extend protection to every type of work, including those – such as remote work – that were not foreseeable at the time of drafting the Constitution. This requires reflection on the distinctive features of remote work, which, as seen above, are intimately connected to the temporal dimension.

Yet the general protective scope of Article 35 must be read in conjunction with the more specific guarantees of Article 36. This provision governs the right to rest and, more generally, working time; it is precisely on this article that scholarship has most frequently concentrated its analysis of the problems associated with hyper-connectivity.

The scope of this provision has been progressively clarified by both legal scholarship and the Constitutional Court, which have framed the right to rest and the right to annual leave

[37] More specifically, this protection "is justified not within a generic protective-assistential perspective, but insofar as it is functional to the task of removing the obstacles that, in practice, hinder the substantive equality of workers". Treu Tiziano, "Art. 35," in *Commentario alla Costituzione, Art. 35-40*, I, edited by Giuseppe Branca, (Bologna: Zanichelli, 1979), 5.

[38] The speech is reported by Bifulco Daniela, "Art. 35," in *Commentario alla Costituzione*, edited by Raffaele Bifulco, Alfonso Celotto and Marco Olivetti (Turin: Utet, 2006), 720.

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as “perfect, inalienable, and non-waivable subjective rights, inherent to the human person as a worker”.[39] In its practical application, the Court – called upon on several occasions to address the periodicity of the right to rest – has not only affirmed that the maximum duration of the working day may vary according to the type of work,[40] but has grounded the “periodic alternation between work and rest” in “reasons of a human and social order”.[41] In sum, taking into account the various modalities of work performance – and the consequent needs arising from the particular nature of the work performed – the Court has repeatedly affirmed that the effectiveness of the right to rest must be guaranteed.[42] The “withdrawal from work”, according to the Constitutional Court, in fact proves to be necessary in order to “restore the psycho-physical energies worn down by work” and to “satisfy recreational and cultural needs and more actively participate in family and social life”.[43]

Thus, far from being reducible to the mere protection of psycho-physical integrity – which finds expression in Article 32 of the Constitution – the right to rest has already been assigned by our legal order the further function of safeguarding moral personality,[44] “through the guarantee of free time, recreation, and participation in the life of one’s community of affections”.[45]

Today, however, in light of what has been argued above, this framework is no longer sufficient. It tends to confine the question of the individual’s reachability within the traditional parameters of working time – parameters which show their limitations. It is indeed outside working hours that a series of communications and requests are generated which produce a substantial effect of constant availability, rendering uncertain the line of demarcation between working time and non-working time.

To put it differently, with regard to the right to disconnect, the problem does not reside – or does not reside solely – in the performance of work in terms of hours, but in the quality of free non-working time. For this reason, scholarship has emphasised that the right to discon-

[39] Baldassare Antonio, “Diritti sociali,” in *Enciclopedia giuridica*, XI (Rome: Treccani,1989), 16.

[40] Italian Constitutional Court, decision no. 99 of 1971, *Considerato in diritto.*

[41] Italian Constitutional Court, decision no. 67 of 1967, *Considerato in diritto*, para. 2.

[42] See Italian Constitutional Court, decision no. 150 of 1967, «The Court holds that the constitutional precept, necessarily taking the form of a broad statement of a general principle, is not limited to the only form of periodicity that most commonly occurs, but also encompasses those other forms provided for by ordinary rules as a consequence of the requirements dictated by the great variety of working arrangements in the fields of industry, commerce, agriculture, transport, etc., and in relation to the various types of working activity characterized by peculiar circumstances (industries with continuous-process shift work, homeworkers, seafaring or travelling personnel, seasonal agricultural work, etc.). Nor can it be denied that the enactment of specific rules – which, in the spirit of adaptation to the needs of production, industry or agriculture, regulate the exercise of the right – serves the interests of the working world, provided they do not depart from the principles of reasonableness, which must necessarily be taken into account in the assessment of constitutional legitimacy. What matters is that the cases in which rest is granted after more than six working days be confined to situations of evident necessity for the protection of other appreciable interests, and that, above all, they be not such as to distort or circumvent the constitutional precept. It follows that those rules are legitimate which, within strictly indispensable limits, authorize on a case-by-case basis rest at intervals longer than one week, on the condition that within the working cycle of a given period of time the average of twenty-four hours of rest after six working days is maintained», *Considerato in diritto*, para. 2.

[43] Italian Constitutional Court, decision no. 616 of 1987, *Considerato in diritto.*

[44] Preteroti Antonio, “Ambiente digitale e benessere: la disconnessione come diritto della personalità e strumento di tutela della dignità umana,” 12.

[45] Baldassare Antonio, “Diritti sociali,” 16.

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nect possesses "autonomous legal dignity with respect to the right to rest – that is, alongside it, and not within it".[46] In this sense, disconnection is "inherent to working time, without necessarily coinciding with it".[47] The right to rest may ensure the recovery of energies, but it does not necessarily guarantee that individuals can enjoy time truly exempt from the logic of work. In such a condition, they may be formally free, yet not fully able to engage with the constitutionally recognised dimensions of personal life – such as political participation (Article 49), cultural and sporting engagement (Articles 9 and 33), or family life (Articles 29, 30 and 31), and, more broadly, active membership in the social community that the Constitution envisions as part of a dignified existence.

5. *Concluding Remarks*

The right to disconnect has today assumed a central role, particularly in light of the increasing digitalisation of employment relationships. As Jean-Emmanuel Ray observed, the ability to work anywhere entails not only a fundamental modification of private life, but also of family and social life. And yet, as argued throughout his analysis, the right to disconnect is more than a mere *droit à la vie privée du XXIème siècle*: it concerns the very conditions of social and civic participation and, more fundamentally,[48] the effective attainment of the constitutional rights pertaining to labour within the digital society.

This conclusion rests on the argumentative path developed above. The right to disconnect, as argued, cannot be reduced to a merely defensive instrument aimed at protecting the worker's psycho-physical integrity, confined to the static dimension of security. Its deeper constitutional significance lies in the dynamic dimension of the realisation of their personality: the condition of availability generated by hyper-connectivity, even outside formal working hours, prevents the individual from genuinely disengaging from the productive dimension, thereby compromising their participation in political, cultural, familial, and social life.

Notwithstanding the legislative interventions of 2017 and 2021, the right to disconnect has not yet taken shape as a general guarantee applicable to all forms of work. The legislative proposals of 2024 – still pending before the labour committees – represent a step in the right direction, insofar as they seek to extend the personal scope of this right to all workers and to remove from individual agreements the power to determine its conditions of exercise. In the light of the foregoing analysis, a comprehensive and organic regulatory intervention therefore appears indispensable, in order for the State to fulfil its task of "reconciling order, liberty and, beyond liberty, the rights of the person", while at the same time addressing the "legitimate concern for justice and security".[49]

This reading finds further confirmation in the very structure of the right to work: its full realisation entails the commitment of "all public authorities (including the legislature) and the

[46] Preteroti Antonio, "Ambiente digitale e benessere: la disconnessione come diritto della personalità e strumento di tutela della dignità umana," 9.

[47] Maresca Arturo, "Il nuovo mercato del Lavoro e il superamento delle diseguaglianze: l'impatto della digitalizzazione e del remote working," *Federalismi.it*, 9 (2022): 173.

[48] Ray Jean Emmanuel, "De la sub/ordination à la sub/organisation," *Droit social*, (2002): 5 ff.

[49] Girardet Raul, "L'uomo e lo Stato," in *Linee per uno Stato moderno. Terzo incontro romano* (Rome: Giovanni Volpe editore, 1975), 13-14.

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community as a whole […] to create the conditions necessary to ensure that every individual may engage in work capable of securing a dignified life".[50] Indeed, as already noted, work is regarded as one of the principal instruments through which to transform the relationship between the State and its citizens – along a path that relies on the "integration of individuals into both the life of the State and that of the social community"[51] – providing the latter with an essential means for achieving freedom and equality, while at the same time constituting a "factor of unity and organisation of the social base", as well as a "factor of inclusion".[52]

From this perspective, the constitutional configuration of the right to work highlights the coexistence of both an individual and a public dimension.[53] It is precisely by virtue of its 'ambivalent' nature[54] that work cannot remain extraneous to the "discourse" of the social State governed by the rule of law,[55] which is called upon to undertake "a careful reading of social dynamics"[56] and to adapt protective instruments to the transformations of labour.

Within this framework, the right to disconnect emerges as a safeguard of non-working time, conceived not as a residual category or a mere absence of work, but as something that belongs to the individual. Accordingly, a conception of labour freedom has been advanced, taking the form of "a leisure" that "is not merely separate from or opposed to work, not a negation of work, but one that is capable of maintaining relations of freedom and meaning with it".[57] In other words, a form of non-working time that is not in opposition to work, but rather capable of contributing, together with it, to the achievement of constitutional aims, for it is only within such a horizon that the "maximally emancipatory and socialising function of work"[58] can be realised. It is precisely at this conceptual juncture that the right to disconnect intersects with the polysemic nature of security: from this perspective, the proposed interpretation makes it possible to reaffirm the public dimension of labour, preventing both security and labour itself from being reduced to what has been described as "an equality in insecurity".[59]

This reflection is all the more significant at a time when labour is undergoing a deep crisis that puts its very meaning into question.[60] If the constitutional recognition of labour as a "structural principle"[61] was intended to capture the complexity of social reality,[62] today the right to disconnect can be seen as a renewed expression of those constitutional safeguards, highlighting its essential role in protecting workers.

[50] Bartole Sergio and Bin Roberto, *Commentario breve alla Costituzione* (Padova: Cedam, 2008), 38.

[51] Tondi della Mura Vincenzo, "La solidarietà fra etica ed estetica. Tracce per una ricerca," *Rivista AIC*, 2 (2010): 2.

[52] Flick Giovanni Maria, "Lavoro, dignità e Costituzione," 5.

[53] Cariola Agatino, "Art. 4," 4.

[54] Apostoli Adriana, *L'ambivalenza costituzionale del lavoro tra libertà individuale e diritto sociale*.

[55] Cantaro Antonio, "La costituzionalizzazione del lavoro. Il secolo lungo," 63.

[56] Grossi Paolo, L'invenzione del diritto, XI.

[57] Mari Giovanni, "L'ozio come compito del lavoro," *Iride*, 2 (2006): 249.

[58] Benvenuti Marco, "Lavoro (principio costituzionale del)," in *Enciclopedia giuridica*, Agg. XVIII (Rome: Treccani, 2009), 5, which in turn cites Romagnoli Ugo, "Il diritto al lavoro nel prisma del principio d'eguaglianza," in *Costituzione, lavoro, pluralismo sociale*, edited by Mario Napoli (Milan: Vita e pensiero, 1998), 15 ff.

[59] Benvenuti Marco, "Lavoro (principio costituzionale del)," 4.

[60] Zagrebelsky Gustavo, *Fondata sul lavoro* (Turin: Einaudi, 2013), *passim.*

[61] Crisafullli Vezio, "Appunti preliminari sul diritto al lavoro nella Costituzione," *Rivista giuridica del lavoro*, 1 (1951): 166.

[62] Benvenuti Marco, "Lavoro (principio costituzionale del)," 2.

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JUDICIAL REVIEW OF NATIONAL SECURITY IN ISRAEL: PAST PRESENT AND FUTURE

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Keywords: Judicial Review; National Security; Democratic Backsliding

Summary: 1. Background: National Security and JR in Comparative Perspective. – 2. Judicial Review in Israel. – 3. JR of National Security – Background. – 4. JR of National Security – Development. – 5. The Developments during the Last Decade and the Legal 'Reform' of 2023. – 6. The War in Gaza. – 7. Conclusion.

1. *Background: National Security and JR in Comparative Perspective*

In the discussion of judicial review, national security has always been considered a sensitive issue. On the one hand, the powers held by the state in this field are robust and carry ample potential to infringe on human rights. On the other hand, these very powers are considered as the most fundamental powers of the state, essential to preserve the very existence and integrity of the relevant collectivity. Thus, the discussion of national security is often intertwined with the discussion of national crises, *i.e.*, with situations that necessitate the deployment of exceptional powers of state, such as emergency powers, as well as the suspension of ordinary legal arrangements.

As a result, legal systems often regard national security as a special realm for judicial review that merits distinctive legal regime and exceptions to the general legal doctrines. In particular, the realm of national security is often viewed as "the domain of the executive" with minimal involvement of both the legislature and the judiciary. Thus, for example, in the United Kingdom, national security has traditionally been regarded as an executive prerogative, with Parliament playing a minimal role.[1] Accordingly, UK courts held that powers exerted by the government in this field are either completely outside the scope of judicial review, or, in any case merit enhanced judicial restraint.[2] Likewise, under Article 2 of the U.S. Constitution, issues of national security and war powers are considered to be the domain of the executive branch and enumerated among the powers of President. This means that, unlike in other fields, the very power of

[1] *I am grateful to Noa Mechter for her excellent work as a research assistant.

This has somewhat changed recently, see National Security Act 2023, c. 32 (U.K.), which introduces a set of criminal prohibitions of various offences related to espionage and sabotage and provides the police and security authorities with ample powers to take measures against suspects of such activities.

[2] See *e.g.* Council of Civil Service Unions v. Minister for the Civil Service, [1985] A.C. 374 (H.L. 1984).

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Congress to regulate issues related to national security and war powers by legislation is limited and any legislation in these fields may raise constitutional questions.[3] Accordingly, the scope of judicial review of executive actions in the field of national security is very limited.[4]

As we shall see, the point of origin of Israeli law regarding the scope of judicial review of national security powers was largely similar, but during the years there have been considerable developments.

2. *Judicial Review in Israel*

Israel has no formal written constitution. Instead, the Knesset (Israeli Parliament) legislated, throughout the years a series of basic laws, which were attributed a constitutional status in the sense that any regular statute that does not conform with these basic laws can be struck down by the courts.[5] Nevertheless, despite their constitutional status, these basic laws are susceptible – at least in theory – to the possibility of amendment or repeal by the Knesset at any time (with no requirement for special majority or special procedural requirements in most cases). Moreover, in the absence of constitutional constraints, parliamentary reaction to an unfavorable judicial decision may also take the form of a statue which would directly curtail the powers of the Supreme Court itself.[6] Some fundamental civil rights are included in two basic laws enacted by the Knesset in 1992: *Basic Law: Human Dignity and Freedom* and *Basic Law: Freedom of Occupation*. The Knesset, however, can infringe upon most liberties included in these laws through legislation approved by a simple majority.[7]

Despite these seemingly fragile constitutional foundations, the Israeli judiciary has developed, throughout the years, a powerful regime of judicial review. The central pillar of this regime is the High Court of Justice (HCJ) which is the Israeli Supreme Court sitting as a court of first and last instance for important public law cases.[8] The HCJ's effectiveness as a forum for judicial review is based on three main elements.

First, on a structural and procedural level, the High Court provides the first and only opportunity for review in most major cases. This means that most major cases make their way to the High Court directly and instantly when the government announces action or policy.[9] The Covid-19 crisis forms a good example for this. Almost all cases of judicial review over corona legislation and regulation were disposed by the HCJ.

[3] Youngstown Steel & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

[4] See *e.g. Hamdi v. Rumsfeld,* 542 U.S. 507 (2004); *Boumediene v. Bush,* 28 S.Ct. 2229 (2008).

[5] C.A. 6821/93 Bank Ha'mizrachi v. Migdal 39 (4) P.D. 221 (translated in 31 *Isr. L.Rev.* 764 (1997)).

[6] See, however, the discussion in Part 5 below.

[7] Hofnung Menachem, *Democracy, Law and National Security in Israel* (Aldershot: Dartmouth, 1996); Barak-Erez Dafna, "From Unwritten to a Written Constitution: The Israeli Challenge in American Perspective," *Columbia Human Rights Law Review*, 26 (1995): 309.

[8] The HCJ is one of the three capacities of the Israeli Supreme Court. It also functions as an appellate court and as court of cassation for criminal and civil cases. In administrative law the HCJ functions as first and last instance for administrative litigation in important matters, including when the legality of regulations is at stake (see The Administrative Affairs Courts Law, 5760-2000 (2000) (Isr.) Sec. 5). In administrative petitions of lesser importance, the HCJ functions as an appellate court over the Courts of Administrative Affairs.

[9] Dotan Yoav, *Lawyering for the Rule of Law: Government Lawyers and the Rise of Judicial Power in Israel* (Cambridge: Cambridge University Press, 2014), 18-21.

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Second, on a doctrinal level, over the years the High Court has lowered access barriers such as standing, justiciability, and political question restrictions. As a result, almost anyone may petition the High Court about almost any governmental move.[10] In addition, the Court developed throughout the years ambitious tools for judicial review as it imposed broad requirements on administrative authorities, such as the duties of reasonableness,[11] rationality of the decision-making process[12] and proportionality.[13] In addition, the Court developed a doctrine that enables it to oversee and interfere in governmental appointments and even to order the removal of elected officials in case those officials are suspected or being charged in criminal offences.[14] As we shall see below, the Court also significantly expanded judicial review over national security powers during this period.

Third, the High Court has developed various doctrines and instruments enabling it to supervise and direct the Israeli government's legal apparatus, which most importantly includes the Attorney General Office (AGO), the department in charge of both providing legal advice to the government and representing the government in court. This means that the legal bureaucracy largely internalizes the judicial doctrine and regards itself as 'guardians of the rule of law'. Accordingly, they function as 'gatekeepers' who seek to implement judicial values and policies even in the absence of immediate possibility of court litigation.[15]

The bottom line is that review by the High Court may take place within days or even hours of a petition's filing, which enables the High Court to review and react to government action almost in real time. The influence of the High Court over governmental policies, however, is exerted in most cases even before litigation begins – through the advisory mechanism of the AGO, over which the High Court exerts considerable influence. This means that the vast majority of petitions issued to the HCJ do not reach final judicial determination, but instead are settled before the litigation even starts or while the case is pending, with or without active involvement of the judges in the formation of such settlements.[16]

3. *JR of National Security - Background*

Ever since its establishment in 1948 the State of Israel has been subject to considerable security pressures. Israel is surrounded by Arab states, all of which have been hostile to the idea of the Zionist state before and after establishment. In addition, the reality of the Jewish Palestinian conflict within Israel itself also serves as a significant factor in this respect. Ac-

[10] H.C. 910/86 Ressler v. Minister of Defense 42(2) P.D. 441, 477; Dotan Yoav and Hofnung Menachem, "Interest Groups in the Israeli High Court of Justice: Measuring Success in Litigation and in Out-of-Court Settlements," *Law & Policy*, 23, 1, (2001): 1.

[11] HCJ 389/80 Dapei Zahav v. Broadcasting Authority 35(1) PD 421 [1980] (Isr.).

[12] HCJ 297/82 Berger v. Minister of Interior 37(3) PD 29 [1983] (Isr.).

[13] HCJ 5510/92 Turkeman v. Minister of Defense 48(1) PD 217 [1993] (Isr.). See also Zamir Itzhak, "Unreasonableness, Balance of Interests and Proportionality", in *Public Law in Israel*, edited by Itzhak Zamir and Allen Zysblat (Oxford: Clarendon Press, 1996), 327.

[14] HCJ 3094/93 Movement for Quality in Government in Israel v. State of Israel 47(5) PD 404 (1993); Dotan Yoav, "Impeachment by Judicial Review: Israel's Odd System of Checks and Balances," *Theoretical Inquiries in Law*, 19, 2, (2018): 705.

[15] See Dotan Yoav, Lawyering for the Rule of Law, 71.

[16] See Dotan Yoav, Lawyering for the Rule of Law, 93 ff.

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cordingly, issues of national security have always been on the top of the political agenda in Israel, and this reality is also reflected in the constitutional and legislative framework.

Following this state of affairs, there are several legal vehicles of major importance that regulate the field of national security. Firstly, The Basic Law: The Government (2001) contains a chapter that refers to emergency regulations. This law authorizes the government in a state of emergency to issue emergency regulations that prevail over regular legislation. Such regulations, however, can only be in force for three months, unless extended by the legislature, and, in any case, they are subject to judicial review.[17] Another major piece of legislation in the field of national security is The Emergency Defense Regulations (1945). These regulations were enacted by the High Commissioner during the British Mandate on Palestine and were kept in force in Israel for several years, before there were replaced by modern legislation.[18] Still, however, these regulations were kept in force in the Occupied Territories. In these territories that have been controlled by Israel since the 1967 War, there is a military regime, and all legislative functions are in the hands of the Military Commander. As we shall see, however, all actions of the Military Commander are subject to judicial review before the HCJ.

4. *JR of National Security - Development*

a) The 'Old Court' - From Establishment to 1980

The Supreme Court of Israel was always considered an influential institution within the Israeli polity. A distinction should, however, be made between two principal stages regarding its overall involvement in political and bureaucratic decision-making. From the establishment of the State and until the late Seventies the Supreme Court, while gradually and consistently developing a rich jurisprudence of judicial review, kept a fairly low public profile. Soon after Israel was established, the Court firmly established the principle of the rule of law while stating that requirement of legality applies to any governmental agency. During the first three decades since Establishment (1948-1980) the Court also developed principles of human rights. In the absence of a formal written constitution,[19] the Court entrenched in its decisions basic liberties such as the right of free speech, freedom of procession and association, and freedom of trade.[20] It also exerted judicial supervision over the actions of most

[17] Basic Law: The Government (2001), Sec. 39. It should be noted that Israel has been under an official legal "state of emergency" since its establishment and until this very day.

[18] Emergency Powers (Detentions) Law, 1979 (Isr.).

[19] Israel has no written constitution. Instead, the Knesset enacted a number of Basic Laws that enjoy a partial supremacy over regular legislation. Most of these Basic Laws, however, refer to structural issues and do not contain a Bill of Rights. Only in 1992 did the Knesset accept the Basic Law: Human Rights and Dignity that specifically refers to the protection of fundamental human rights such as the freedom of movement, privacy and human dignity. Still, many fundamental political rights (such as freedom of speech and political equality) are yet to be entrenched in Basic Laws. See Basic Law: Human Dignity and Liberty; See Bank Ha'mizrach, *supra* note 5; See Barak-Erez Dafna, "From Unwritten to a Written Constitution".

[20] H.C. 7387/53 Kol Ha'am v. Minister of the Interior, 7 P.D. 871 (1953); H.C. 148/79 Saar v. Minister of the Interior and the Police 34(2) P.D. 169 (1980); H.C. 241/60 Kardosh v. The Company Register 15 P.D. 1151 (1961); H.C. 1/49 Begerano v. Minister of Police 2 P.D. 80 (1949); H.C. 370/79 Katalan v. The Prison Service 34(3) P.D. 294 (1980); Bracha Baruch, "The Protection of Human Rights in Israel," *Israel Yearbook of Human Rights,* 12 (1982): 110; Zysblat Allen, "Protecting Fundamental Human Rights in Israel without a Written

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administrative agencies and governmental units. The development of judicial review was, however, done cautiously. The Court kept a low public profile, refrained from entering into sensitive political questions and avoided direct confrontation with the executive branch.

The cautious policy of judicial review was reflected primarily in regard to issues of national security and military activities. As early as 1948, the year of Establishment, the Supreme Court ruled that the military and all security agencies are subject to the principle of the rule of law and the supervision of the courts. It ordered the release of an Arab resident of Jaffa who was detained according to a writ issued under emergency regulations, since it found that the appropriate procedure was not properly exercised prior to the arrest.[21] Judicial supervision in the area of national security was, however, extremely limited before 1980. The Court's review was extremely formal in nature. It was based on the question of the (strict) legality of the action at stake in accordance with the lines of the traditional (English) test of *Ultra-vires.* The Court overtly refrained from any attempt to second-guess (or even to examine) the discretion of the relevant decision-maker on substantive grounds. It also openly stated that due to the sensitivity of national security claims, the scope of review in security issues would be narrower than what was generally applied in other matters.[22] The limited nature of judicial review in areas of national security was further sustained by other doctrines regarding access to judicial review. Before 1980 the court applied the doctrine of *judiciability* to assure that sensitive questions in the area of foreign relations and national security could be kept away from the Court's docket, as long as the justices hold them 'unsuitable' for judicial determination.[23] This doctrine effectively enabled the Court to avoid dealing with certain cases whenever the judges felt that intervention in a sensitive or controversial matter would endanger the Court's reputation or autonomy.[24] Issues of national security were also hidden behind a thick veil of secrecy. Therefore, in many instances, even if the issue arrived into the courtroom, the public had no knowledge about the very existence of the process.[25] Not surprisingly, before 1980, there was hardly an Israeli court case that even refers to the existence of the GSS.

b) The Breakthrough of Judicial Activism in the Eighties

As described above, since 1980 there has been a major shift in almost all aspects of judicial review. There was a dramatic change in the principles concerning access to the courts. In its landmark decision in *Ressler v. Minister of Defense,* the Supreme Court sharply reversed its prior rulings on the issue of justiciability. Justice Aharon Barak said: "…Any [human] action is susceptible to determination by a legal norm, and there is no action regarding which there

Constitution," in *Public Law in Israel,* edited by Itzhak Zamir and Allen Zysblat (Oxford: Oxford University Press, 1996), 47.

[21] H.C. 7/48 El-Karbotli v. Minister of Defence, 2 P.D. 5, 15 (1948).

[22] E.g., H.C. 46/50 El Aiubi v. Minister of Defense 4(1) P.D. 222 (1950); Zamir Itzhak, "Human Rights and National Security," *Israel Law Review*, 23 (1989): 401.

[23] The doctrine of Judiciability was applied by Israeli courts in a way that was roughly equivalent to the use of the doctrines of *Political Question, Equitable Discretion* or *Act of State* in United States, see Tribe Laurence H., *American Constitutional Law* (New York: Foundation Press, 2000), 365 ff. and note 44 *ibid.*

[24] H.C. 561/75 Ashkenazi v. Minister of Defense, 30(3) P.D. 309 (1976); H.C. 222/68 Hugim Leumiem v. Minister of Police 24(2) P.D. 141(1970).

[25] See *e.g.* the case of a former Security Service officer who was convicted of murdering his coleague and served life imprisonment while even his name remained covert (Mr. X), see Reinfeld M., Melman Y. and Nesher M., "Mordechei Kedar, 'Mr. X', petitioned the HCJ Demanding a Re-trial", in *Ha'aretz* (January 5, 1996).

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is no legal norm determining it. There is no 'legal vacuum' in which actions are taken without the law having anything to say about them. The law encompasses any action… The fact that an issue is 'strictly political' does not change the fact that such an issue is also 'a legal issue'".[26]

The activist trends of the Court during the 1980ies and the 1990ies have extended to petitions against military or other security agencies. As mentioned above, in the past, the Court stated that the scope of judicial review would be narrower in cases involving security matters than in other cases of administrative discretion. More recently, however, the Court has stepped back from this position. For example, in a case in which the Court was asked to review a decision of the Military Censor not to allow the media to publish the name of the new Head of the Mosad (The Israeli Intelligence Agency), Justice Barak (currently the President of the Court) concluded: "The security nature of the administrative discretion deterred judicial review in the past… Over the years it was made clear that there is nothing unique in security considerations… Judges can and should review the reasonableness of discretion in security matters as much as they can and should review administrative discretion in any other field. Hence, there are no special limits on the scope of judicial review in security matters".[27]

The Court also stated that a military authority may infringe on basic civil rights (such as the freedom of speech or the freedom of association) only where there is a real likelihood for a serious injury of national security. The *Shnitzer* case and numerous other decisions reflect the tendency of the Court to expand its supervision over the field of national security.[28]

The willingness of the Israeli courts to supervise the actions of the military and the other security agencies extended also to the actions of these agencies in the Occupied Territories. Since the beginning of Israel's occupation of the West Bank and Gaza Strip, the residents of these territories have been allowed to petition the Supreme Court in order to challenge the actions of the Military Government.[29] During the long period of military occupation, the Court issued some

[26] H.C. 910/86 Ressler v. Minister of Defense 42(2) P.D. 441, 477 (1988). While this wide concept of justiciability was not adopted in its entirety by all other justices of the Supreme Court, it did mark a willingness on the part of the Court to substantially widen the range of issues which were thereafter considered justiciable under the new approach. Similar reform was conducted in regard to the *Standing* requirement. Before the 1980s the petitioner was required to show a direct personal interest in the action subject to judicial review. Since 1980 and particularly after the *Ressler* decision the Court acknowledged the standing of petitioners in matters of public importance even if they had no personal interest in the decision at stake. This reform opened the gate for many public actions organizations and political groups to resort to litigation as a vehicle to initiate social and political reforms, see Dotan Yoav and Hofnung Menachem, "Interest Groups in the Israeli High Court of Justice".

[27] H.C. 680/88 Shnitzer v. The Military Censor *et al.,* 42(4) P.D. 617 (1989) at 639-640. There, the Court quashed a decision not to allow the publication of criticism on the actions of the Head of the Mossad (the Security Service for Special Actions).

[28] See e.g. H.C. 554/81 Beransa v. Commander of Central Command, 36(4) P.D. 247 (1982); H.C. 448/85 Dahar v. Minister of the Interior, 40(2) P.D. 701 (1986); H.C. 799/80 Shlalam v. The Licensing Officer for Weapons, 36(1) P.D. 317 (1981). Bracha Baruch, "Judicial Review of Security Powers in Israel: A New Policy of the Courts," *Stanford Journal of International Law* 28 (1991): 39; Hofnung Menachem, *Democracy, Law and National Security in Israel*; Zamir Itzhak, "Rule of Law and The Control of Terrorism," *Tel Aviv University Studies in Law*, 8 (1988): 81.

[29] H.C. 302,306/72 Hilu *et al.* v. Government of Israel, 27(2) P.D. 169 (1973); H.C. 393/82 El Masulia v. Army Commander, 37(4) P.D. 785 (1983); Shamgar Meir, "The Observance of International Law in the Administrative Territories," *Israel Yearbook of Human Rights*, 1(1971): 262. The legal standards applied by the Court to these actions derived from various sources: the local law in the territories, including both Jordanian law and orders of the Military Government itself, the principles of customary Public International Law (as integrated into Israeli Law), and the general principles of judicial review derived from Israeli Administrative Law, see H.C.

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important decisions allowing protection of the basic liberties of the Palestinian population. For example, in its landmark decision in the *Elon Moreh* case the Court ruled that the Government is not allowed, under international law, to confiscate privately owned lands for the purpose of building new Jewish settlements, unless the seizure order can be justified on the basis of military needs.[30] The Court also restricted the ability of the Military Commander to make use of his powers under emergency regulations to take severe administrative actions against people involved in terrorist activities, such as deportation or house demolition. It did so by imposing procedural requirements on the authorities before any such action could be taken.[31] The Court also interfered to supervise the construction of 'The Security Barrier' between Israel and the Territories in a way that tempered to some extent the infringement of human rights caused by the fact that the many parts of the Barrier were constructed on lands owned by Palestinians.[32]

Even though the Court has been supervising, on an almost daily basis, every action and move of the Israeli forces and agencies in the Territories, the question of the effectiveness of its supervision on the human rights of the residents of the Territories remains subject to much debate. Thus, many critics contended that the Court's ability to effectively defend the human rights of Palestinians in the Territories was extremely limited, if not negligible, and that its supervision over the actions of the Israeli military legitimates the occupation regime rather than limiting its harsh consequences on human rights.[33]

5. *The Developments during the Last Decade and the Legal 'Reform' of 2023*

The above-described process of expansion of judicial review over legislative and administrative actions that began during the Eighties continued throughout the first decade of the 21st Cen-

393/82 Gama't Asachan v. Regional Commander of Judea and Samaria 37(4) P.D. 785 (1983); H.C. 493/81 Abu Ita *et al.* v. Regional Commander of Judea and Samaria 37(2) P.D. 197 (1982).

[30] H.C. 390/79 Dawikat v. Government of Israel 34(1) P.D. 1 (1980). This decision forced the Government to evacuate an already established settlement and had – according to some observers – wide impact on the ability of the Israeli Government to build new settlements subsequently. See Negbi Moshe, *Justice Under Occupation: The Israeli Supreme Court Versus the Military Administration in the Occupied Territories* (Jerusalem: Kana, 1981) (Hebrew); See Hofnung Menachem, *Democracy, Law and National Security in Israel*, 246-251. Likewise, in another important case, the Court quashed the decision of the Interior Minister to refuse an application for a permit to publish a new newspaper in East Jerusalem on the grounds that the petitioner was a subversive element: H.C. 2/79 El-Asad v. Minister of Interior 34(1) P.D. 505 (1980).

[31] H.C. 320/80 Kawasme *et al.* v. Minister of Defense 35(3) P.D. 113 (1981); H.C. 358/88 Association for Civil Rights in Israel (ACRI) v. Commander of Central Command 43 P.D. 529 (1989).

[32] HCJ 2056/04 Beit Sourik Village Council v. Government of Israel, 58(5) PD 807 (2004).

[33] See *e.g.* Shamir Ronen, "'Landmark Cases' and the Reproduction of Legitimacy: The Case of Israel's High Court of Justice," *Law & Society Review*, 24 (1990): 781; Kimerling Baruch, "Bagatz Should Withdraw from the Occupied Territories," in *Ha'aretz*, (January 29, 1993); Kretzmer David, "Judicial Review of Demolition and Sealing of Houses in the Occupied Territories," in *Klinghoffer Book on Public Law,* edited by Itzhak Zamir (Jerusalem: Harry Sacher Institute, 1993) (Hebrew); Kuttab Jonathan, "Avenues Open for Defense of Human Rights in the Israeli Occupied Territories," in *International Law and the Administration of Occupied Territories: Two Decades of Israeli Occupation of the West Bank and Gaza Strip*, edited by Emma Play Fair (Oxford: Clarendon Press, 1992), 489 But *cf.* Negbi Moshe, *Justice Under Occupation*; Bisharat George E., "Courting Justice? Legitimation in Lawyering under Israeli Occupation," *Law & Social Inquiry*, 20 (1995): 349; Dotan Yoav, "Judicial Rhetoric, Government Lawyers and Human Rights: The Case of the High Court of Justice During the Intifada," *Law & Social Inquiry*, 33, 2 (1999): 319.

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tury. However, since 2010 there has been a change in the relationship between the Court and the political branches. Critiques against judicial activism in political circles (and in particular in right-wing circles, blaming the Court for being ultra-liberal) became commonplace.[34] Likewise legislative initiatives to curtail judicial review became ever more common. Some of these initiatives aimed to change the balance of powers between the Court and the Knesset by adding a 'notwithstanding provision' to the basic laws, which will allow the Knesset to overcome judicial decisions in case they strike down legislation that infringe on basic rights.[35] These developments were not overlooked by the Court, which reacted on two levels. On one level, the Court tempered, at least to some extent, its willingness to intervene in legislative and executive action, particularly in cases which were politically sensitive (national security issues among them, see below). On another level, the Court invested much effort in developing constitutional doctrines that would enable it to strike down legislation by the Knesset, aiming to curtail judicial review.[36]

The clash between the judiciary and the political branches reached its peak after the 2022 elections in which the right-wing coalition, headed by Benjamin Netanyahu succeeded in winning a stable majority in the Knesset. One of the first steps by the extreme right-wing coalition formed after the November 2022 elections was the initiation of the Judicial 'Reform'. The plan, announced by the Minister of Justice Yariv Levin in a press conference, included four principal components.[37] The *first* was a radical reform in the system of judicial appointments in a way that would give the governmental coalition full control over the judicial selection committee.[38] The *second* component was wide-range limitations on the power of the judiciary to strike down legislation by the Knesset, by requiring super-majority (of 14 out of 15 justices) in the Court for such purpose, and by providing the Knesset with the power to overcome any such judicial decision by a simple majority.[39] *Thirdly,* the plan sought the

[34] *See e.g.,* Azulay Moran, "The Knesset vs. the Supreme Court: A Series of Laws to Limit Its Power," in *Ynet.co.it* (October 20, 2013); Azulay Moran, "Bill Aimed at Restricting Left-Wing Organizations," in *Ynet.co.it* (May 12, 2017); "Yariv Levin, A Red Rag," in *Haaretz.co.il* (April 29, 2019).

[35] Draft Bill for Basic Law: Human Dignity and Liberty (Amendment - Overriding Provisions of a Law), 1891/18 (Private Member Bill) (Isr.); Draft Bill for Basic Law: Human Dignity and Liberty (Amendment - Overriding Provisions of a Law), 1406/19 (Private Member Bill) (Isr.); Draft Bill for Basic Law: Human Dignity and Liberty (Amendment - Overriding Provisions of a Law), 1944/19 (Private Member Bill) (Isr.); Draft Bill for Basic Law: Human Dignity and Liberty (Amendment - Overriding Provisions of a Law), 2115/20 (Private Member Bill) (Isr.); Draft Bill for Basic Law: Human Dignity and Liberty (Amendment - Overriding Provisions of a Law), 4005/20 (Private Member Bill) (Isr.); Draft Bill for Basic Law: Human Dignity and Liberty (Amendment - Overriding a Decision), 5219/20 (Private Member Bill) (Isr.); Draft Bill for Basic Law: Human Dignity and Liberty (Amendment - Overriding a Decision), 459/25 (Private Member Bill) (Isr.).

[36] See Dotan Yoav, "Israel's Constitutional Moment," *Israel Law Review,* 56, 3 (2023): 521.

[37] The government, however, announced that the plan presented in this press conference was only 'the first stage' in the larger plan to transform the judicial system. and additional steps, such as reforming the content of access doctrines to limit standing and justiciability in judicial review are to follow, *see* Knesset Channel, "The Justice Reform of Minister Yariv Levin", in *youtube.com/watch?v=RzLEgHeAwPU* (January 5, 2023).

[38] Currently, the committee is composed of 3 Supreme Court Justices, 2 cabinet ministers, 2 MKs and 2 representatives of the Bar. According to the plan 7 out of the 11 members of the committee would be appointed by the coalition, the representation of the Bar would be abolished and the appointment of the judges on the committee would need approval of the Minister of Justice (*see* para. 4a Basic law: Judiciary).

[39] In more recent versions of the plan, the majority needed in the Court reduced to 12 out of 15 justices, *see* Shafir Nitzan, "Rotman Announces Plan to Lower Majority Required for Striking Down Laws in the Supreme Court to 12–13 Justices Instead of a Full Bench," in *Globes.co.il* (February 26, 2023).

annulment of *reasonableness* as a ground for judicial review. *Lastly,* the plan proposed radical changes in the appointment procedures of the AG and other legal advisors of the government, as well as in their powers and in their status as 'gate-keepers' (by redefining all legal advisors as political appointments).[40] It was crystal clear from the way by which the plan was openly presented shortly after the formation of the government and from its content, that – unlike in the case of previous proposals to reform judicial review – the architects of this plan are aiming to completely wipe out the concept of judicial review as developed by the Supreme Court as of the early 1980s.

The introduction of this far-reaching plan aiming to curtail judicial review created a full-fledged political clash between the political branches and the judicial system. While the government enjoyed a majority in the Knesset, the plan encountered strong opposition among the public and stirred wide-spread protest. The protest broke out in January 2023 almost immediately after the announcement on the Reform and has continued since then and until the moment these lines are written. The protest movement draws support almost all sectors of Israeli civil society including the legal profession, the business and financial sector, senior officials and veterans of the military and security services, professionals in the public health and educational sector, the academia and many others.[41] The size and magnitude of the protest surprised the government and managed to compromise its ability to pass the 'Reform' into law. In the end the government managed to pass only a limited part of its plan that referred to the reasonableness doctrine, and eventually the law containing it was struck down by the Court as infringing on "the fundamental constitutional values of Israel as Jewish and Democratic State".[42]

6. *The War in Gaza*

On October 7th, 2023, while Israel was still amidst a political and constitutional crisis, the Hamas terrorist organization launched a large-scale terror attack on dozens of Israeli cities and villages in Southern Israel. During the attack, over 1400 Israelis (mostly civilians) were brutally massacred by Hamas terrorists (while over 250 were kidnapped as hostages to Gaza). Following the attack the Israeli IDF launched a major military attack on Gaza. The war, which is still ongoing, claimed the lives of over 50,000 Palestinians as well as hundreds of Israeli soldiers and civilians.

During the war there were many claims regarding human rights violations committed by the IDF in Gaza, as well as violations referring to the attitudes towards Palestinians suspected of terror activities captured by Israeli authorities and held in prisons and detention camps in Israel. As above described, the HCJ developed throughout the years a rich jurisprudence that enabled it to closely review military actions (even during wars) as well as to review the conditions under which suspected terrorists are held in captivity.[43] Accordingly, under the

[40] Grinshitz Avishai, "Override Clause and Change in Judicial Selection: Justice Minister Yariv Levin Presents a Dramatic Reform of the Judicial System," in *Globes.co.il* (January 4, 2023).

[41] See Dotan Yoav, "Israel's Constitutional Moment".

[42] HCJ 5658/23 Movement for Quality Government in Israel v. Knesset (Nevo, January 1, 2024); Dotan Yoav, "Israel's Constitutional Moment".

[43] See *e.g.,* HCJ 102/82 Tsemel v. Minister of Defense, 37(3) PD 365 (1983), that dealt with captivity conditions of suspected terrorists during the First Lebanon War.

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existing regime of judicial review one should have expected that the Court would exert close supervision over the IDF's military activities and particularly with regard to the conditions in detention facilities.

It seems, however, that the reaction of the Court to these allegations regarding serious abuses of fundamental rights have been rather faint. Indeed, the Court did deal with petitions referring to human rights violations and arguably, the very fact that judicial review was available did contribute to temper, at least to some extent, the magnitude of violations.[44] However, critics argued that, given the amounting evidence of serious abuses of prisoners' rights, the Court's reaction was far from being satisfactory.[45] The pale reaction of the Court in the face of the amounting evidence regarding human rights violations during the war seems to be the combination of two factors: Firstly, following the horrific atrocities committed by Hamas during the October 7th attack, the atmosphere within the Israeli public towards Palestinian rights was extremely hostile. Accordingly, any judicial decision in favor of Palestinian (let alone suspected of terrorist activities) faces strong negative reaction in public opinion, which is even further aggravated by on the Court in right-wing media outlets.[46] Secondly and correspondingly, due to the overall attack on judicial integrity following the 'Reform' of 2023, the Court is too busy to defend its own autonomy vis-à-vis the political branches, which makes it even more sensitive to such hostile reactions in public opinion. In other words, it seems that currently the HCJ is left with very little of its "reservoir of good will" in public opinion[47] – which makes it almost impossible for it to 'spend' it in the defense of Palestinian rights.

7. *Conclusion*

Judicial review in the field of national security poses significant challenges for courts of law all over the world. In Israel, the HCJ has developed an ambitious doctrine of judicial review that aims to deal with national security powers with the general tools of judicial review like any other administrative powers of the state. However, given the mounting tensions in the field of national security during the last 3 years and the deterioration in the status of the court in public opinion – there is a serious doubt regarding the ability of the HCJ to stick to its proclaimed policies in this field.

[44] HCJ 4268/24 Association for Civil Rights in Israel v. Minister of Defense (Nevo, September 18, 2024). The petition referred to a major detention facility in *Sde-Teiman*, which was the subject of ample media reports for human rights violations, see Gallagher Patrick, "Strapped Down, Blindfolded, Held in Diapers: Israeli Whistleblowers Detail Abuse of Palestinians in Shadowy Detention Center," in *Edition.cnn.com* (May 11, 2024); Berger Miriam, "Israeli detention center faces legal challenge after 'unimaginable abuses'," in *Washingtonpost.com* (June 5, 2024); Mcneil Sam and Magdy Samy, "Israeli military detains 9 soldiers over alleged abuse of a detainee at a shadowy military facility," in *Apnews.com* (July 29, 2024).

[45] See Medina Barak, "The Israeli Law During the Gaza War (2023-2025): Anatomy of Judicial Restraint" s*forthcoming Law & Government* 2026).

[46] HCJ 2858/24 Association for Civil Rights in Israel v. Minister of National Security (Nevo, September 7, 2025); Tamari Liran and Bendel Netael, "Netanyahu and Ben-Gvir Attack Supreme Court at Terror Scene: "We Do Not Go Easy on Our Enemies - Neither Should You"," in *Ynet.co.il* (September 8, 2025).

[47] Caldeira Gregory A. and Gibson James L., "The Etiology of Public Support for the Supreme Court," *American Journal of Political Science*, 36 (1992): 635; Medina Barak, "The Israeli Law During the Gaza War".

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FROM ACCOUNTING FOR ATOMS TO GOVERNING HYBRID RISK: THE EVOLUTION OF IAEA SAFEGUARDS AND THE CONTEMPORARY SECURITY ENVIRONMENT

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Keywords: IAEA Safeguards; Nuclear Security; Additional Protocol; Hybrid Risk; Nonproliferation Governance.

Summary: 1. Introduction: Safeguards as Institutions for a Changing Strategic Problem. – 2. The Formative Safeguards Architecture: from Project Instruments to Comprehensive Agreements. – 3. From 'Diversion' to 'Pathways': Safeguards in a World of Networks and Clandestinity. – 4. Nuclear Security, Insider Risk, and the Interface Problem. – 5. Nuclear Terrorism, Radiological Risk, and Contested Probability. – 6. Hybrid Security Environments and the Vulnerability of Nuclear Infrastructures. – 7. Conclusion: Integrating Assurance and Protection without Collapsing their Mandates.

1. *Introduction: Safeguards as Institutions for a Changing Strategic Problem*

Safeguards are often described in procedural terms – material accountancy, containment and surveillance, design information verification, and access rights – but they are better understood as institutions crafted to manage a strategic problem: the international community's demand for credible assurance that nuclear cooperation will not facilitate nuclear weapons acquisition. Historically, the safeguards problem has been shaped by the incentives and constraints of states: deterrence and security dilemmas, domestic politics, and the role of norms and identity in shaping nuclear choices.[1] Yet contemporary nuclear risk is also shaped by pathways that run through and around states: the diffusion of sensitive know-how, the role of commercial supply chains, illicit procurement networks, and the possibility that non-state actors might seek nuclear or radiological capabilities.[2]

This chapter takes the safeguards system's documentary evolution as an entry point to a broader argument about governance. The foundational IAEA safeguards instruments – ranging from early information circulars tied to specific nuclear supply and project agreements to

[1] Sagan Scott D., "Why Do States Build Nuclear Weapons? Three Models in Search of a Bomb," *International Security*, 21, 3 (1996): 54-86; Hymans Jacques E. C., *The Psychology of Nuclear Proliferation: Identity, Emotions, and Foreign Policy* (Cambridge: Cambridge University Press, 2006).

[2] Albright David and Hinderstein Corey, "Unraveling the A. Q. Khan and Future Proliferation Networks," *The Washington Quarterly*, 28, 2 (2005): 109-28; Allison Graham, *Nuclear Terrorism: The Ultimate Preventable Catastrophe* (New York: Times Books, 2004); Levi Michael A., *On Nuclear Terrorism* (Cambridge, MA: Harvard University Press, 2007).

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the comprehensive safeguards model and the Additional Protocol – reflect a particular understanding of what the international community needed to verify, and how. The emergence of the nuclear security agenda, and the political experiment of the Nuclear Security Summits (NSS), did not eliminate this verification mission; rather, it exposed the growing importance of interfaces: between safeguards and security, between the IAEA and other governance venues, and between formal legal obligations and informal political commitments.[3]

The chapter proceeds in three steps. It first reconstructs the safeguards system's formative documents and the logic embedded in them. It then connects that logic to contemporary threat pathways – state-level, networked, and hybrid. Finally, it draws implications for governance, focusing on legitimacy and effectiveness in a 'regime complex' where multiple institutions address overlapping nuclear risks.

2. *The Formative Safeguards Architecture: from Project Instruments to Comprehensive Agreements*

The early documentary record of IAEA safeguards illustrates a basic institutional reality: safeguards were initially built around concrete instances of nuclear assistance and supply. INFCIRC/3, for example, compiled texts of instruments connected with the Agency's supply of uranium to Japan – an early case in which the IAEA's statutory responsibility to ensure peaceful use was operationalized through specific contractual arrangements.[4] In a similar spirit, INFCIRC/29 assembled instruments relating to a joint Agency–Norwegian research programme involving the zero-power reactor 'NORA,' again showing safeguards as embedded in the governance of particular projects.[5]

The transition from such project-centred instruments to a more general safeguards system was codified in INFCIRC/26, which set out 'The Agency's Safeguards' as a system approved by the Board of Governors.[6] This move mattered not simply because it standardized procedures, but because it reflected the IAEA's need to anticipate scale. Once nuclear cooperation expanded, safeguards could no longer be negotiated as bespoke, one-off technical attachments; they needed to be a predictable institutional framework, sufficiently general to apply to a growing diversity of facilities and materials.

That logic continued in INFCIRC/66, which set out 'The Agency's Safeguards System (1965)' and later revisions that provisionally extended the system to cover additional facilities

[3] Tobey William, "Peering down from the Summit: The Path to Nuclear Security 2010-2016 and beyond," *Global Summitry*, 2, 2 (2016): 93-113; Decker Jonathan, *Gift Basket Diplomacy: The Nuclear Security Summit and Statecraft in the Information Age* (Cambridge: Cambridge University Press, 2017); Matchett Leah, "Minilateralism and Backlash in the Nuclear Security Summit: The Consequences of Nuclear Governance outside the IAEA," *Security Studies*, 30, 5 (2021): 823-59.

[4] International Atomic Energy Agency, *The Texts of Instruments Connected with the Agency's Supply of Uranium to Japan (INFCIRC/3)* (Vienna: International Atomic Energy Agency, 1959).

[5] International Atomic Energy Agency, *The Texts of the Instruments Relating to a Project for a Joint Agency-Norwegian Program of Research with the Zero Power Reactor "NORA" (INFCIRC/29)* (Vienna: International Atomic Energy Agency, 1961).

[6] International Atomic Energy Agency, *The Agency's Safeguards (INFCIRC/26)* (Vienna: International Atomic Energy Agency, 1961).

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and processes, including reprocessing and fuel cycle stages beyond reactors.[7] At this stage, the safeguards paradigm was still fundamentally item – and facility-oriented: the problem was to verify that specified material and specified items under specified agreements were not misused.

The major structural pivot came with the NPT and the model comprehensive safeguards agreement reflected in INFCIRC/153 (Corrected). Here the safeguards logic became country-wide: non-nuclear-weapon states party to the NPT accept safeguards on all source or special fissionable material in all peaceful nuclear activities, for the exclusive purpose of verifying non-diversion.[8] This was not merely a bureaucratic expansion; it was a different theory of assurance. Instead of building verification around discrete transfers, the comprehensive safeguards agreement (CSA) created a baseline of obligations and rights that could support ongoing verification across the whole nuclear programme of a state.

The CSA architecture also needed flexibility for states with minimal nuclear material. The 'Small Quantities Protocol' (SQP), originally circulated in GOV/INF/276, was meant to tailor safeguards implementation where the quantities and types of nuclear material reduced verification needs.[9] Over time, however, experience indicated that the SQP could create vulnerabilities – particularly as states' nuclear activities changed and as the international community's expectations about early detection of undeclared activities sharpened. This is part of the logic behind the later revision captured in GOV/INF/276/Mod.1.[10]

The safeguards system's other decisive post-Cold War development was the Model Additional Protocol in INFCIRC/540 (Corrected). The Additional Protocol institutionalized expanded declarations and complementary access intended to strengthen the IAEA's capacity to detect undeclared nuclear material and activities – an explicit response to the problem of clandestine programmes that could develop alongside, or outside, declared facilities.[11] In governance terms, this represented a shift from verifying declared flows to building an evidentiary basis for broader assurances about the absence of undeclared activities.

3. *From 'Diversion' to 'Pathways': Safeguards in a World of Networks and Clandestinity*

The safeguards evolution described above can be read as a sequence of problem redefinitions. Early documents addressed the governance of specific nuclear assistance and sup-

[7] International Atomic Energy Agency, *The Agency's Safeguards System (1965) (INFCIRC/66)* (Vienna: International Atomic Energy Agency, 1965); International Atomic Energy Agency, *The Agency's Safeguards System (1965, as Provisionally Extended in 1966) (INFCIRC/66/Rev.1)* (Vienna: International Atomic Energy Agency, 1967); International Atomic Energy Agency, *The Agency's Safeguards System (1965, as Provisionally Extended in 1966 and 1968) (INFCIRC/66/Rev.2)* (Vienna: International Atomic Energy Agency, 1968).

[8] International Atomic Energy Agency, *The Structure and Content of Agreements between the Agency and States Required in Connection with the Treaty on the Non-Proliferation of Nuclear Weapons (INFCIRC/153 (Corrected))* (Vienna: International Atomic Energy Agency, 1972).

[9] International Atomic Energy Agency, *The Text of the Small Quantities Protocol (GOV/INF/276)* (Vienna: International Atomic Energy Agency, 1974).

[10] International Atomic Energy Agency, *The Text of the Small Quantities Protocol (Revised): Note by the Director General (GOV/INF/276/Mod.1)* (Vienna: International Atomic Energy Agency, 2006).

[11] International Atomic Energy Agency, *Model Protocol Additional to the Agreement(s) between State(s) and the International Atomic Energy Agency for the Application of Safeguards (INFCIRC/540 (Corrected))* (Vienna: International Atomic Energy Agency, 1997).

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ply arrangements. INFCIRC/26 and INFCIRC/66 expressed an institutional push toward generality and predictability. INFCIRC/153 connected safeguards to a near-universal treaty framework and made the 'state' the primary unit of verification. INFCIRC/540 acknowledged a further shift: the core nonproliferation challenge was not only diversion from safeguarded stocks, but also the pursuit of undeclared capabilities.

The wider nonproliferation literature helps clarify why this mattered. If states pursue nuclear weapons for security reasons, they may seek to hedge or to maintain options under uncertainty; if domestic political coalitions or identity narratives drive nuclear ambition, concealment may be an attractive strategy to reduce external constraints.[12] In these conditions, a safeguards system that is strongest when states declare fully, and that is procedurally oriented around verifying the correctness and completeness of declarations, must continually adapt its information base and analytic methods.

The existence of transnational procurement networks raises a parallel challenge. The A. Q. Khan network illustrated how sensitive technology and know-how could move through complex intermediaries, exploiting weak export controls and commercial opacity, thereby enabling states to acquire capabilities while diluting traceability.[13] For safeguards, this matters in two ways. First, clandestine acquisition pathways can generate 'capability surprises' that are only partially visible through facility-focused verification. Second, procurement networks blur the boundary between state and non-state roles, since private actors, brokers, and firms can become enabling nodes even when they are not the principal decision-makers.

The safeguards response to these dynamics is not simply 'more inspection.' It depends on the credibility of an integrated evidentiary approach: declarations, access rights, state-level analysis, and information from a variety of sources. The Additional Protocol can be interpreted as the institutional expression of this broader approach, because it expands the set of locations and activities that become visible to the Agency and widens the set of legal pathways through which questions about completeness can be pursued.[14]

4. *Nuclear Security, Insider Risk, and the Interface Problem*

If safeguards are about assurance against diversion and undeclared activities, nuclear security focuses on preventing theft, sabotage, and unauthorized access to nuclear and other radioactive material. The two agendas are analytically distinct but operationally entangled. Facilities that hold nuclear material must protect it; those same facilities may also be subject to safeguards inspections and surveillance. Information relevant to safeguards can sometimes be sensitive from a security perspective, and some security measures can complicate verification.

A critical bridge concept in contemporary literature is the 'human dimension' of nuclear security. Studies of security culture highlight that physical protection systems can be undermined by organizational practices, complacency, and the behavior of authorized person-

[12] Sagan Scott D., "Why Do States Build Nuclear Weapons?"; Hymans, *The Psychology of Nuclear Proliferation*.

[13] Albright David and Hinderstein Corey, "Unraveling the A. Q. Khan and Future Proliferation Networks".

[14] International Atomic Energy Agency, *Model Protocol Additional to the Agreement(s) between State(s) and the International Atomic Energy Agency for the Application of Safeguards*.

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nel.[15] Insider threats are particularly salient: historical cases of theft or attempted diversion of nuclear material often involve insiders or insider assistance, suggesting that the key risk is not only technological but organizational.[16]

This insight has two governance implications. First, it reframes the relationship between compliance and protection. Even a state that complies with safeguards obligations may still face security vulnerabilities if facility-level practices are weak. Second, it suggests that some of the most consequential nuclear risks will not be 'found' primarily through safeguards instruments; they will be prevented through continuous organizational learning, auditing, training, and a culture that resists normalization of deviance.[17]

The NSS process can be read as an attempt to close this gap through high-level political attention. Analyses of the summits emphasize both their achievements and their limits: they created momentum, encouraged states to make commitments, and generated a political narrative of urgency, but they did not 'solve' nuclear security and could not substitute for sustained institutional work.[18] Moreover, the summit format encouraged 'minilateral' practices—smaller groupings and voluntary packages – that could accelerate agreement but also raise legitimacy questions and concerns about governance outside the IAEA.[19]

From a safeguards perspective, these developments matter because nuclear governance risks fragmentation. When political attention and resources shift to new venues, the legitimacy and centrality of the IAEA can be strained; yet the IAEA also remains the institution with the legal mandate and technical expertise to anchor verification and, increasingly, to support aspects of security guidance and assistance. The resulting governance challenge is not to choose between safeguards and security, but to manage their interface so that each supports, rather than undermines, the other.

5. *Nuclear Terrorism, Radiological Risk, and Contested Probability*

Debates about nuclear terrorism illustrate the difficulty of governing low-probability, high-consequence risks. Some analyses emphasize plausibility and catastrophic potential, arguing that preventing nuclear terrorism is an urgent priority because the consequences would be existentially disruptive.[20] Others stress barriers to acquisition and weapon construction and caution against inflated threat narratives.[21] Efforts to model risk have attempted to make the debate more tractable by identifying the multiple pathways that would need to align for a successful attack and by examining how layered defenses change expected risk.[22]

[15] Hobbs Christopher and Moran Matthew, "Exploring the Human Dimension of Nuclear Security: The History, Theory, and Practice of Security Culture," *The Nonproliferation Review*, 28, 4-6 (2021): 275-95.

[16] Bunn Matthew and Sagan Scott D., *A Worst Practices Guide to Insider Threats: Lessons from Past Mistakes* (Cambridge, MA: American Academy of Arts and Sciences, 2014).

[17] Hobbs Christopher and Moran Matthew, "Exploring the Human Dimension of Nuclear Security"; Bunn Matthew and Sagan Scott D., *A Worst Practices Guide to Insider Threats*.

[18] Tobey William, "Peering down from the Summit".

[19] Decker Jonathan, *Gift Basket Diplomacy*; Matchett Leah, "Minilateralism and Backlash in the Nuclear Security Summit".

[20] Allison Graham, *Nuclear Terrorism*.

[21] Levi Michael A., *On Nuclear Terrorism*.

[22] Bunn Matthew, "A Mathematical Model of the Risk of Nuclear Terrorism," *The Annals of the American*

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For safeguards and security governance, the key point is not to adjudicate the probability in abstract terms, but to recognize how threat perceptions shape institutional choices. If policymakers believe that non-state actors could plausibly acquire nuclear material, they will place more weight on physical protection, material minimization, and insider threat mitigation.[23] If they believe the probability is very low, they may still endorse certain measures but prioritize them differently relative to other security agendas.[24]

Either way, the risk environment reinforces a general governance lesson: verification and protection are both necessary, but they operate on different causal chains. Safeguards can deter and detect state diversion and help reveal undeclared state activities; nuclear security measures aim to prevent unauthorized access and sabotage. In the contemporary environment, both agendas must also engage supply chains, export controls, and organizational behavior – domains where neither classical safeguards tools nor classical physical protection measures are sufficient on their own.

6. *Hybrid Security Environments and the Vulnerability of Nuclear Infrastructures*

The contemporary security environment is increasingly described through concepts such as 'hybrid warfare' and 'new wars,' which emphasize the blending of regular and irregular tactics, coercion below the threshold of declared war, information operations, and the strategic use of ambiguity.[25] Whether or not one accepts 'hybrid' as a fully coherent analytic category, the underlying observation is relevant for nuclear governance: critical infrastructures – including nuclear facilities and supporting energy, cyber, and logistics systems – can become targets in conflicts that blur lines between war and peace.

For safeguards, hybrid contestation raises a practical question: how does verification function under conditions of political coercion, disrupted access, or contested control of territory? For nuclear security, it raises a different question: how can physical protection and security culture withstand adversarial pressure that exploits insider vulnerabilities, supply-chain compromise, or cyber-physical pathways?

The IAEA safeguards documents were drafted in an era when the central verification challenge was conceived largely as diversion or clandestine development by states operating within recognizable sovereign control structures. In hybrid environments, the governance problem expands. Facilities may face threats that do not fit neatly into diversion scenarios, and institutions may need contingency mechanisms – legal, technical, and political – to maintain minimal assurance and protection even when ordinary cooperation is strained. This does not imply that safeguards should become a general-purpose security instrument. It implies that safeguards and nuclear security institutions must coordinate more effectively, and that governance arrangements must anticipate stress conditions rather than assuming stable environments.

Academy of Political and Social Science, 607 (2006): 103-20.

[23] Allison Graham, *Nuclear Terrorism*; Bunn Matthew, "A Mathematical Model of the Risk of Nuclear Terrorism".

[24] Levi Michael A., *On Nuclear Terrorism*.

[25] Hoffman Frank G., *Conflict in the 21st Century: The Rise of Hybrid Wars* (Arlington: Potomac Institute for Policy Studies, 2007); Kaldor Mary, *New and Old Wars: Organized Violence in a Global Era*, 3rd ed. (Cambridge: Polity, 2012).

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7. *Conclusion: Integrating Assurance and Protection without Collapsing their Mandates*

The documentary evolution from INFCIRC/3 through INFCIRC/540 can be interpreted as a gradual enlargement of the IAEA's capacity to provide credible assurance in a changing proliferation environment. The early project instruments reflected safeguards as embedded in specific assistance and supply relationships. INFCIRC/26 and INFCIRC/66 represented standardization and scalability. INFCIRC/153 made the state the unit of comprehensive verification under the NPT. INFCIRC/540 responded to clandestinity by expanding declarations and access. The SQP and its revision illustrate an ongoing balancing act between proportionality and vulnerability.[26]

At the same time, the wider security landscape has complicated what 'assurance' must accomplish. Transnational procurement networks expose supply-chain pathways that can enable clandestine capability development.[27] The nuclear security agenda highlights insider threats and organizational weaknesses that can undermine even well-designed physical systems.[28] The NSS experiment and its aftermath show both the benefits and the governance trade-offs of minilateralism and informal commitment-making outside traditional multilateral institutions.[29] Hybrid security environments add further stress by placing nuclear infrastructures within broader patterns of coercion and disruption.[30]

The central implication is not that safeguards should become security, or that security initiatives should replace safeguards. Rather, the governance task is to design robust interfaces: between verification and protection, between legal obligations and political commitments, and between the IAEA's mandate and the broader institutional ecology that now shapes nuclear risk. In practice, this means sustaining the legal and technical credibility of safeguards while investing in security culture, insider threat mitigation, and governance arrangements that can maintain continuity under stress. The future effectiveness of the nonproliferation and nuclear security enterprise will depend less on choosing a single "best" institution and more on ensuring that the system as a whole remains coherent, legitimate, and adaptive.

[26] International Atomic Energy Agency, *The Texts of Instruments Connected with the Agency's Supply of Uranium to Japan*; International Atomic Energy Agency, *The Agency's Safeguards*; International Atomic Energy Agency, *The Agency's Safeguards System (1965)*; International Atomic Energy Agency, *The Structure and Content of Agreements between the Agency and States Required in Connection with the Treaty on the Non-Proliferation of Nuclear Weapons*; International Atomic Energy Agency, *Model Protocol Additional to the Agreement(s) between State(s) and the International Atomic Energy Agency for the Application of Safeguards*; International Atomic Energy Agency, *The Text of the Small Quantities Protocol (Revised)*.

[27] Albright and Hinderstein, "Unraveling the A. Q. Khan and Future Proliferation Networks".

[28] Bunn and Sagan, *A Worst Practices Guide to Insider Threats*; Hobbs and Moran, "Exploring the Human Dimension of Nuclear Security".

[29] Decker, *Gift Basket Diplomacy*; Tobey, "Peering down from the Summit"; Matchett, "Minilateralism and Backlash in the Nuclear Security Summit".

[30] Hoffman, *Conflict in the 21st Century*; Kaldor, *New and Old Wars*.

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SUPRANATIONAL RESPONSES TO CYBER THREATS: THE PERFORMANCE OF EU AND NATO IN CYBERATTACKS

Delina Hajradinovic

Keywords: EU; NATO; Performance; Cybersecurity; Cyberattacks.

Summary: 1. Introduction. – 2. Conceptualization and Methodology. – 3. Supranational Responses to Cyber Attacks. – 4. 2022 ViaSat Cyber Attack. – 5. Conclusion.

1. *Introduction*

The usage and development of technology has become widespread in almost every area of the human experience. Due to the inter-connectedness of the modern world that goes beyond national borders, global actors are being faced with new security threats known as 'cyber threats'. Cyber threats can endanger individual countries, as well as cause harm on a global scale. Additionally, they allow a wide range of actors, state and non-state, to have the potential to disrupt networks and commerce.[1] Therefore, the governance of the cyberspace is complex because it has asymmetrical, anonymous and dual-use characteristics.[2]

The abuse of databases and networks in order to achieve military objectives was known in the early 1980s in the Soviet Union as the Military Technological Revolution.[3] Since then, cyber threats and attacks have become powerful means to achieve various ends. They are defined as use of deliberate actions in order to alter, disrupt or exploit a cyberspace for accessing unauthorized or secure information.[4] Both fields of cybercrime and cybersecurity have adopted artificial intelligence (AI) and machine learning (ML) to be able to analyze vast amount of data that indicate cyber threats and can create sophisticated malware to evade traditional security systems.[5] The vulnerability of the cyberspace has revealed the dependence

[1] Choucri Nazli and Goldsmith Daniel, "Lost in cyberspace: Harnessing the Internet, international relations, and global security," *Bulletin of the Atomic Scientists*, 68, 2 (2012): 70-77.

[2] Slack Chelsey, "Wired yet Disconnected: The Governance of International Cyber Relations," *Global Policy*, 7, 1 (2016): 69-78.

[3] Geers Kenneth, *Strategic Cyber Security* (Talinn: CCD COE Publication, 2011).

[4] National Research Council, "*Technology, Policy, Law, and Ethics Regarding U.S. Acquisition and Use of Cyberattack Capabilities*" (Washington, DC: The National Academies Press, 2009); Uma M. and Padmavathi Ganapathi, "A survey on various cyberattacks and their classification," *International Journal of Network Security*, 15, 6 (2013): 391-397; Waxman Matthew C., "Cyber Attacks and the Use of Force: Back to the Future of Article 2(4)," *The Yale Journal of International Law*, 36 (2011): 421-59.

[5] Kuzior Aleksandra *et al.*, "Cybersecurity and cybercrime: Current trends and threats," *Journal of International Studies*, 17, 2 (2024): 220-39.

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and urgent need for cyber security policies, which will prevent the evolution of cyber-attacks to real-world disputes.

The inability of individual actors, such as national governments, has called for supranational responses to cyber threats. The European Union (EU) and North Atlantic Treaty Organization (NATO) have long-term cooperation, which currently includes cyber security issues.[6] The same cyber threat vectors[7] target both EU and NATO and endanger the civil, political, economic and military security of all Member States.[8] Motivated by the growing number of cyberattacks, international organizations (IOs) such as the EU and NATO are launching initiatives and working on their cyber resilience.

The starting point that shifted EU's and NATO's policy frameworks was the 2007 Estonia cyberattack. The cyberattack against the Estonian public and private infrastructure hit the country's sovereignty; however, it served as a catalyst for IOs to make a series of decisions, actions and agreements concerning cybersecurity.[9] Despite the urgency, the EU launched its first Cyber Security Strategy in 2013, which represented a soft-law document defining priority areas and direction for further efforts in addressing cyber threats.[10] In contrast to the EU, NATO put cybersecurity on its political agenda for the first time in 2002 at the Prague Summit; however, no policy was developed until 2008.[11] At the 2008 Bucharest Summit, NATO Members declared the intention to cooperate with other states on cyber threats in order to strengthen the computer systems of NATO.[12] This Summit resulted in the first official framework on the subject of cyber security.

Cyberattacks generated the official cybersecurity policy frameworks of both state and non-state actors. An example of a cyberattack that raised awareness of the severity of consequences of cybercrime and the urgent need for security measures against them was the 2017 NotPetya attack. The NotPetya malicious code is the first coordinated cyberattack on a sovereign state in peacetime, which targeted critical infrastructures, civilian facilities and companies.[13] Even though the target was Ukrainian organizations, the cyberattack spread outside its borders, ending up causing huge costs to multinational companies mainly in Europe, as well as the United States (US) and Australia.[14]

[6] Kutlu Fatih B., "A New Field Between Two Old Allies: Cybersecurity Approaches of EU and NATO (2016–2020)," *Journal of Diplomatic Research*, 5, 1 (2023): 25-41.

[7] "Cyber threat vector is a method that a cybercriminal uses to gain initial access to a victim network or infrastructure and this term is often used interchangeably with attack vector": see Baker Kurt, "Attack Vectors: What They Are and How They Are Exploited," in *Crowdstrike.com* (January 17, 2025).

[8] Lindstrom Gustav and Tardy Thierry, *The EU and NATO: The Essential Partners* (Luxembourg: EU Institute for Security Studies, 2019).

[9] Trimintzios Panagiotis *et al*., "Cybersecurity in the EU Common (CSPD): Challenges and risks for the EU," Study, European Parliament (2017): 5-79.

[10] Hernández Eimys Ortiz, "The European Union and the Pursuit of Global Governance in a Multi-Polar, Fractured World," *Global Policy*, 15, S8 (2024): 1-81.

[11] Pernik Piret, "Improving Cyber Security: NATO and the EU," Analysis, International Centre for Defence Studies (Tallinn, 2014): 1-18.

[12] Szentgali Gergely, "The NATO Policy on Cyber Defence: The Road so Far," *Academic and Applied Research in Military and Public Management Science*, 12, 1 (2013): 83-91.

[13] Krasznay Csaba, "Case Study: NotPetya Campaign," in *Információ- és kiberbiztonság* (Budapest: Ludovika Egyetemi Kiadó, 2020).

[14] Hageback Niklas and Hedblom Daniel, "What is Digital Warfare," in *AI for Digital Warfare* (London and New York, 2022), 43-74.

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The NotPetya attack showed a high degree of possible future harm, which resulted in IOs new approaches to cybersecurity. Ukraine's cooperation with EU and NATO did not only create a solid defense in this attack, but it created political pressure for action on global cybersecurity.[15] The European Commission published the Joint Communication on building strong cybersecurity in the EU in September 2017 aiming to "put cybersecurity at the heart of the EU as a digital society".[16] Since then, the EU has created tools such as cyber sanctions in order to try to respond to cyber operations in a coordinated way under the Common Foreign and Security Policy (CFSP).[17] On the other hand, NotPetya was the catalyst for NATO's declaration that the cyberspace will be considered a fifth operational domain (in addition to land, sea, air, and space).[18] Following this, NATO gradually developed and encouraged the growth of Alliance cyber-assets by establishing cyber-defense centers and professional military educational institutions.[19]

On the path of becoming a prioritized field, cybersecurity became constituted by technological possibilities, political choices, and scientific practices.[20] That said, cyber security politics are defined by national and international negotiation processes about both boundaries and responsibilities of state, economic, and societal actors.[21] Most recent cyberattacks, such as the Viasat cyberattack, showed that the future of cybersecurity entails the involvement of the private and business sector.[22]

Existing studies have predominantly analyzed cybersecurity issues in organizational and managerial aspects[23] such as cooperation of state and non-state actors in 'information sharing'[24] and/or analysis of the impact of cyber threats on conflict dynamics and overall security in the international system.[25] Therefore, this article addresses the gap of limited empirical analysis on institutional performance in cyberattacks, particularly EU's and NATO's performance in the case of 2017 NotPetya attack.

[15] Hassam Sana, "The NotPetya Cyber Attack: Russia-Ukraine Conflict and its Impact on the Regional Economies," *Advance Social Science Archives Journal*, 3, 1 (2025): 373-85.

[16] European Commission, "Joint Communication to the European Parliament and the Council: Resilience, Deterrence and Defence: Building strong cybersecurity for the EU," (August 13, 2017).

[17] Bendiek Annegret and Schulze Matthias, *Attribution: A Major Challenge for EU Cyber Sanctions. An Analysis of WannaCry, NotPetya, Cloud Hopper, Bundestag Hack and the Attack on the OPCW* (Berlin: Stiftung Wissenschaft und Politik (SWP), 2021), 5-42.

[18] Shea Jamie, "How is NATO Meeting the Challenge of Cyberspace?" *PRISM*, 7 (2) (2017): 18-29.

[19] Salt Alexander and Sobchuk Maya, *Russian Cyber-Operations in Ukraine and the Implications for NATO* (Calgary: Canadian Global Affairs Institute, 2021), 1-9.

[20] Cavelty Dunn and Wenger Andreas, "Introduction," in *The Politics and Science of Prevision*, edited by Andreas Wegner *et. al.* (London: Routledge, 2020).

[21] Cavelty Dunn Myriam and Egloff Florian, "The Politics of Cybersecurity: Balancing Different Roles of the States," *St Antony's International Review*, 15, 1 (2019): 37-57.

[22] Gordon Lawrence L., Loeb Martin and Lucyshyn William, "Cybersecurity Investments in the Private Sector: The Role of Governments," *The Georgetown Journal of International Affairs*, International Engagement on Cyber IV(2014): 79-88.

[23] Gal-Or Esther and Ghose Anindya, "The Economic Incentives for Sharing Security Information," *Information Systems Research*, 16, 2 (2005): 186-208.

[24] Cavelty Dunn Myriam and Suter Manuel, "Public–Private Partnerships are no silver bullet: An expanded governance model for Critical Infrastructure Protection," *International Journal*, 2, 4 (2009): 179-87.

[25] Rid Thomas, "Cyber War Will Not Take Place," *The Journal of Strategic Studies*, 35, 1 (2012): 5-32; Kostyuk Nadiya and Zhukov Yuri M., "Invisible Digital Front: Can Cyber Attacks Shape Battlefield Events?," *Journal of Conflict Resolution*, 63, 2 (2017): 317-47.

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In order to contribute to performance literature in cybersecurity, this article is organized into five sections. The first section outlines EU and NATO as supranational actors and the evolution of their cybersecurity policies from key turning points like 2007 Estonia cyberattack and decade later the NotPetya attack. The second section situates the theoretical framework and methodology by conceptualizing IOs performance through process and outcome dimensions used to asses EU and NATO responses to the NotPetya attack. The third section presents the empirical analysis and applies the five dimensions of IO policy output. The fourth section makes a comparison of EU's and NATO's performance in cyber-attacks by analyzing the 2022 ViaSat attack in order to answer the 'high performance or delayed response dilemma'. Finally, the conclusion reflects on the findings and therefore, addresses the structural strengths and weaknesses of EU and NATO policy frameworks and strategy in cybersecurity, both in this specific case and more broadly.

2. *Conceptualization and Methodology*

International organizations are central to the study of IR, however, the knowledge of their performance is limited.[26] Performance is a very broad term with many usages; however, when referring to organizational performance, this concept outlines both the process including the effort, efficiency and skill used to pursue the goal and the outcomes of it.[27] Although, Barnett and Finnemore[28] (1999) are the first to conceptualize IO's performance as the constitutive basis of global politics, they do not explain why some IOs exhibit better or worse performance.

Generally, IO's performance is understood on the basis of their designs and process indicators that affect their outcomes.[29] In order to assess the effects of associational performance, cohesion, decision-making and policy output is reviewed.[30] Therefore, Lipson defines performance as "an organization's use of its resources, technology, and relationships with its

[26] Lall Ranjit, "Beyond Institutional Design: Explaining the Performance of International Organizations," *International Organization*, 71, 2 (2017): 245-80.

[27] Gutner Tamar and Thompson Alexander, "The politics of IO performance: A framework," *The Review of International Organizations*, 5, 1 (2010): 227-48.

[28] Barnett Michael N. and Finnemore Martha, "The Politics, Power, and Pathologies of International Organizations," *International Organization*, 53, 4 (1999): 699-732.

[29] Eckhard Steffen and Parizek Michal, "Policy Implementation by International Organizations: A Comparative Analysis of Strengths and Weaknesses of National and International Staff," *Journal of Comparative Policy Analysis: Research and Practice*, 24, 3 (2020): 1-17; Lusthaus Charles *et al.*, *Organization Assessment: A Framework for Improving Performance* (Ottawa: International Development Research Centre/Inter-American Development Bank, 2002); Maigre Merle, *NATO's Role in Global Cyber Security* (Policy Brief, The German Marshall Fund of the United States, 2022), 1-10; Ness Gayl D. and Brechin Steven R., "Bridging the gap: international organizations as organizations," *International Organization*, 42, 2 (1988): 245-73; Raimondo Estelle, "The power and dysfunctions of evaluation systems in international organizations," *Evaluation*, 24, 1 (2018): 26-41.

[30] Cadena-Roa Jorge, Luna Matilde and Puga Cristina, "Associational Performance: The Influence of Cohesion, Decision-Making, and the Environment," *Voluntas: International Journal of Voluntary and Nonprofit Organizations*, 23, 4 (2012): 993-1013; Tallberg Jonas *et al.*, "The performance of international organizations: a policy output approach," *Journal of European Public Policy*, 23, 7 (2016): 1077-96.

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organizational environment to achieve collective goals".[31] However, a question remains on how can one truly evaluate performance?

Especially when it comes to the idea of achieving collective goals and therefore, having effective performance, it is indeed challenging to differ between constitutional success or quality and whether those too are separate or always plural as concepts.[32] It is easy to assume that the assessment of constitutional performance would simply involve a comparison between written provisions with observed political practice at a given point in time.[33] Notably, most authors rely on result/outcome-based metrics, which show the extent of the achieved objectives.[34] Effective outcomes would lead to a small gap between legal provisions and performance. In the case of a larger gap, the constitution and regulations are deemed ineffectual. This evaluative approach is convenient when IO's goals are precisely defined; however, opposing authors view this framework as problematic as its results are short-term[35] and can lead to lack of transparency on the development processes.[36]

Following this, the importance of IOs and their performance in contemporary democratic societies is indisputable;[37] however their response frameworks and approaches in the case of cyber attacks have been limited in scope and coverage.[38] Cyber studies include multiple disciplines that are not only engineering-oriented but political and social too.[39] The cyberspace is governed by an infinite number of asymmetrical, multilateral, and bilateral relationships that are constantly in flux and shaped by changing interests, power dynamics and defenses.[40] Therefore, cyber threats and attacks are creating major shifts in IR and for-

[31] Lipson Michael, "Performance under ambiguity: International organization performance in UN peacekeeping," *The Review of International Organizations*, 5, 3 (2010): 49-284.

[32] Ginsburg Tom and Huq Aziz, *Assessing Constitutional Performance* (Cambridge: Cambridge University Press, 2017).

[33] *Ibid.*, 11.

[34] See related works: Gutner Tamar and Thompson Alexander, "The politics of IO performance," 230; Raimondo Estelle, "The power and dysfunctions of evaluation systems," 27; Eckhard Steffen and Parizek Michal, "Policy Implementation by International Organizations," 764; Tallberg Jonas *et al.*, "The performance of international organizations," 1078; Leyer Michael *et. al.*, "Process Performance Measurement," in *Handbook on Business Process Management*, (Berlin: Springer, 2015), 234-35.

[35] Radin Beryl A., *Challenging the Performance Movement: Accountability, Complexity, and Democracy* (Washington: Georgetown University Press, 2006).

[36] Carden Fred, "Evaluation, Not Development Evaluation," *American Journal of Evaluation*, 34, 4 (2013): 576-79.

[37] Cadena-Roa Jorge, Luna Matilde and Puga Cristina, "Associational Performance: The Influence of Cohesion, Decision-Making, and the Environment," *Voluntas: International Journal of Voluntary and Nonprofit Organizations*, 23, 4 (2012): 993-1013.

[38] Leventopoulos Sozon, Pipyros Kosmas and Gritzalis Dimitris, "Retaliating against cyber-attacks: a decision-taking framework for policy-makers and enforcers of international and cybersecurity law," *International Cybersecurity Law Review*, 5 (2024): 237-62.

[39] Kello Lucas, "The Meaning of the Cyber Revolution: Perils to Theory and Statecraft," *International Security*, 38 (2) (2013): 7-40; Libicki Martin C., *Conquest in Cyberspace: National Security and Information Warfare* (Cambridge: Cambridge University Press, 2007); Noel George and Reith Mark, "Cyber Warfare Evolution and Role in Modern Conflict," *Journal of Information Warfare*, 20, 4 (2021): 30-44.

[40] Sterner Eric, "Retaliatory Deterrence in Cyberspace," *Strategic Studies Quarterly*, 5, 1 (2011): 62-80; Liff Adam, "Cyberwar: A New 'Absolute Weapon'? The Proliferation of Cyberwarfare Capabilities and Interstate War," *Journal of Strategic Studies*, 35, 3 (2012): 401-28.

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eign policy.[41] It is now acceptable to respond to cyber threats and attacks from one domain, cyberspace, through another domain, the physical world, thus these responses become the norm in IR.[42]

Although cyber security regulations have finally been passed in the USA and EU, there are still many state and non-state actors whose awareness and prioritization of cyber security is not the highest.[43] However, the overwhelming, global reliance on cyberspace has highlighted the need for trust and increased international cooperation in order to improve cyber security.[44] Given the diversity of actors, threats and motivations, the academic debate on the possibility of effective supranational responses continues.[45]

EU's and NATO's distinct legal, regulatory, and organizational laws governing cybersecurity are connected to their historical, cultural, and geopolitical context.[46] The EU prioritises coordination among member nations, whereas NATO makes diplomatic and political arrangements, as well as technological and organizational ones in order to enable information exchange with actors such as the EU.[47] Under these conditions, while transcending borders and disrupting public and private sectors, cyber threats put the coordination and cohesiveness of both EU and NATO to a test. Therefore, this article aims to answer the question of: "To what extent did EU and NATO actions and cyber-policies in the recent cyberattacks reveal structural strengths and weaknesses of their supranational frameworks?".

In order to answer the research question, this article's methodology framework applies a qualitative research based on the performance theory. Choosing performance evaluation is critical for IR scholars in order to expand more on effective performance,[48] especially when facing security challenges. For the purpose of understanding the two dimensional concept of performance, a definition on process and outcome performance is made and its applicability to this study (see table 2.1).

Process performance encompasses the extent to which IOs have rules, policies and systems in order to effectively respond to global problems, whereas outcome performance refers to the achieved results relevant to the beneficiary needs.[49,50] Arguably, process performance is more

[41] Gartzke Erik, "The Myth of Cyberwar: Bringing War in Cyberspace Back Down to Earth," *International Security*, 38, 2 (2013): 41–73; Watanabe Seiko, "States' Capacity Building for Cybersecurity: An IR Approach," in *14th IFIP International Conference on Human Choice and Computers (HCC)* (Tokyo: HAL, 2020), 222-32.

[42] Maness Ryan C. and Valeriano Brandon, "The Impact of Cyber Conflict on International Interactions," *Armed Forces & Society*, 42, 2 (2016): 301-23.

[43] Tiirmaa-Klaar Heli, "Building national cyber resilience and protecting critical information infrastructure," *Journal of Cyber Policy*, 1, 1 (2016): 94-106.

[44] Hill Richard, "Dealing with Cyber Security Threats: International Cooperation, ITU and WCIT," in *7th International Conference on Cyber Conflict: Architectures in Cyberspace* (Geneva: NATO CCD COE Publications, 2015), 120-134; Blumfelde Stella, "The role of international organizations in global cybersecurity governance," *Rivista di Digital Politics*, 3 (2022): 331-350.

[45] Burton Joe, "Cyber Deterrence: A Comprehensive Approach," in *Cddoe.org* (2018), 1-29.

[46] Cirnu Carmen-Elena, Rotuna Carmen-Ionela and Vasiloiu Ioana-Cristina, "Comparative Analysis on Cyber Diplomacy in EU and US," *Romanian Cyber Security Journal*, 5, 1 (2023): 77-86.

[47] Clapp Sebastian, "EU- Nato Cooperation", in *Europarl.europa.eu* (June 23, 2025).

[48] Tamar and Thompson Alexander, "The politics of IO performance: A framework," 227-248.

[49] Leyer Michael *et. al.*, "Process Performance Measurement," 227-41.

[50] Reinsberg Bernhard, "Earmarked Funding and the Performance of International Organizations: Evidence from Food and Agricultural Development Agencies," *Global Studies Quarterly*, 3 (2023): 1-14.

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under the control of the IO leadership than outcome performance, which may also be affected by external circumstances.[51] Therefore, by assessing the process performance of IOs, the development, coordination and policy implementation in cybersecurity is reviewed, whereas the outcome performance shows the results of application of said policies. Following this, the main sources of information for this article are documents and publications about the NotPetya and ViaSat cyber-attacks, as well as the development and implementation of cybersecurity policies provided by EU and NATO. To gain further information and viewpoints on the subject, news, research articles, policy documents and reports are analyzed too.

This article aims to contribute to the IO performance literature first, by examining the effects and IO policies in a case of a major cyberattack such as the NotPetya attack and secondly, serve as another valuable analysis of sources for future research. Finally, in grounding said analysis in the context of supranational responses to cyberattacks, this article wishes to stimulate future discourse on the connection between cyber threats and IOs policy-making. By asking the question of how well IOs perform in cases of cyber attacks, a clearer understanding of the influence of IOs in creating effective and coordinated responses to cyber threats and ensuring peace in the cyber domain is made.

Table 2.1 Performance Assessment

Dimension of Performance	*Definition*	*Application to the Article*
Process Perfromance	the extent to which IOs have rules, policies and systems in order to effectively respond to global problems.	The process refers to EU's and NATO's way of applying their cybersecurity policies and rules in the case of NotPetya attack and how their cyberdefense was perceived globally.
Outcome Performance	the extent to which IOs achieve results relevant to the beneficiary needs.	EU's sanctions toolbox and NATO's collective defense mechanism as specific outcomes of the NotPetya attack.

Source: Reinsberg (2023)

3. *Supranational Responses to Cyber Attacks*

a) EU's Response to NotPetya Attack

The NotPetya attack did not become known only as a malicious software, but as a political actor that shaped geopolitics.[52] The global outbreak of NotPetya malware on 27 June 2017 hit multiple organizations in Ukraine, Europe, US, affecting government agencies and international businesses.[53] This was subsequently attributed to the Russian military which through this attack showed its cyber reach and capabilities.[54] The spread and severity of the

[51] *Ibid.*

[52] Dwyer Andrew C., "Cybersecurity's grammars: A more-than-human geopolitics of computation," *Area*, 55, 1 (2023): 10-17.

[53] Greenberg Andy, "The Untold Story of NotPetya, the Most Devastating Cyberattack in History," in *Wired.com* (August 22, 2018).

[54] Brennan David, "Russia Is Preparing a Huge Cyberattack, Ukraine Warns," in *Newswek.com* (June 27, 2018).

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cyber attack called for immediate responses globally; however, only Estonia called out states to act "responsibly and follow the rules of international cooperation and the norms of international law that apply in cyberspace".[55]

The NotPetya attack raises a question on effective supranational responses in cyberattacks, as well as applicability of International Humanitarian Law (IHL) in cases of cybercrime. When analysing NotPetya and its effects, destroyed data can hardly be compared to physical harm caused by weapons.[56] However, the power of cyber weapons to disable systems to the point that they cannot provide a service they were implemented for is enough of an obstacle to 'soften' the harm requirement in the IHL interpretations.[57] This results in viewing cyber threats from the perspective of what effect they have on systems, rather than the harm they emit.

The European Commission introduced the EU Cyber Security Strategy in 2013 (the Strategy) with three broad motivations which entailed: increasing EU's economic prosperity, sealing its capability gap in cybersecurity, ensuring dialogue with international partners such as NATO and protecting democracy and rule of law.[58] Given that these goals are not unique to the EU, the distinctive theme in the Strategy is the emphasis on overcoming differences among Member States and its cybercapabilities. Following the central theme of harmonisation and coordination, the Strategy has five objectives: Achieving cyber resilience; Drastically reducing cybercrime; Developing cyberdefence policy and capabilities related to the CSDP; Developing the industrial and technological resources for cybersecurity; Establishing a coherent international cyberspace policy for the European Union and promote core EU values.

Notably, the EU Council condemned this attack by referring to the United Nations Group of Government Experts (UN-GGE) 2013 and 2015 reports, which specify the principles of international law applicable to cyberspace.[59] Two years after the attack, the EU Council recalls the bullet points on its Framework for a Joint EU Diplomatic Response to Malicious Cyber Activities and sets out the measures within EU's CFSP.[60] In this statement, the EU explicitly mentions the significant damage and economic loss this cyber attack caused in the EU and beyond.[61] Furthermore, the EU recognized that the interconnected and complex nature of cyberspace calls for cooperation between governments, private sector and civil society in order to secure a stable cyberspace and prevent future cyber attacks.[62]

While the EU failed to take collective measures against the actors behind the NotPetya attack, the attack itself put pressure on the Union to develop effective cyber policies. This

[55] MFA Estonia, "Foreign Minister Mikser condemns Russia for NotPetya attacks against Ukraine," in *Vm.ee* (2018).

[56] Kaminska Monica, Cristiano Fabio and Broeders Dennis, "Limiting Viral Spread: Automated Cyber Operations and the Principles of Distinction and Discrimination in the Grey Zone," in *13th International Conference on Cyber Conflict* (Tallinn: NATO CCDCOE Publications, 2021), 59-72.

[57] *Ibid.*

[58] European Commission, "Joint Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Cybersecurity Strategy of the European Union: An Open, Safe and Secure Cyberspace" (Brussels: European Commission, 2013), 1-20.

[59] Broeders Dennis *et al*., "Revisiting past cyber operations in light of new cyber norms and interpretations of international law: inching towards lines in the sand?," *Journal of Cyber Policy*, 7, 1 (2021): 97-135.

[60] *Ibid.*

[61] Council of the European Union, "Council conclusions on malicious cyber activities - approval" (Brussels, 2018), 1-3.

[62] *Ibid.*

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attack called for EU's immediate institutional advancement in the operationalization of the cybersecurity toolbox.[63] The Council consequently no longer being tolerable towards misuse and abuse of data, completed the cyber sanction regime with Regulation (EU) 2019/796 on restrictive measures against cyber-attacks.[64] This policy framework applies to cyberattacks that originate both from and out of the Union and imposes measures such as assets freezes and travel bans on legal persons, entities or bodies involved in cyber attacks.[65]

Following this, the Commission also adopted a cybersecurity package with new initiatives tabled to strengthen the EU Agency for Network Information Security (ENISA).[66,67] ENISA is expected to play a broader role in EU's future cybersecurity landscape, in both expert advisory and performance of operational tasks.[68] In synthesis to ENISA, the EU adopted a sanctions framework regulation applicable to cyber attacks, which in July 2020, allowed for EU's first sanctions against cyber attacks.[69] The EU imposed these sanctions by issuing travel bans and assets freeze against the North Korean, Chinese and Russian entities and individuals responsible for WannaCry, Cloud Hopper and NotPetya attacks.[70] This marked a significant shift in cybersecurity responses from being predominantly preventive to assertive and binding.

b) Five Dimensions of EU's Policy Output in the NotPetya Attack

In this article, performance is conceptualized as 1) performance dependent on an individual IO (EU and NATO), and as 2) the IO's policy framework changing as an outcome of a cyber attack. In order to apply elements of performance, the approach of an article that analyzes IOs by looking at their output is used. According to Tallberg *et al.*,[71] IO performance is best conceptualized as the adoption of policy output that applies to the issue that the organization needs to address; therefore, it offers five dimensions of policy output: volume; orientation; type; instrument; and target. Although authors conceptualize output very narrowly, the understanding of output can be observed as the organizational effort within IOs, without the geopolitical and economic context taken into consideration. Therefore, output assessment is significant because it analyzes the implementation of policies without considering the external factors that potentially impact performance.[72] This approach is reliable and makes IOs performance central to the research with the argument that weak outcomes do not equal to poor performance, since the 'results' are dependent on many factors.[73]

[63] General Secretariat of the Council, "EU Coordinated Response to Large-Scale Cybersecurity Incidents and Crises" (Brussels: Council of the European Union, 2018), 1-6.

[64] Bendiek Annegret and Schulze Matthias, *Attribution: A Major Challenge for EU Cyber Sanctions*, 5-42.

[65] Council of the European Union, "Council Regulation (EU) 2019/796 of 17 May 2019 concerning restrictive measures against cyber-attacks threatening the Union or its Member States" (May 17, 2019).

[66] European Union Agency for Cybersecurity (ENISA), *Definition of Cybersecurity: Gaps and overlaps in standardization*, (2015).

[67] The European Union Agency for Cybersecurity (ENISA), "ENISA and a new cybersecurity act," (February 26, 2019).

[68] *Ibid.*

[69] Lonardo Luigi, "EU Law Against Hybrid Threats," *European Papers*, 6 (2) (2021): 1075-96.

[70] White Maddy, "EU imposes first-ever cyber sanctions against entities in China, North Korea and Russia," in *Gtreview.com* (August 4, 2020).

[71] Tallberg Jonas *et al.*, "The performance of international organizations: a policy output approach," *Journal of European Public Policy*, 23, 7 (2016): 1077-96.

[72] *Ibid.*, 1079-80.

[73] *Ibid.*

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In this respect, I apply the five dimensions in the following manner. Volume refers to the number of policy decisions produced by the EU during and after the NotPetya attack. Orientation answers the question whether the EU was advocating policy acts across issue areas in a given time period. The type refers to EU's legal and regulatory terms adopted in this cyber attack. The instrument shows how the EU combines soft law instruments and hard law instruments during and after the attack. Lastly, the target explains the output receivers which in this context is the Union itself and then the international community as a whole.

Table 3.2 Five dimensions of IO policy output

Output Dimension	*Definitions*	*Application to the Article*
Volume	The volume of policy decisions produced by an IO in a given time period.	Adoption of Regulation (EU) 2019/796 on restrictive measures against cyber-attacks; Operationalisation of the Cyber Diplomacy Toolbox; Adopting and strengthening ENISA.
Orientation	The distribution of policy acts across issue areas in a given time period.	In 2020, the EU uses sanctions in the form of travel bans and asset freezes to directly impose policies on attackers.
Type	Whether the aim of a policy is regulatory, distributive, declarative, constitutional or administrative	The EU responded mainly in legal and regulatory terms adopted by the Council under the CFSP framework.
Instrument	Whether a policy is binding (hard law) or non-binding (soft law)	EU combined soft law instruments such as condeming cyber attacks and using the Cyber Diplomacy Toolbox, together with hard law instruments such as adoption of Regulation (EU) 2019/796 and imposing cyber sanctions as binding policies against cybercrime.
Target	Whether a policy is aimed at states, non-state actors, the IO itself, other IOs, or the international community as a whole	Primarily, the EU aimed at invoking policies within the Union and then the international community. However, the imposing of sanctions in 2020 directly aimed individuals and entities from Russia, China, and North Korea deemed as responsible for the NotPetya attack.

Source: Tallberg *et al.* (2016)

c) NATO's Response to NotPetya Attack

At the 2014 NATO Summit in Wales, NATO recognized that cyber defense is an inseparable part of collective defense, which means that a cyber attack could be grounds to invoke Article 5 of NATO's founding treaty.[74] This also meant that international law becomes applicable in cyberspace. However, Article 5, as the the cornerstone of the military alliance is based on the the principle that an attack against one member state is considered an attack against all member states, and that by exercising their right of individual or collective self-defense – as recognized in Article 51 of the UN Charter – Allies may take collective action to restore the security of the North Atlantic area.[75] Although Article 5 equally applies to cyberattacks, the multidimensionality of cyberspace creates various challenges. The legal jus-

[74] NATO, "Cyber defence," in *Nato.int* (2024).

[75] Wiedemar Sarah, "NATO and Article 5 in Cyberspace," in *CSS Analyses in Security Policy*, 323, (May 2023): 1-4.

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tification of particular political or military responses in cyber attacks cannot be at the same level of certainty as it is in security issues in the physical world.[76] When the NotPetya attack comes into question, the effects of this cyber attack were not comparable to consequences of an armed attack such as injury or physical damage being caused by it and therefore it did not trigger Article 5.[77]

However, since the declaration of cyberspace as a military domain at the 2016 Warsaw Summit, NATO has upgraded its capabilities and updated its institutional and legal frameworks to operate effectively as in other domains.[78] NATO directly controls and owns all assets required (in the form of military units and capabilities); however, in cases of cyber operations, many of the critical assets come from outside NATO and from completely different areas of government or the private sector.[79] Therefore, in order to make an effective cyber defense, NATO relies on cooperation inside and outside the Alliance.

The NotPetya attack put NATO's cohesiveness and reputation to a test. While this attack was a result of the undeclared war between Ukraine and Russia, neither of which are part of NATO, the attack did spillover and damage NATO member states.[80] The need for new approaches towards cybersecurity crystalized and cyberspace, according to NATO's declaration, started to be considered as the fifth operational domain, in addition to land, sea, air, and space.[81] Following this, NATO gradually developed and encouraged the growth of Alliance cyber-assets by establishing cyber-defense centers and professional military educational institutions.[82]

As part of the cybersecurity policy framework, NATO created the Cyberspace Operations Centre (CYOC) and integrated Sovereign Cyber Effects Provided Voluntarily by Allies (SCEPVA) into NATO operations.[83] CyOC is the first cyber-dedicated entity that aims at enhancing awareness in cyberspace and into NATO's planning and operations at all levels.[84] This entity integrates cyber effects into NATO operations. However, the establishment of CYOC signaled a more aggressive approach towards cyber security. The addition of offensive cyber capabilities to NATO's force structure and response doctrine potentially increases its deterrence posture.[85]

[76] *Ibid.*, 2.

[77] CCDCOE, "NotPetya and WannaCry Call for a Joint Response from International Community," in *Ccdcoe.org* (June 30, 2017).

[78] Stevens Tim *et al.*, *Cyber Threats and NATO 2030: Horizon Scanning and Analysis* (Tallinn: NATO Cooperative Cyber Defence Centre of Excellence, 2021).

[79] Shea Jamie, "Cyberspace as a domain of operations: what is NATO's vision and strategy?" *MCU Journal*, 9, 2 (2018): 133-50.

[80] Reinsberg Bernhard, "Earmarked Funding and the Performance of International Organizations: Evidence from Food and Agricultural Development Agencies," *Global Studies Quarterly*, 3 (2023): 1-14.

[81] Shea Jamie, "How is NATO Meeting the Challenge of Cyberspace?" *PRISM*, 7, 2 (2017): 18-29.

[82] Salt Alexander and Sobchuk Maya, *Russian Cyber-Operations in Ukraine and the Implications for NATO* (Calgary: Canadian Global Affairs Institute, 2021), 1-9.

[83] Stevens Tim *et al.*, *Cyber Threats and NATO 2030: Horizon Scanning and Analysis* (Tallinn: NATO Cooperative Cyber Defence Centre of Excellence, 2021).

[84] Maigre Merle, *NATO's Role in Global Cyber Security* (Policy Brief, The German Marshall Fund of the United States, 2022), 1-10.

[85] Jacobsen Jeppe T., "Cyber offense in NATO: Challenges and Opportunities," *International Affairs*, 97, 3 (2021): 703-20.

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On the other hand, SCEPVA pertains specifically to offensive cyber operations, which are voluntarily conducted by individual member nations that have full control over the execution and oversight of these operations.[86] This approach ensures coordination, with distinct roles assigned to various commands and entities, as well as preservation of authority of each member state.[87] Although NATO recognizes that this is not an optimal tool, SCEPVA still opens a venue for NATO members to deploy offensive cyber capabilities in support of the alliance without disclosing classified information.[88] In times of actual cyber attack and security crisis, the concept of SCEPVA allows NATO to gain experience and develop new doctrines and procedures.[89]

Clearly, the cyberspace accelerates the speed at which a crisis occurs and terms such as "at the speed of relevance" is highly applicable in cases of cyberattacks.[90] Accordingly, NATO's has been working on a set of crisis response measures that allow them to initiate forward scanning of networks, active defense measures, and the activation of a back-up NATO Computer Incident Response Capability (NCIRC).[91] Following this, NATO recognizes the need to make an effort in understanding its potential adversaries and their cyber capabilities in order to build earlier and more effective security responses.

3.4 Five Dimensions of NATO's Policy Output in the NotPetya Attack

After examining NATO's responses to the NotPetya attack, parallel to the previous section, a policy output assessment is made. In this case, applying the five dimensions starts with NATO's recognition of cyberspace as the volume of policy decisions. Orientation explains NATO's main focus, which is institutional capacity building and multilateral cooperation. The type refers to NATO's operational and doctrinal outputs, whereas the instrument explains that most commonly, they are non-binding. Finally, NATO's target is aimed at its intra-Alliance's strengthening, coordination and cohesion of the cybersecurity framework, especially after the NotPetya attack.

Table 3.4 Five dimensions of IO policy output

Output Dimension	*Definitions*	*Application to the Article*
Volume	The volume of policy decisions produced by an IO in a given time period.	Recognition of cyberspace as an operational domain; Established CYOC and integrated SCEPVA; Development of a set of crisis response measures (NCIRC).
Orientation	The distribution of policy acts across issue areas in a given time period	NATO mainly focused on institutional capacity building and possible coordination with other global actors.

[86] Olech Aleksander and Štrucl Damjan, *The evolution of cyber forces in NATO countries* (Tallinn: NATO Cooperative Cyber Defence Centre of Excellence, 2025), 9-111.

[87] *Ibid.*

[88] NATO, *Allied Joint Doctrine for Cyberspace Operations* (Assets Publishing Service, January 29, 2020).

[89] Jensen Mikkel Storm, "Denmark's Offensive Cyber Capabilities: Questionable Assets for Prestige, New Risks of Entrapment," *Scandinavian Journal of Military Studies*, 5, 1 (2022): 111-28.

[90] Shea Jamie, "How is NATO Meeting the Challenge of Cyberspace?" *PRISM*, 7, 2 (2017): 18-29.

[91] *Ibid.*

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Output Dimension	*Definitions*	*Application to the Article*
Type	Whether the aim of a policy is regulatory, distributive, declarative, constitutional or administrative	NATO relied mainly on operational and doctrinal outputs by recognizing cyberspace as a military domain and integrating reforms in its policy frameworks (CYOC and SCEPVA).
Instrument	Whether a policy is binding (hard law) or non-binding (soft law)	NATO relied on soft law instruments such as CYOC, SCEPVA and NCIRC which are not legally binding obligations to members nor external actors.
Target	Whether a policy is aimed at states, non-state actors, the IO itself, other IOs, or the international community as a whole	NATO's policies were mainly aimed at its Alliance's internal building of cyberpolicy frameworks.

Source: Tallberg *et al.* (2016)

4. *2022 ViaSat Cyber Attack*

a) EU and NATO Response to Viasat Attack

As a grouping of multiple states, both the EU and NATO are faced with unique challenges in obtaining a unified cyber policy framework. As mentioned in previous chapters, this occurs as the result of their structure and limited role in foreign and security policy.[92] Particularly, the EU's cyber regulations have significantly expanded and mainly reference to 'privacy and data protection' and 'network and information security' while trying to formulate a cohesive and collective response to cyberattacks tailored in the form of sanctions.[93] On the other hand, NATO establishes robust education, training and exercise programs dedicated to cybersecurity while not facing the central challenge of lacking an articulated offensive cyber capability to deter or defend.[94] Although the trend of higher prioritization of cyber threats is visible in both of these IOS, it has not consistently translated into high performance and effective security policies. This poses a question whether the EU and NATO face restraints or weaknesses in their performance. Furthermore, have their responses to cyberattacks been simply delayed or less adaptive to the changing nature of cybercrime? In order to answer these questions, this chapter reviews a recent cyberattack, which highly affected the EU and consequently NATO and makes a comparison to the performance of these IOs in the case of the NotPetya attack.

In the contemporary, digitalized world, all countries heavily rely on satellites for coordination and communication in all the new military and civilian operations, which makes them a primary target for cyberattacks.[95] As a result of this, both government agencies and

[92] Saalman Lora, Su Fei and Saveleva Dovgal Larisa, "The European Union's Cyber Posture," in *Cyber Posture Trends in China, Russia, the United States and the European Union* (Stockholm: Stockholm International Peace Research Institute, 2022).

[93] *Ibid*.

[94] Caton Jeffrey L., NATO Cyberspace Capability: A Strategic and Operational Evolution (Carlisle: US Army War College Press, 2016).

[95] *Ibid.*

private companies invest in cybersecurity measures in order to establish an effective incident response plans in the event of a breach.[96] On 24 February 2024, The ViaSat KA-SAT cyber-attack demonstrated the present vulnerabilities in satellite communications and their strategic exploitation that can lead to severe geopolitical repercussions.[97] This attack was directed mainly towards the management network of the KA-SAT satellite that provided internet access services mainly in Europe, part of the Middle East and most importantly counted among its clients- the Ukrainian Army.[98]Although Viasat did not provide precise information on the number of affected devices, the EU Agency for Cybersecurity reported that at least 27,000 devices were impacted.[99]

The significance of this attack lies in the fact that it showed how cybercrimes can have repercussions on military capabilities, in this case Ukraine's Army. Because this attack was directly linked to Russia's invasion of Ukraine, the EU strongly condemned said attack and expressed its concern over the security of Europe's citizens.[100] NATO Secretary General Jens Stoltenberg also emphasized that this attack caused collateral damage beyond Ukraine and included the US, UK and EU as victims as well while formally attributing the ViaSat hack to the Russian government.[101] The political attribution of the cyberattack contributed to the understanding of international law in cyberspace. However, despite the effects of the attack in the context of an international armed conflict, the Alliance did not publicly deliberate the application of Article 5.[102] Therefore, the recent ViaSat attack naturally poses the question of accountability and how IOs (and consequently domestic governments) applied the law to this case.

Particularly for NATO, effective policy should address collective and coordinated cyberspace operations that are both offensive and defensive.[103] In the case of cyberattack, warranting Article 5 in action would entail that the NATO Commander becomes the commander and coordinator for all cyberspace activities, capability and capacity, which later connects to NATO members presenting the warnings and attributions of cyberattacks for both response and action.[104] However, none of the cyber incidents have thus far led to the invocation of Article 5 and neither has the Alliance stated openly what level or damage the triggering attack would have to cause.[105] This is often criticized due to the vague statement of the Alliance. Besides the unclear drawn lines, NATO states that Article 5 "must remain purposefully vague", because this uncertainty serves as a deterrent and can help avoid large-scale attacks that could

[96] Dimitrov Dimitar, "Cybersecurity in the Satellite Sector. Threats and Trends," (December, 2024).

[97] Kazi Arsheen, Kazi Samreen and Bhosale Saloni, "Invisible Battlefields: Analyzing the Viasat Attack and Its Broader Implications," *Scientific Bulletin*, 30, 1 (2025): 59-67.

[98] Mura Alessandro, "An Analysis of the Cyberattack against ViaSat of February 2022 from Technical Details to the Overall Relevance for Cybersecurity of Critical Infrastructures," *Analysis*, (2017): 1-26.

[99] Burgess Matt, "A Mysterious Satellite Hack Has Victims Far beyond Ukraine," in *Wired.com* (March 23, 2022).

[100] Council of the European Union, "Press release on cyber incident (related Viasat attack)," (2022).

[101] Wiedemar Sarah, "NATO and Article 5 in Cyberspace," CSS Analyses in Security Policy, Center for Security Studies, Swiss Federal Institute of Technology, Zurich (2023): 1-4.

[102] *Ibid.*

[103] Klipstein Michael and Japaridze Tinatin, "Collective cyber defence and attack: NATO's Article 5 after the Ukraine conflict," in *Europeanleadershipnetwork.org* (May 16, 2022).

[104] *Ibid.*

[105] Prucková Michaela, "Cyberattacks and Article 5 - a note on a blurry but consistent position of NATO," NATO Cooperative Cyber Defence Centre of Excellence, Tallinn (2023): 1-3.

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cross the blurred threshold.[106] However, the need for clear and stable security strategies and responses to attacks continues.

In contrast, the EU used public attribution as a cyber-policy and attributed the attack to Russia while also openly offering to provide additional, direct, technical assistance to Ukraine to remediate this attack and build up resilience against hybrid and cyber threats.[107] Although both the EU and NATO strongly condemned the attack, this did not escalate into using collective defense mechanisms. The EU mainly recognized the relevance of collective operational capability and focused on creating new cybersecurity emergency responses, which resulted in proposing the Cyber Solidarity Act. This system aims to be composed of National and Cross-Border Cyber Hubs across the EU, who will use advanced technology such as AI and data analytics to detect and share warnings on threats with authorities across borders.[108]

Notably, the "successful" response against Russia's cyber offensive on 24 February is attributed to three key elements: the readiness of the domestic government years before the war, the cyber defense assistance from NATO and the EU and the involvement of private companies, which offered commercial solutions and critical communications infrastructure.[109]

4.2. *Process and Outcome Dimensions of Performance in the ViaSat Attack*

After the NotPetya attack, cyberattacks showed that they can damage far beyond the original target and can affect both governments and business data, which NATO highlighted on the 2022 Madrid Summit by deciding to use national assets to build cyber capability.[110] This was part of NATO's 2022 Strategic Concept that took Russia's invasion as the crucial event for introducing this document.[111] The 2022 Strategic Concept concentrates on three key areas: collective defense, crisis management and cooperative security; however, collective defense under Article 5 of the Washington Treaty remains Alliance's main task.[112]

Due to IOs performance in this recent cyberattack being more diplomatic than direct and operational, their performance is measured through process and outcome dimension. This helps to analyze the extent to which IOs utilize their policies and systems when responding to threats and how well do they achieve results relevant to this case.

[106] *Ibid.*

[107] Brumfield Cynthia, "Russia-linked cyberattacks on Ukraine: A timeline," in *Csoonline.com* (August 24, 2022).

[108] European Commission, "EU Cyber Solidarity Act," Digital Strategy (October 23, 2025).

[109] Herber Paul, "Air Power in the Russian-Ukrainian War: Myths and Lessons Learned," *The Journal of the JAPCC*, 6 (2023): 6-75.

[110] *Ibid.*, 65.

[111] Olbrycht Pawel, "NATO 2022 Strategic Concept in the Face of Security Threats," *Historia i Polityka (HIP)*, 56, 63 (2026): 41-59.

[112] *Ibid.*, 46.

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Table 4.2 Dimensions of Performance

Dimension of Performance	*Definition*	*Application to the Article*	
Process Performance	the extent to which IOs have rules, policies and systems in order to effectively respond to global problems.	The EU's response in this attack was limited and mainly consisted of public attribution, expansion of regulatory mechanisms.	NATO's response was limited and mainly consisted of establishment of strong cyber defense structures such as training and intelligence-sharing.
Outcome Performance	the extent to which IOs achieve results relevant to the beneficiary needs.	The EU successfully coordinated political attribution of the attack to Russia and contributed to supporting Ukraine through the aggression; This attack initiated the Cyber Solidarity Act which promises future efficient responses to cyber threats.	NATO did not invoke Article 5 but the Alliance supported the collective attribution and condemned the attack; This attack inspired the NATO Strategic Concept which aims to ensure national and collective resilience through deterrence and defence.

Source: Reinsberg (2023)

5. *Conclusion*

The overall aim of this article was to find out how the EU and NATO perform in cyberattacks, by looking at their responses in the case of NotPetya attack, which significantly influenced the development of cybersecurity policies. Following this, a comparison was made with a recent cyberattack, known as the ViaSat attack, in order to analyze the development of IOs responses and performance in cybersecurity. By reviewing their policy frameworks and responses, gaps and delays in coordinated action were recognized. This indicated the existing weaknesses in the institutional frameworks of both IOs when it comes to cybersecurity.

However, the analysis also reviewed consistent measures and policies, which helped the development of effective responses in the cyber crisis. The case of NotPetya attack revealed inconsistencies in policies and capabilities, but it also catalyzed on-going development and integration of new cybersecurity frameworks. The findings illustrate that supranational responses to cyber issues are so far theoretically and empirically underdeveloped. Notably, there is limited literature and information on EU and NATO cyber units. Therefore, this article relied on official documents and publications from EU's and NATO's key actors such as the EU Commission, ENISA, NATO's Cyberspace Operations Centre and SCEPVA. For further information and viewpoints on the NotPetya and ViaSat attack- news, research articles, policy documents and reports were analyzed as well.

In the broader context, the EU and NATO have complementary responses to cyber threats and attacks. The EU focuses on binding legal measures and regulations and combines

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hard law instruments such as sanctions in order to address both internal and external actors. The NotPetya attack ignited the Council to not be tolerable towards misuse and abuse of data and therefore, completed the cyber sanction regime with Regulation (EU) 2019/796 on restrictive measures against cyber-attacks.[113] This policy framework that is applicable to cyberattacks from in and out of the EU, imposes measures on legal persons, entities and bodies involved in the attack which shows EU's aim to hold actors responsible in the cyber domain as well. Additionally, the EU worked on the operationalization of the Cyber Diplomacy Toolbox and adopting ENISA as soft law instruments that further strengthen the EU's cybersecurity toolbox.

On the other hand, NATO prioritizes institutional capacity building within the Alliance and relies on non-binding instruments. The NotPetya attack catalyzed NATO's recognition of cyberspace as an operational domain and therefore, upgraded institutional and legal frameworks to operate effectively in cyberspace. Following this, NATO gradually developed and encouraged the growth of Alliance cyber-assets by establishing cyber-defense centers and professional military educational institutions.[114] NATO aims to constantly develop and integrate new, efficient cyber policies, which is why instruments such as SCEPVA, CYOC and NCIRC were developed.

When assessing the EU's and NATO's performance in a recent attack such as ViaSat, outcomes were very limited. Mainly, they achieved a successful and coordinated political attribution of the attack to Russia and with that contributed support for Ukraine with technical assistance and cyber defense cooperation. Considering previous lessons, the ViaSat attack showed that development of cyber resilience could strengthen with collaboration of the private sector, the EU and other political entities that are prone to threats.[115] However, neither IO was able to prevent the attack nor provide an efficient response to mitigate the impact of the cyberattack on satellite communications and affected infrastructure. The reliance on private companies and national capabilities shows a consistent gap in international responses when it comes to delivering effective protection.

In comparison to EU's and NATO's performance in the NotPetya attack, the ViaSat attack showed the remaining reactive approach even in the light of recent cyber threats. However, the EU invoked cyber sanctions for the NotPetya attack, which was not the case in the 2022 ViaSat attack. This attack remains publicly attributed by both the EU and NATO; however, no legal and judicial charges have been made.[116] Both of these cyberattacks motivated these IOs on institutional capacity- building and collective coordination; however, the Viasat cyberattack as a case study will likely become a common reference point, especially for advocates of space cybersecurity in decades to come.[117]

These findings support the main assumption of this article, which assumed that EU's and NATO's cyber policies revealed both of their structural strengths and weaknesses. Performance cannot be studied as a simple concept and therefore looking at several elements of

[113] Bendiek Annegret and Schulze Matthias, *Attribution: A Major Challenge for EU Cyber Sanctions*, 5-42.

[114] Salt Alexander and Sobchuk Maya, *Russian Cyber-Operations in Ukraine and the Implications for NATO* (Calgary: Canadian Global Affairs Institute, 2021), 1-9.

[115] NATO, "Cyber defence".

[116] Verbruggen Yola, "Cyberattacks as war crimes," in *Ibanet.org* (January 24, 2024).

[117] Boschetti Nicolò, Gordon Nathaniel and Falco Gregory, "Space Cybersecurity Lessons Learned from The ViaSat Cyberattack," in *AIAA ASCEND* (Las Vegas, 2022), 1-8.

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policy outputs can draw a clearer conclusion. EU and NATO tend to be characterized by their norms and values, which is evident in their performance. However, this analysis shows the impact of IOs institutional complexity and the external and internal limitations that affect their performance. The EU and NATO face internal fragmentation when it comes to performance in cybersecurity as well. Their member states which are in need of increasing their national resilience remain skeptical about the EU or NATO external assistance that fits their national needs, and are often unwilling to ask for help from the supranational level because of the information sharing issues.[118]

However, the future of cybersecurity policies can be looked at national and international level. IOs performance can be utilized by conducting regular risk assessments to identify vulnerabilities and prioritize protection measures.[119] Furthermore, by understanding potential risks, state and non-state actors can develop tailored strategies and protect assets, which would reduce the exposure to cyber threats and improve resilience.[120] This further highlights the need for cooperation in the cyber domain on a global level by information exchange and adoption of legal norms and regulations for sustainable protection from cyber threats.[121] The EU and NATO must assert their credibility in cyberspace as strong powers in the eyes of their members, partners and antagonists while continuously adapting and evolving their cybersecurity cooperation.[122] In the events of cyber threats and attacks, a strategic situation assessment for the protection of EU and NATO cyberspace is marked not as a response, but as a supranational competence.[123]

[118] Lete Bruno and Pernik Piret, *EU–NATO Cybersecurity and Defense Cooperation: From Common Threats to Common Solutions* (Policy Brief, The German Marshall Fund, Washington, 2017), 1-9.

[119] Radwan Yasmine and Abdel Qader Ayat, "Public Cybersecurity Policies and Mobilizing International Political Cooperation: A Comparative Study between the NotPetya Ransomware Attack of 2017 and the SolarWinds Hack of 2020," *Culture Science Journal for Human Studies*, 1 (2) (2025): 19-48.

[120] *Ibid*.

[121] Jampani Siva Krishna, "Cross-border cybersecurity collaboration-building a global framework for threat," *World Journal of Advanced Engineering Technology and Sciences*, 14, 2 (2025): 1-10.

[122] Lete Bruno and Pernik Piret, "EU-NATO Cybersecurity and Defense Cooperation: From Common Threats to Common Solutions" (December 2017).

[123] Bendiek Annegret and Schulze Matthias, *Attribution: A Major Challenge for EU Cyber Sanctions*, 5-42.

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THE HUMANIZATION OF COMPANIES

Lejla Hasanović

Keywords: European Court of Human Rights; corporate human rights; piercing the corporate veil; legal personality; corporate liability

1. *Legal Persons as Holders of Rights and Obligations*

When discussing the protection of human rights, the notion that such rights extend to business companies is not typically at the forefront. More precisely, scholars argue that companies cannot[1] have human rights because they connect them with human beings and the question of morality, and they openly critique the very notion of the necessity of corporate human rights.[2] What has been discussed in the scholarly discourse is the idea of creating binding international human rights obligations for companies.[3] The European Union (EU) acknowledges that corporate actions can significantly affect both human rights and the environment. Accordingly, it has committed to advancing frameworks that ensure companies respect these rights and contribute positively to sustainable development. In line with its global human rights agenda, the EU collaborates with diverse stakeholders to promote responsible business conduct and sustainable practices, as outlined in the EU Action Plan on Human Rights and Democracy 2020-2024. The EU has developed a comprehensive regulatory framework to strengthen corporate responsibility in relation to human rights, sustainability, and responsible business conduct. Recent legislation includes the Corporate Sustainability

[1] Isiksel Türker, "Corporate human rights claims under the ECHR," *Georgetown Journal of Law & Public Policy,* 17 (2019): 979; Jones Peter, "Human rights, group rights, and peoples' rights," *Human Rights Quarterly*, 21, 1 (1999): 80.

[2] Grear Anna, "Challenging corporate 'humanity': Legal disembodiment, embodiment and human rights," *Human Rights Law Review*, 7, 3 (2007): 511-43.

[3] Cantú Rivera Humberto, "Negotiating a Treaty on Business and Human Rights: The Early Stages," *University of New South Wales Law Journal*, 40, 3 (2017): 1200.

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Due Diligence Directive, the Sustainable Finance Disclosures Regulation, the Corporate Sustainability Reporting Directive, and sector-specific instruments such as the Regulation on deforestation-free products, the Batteries Regulation, the Conflict Minerals Regulation, and the Critical Raw Materials Act. In the digital sphere, the EU has adopted the Artificial Intelligence Act and the Digital Services Act. These initiatives are complemented by the EU's partnerships with governments, businesses, trade unions, and civil society to support the implementation of the UN Guiding Principles on Business and Human Rights and to assist companies in adapting to heightened due-diligence expectations. If companies have human rights obligations, how are their rights treated in the international arena? This poses another question: do legal persons fall within the personal scope of the rights guaranteed by the European Convention on Human Rights (ECHR).

1.1. *Legal Personhood and Its Relevance to Human Rights Discussions*

Eighteenth – and nineteenth – century jurists offered foundational accounts of legal personality that continue to structure contemporary corporate law. Blackstone famously articulated the classical position that corporations are artificial persons, created whenever it is socially advantageous for certain rights and obligations to be preserved beyond the lifespan of natural individuals. He described such entities as "bodies politic, bodies corporate" (*corpora corporata*), or corporations endowed with "perpetual succession" and a form of "legal immortality" that allows rights to be "kept on foot and continued" for public benefit.[4] This understanding reflects the essence of what later became known as fiction theory. Fiction theorists, most prominently Friedrich Carl von Savigny, drawing upon Roman legal traditions, argued that legal persons are not real actors in any sociological sense. According to this view, a corporation has no existence apart from the individuals composing it; it is instead a juridical construct brought into being by the state. Its personality is thus derivative and contingent, existing only because the law chooses to treat an organized group as if it were a single person. The corporation's rights and duties ultimately flow from human agency, not from any intrinsic capacity of the entity itself. This account was sharply challenged by the realist or entity theory that emerged in the late nineteenth century, most fully developed by Otto von Gierke and popularized in the Anglo-American world through the work of Frederic William Maitland. For Gierke, social groups, guilds, associations, municipalities, and corporations possess a real and organic existence independent of their members. Maitland forcefully adopted this position, declaring that the corporation is "as real and natural as is the personality of man".[5] Rather than a fiction, the corporation was seen as a genuine "real personality" with a collective will: a group will.[6] Under this conception, corporate acts are not merely the acts of individuals aggregated; they are the expressions of an autonomous social organism. By the early twentieth century, entity theory had become deeply influential in Anglo-American legal thought. As

[4] Blackstone William, *Rights of Persons*, I (London: A. Strahan, 1809).

[5] Maitland Frederic William, *Collected Papers*, III (Cambridge: Cambridge University Press, 1900), 335; Von Gierke Otto, *Das deutsche Genossenschaftsrecht* (Berlin: Weidmann, 1873).

[6] Von Gierke Otto, *Political Theories of the Middle Age*, translated by Frederic William Maitland (Cambridge: Cambridge University Press, 1913).

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Millon[7] and Horwitz[8] have shown, the realist conception of the corporation played a significant role in legitimating the rise of the modern business corporation. If the corporation is a distinct legal person with its own rights, obligations, and capacity for action, then it is also the proper locus of liability. This understanding reinforced the doctrinal separation between the corporation and its shareholders and supported the institutionalization of limited liability, allowing shareholders to confine their financial exposure to the amount of their investment. Second-generation theorists, such as John Dewey, attempted to reconcile the competing traditions. Dewey[9] argued that the dispute between fictionalists and realists stemmed largely from metaphysical assumptions about what a 'person' is. For Dewey, the corporation should be understood not in terms of ontological claims but as a functional legal unit, a bearer of rights and duties because the legal system treats it as such. Personality is therefore not a matter of metaphysics but of legal and social policy. What matters is the corporation's recognized capacity to generate outcomes that the law must regulate. Taken together, these theoretical traditions map the evolution of corporate personhood: from an artificial construct dependent on natural persons (fiction theory), to an autonomous social organism with a real will (entity theory), to a functional unit defined by its legally recognized consequences (Dewey's pragmatism).[10] In this context, the next step is to examine how these competing conceptions of legal personhood shape the recognition of corporations as holders of human rights under the European Convention on Human Rights (ECHR) and how the Court operationalizes these theories in determining which corporate interests merit protection.

2. *Human Rights of Companies Protected by the European Convention on Human Rights*

As Emberland[11] persuasively argues, it is generally undisputed that both companies and their founders may, in principle, benefit from Convention protections even though he recognized that companies would have additional protection under the Convention as applicants, which could be considered disproportionate to other rights holders. With their additional financial resources, companies may be in a better position to protect their rights under human rights law than humans themselves. He was among the first scholars to articulate a coherent framework for recognizing legal persons and their shareholders as 'victims' under the Convention within the jurisprudence of the European Court of Human Rights (ECtHR).[12] Article 34 of the ECHR provides that the Court may receive individual applications from "any person, non-governmental organization, or group of individuals" claiming to be the victim of a violation of Convention rights by a High Contracting Party.

[7] Millon David, "Theories of the corporation," *Duke Law Journal*, (1990): 201.

[8] Horwitz Morton J., *The Transformation of American Law, 1870-1960: The Crisis of Legal Orthodoxy* (Oxford: Oxford University Press, 1992).

[9] Dewey John, "The Historic Background of Corporate Legal Personality," *Yale Law Journal*, 35 (1925): 655.

[10] Hasanović Lejla and Muftić Nasir, "*Lifting the AI Veil in Company Law*," *Regional Law Review*, (2025): 49.

[11] Emberland Marius, *The Human Rights of Companies: Exploring the Structure of ECHR Protection* (Oxford: Oxford University Press, 2006).

[12] Harris David John, O'Boyle Michael, Bates Ed and Buckley Carla, *Law of the European Convention on Human Rights* (Oxford: Oxford University Press, 2023).

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Importantly, the term 'non-governmental organization' (NGO) is not limited to non-profit or civil society actors but is also understood to encompass business entities.[13] Earlier drafts of the Convention referred to 'natural or legal persons' as potential applicants. This wording was later replaced with the broader term 'legal persons', before arriving at the final formulation of 'non-governmental organizations'. However, neither the preparatory works nor subsequent interpretation of the Convention suggest that this change was intended to exclude commercial companies from the scope of its protections.[14] The very first case before the ECtHR arose in 1978 in the case The Sunday Times v. United Kingdom.[15] In this case, The Sunday Times wanted to publish an article about the thalidomide scandal, the responsibility of the company Distillers for children born with deformities due to a drug given to pregnant women. The English courts granted an injunction preventing publication, on the basis of contempt of court, because civil actions against Distillers were pending and the article was said to prejudge issues and put improper pressure on settlement. In this case, the ECtHR clearly accepted that a company can invoke Article 10 ECHR and it found a violation of freedom of expression. In its decision, the Court expressly analyzed the interference with the applicants' freedom of expression in the same way as for natural persons. This was confirmed by the Court in the case Autronic AG v. Switzerland. Switzerland's refusal to allow Autronic AG to receive uncoded satellite transmissions constituted an unjustified interference with the right to receive information. The Court emphasized that Article 10 protects not only the content but also the means of transmission and reception, and found a violation because the restriction was not necessary in a democratic society. The Court explicitly stated that "… neither Autronic AG's legal status as a limited company nor the fact that its activities were commercial nor the intrinsic nature of freedom of expression can deprive Autronic AG of the protection of Article 10 (art. 10). The Article (art. 10) applies to everyone, whether natural or legal persons".[16]

Several Convention rights are consistently recognized as applicable to corporations. These include the right to a fair trial (Article 6), the principle of no punishment without law (Article 7), the right to an effective remedy (Article 13), and the right to peaceful enjoyment of possessions (Article 1 of Protocol No. 1), which is considered the most important property right for corporate actors.[17] Corporations may also rely on Article 18, which limits the permissible purposes of restrictions on other rights, although its application is typically derivative.[18]

In addition, several other rights have been found to extend to companies in specific con-

[13] Dignam Alan J. and Allen David, *Company Law and the Human Rights Act* (London: Tottel, 1998); Dhooge Lucien J., "Human Rights for Transnational Corporations," *Journal of Transnational Law & Policy,* 16 (2006): 197; Van den Muijsenbergh Winfried and Rezai Sam, "Corporations and the European Convention on Human Rights," *Pacific McGeorge Global Business & Development Law Journal*, 25 (2012): 43.

[14] Emberland Marius, *The Human Rights of Companies: Exploring the Structure of ECHR Protection.*

[15] Van den Muijsenbergh Winfried and Rezai Sam, "Corporations and the European Convention on Human Rights," 48.

[16] European Court of Human Rights, 12726/87.

[17] Addo Michael K., "The corporation as a victim of human rights violations," in *Human Rights Standards and the Responsibility of Transnational Corporations*, edited by Michael K. Addo (Leiden: Brill Nijhoff, 1999), 187; Emberland Marius, *The Human Rights of Companies: Exploring the Structure of ECHR Protection*, 63.

[18] Van den Muijsenbergh Winfried and Rezai Sam, "Corporations and the European Convention on Human Rights".

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texts. Article 14 (non-discrimination) and Article 11 (freedom of assembly and association) have both been deemed applicable to legal persons. Article 9 (freedom of religion), while generally not relevant to profit-seeking corporations, has been applied to religious legal entities such as churches, demonstrating that non-natural persons may hold Convention rights traditionally associated with individuals.

Scholarly analysis supports this broad applicability of human rights to legal persons.[19] Case law confirms this approach in cases AGOSI v. United Kingdom[20] for Article 6; Church of Scientology v. Sweden[21] for Article 9; Stallarholmens Plåtslageri v. Sweden[22] for Article 11; and Yukos v. Russia[23] for Articles 6, 7, 13, 14, 18, and A1P1. Against this background, it is instructive to turn to the Court's 'hard cases',[24] where the applicability of rights traditionally associated with individuals, such as freedom of expression (Art. 10), privacy-related interests (Art. 8), and compensation for non-pecuniary damages (Art. 41) was tested in corporate contexts. Three seminal judgments illustrate how the Court's interpretative methodology accommodates corporate claims despite the conceptual tensions: Bernh Larsen Holding AS v. Norway,[25] Centro Europa 7 S.R.L. v. Italy,[26] and Comingersoll S.A. v. Portugal.[27]

2.1. *Analysis of Case-law*

In Bernh Larsen Holding AS and Others v. Norway, the applicant companies complained that their right to respect for privacy, home and correspondence under Article 8 had been infringed by a tax order requiring them to provide a full backup copy of a shared server for off-site inspection by the tax authorities. Conceptually, the case again forced the Court to confront the language of Article 8 "home", "private life", "correspondence" in a context where the affected entities were purely commercial companies and the impugned measure concerned an IT infrastructure used for business and work-related communications rather than a human dwelling. The Court first dismissed the Government's objections on admissibility (exhaustion and victim status), holding that the applicants had sufficiently raised their Article 8 arguments domestically and could themselves complain even though the seized data also contained employees' private material. Relying on Niemietz v. Germany,[28] it confirmed that the concept of "home" under Article 8 extends to corporate offices and other business premises and that legal persons may also invoke protection of their "correspondence", including electronic communications stored on a company server.[29] It considered that the order to provide a complete backup of the server interfered with the companies' right to respect for their "home" and "correspondence" and had accepted that the concept of "private life"

[19] Bovens M.A.P., "Hebben rechtspersonen morele plichten en fundamentele rechten?," *Ars Aequi*, 7-8, 47 (1998): 1.

[20] European Court of Human Rights, 108/1983/613/697.

[21] European Commission of Human Rights, 7805/77.

[22] European Commission of Human Rights, 12733/87.

[23] European Court of Human Rights, 14902/04.

[24] Emberland Marius, *The Human Rights of Companies: Exploring the Structure of ECHR Protection*, 110.

[25] European Court of Human Rights, 24117/08.

[26] European Court of Human Rights, 38433/09.

[27] European Court of Human Rights, 35382/97.

[28] European Court of Human Rights, 13710/88.

[29] European Court of Human Rights, 24117/08, para. 96.

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could also encompass "professional activities" in a strict sense. Turning to the merits, the Court accepted that the interference was "in accordance with the law", that it pursued the legitimate aim of protecting the economic well-being of the country through effective tax audits, and that it was "necessary in a democratic society". Although the measure was very far-reaching, capturing all data on the server, including irrelevant and private material, the Court attached decisive weight to the procedural safeguards in Norwegian law (possibility to complain, sealing and depositing of the tape, limits on use, obligation to destroy irrelevant data, and judicial review), as well as to the fact that the companies themselves had chosen to use "mixed archives" on a shared server. Within this framework, the interference was held to be proportionate and non-arbitrary, and the Court ultimately found no violation of Article 8, while at the same time firmly confirming that corporate "home" and "correspondence" fall within the protective scope of that provision.

In Centro Europa 7 S.r.l. and Di Stefano v. Italy,[30] the company Centro Europa 7 was granted a national TV broadcasting license in 1999 but, due to a sequence of transitional laws favoring incumbent operators (RAI and Mediaset), it never received usable frequencies and could not actually broadcast until mid-2009. The company argued that this decade-long regulatory limbo violated its freedom to impart information and ideas under Article 10. The Grand Chamber held that there was an interference with the company's freedom of expression: a license without frequencies made the right purely theoretical, not "practical and effective".[31] The Court found that the Italian legislative framework on analogue-digital transition was vague, open-ended, and structurally biased in favor of incumbent broadcasters, so that Centro Europa 7 could not foresee when it would ever be able to exercise its licensed activity. Importantly, the Court stressed the State's positive obligation to ensure effective media pluralism: it is not enough to have several channels in theory; the legal framework must enable new entrants to access the market in practice. By maintaining a de facto duopoly and blocking a licensed new entrant for more than ten years, Italy violated Article 10.

In Comingersoll S.A. v. Portugal,[32] the Grand Chamber found a violation of Article 6 para. 1 because debt-enforcement proceedings brought by a company lasted over seventeen years, and then used Article 41 to clarify that commercial companies can receive monetary compensation for non-pecuniary damage. The Court rejected the government's argument that only natural persons can suffer such harm and held that a company's non-pecuniary damage may include effects on its reputation, uncertainty in decision-making, disruption of management, and to a lesser extent, the anxiety and inconvenience suffered by members of its management. This is not the first case of awarding nonpecuniary damages to companies, similar rulings were delivered in Immobiliare Saffi v. Italy,[33] Vereinigung demokratischer Soldaten Österreichs and Gubi v. Austria,[34] Freedom and Democracy Party (ÖZDEP) v. Turkey.[35]

Ruling on an equitable basis, it awarded Comingersoll S.A. non-pecuniary damages (PTE 1,500,000), thereby confirming that just satisfaction under Article 41 can encompass

[30] European Court of Human Rights, 38433/09.

[31] European Court of Human Rights, 38433/09, para. 138.

[32] European Court of Human Rights, 35382/97.

[33] European Court of Human Rights, 22774/93.

[34] European Court of Human Rights, 302/94.

[35] European Court of Human Rights, 23885/94.

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'moral' harm suffered by the human actors within a corporation, not only pecuniary loss. In a concurring opinion, judges Rozakis, Bratza, Caflish and Vajic emphasized that it should not be implied that a company may suffer non-pecuniary damage because of the anxiety or uncertainty felt by its human actors, but because, "as a legal person, in the society in which it operates, it has attributes, such as its own reputation, that may be impaired by acts or omissions of the State".[36]

The overview of case law demonstrates broad academic consensus that specific Convention rights may be invoked by corporate entities. Addo,[37] Emberland,[38] and Bovens,[39] have all argued for the applicability of human rights norms to business companies. This doctrinal stance is further confirmed by ECtHR case law. This doctrinal stance, reinforced by the Court's expanding corporate-rights jurisprudence, highlights that corporate entities are not merely procedural claimants but can be substantive rights-holders under the Convention. Van den Muijsenbergh & Rezaihave defined this gradual extension of the scope of rights to corporations the 'snowball argument' that leads to the humanization of corporations.[40]

However, recognizing companies as rights-bearing actors cannot be separated from the foundational private-law fiction on which their legal personality rests: limited liability. To understand when the ECtHR permits States to identify shareholders with their companies, or refuses such identification, it is necessary to examine the historical emergence of limited liability, the normative justifications behind it, and the criticisms that have led scholars to advocate for veil-piercing reforms. The following section therefore shifts from human rights doctrine to corporate law foundations, tracing the development of limited liability and the exceptional mechanism of corporate veil piercing that the ECtHR has cautiously begun to engage with, portraying another side of the medal in which the court disregards the corporate personhood of the legal person to protect human rights.

3. *Piercing the Corporate Veil Standards*

The modern corporation is founded upon a legal fiction: the recognition of a company as a separate legal person whose liabilities are distinct from those of its shareholders.[41] This fiction did not always exist. In the eighteenth century, most business associations operated as partnerships, and their members were unlimitedly liable for debts owed to creditors. Incorporation was rare, politically sensitive, and typically required a specific act of the legislature. It was only with the development of large-scale commercial ventures, canal building, mining, colonial trade, that the economic and political demand for risk-sharing made limited liability first imaginable and then indispensable. Early experiments in limited liability emerged through limited partnerships, in which passive investors (the commanditaires) contributed capital but were shielded from personal liability beyond their investment. They functioned as 'money-givers', enabling

[36] European Court of Human Rights, 35382/97, concurring opinion Rozakis, Bratza, Caflish and Vajic.

[37] Addo Michael K., "The corporation as a victim of human rights violations".

[38] Emberland Marius, *The Human Rights of Companies: Exploring the Structure of ECHR Protection.*

[39] Bovens M. A. P., "Hebben rechtspersonen morele plichten en fundamentele rechten?".

[40] Van den Muijsenbergh Winfried and Rezai Sam, "Corporations and the European Convention on Human Rights," 59.

[41] Grbo Zinka, *Uvod u pravo privrednih društava* (Sarajevo: Pravni fakultet Univerziteta u Sarajevu, 2017).

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them to distribute risk across multiple ventures and thereby encouraging capital formation.[42] These arrangements helped finance projects such as the Bridgewater Canal, where private investors funded public infrastructure, often under parliamentary authorization, and recouped their investment through tolls. By the late eighteenth century, jurisdictions such as Pennsylvania began codifying special-partnership regimes that provided limited liability for passive partners. The broader policy rationale soon became unmistakable: limited liability could facilitate economic growth by mobilizing private capital for public and public-private purposes. States gained access to the financial resources of investors without incurring direct debt, and investors gained access to projects otherwise too risky to undertake individually. Limited liability thus became one of the cornerstones of the industrial economy, allowing shareholders to participate in enterprises while insulating their private assets from corporate failure. Under this model, shareholders are not personally liable for the obligations of the company beyond the value of the capital they contribute in exchange for their shares.

Despite its economic contribution, limited liability has been consistently criticized for enabling companies to externalize social costs. Scholars like Smith and Ribstein argue that the insulation of shareholders from downside risk may encourage excessive risk-taking, opportunistic behavior, and, in the worst cases, misuse of the corporate structure for personal gain. Because shareholders can capture gains while shifting losses onto creditors, employees, and the public, limited liability carries an inherent potential for moral hazard. This critique has generated a substantial literature calling for doctrinal or legislative reform. The principal doctrinal counterbalance to these concerns has been the development of piercing the corporate veil, an extraordinary remedy that allows courts, in narrowly defined circumstances, to disregard the separate legal personality of the company and impose liability on its shareholders. In theory, veil-piercing serves as a corrective mechanism to prevent the abuse of the corporate form. In practice, however, the doctrine has been criticized as unpredictable, unprincipled, and unevenly applied. As Millon and others have argued, the doctrine's inconsistent deployment undermines the certainty necessary for efficient investment and credit markets and may paradoxically increase costs for shareholders by introducing legal risk that is difficult to quantify.[43] Bainbridge, and Macey and Mitts have all argued that veil-piercing should be substantially narrowed or abolished[44] due to its conceptual incoherence and its tendency to obscure rather than clarify the true economic relationships within corporate groups.[45] Even though the doctrine has been contested by scholars it remains in most laws in national legal systems in Europe. In the forthcoming section, it will be elaborated how the ECtHR has viewed this doctrine through its case-law.

4. *Piercing the Corporate Veil Before the European Court of Human Rights*

Although piercing the corporate veil originates in domestic commercial law, the ECtHR has increasingly encountered veil-piercing questions in cases involving property rights, vic-

[42] Kuntz Thilo, "Asset partitioning, limited liability and veil piercing," *European Business Organization Law Review*, 19, 2 (2018): 439.

[43] Millon David, "Theories of the corporation," 201.

[44] Bainbridge Stephen M., "Abolishing veil piercing," *Journal of Corporation Law*, 26 (2000): 479.

[45] Macey Jonathan and Mitts Joshua, "Finding order in the morass: the three real justifications for piercing the corporate veil," *Cornell Law Review*, 100 (2014): 99.

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tim status, and liability for corporate wrongdoing. In the case Albert and Others v. Hungary a group of shareholders of two Hungarian banks (Kinizsi Bank and Mohácsi Bank) challenged new legislation (the Integration Act and related amendments). The legislation effectively transferred significant control over these banks from the shareholders to state-linked integration bodies. The Court held that shareholders were not victims within the meaning of Article 34 because the legislation did not directly affect their individual rights as shareholders.[46] The doctrine of piercing the corporate veil did not apply in this context, because the banks were not in liquidation, insolvency, or under external supervision that prevented them from bringing claims themselves. The Court has disregarded the corporate form in cases where the corporation was wholly or almost wholly owned by one shareholder.[47] The ECtHR does not address veil-piercing as a matter of corporate or commercial doctrine, but rather as a question of constitutional structure and human-rights protection under the Convention. When national authorities pierce (or refuse to pierce) the corporate veil, the Court assesses the legality, foreseeability, and proportionality of such measures through the lens of Article 1 of Protocol No. 1, ensuring that any interference with the "peaceful enjoyment of possessions" of natural or legal persons meets the standards required by the Convention.

Before turning to the specific cases in which the Court has allowed or rejected veil-piercing, it is therefore necessary to outline the tests it applies. The ECtHR emphasizes that any interference by public authorities with property, whether directed at a natural or legal person, must be lawful, meaning that the underlying legal provision must be accessible, precise, and foreseeable. A norm is 'foreseeable' when it offers adequate protection against arbitrary state action. Furthermore, affected persons must have a reasonable opportunity to challenge the measure through judicial or administrative procedures. Finally, any interference must pursue a legitimate aim and comply with the requirement of proportionality, ensuring a fair balance between public and private interests.

Within this framework, the Court has identified two categories of situations in which the corporate veil may be lifted and the corporate form disregarded:

'From within' – where shareholders seek to be identified with the company to claim victim status (e.g., to challenge state measures affecting the company's property).

'From without' – where creditors or public authorities seek to pierce the veil to hold shareholders liable for the company's obligations because the company has been used as a façade to evade obligations.

An example of piercing the corporate veil from within, can be found in Lekić v. Slovenia.[48] The ECtHR examined the lawfulness and proportionality of piercing the corporate veil in the context of shareholder liability under Slovenian law. The applicant, a minority shareholder with 11.11% of shares in a dormant limited liability company, challenged a domestic measure that held shareholders with more than 10% ownership personally liable for corporate debts following the company's deregistration. This deregistration was enabled by the 1999 Financial Operations of Companies Act (FOCA), which targeted inactive companies with debts, no employees, and frozen accounts. The Court held that the interference with Mr. Lekić's rights under Article 1 of Protocol No. 1 to the European Convention on Hu-

[46] European Court of Human Rights, 5294/14.

[47] Kulick Andreas, "Corporate Human Rights?," *European Journal of International Law*, 32, 2 (2021): 549.

[48] European Court of Human Rights, 36480/07.

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man Rights was lawful and proportionate. It found that the corporate veil could be pierced if it is foreseen by national law when members abused the corporate form to harm creditors or misused company assets. Importantly, the Court accepted the 10% threshold for "active member" status, noting its alignment with definitions of "significant influence" used by international bodies such as the OECD and IMF, particularly for distinguishing between portfolio and direct investors.[49] While the applicant had not actively engaged in abusive practices, the Court emphasized that Lekić failed to uphold the corporate structure: the company had no director, was undercapitalized, did not hold general meetings, and failed to initiate insolvency proceedings. These circumstances justified holding shareholders with sufficient influence liable for the company's obligations, reinforcing the principle that shareholders who can significantly influence corporate governance should also bear responsibility when the legal personality of the company is misused.

Piercing the corporate veil from without can be analyzed in the case Ališić and Others v. Bosnia and Herzegovina and Others.[50] The Court emphasized that when a State-owned entity is used merely as a façade, particularly in cases of siphoning funds, excessive control, or failure to maintain institutional independence, the State remains responsible under the Convention. Thus, the Court found that both Slovenia and Serbia had to be considered directly liable for the debts of Ljubljanska Banka Ljubljana and Investbanka, respectively. This doctrinal development signals that human rights obligations may override formal corporate separateness where State-controlled legal persons are used to circumvent individual rights. As the Court noted, "[t]he State thus disposed of [the bank's] assets as it saw fit", justifying the lifting of the corporate veil in light of effective State ownership and control.[51] The applicants had deposited foreign-currency savings in branches of two banks before the dissolution of the Socialist Federal Republic of Yugoslavia (SFRY). For over two decades, they were unable to access these funds due to State-imposed account freezes and inaction by the successor States. The Court recognized the savings as 'possessions' under Article 1 of Protocol No. 1 and held that the prolonged denial of access constituted a disproportionate burden on the savers. Although the freezing of accounts could initially be justified under the general interest, the Court held that the States had failed to strike a 'fair balance' between public interest and individual rights, especially in light of positive obligations to secure effective property. Importantly, the Court accepted that States may be held responsible even where there has not been a formal legal expropriation, but rather an effective denial of use and access.

5. *Conclusion*

According to the fiction theory, a corporation possesses legal personality only as a juridical construct. The corporation does not exist independently of the natural persons behind it. It is instead a legal technique that enables individuals to act collectively. Within this theoretical framework, corporate human rights are understood as derivative of the interests of real human beings. The ECtHR often adopts reasoning that resembles this approach. The Court permits companies to rely on rights that protect economic interests or procedural guarantees

[49] European Court of Human Rights, 36480/07, para. 56.
[50] European Court of Human Rights, 60642/08.
[51] European Court of Human Rights, 60642/08, para. 116.

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but excludes rights that presuppose human dignity or physical existence. For example, companies may not invoke protection against inhuman or degrading treatment under Article 3 of the Convention because that right is inherently tied to human experience.

In contrast, the realist or entity theory conceptualizes corporations as genuine legal persons with an independent existence. Although the Court does not explicitly endorse this theory, its jurisprudence increasingly reflects the idea that corporations can be direct bearers of Convention rights. The analysis of ECtHR case-law illustrates that the Court often treats corporations as autonomous subjects whose rights can be violated in their own capacity. More interestingly, in the case Comingersoll SA v. Portugal, judges Rozakis, Bratza, Caflish and Vajic describe a corporation as "an independent living organism, protected as such by the legal order of the State concerned, and whose rights also receive autonomous protection under the European Convention on Human Rights". The most accurate description of the Court's approach is provided by Dewey's functional theory of personhood. Dewey argued that the legal person is best understood as a right-and-duty-bearing unit that the legal system recognizes for practical reasons. Within this functionalist understanding, extending certain Convention rights to corporations is necessary to regulate the conduct of public authorities, protect legitimate economic interests, and maintain the rule of law in commercial life. The Court's consistent acceptance of corporate applications under Article 34 demonstrates that corporations serve as important legal units through which rights and obligations are operationalized.

Legal personhood therefore performs a crucial boundary-setting function in the interpretation of the ECHR. It determines which rights can meaningfully attach to companies and which remain exclusive to natural persons. It shapes proportionality assessments, influences the balancing between private economic interests and competing public or individual interests, and provides coherence to the Court's reasoning when resolving conflicts between commercial activity and state regulation. Without a coherent conceptual foundation regarding corporate personhood, the extension of human rights protections to companies' risks becoming inconsistent and unpredictable. With such a foundation, the Court can distinguish rights that are logically and normatively appropriate for corporate entities, such as property rights, procedural guarantees, and certain aspects of freedom of expression, from rights that cannot meaningfully be applied to non-human actors.

The ECtHR respects the corporate form and grants corporations' human rights until it does not, by piercing the corporate veil. It does so by granting individuals the right to file an application before the court when the company has been liquidated and to protect the right to fair trial.

Yuval Noah Harari offers a useful sociological analogy in Sapiens,[52] where he explains that many of the structures underpinning contemporary society, such as money, states, and corporations, among them, are sustained not by any tangible reality but by collective belief. Their authority derives from shared acceptance rather than physical existence. Viewed through this lens, the corporation as a legal fiction remains defensible only insofar as it fulfills a legitimate social and economic role. When corporate personality is invoked to conceal misconduct or to exploit legal separateness for abusive ends, the underlying social consensus that supports this fiction begins to erode, diminishing its normative legitimacy. This could apply also to rights of corporations. These decisions are not merely technical but touch on

[52] Harari Yuval Noah, *Sapiens: A Brief History of Humankind* (New York: Harper, 2014).

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fundamental questions of access to justice, legal personality, and the contours of constitutional rights in the economic sphere. Particularly in jurisdictions experiencing structural deficiencies or limited judicial independence, features often associated with constitutional crisis, the recognition of companies as rights-holders, and the scope of protection they enjoy, carries significant implications for foreign investment, market stability, and the rule of law.

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DIGITAL EMERGENCY: CONSTITUTIONAL OBSOLESCENCE AND THE 'DOUBLE DEFICIT' IN THE AGE OF CYBER WARFARE

Omer Kleinman

Keywords: Separation of Powers; State of Emergency; Graded Emergency Model; Cyber-attacks; Public Trust.

1. *Introduction*

Historically, the invocation of emergency declarations and powers was intended to address 'States of Emergency' (SoE) in their classic and familiar sense – namely, physical or kinetic threats that are visible and circumscribed in both time and the physical space in which they occur, such as war, pandemics, or natural disasters.[1] In general, classical models of emergency are binary in nature, predicated on a sharp distinction between 'normalcy' and the 'exception'. Within this reality, an emergency is perceived as a temporary deviation from the regular constitutional order, whose primary objective is to restore the status quo through the exercise of extreme, yet strictly defined, powers. This perception relies on "models of law" that strive to subject even the extreme to a normative framework, counteracting the risk of overstepping boundaries and the "abandonment of the law".[2]

However, the threat landscape of the 21st century marks a real shift that challenges the very concept of a 'State of Emergency'. The rise of cyber-attacks, hybrid warfare, and digital disinformation campaigns has created a reality where insecurity is no longer an isolated event but a continuous and amorphous state of vulnerability. Unlike kinetic threats, cyber

[1] Gross Oren, "Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?," *The Yale Law Journal*, 112, 5, (2003): 1031; Kleinman Omer, *Definition of Emergency* (Herzliya: Reichman University, 2023), 12.

[2] Dagan Nadav, "States of Emergency and the Rule of Law in Israel - A Model of Law and the Abandonment of Law in the Corona Crisis," *Mishpat Umimshal*, 2 (2023) [Hebrew]; Salzberger Eli and Neufeld Robert, *Emergency Management in Israel: Towards an Israeli Doctrine and a Unified Regulatory Framework* (Israel: National Knowledge and Research Center for Emergency Preparedness, 2022), 22 [Hebrew].

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risks are often invisible, transcend territorial borders, and exist in a perpetual state of flux, effectively blurring the traditional boundaries between 'normalcy' and 'emergency' in the aspect of cyber-attacks.[3]

The absence of a concrete legal definition for emergencies in the digital sphere creates a state of 'Constitutional Obsolescence', leading to what can be termed, to my opinion – as the 'Double Deficit'. On the one hand, there is a normative deficit, stemming from reliance on vague legislation and the lack of clear criteria for exercising powers against cyber threats. On the other hand, a democratic deficit emerges, characterized by the weakening of checks and balances due to the inherent secrecy of the digital realm.[4] The quality of emergency arrangements is measured by their ability to generate legal certainty even at the height of a crisis; yet, the current situation, characterized by legislative 'patchwork', encourages the exercise of powers 'in the dark' without a proper constitutional anchor, thereby eroding the principle of legality.[5]

Ultimately, a democracy's resilience during emergencies depends directly (also) on maintaining public trust in the legitimacy of governmental actions. Without restrictive legal definitions that distinguish between various levels of threat, the state risks sliding into a permanent emergency – a condition where the exception becomes the permanent norm, eroding individual rights and the separation of powers.[6]

Therefore, this paper proposes a solution in the form of a 'Graded Constitutional Model' – and seeks to restore certainty and oversight into the system by tailoring the scope of powers to the actual intensity of the digital threat. The model is based on the premise that a clear and distinct definition is the most vital infrastructure for preserving democratic order and preventing 'emergency' from becoming a tool to bypass state control mechanisms.

2.1. *Background on States of Emergency*

Emergency, in essence, describes the transition of human beings, whether as a group or as individuals, from their ordinary and routine state of consciousness regarding potential threats to a state of 'vigilance' in the face of a danger that is currently occurring or is about to occur imminently.[7] This transition involves taking actions to cope with said danger–actions that may sometimes be extreme or exaggerated from an objective point of view.

[3] Dacar Rok, "Cyberattacks as Grounds for the Declaration of a State of Emergency," *Risk, Hazards & Crisis in Public Policy*, 46, 3 (2025): 608.

[4] Margalit Lila, *On the Importance of a Specific Declaration of Emergency: The Emergency Arrangement in the Basic Law: The Government in Light of the COVID-19 Crisis* (Jerusalem: Israel Democracy Institute, 2021), 9 [Hebrew].

[5] Kleinman Omer, *Definition of Emergency*, 100; Barak-Erez Daphne, "The National Security Constitution and the Israeli Condition," in *Israeli Constitutional Law in the Making*, edited by Gideon Sapir, Daphne Barak-Erez and Aharon Barak (Oxford: Hart Publishing, 2013), 430.

[6] Greene Alan, *Permanent States of Emergency and the Rule of Law: Constitutions in an Age of Crisis* (Oxford: Hart Publishing, 2018), 241; Mizrahi Shlomo *et al.*, "Compliance with Government Policies during Emergencies: Trust, Participation and Protective Actions," *Governance*, (2023): 1; Kaim Arielle and Kubbe Ina, "Who Is the Master of Disasters? A Comparative Analysis of COVID-19 Crisis Response and Resilience in Democracies, Hybrid Regimes, and Autocratic States," *Risk, Hazards & Crisis in Public Policy*, (2025): 1.

[7] Primarily attributed to the 'emergency' actions that an individual may take, through the biological 'fight or flight' response, which is activated when there is an immediate threat that requires an instinctive response and the enhancement of resources for survival.

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From a legal perspective, a 'State of Emergency' (SoE) is effectively a legal or normative status declared by the executive or legislative branches, in accordance with the constitutional arrangement of a given state, upon the existence of an external threat to the state's independence or existence that requires handling through special and non-routine measures. Within the framework of an SoE, a government may issue special directives that sometimes enjoy a superior normative status, enabling it to confront the emergency. This often occurs while entailing a probable infringement on the functioning of other governmental branches, primarily the legislature, from which legislative powers are delegated to the executive.[8]

It is common to view emergency laws, which regulate the state's emergency powers during a crisis, as a secondary issue of constitutional law – but it touches on almost all areas of law, and is even inherently related to them – from administrative law on the side of the application of emergency powers in the lives of individuals and their relations with state organs, to the impact on human rights and the rights of litigants in criminal law and the various branches of civil law. Also, the questions that arise in the discussion on the regulation of emergency laws also touch on the areas of legal theory, political thought and the basis of the social contract between the state and its citizens.

As a rule, an SoE is declared when the state is struck by an 'immediate danger'. Conceptually, the SoE is most often associated with security matters, such as war or internal rebellion and insurrection against the government. However, natural disasters, health hazards, or severe economic crises are also recognized as states of emergency.

A central challenge in this field is the absence of a united normative definition for the term 'State of Emergency'.[9] In the classical model, the SoE is perceived as a temporary exception justified only upon the fulfillment of a strict threshold of 'grave and imminent danger' to the existence of the state, its security, or public order.[10] This distinction is inherently binary, assuming a clear boundary line, the crossing of which permits a deviation from the routine constitutional order and the rule of law.

2.2. *The 21st Century Challenge: The Anomaly of Prolonged Emergency*

While in the past the SoE was perceived as a bounded event with a clear 'outbreak point' and an estimated conclusion, the 21st century presents the challenge of an 'anomalous emergency' characterized by unusual and persistent duration. Global and local events – from the COVID-19 pandemic, through the Russia-Ukraine war, to the 'Iron Swords' war in Israel – illustrate the alarming transition from 'emergency as an event' to 'emergency as a state' (Permanent Emergency), where the exception becomes the norm.[11] In such a reality, the boundaries between normalcy and emergency are blurred, and the special powers granted to handle a specific, localized danger become long-term managerial and regulatory tools affecting the entire social fabric.[12]

[8] Agamben Giorgio, *State of Exception* (Chicago: University of Chicago Press, 2004), 38.

[9] Greene Alan, *Permanent States of Emergency and the Rule of Law: Constitutions in an Age of Crisis*, 161; Loevy Keren, *Emergencies in Public Law: The Legal Politics of Containment* (Cambridge: Cambridge University Press, 2016), 60.

[10] Greene Alan, *Permanent States of Emergency and the Rule of Law: Constitutions in an Age of Crisis*, 32.

[11] *Ibid.*, 2.

[12] Salzberger Eli and Neufeld Robert, *Emergency Management in Israel: Towards an Israeli Doctrine and a Unified Regulatory Framework*, 21 [Hebrew].

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This extreme duration creates legal 'black holes', where existing emergency arrangements – often based on archaic legislation and 'legislative patchwork' – fail to provide adequate protection for individual rights.[13] The absence of a foreseeable horizon for the termination of the state of exception erodes parliamentary oversight and judicial review mechanisms, as these institutions tend to exhibit over-restraint and 'judicial laxity' in the name of urgent security necessity.[14]

As indicated by national resilience studies in Israel, the gap between formal declarations and legal reality on the ground leads to an erosion of public trust in the legitimacy of governmental actions.[15] Understanding the anomaly of the prolonged emergency is vital for the discussion regarding cyberspace, as digital threats are inherently continuous and transparent, necessitating a constitutional model that moves beyond the traditional binary distinction.[16]

The purpose of this chapter was to briefly review the conceptual world of 'emergency law' – in preparation for the following discussion regarding the combination of cyberattacks with those concepts.

3. *The Challenges of Cyber-Attacks and 'Cyber-Emergencies'*

In the digital era, a cyber-attack is no longer merely a technical failure or a complex criminal incident; it represents a direct assault on the state's sovereign core and the very fabric of modern life. As established in the 'Definition of Emergency', one of the fundamental and essential tests for defining an SoE is a "serious disruption in the supply and provision of essential services to the public". In the 21st-century reality, the absolute dependence of critical national infrastructures–such as the power grid, water systems, financial institutions, and healthcare services–on communication and computing networks transforms any large-scale digital impairment into a threat that meets the classical criteria of an existential danger.[17]

The unique challenge of a 'Cyber-Emergency' lies in its transparent nature, which undermines the kinetic paradigm upon which analog 'physical emergencies' are built. Unlike traditional warfare, where damage and aggressors are visible and geographically circumscribed, a cyber event is characterized by 'situational ambiguity', complicating the determination of the outbreak point (trigger) and the identification of the substantive transition from normalcy to emergency.[18]

The lack of physical 'visibility' creates a difficulty – on the one hand, the Executive branch may overestimate the threat to justify the use of extraordinary powers; on the other hand, the public and oversight mechanisms struggle to evaluate the intensity of the immediate danger without transparent data, leading to 'Legal Grey Holes', of authority without accountability.

Furthermore, the ever-increasing frequency of state-level cyber-attacks creates a condi-

[13] Kleinman Omer, *Definition of Emergency*, 35; Cohen Margit, "Legislative Patchwork in Emergency Law," *Mishpatim*, 29 (3) (1998): 678 [Hebrew].

[14] Dagan Nadav, "States of Emergency and the Rule of Law in Israel," 2.

[15] Mizrahi Shlomo *et al.*, "How Well Do They Manage a Crisis? The Government's Effectiveness During the COVID-19 Pandemic," *Public Administration Review*, 81 (2021): 1122; Kleinman Omer, *Definition of Emergency*, 45.

[16] Dacar Rok, "Cyberattacks as Grounds for the Declaration of a State of Emergency," 608.

[17] Dacar Rok, "Cyberattacks as Grounds for the Declaration of a State of Emergency," 610.

[18] Gil Elad D., "Cyber Checks and Balances", *Cornell International Law Journal*, 54 (2021): 387-90; Lahmann Henning, "The Plea of Necessity in Cyber Emergencies: Unresolved Doctrinal Questions", *Nordic Journal of International Law*, 92, 3 (2023): 422.

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tion where the 'exception' becomes a constant background noise of digital governance. Attacks on modern democracies (such as the cases of Estonia or Costa Rica) demonstrate that paralyzing national information systems generate a 'Sovereign Disability' (disables critical government functions) no less severe than a physical invasion.[19]

A cyber-attack can disable a government's ability to communicate with its citizens or provide basic welfare services within minutes. This gap necessitates an update to the legal tests developed in the thesis: rather than focusing solely on physical "imminence", we must examine the "function criticality" being harmed and the cumulative potential of transparent digital events.[20]

In this context, a primary challenge in modern emergency law is identifying the exact 'constitutional moment' at which a routine cyber incident escalates from a 'spot' emergency to a national (i.e., state-wide) emergency. Unlike kinetic warfare, where the crossing of physical borders or the launching of missiles provides a clear, visible trigger for emergency declarations, cyber-attacks are characterized by 'situational ambiguity'.[21] They are often stealthy, continuous, and suffer from the attribution problem, making it difficult to ascertain whether the attacker is a hostile state or terrorist group, or a criminal syndicate.

Therefore, and since the legal moment in cyberspace cannot be defined by the source of the attack or its visibility – Instead, it must be identified through an objective, impact-based threshold.

This 'constitutional moment' occurs precisely when a cyber-attack disables critical government functions[22] – a severe and immediate disruption to critical state functions or essential services.[23] Identifying this moment requires a shift from traditional military assessments to functional parameters: the scale of the disrupted infrastructure, the duration of the systemic paralysis, and the potential for cascading economic or physical harm. Recognizing this functional threshold is the crucial first step to prevent the misuse of emergency powers for standard cyber incidents.[24]

4. *The 'Double Deficit' of Cyber Emergencies*

In my opinion, the application of traditional emergency frameworks to the cyber domain does not merely result in technical friction; it creates a structural 'Double Deficit' that threatens the very foundations of the separation of powers and democratic resilience. This section explores how the unique characteristics of digital threats–invisibility, persistence, and complexity–diverge from the 'kinetic' paradigm, leaving a constitutional vacuum that is currently filled by unchecked executive discretion, in two different ways as described below.

4.1. *The Definition Deficit*

The traditional (or simplistic) SoE model is predicated on a high threshold of 'imminent danger' – as a realization of two main elements – 'danger', meaning a physical danger that is about

[19] Carmichael Logan, "Lessons from small and highly-digitalised Estonia: Decision-making in the aftermath of cybersecurity crises," *Internet Policy Review*, 14, 3 (2025): 25.

[20] Dacar Rok, "Cyberattacks as Grounds for the Declaration of a State of Emergency," 610.

[21] Gil Elad D., "Cyber Checks and Balances," 387.

[22] Dacar Rok, "Cyberattacks as Grounds for the Declaration of a State of Emergency," 622.

[23] Kleinman Omer, *Definition of Emergency*, 105.

[24] 'State of Digital Emergency' as will be offered in section 5.2 to this paper.

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to come or is already approaching – and 'immediate', meaning emphasizing the aspect of time and the urgency required to act. However, a significant portion of cyber-attacks–ranging from ransomware on critical infrastructure to the subtle manipulation of electoral systems–exists in a 'Grey Zone'. These threats are severe enough to disrupt national security and social stability, yet they often fail to trigger the formal requirements of a SoE as defined in traditional legal or constitutional texts (for example, Article 15 of the European Convention on Human Rights (ECHR)).

This 'Definition Deficit' creates a constitutional vacuum. Unlike a declaration of war or a visible pandemic, a cyber-attack often occurs in the shadows, lacking the 'public visibility' required to legitimize the suspension of rights in a democratic society. When governments utilize broad, undefined emergency powers to combat these invisible threats–employing measures such as mass surveillance, data interception, or internet shutdowns–they operate without a specific legal mandate.[25] This absence of a concrete normative anchor allows the Executive branch to bypass the Legislature. Since digital crises often lack a clear 'start' or 'end' date, standard parliamentary oversight mechanisms, which are designed for temporary events, become functionally obsolete.[26]

For example, Israel relies on a general, undefined SoE has led to the phenomenon of 'Patchwork Legislation' – Instead of developing specific norms for specific threats, emergency regulations originally intended for conventional warfare have been repurposed for civilian and political 'crises'. A glaring example is the repurposing of security agency surveillance tools–originally designed for counter-terrorism–for civilian purposes, such as tracking citizens during the COVID-19 crisis.[27]

In the European context, this normative deficit directly threatens the principles of the General Data Protection Regulation (GDPR). While the EU seeks to fortify its digital sovereignty through the NIS2 Directive[28] and the EU Artificial Intelligence Act (AI Act), there is a risk that 'cybersecurity necessities' will be used to bypass data protection safeguards. Without a precise constitutional definition of what constitutes a 'Digital Emergency', the high standards of the GDPR may be eroded by secret executive decrees. The Israeli experience warns that the lack of legal certainty allows for the 'securitization' of civilian life, where digital tools of surveillance become permanent fixtures of the administrative state.[29]

The Italian experience, especially during the COVID-19 pandemic, illustrates the risk that a state of emergency leads to the circumvention of parliamentary powers through 'regulatory inflation' and the use of administrative tools lacking a detailed constitutional anchor. Like Israel, the Italian government relied on Article 77 of the Constitution,[30] which allows it to adopt 'Decreti Legge' (law orders) in cases of urgency and necessity.

However, this led to the widespread use of administrative decrees to restrict fundamental rights, bypassing rigorous parliamentary debate. The Italian Constitutional Court (Judg-

[25] Gil Elad D., "Cyber Checks and Balances," 389-390; Kleinman Omer, *Definition of Emergency*, 20.

[26] Greene Alan, *Permanent States of Emergency and the Rule of Law*, 127; Dagan Nadav, "States of Emergency and the Rule of Law in Israel," 4.

[27] Kleinman Omer, *Definition of Emergency*, 55-57; Mordechay Nadiv and Roznai Yaniv, "A Crisis of Legitimacy: The Executive's Over-Reliance on Emergency Regulations during the COVID-19 Pandemic", *Israel Law Review*, 53, 3 (2020).

[28] Directive (EU) 2022/2555 - The EU wide legislation on cybersecurity, to strengthen cyber resilience across critical sectors.

[29] Gil Elad D., "Cyber Checks and Balances," 412; Lahmann Henning, "The Plea of Necessity in Cyber Emergencies: Unresolved Doctrinal Questions."

[30] Italian Constitution, art. 77.

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ment No. 127/2022) ultimately criticised this legislative failure to properly define the legal boundaries of these restrictions.[31]

If this administrative expansion is transposed to a severe cyber crisis, governing a digital emergency through generic administrative decrees could enable the executive to easily override the stringent privacy protections established, for example, by the GDPR or the cybersecurity mandates of the NIS2 Directive. And without a tailored constitutional framework for cyber emergencies, European states risk falling back on 'patchwork legislation', eroding digital civil liberties under the guise of an undefined technological necessity.

4.2. *The Trust Deficit*

Drawing on political-legal theory, public trust is the most critical asset for national resilience during any crisis.[32] In 'kinetic' emergencies, the threat is tangible and visible to the citizenry. This transparency often generates a 'Rally Round the Flag' effect, where the public grants the government a temporary 'license' to act and cooperate with restrictive measures.[33]

In contrast, cyber crises are characterized by inherent invisibility and profound uncertainty. When a government utilizes secretive emergency powers to manage a digital crisis 'in the dark', it paradoxically erodes the very trust it needs to maintain. In an era increasingly dominated by disinformation and 'Deep Fakes', state actions conducted without a transparent legal framework fuel conspiracy theories, public alienation, and systemic skepticism.[34] The 'quality of emergency arrangements' is measured by their ability to provide legal certainty and maintain public legitimacy, and without transparency, the misuse of emergency powers weakens the state's ability to mobilize the public against hybrid threats, ultimately undermining the collective resilience required to overcome digital catastrophes.[35]

5. *Adopting a Graded Constitutional Model for Cyber Emergencies*

The continuous nature of cyber threats inherently disrupts the principle of separation of powers. In the digital realm, the executive branch – specifically technical bodies like national cyber directorates – holds a monopoly on real-time information, technical expertise, and operational capabilities.[36] This concentration of power marginalizes the legislature and weakens judicial review, creating a structural democratic deficit.

The Graded Emergency Model is explicitly designed to restore this balance. Separation of powers is manifested differently at each level of the model. As will be described, In Level

[31] Italian Constitutional Court, Judgement No. 127/2022; See also: Italian Privacy Code, Art. 2-ter.

[32] Mizrahi Shlomo *et al.*, "Compliance with Government Policies during Emergencies: Trust, Participation and Protective Actions," *Governance*, (2023): 2.

[33] Gross Oren, "Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?", 1035; Mizrahi Shlomo *et al.*, "How Well Do They Manage a Crisis?," 1124.

[34] Greene Alan, *Permanent States of Emergency and the Rule of Law*, 127.

[35] Mizrahi Shlomo *et al.*, "Compliance with Government Policies during Emergencies: Trust, Participation and Protective Actions," 1089-1091.

[36] Haber Eldar and Reichman Amnon, "The user, the superuser, and the regulator: functional separation of powers and the plurality of the state in cyber," *Berkeley Technology Law Journal*, 35, 2 (2020): 431.

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one ('Special Cyber Situation'), the executive branch retains the operational agility necessary to contain immediate threats, but this power is strictly balanced by a mandate for ex-post parliamentary reporting and public transparency. In Level two (State of Digital Emergency), the separation of powers is actively enforced – It requires an affirmative, ex-ante authorization from the legislature. Furthermore, this graded structure provides the judiciary with clear, predefined benchmarks to exercise effective judicial review, ensuring that executive actions remain proportional to the declared level of digital emergency.

5.1. *Shifting from Critique to proposal*

This part proposes a new constitutional framework tailored to the digital age – A Graded Digital Emergency Model. The binary "War vs. Peace" dichotomy is insufficient for contemporary cyber threats. Instead, there is justification to add a legal structure designed to resolve the 'Definition Deficit' by establishing a direct link between the intensity of the threat and the scope of the powers invoked.

Comparative SoE models demonstrate that a graded approach allows the legislature to control the 'faucet' of executive power. In Germany, for instance, the German Constitution (art. 12a(5-6), 80a, 87a(4), 115) there is a distinction between different emergency situations, with each emergency, the more serious, requiring a higher level of approval.[37] Similarly, the Canadian Emergencies Act permits the declaration of a different types of emergencies (Public Order Emergency,[38] public welfare emergency, etc.), to address critical infrastructure crises without triggering the full weight of national defence powers unnecessarily.

This proposal can also be supported by Israeli law. This model is even implemented, for example, in an amendment made to the Israeli Coronavirus Law in 2022, through an interesting distinction between a "special health condition due to the coronavirus" and a "state of emergency due to the coronavirus".[39]

And, in the matter of the subject of this paper, I believe that adopting a two-tiered model in the digital sphere enables the state to operate within the 'Grey Zones' of modern warfare without abandoning its democratic foundations.

5.2. *Proposed Severity Levels for Cyber Emergencies*

The proposed model consists of two severity levels, drawing inspiration from comparative frameworks and the Israeli Coronavirus 2022, specifically tailored to the unique characteristics of cyberspace:

[37] An internal emergency is declared in order to: "In order to avert an imminent danger to the existence or free democratic basic order of the Federation or of a Land, a Land may call upon police forces of other Länder, or upon personnel and facilities of other administrative authorities and of the Federal Border Police" (English translation of Article 91(1) of the Constitution); a State of Tension refers to a preliminary situation to a state of emergency as stated in Article 12a of the Constitution; and a State of Defence is declared at the request of the Government, the House of Representatives, with the consent of the Senate, by a two-thirds majority of those present, which includes at least a majority of the members of the House of Representatives. This is in circumstances of attack by armed force or imminent threat of such an attack.

[38] Can. Emergencies Act, SC, 1988, art. 27.

[39] Special Powers Law for Dealing with the Novel Coronavirus (Temporary Provision) (Amendment No. 11), 5782-2022 (Israel).

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Level One: 'Special Cyber Situation' (Point Cyber Event)

This level addresses incidents that necessitate the use of tough measures or coercive powers against specific entities or sectors, without posing an immediate existential threat to the whole state. A prime example is a cyber-attack paralyzing the computing systems of a single hospital or a specific municipality. Such an event justifies extraordinary measures–such as a temporary state 'takeover' of private servers to halt the breach and save lives–but does not warrant a sweeping national declaration.

At this level, the invocation of powers must be immediate and subject to executive discretion (e.g., the Head of the National Cyber Directorate, etc.) due to the high velocity of cyber events that precludes prior parliamentary approval.

However, to mitigate the 'Democratic Deficit', the government must be legally mandated to provide an ex-post report to the legislature within a short, strictly defined timeframe. As the Estonian experience suggests, managing crises at a sectoral level under transparent oversight bolsters public trust and national resilience.[40] This tier prevents an 'all or nothing' scenario and ensures that localized incidents do not become a pretext for nationwide rights suspensions.[41]

Level Two: 'State of Digital Emergency' (Digital State of Emergency)

This is the highest tier, invoked only when a threat meets the classic SoE test: a 'grave and imminent danger' to national security or a total disruption in the provision of essential services on a national scale. Examples include a multi-vector cyber-attack disabling the national power grid, central financial systems, or the food and water supply chains.

At this level, the state may exercise draconian powers, including broad restrictions on digital freedom of movement, mass surveillance, or network shutdowns. In these situations, the state relies on the 'Plea of Necessity' to justify infringements on fundamental rights.[42] However, the Graded Model requires such a declaration to be strictly time-limited and subject to prior (or immediate subsequent) parliamentary approval by a super-majority, alongside rigorous real-time judicial review.

This distinction ensures that full SoE powers are reserved strictly for catastrophic cases, thereby restoring public trust and preventing "Constitutional Obsolescence" in the face of digital threats.[43]

The two-tiered model proposed here – distinguishing between a "Special Cyber Situation" and a "State of Digital Emergency"– is designed to prevent "temporary" cyber measures from inevitably calcifying into permanent norms.

The Israeli experience serves as a stark warning: when the boundary between normalcy and emergency is blurred, the exception becomes the rule. By establishing clear "entry" and "exit" criteria, the Graded Model ensures that the emergency powers used to protect critical infrastructure do not become a backdoor for permanent mass surveillance or the suspension of digital rights. Legal certainty, therefore, is not an obstacle to effective Cybersecurity, but its prerequisite for maintaining a democratic constitutional order in the digital era.

This proposal can be implemented (with the necessary changes), within the framework of

[40] Carmichael Logan, "Lessons from small and highly-digitalised Estonia," 1.

[41] Lahmann Henning, "The Plea of Necessity in Cyber Emergencies," 425.

[42] Lahmann Henning, "The Plea of Necessity in Cyber Emergencies," 445.

[43] Dacar Rok, "Cyberattacks as Grounds for the Declaration of a State of Emergency"; Kleinman Omer, *Definition of Emergency*, 68.

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laws dealing with governmental powers to deal with cyberattacks – for example, in the NIS2 Directive, GDPR, etc.

In addition, a multi-layered approval mechanism is required to manage the transition from Level 1 to Level 2. Such a process would prevent excessive intervention by the executive authority through institutional checks. The process would begin with a professional recommendation from the National Cyber Directorate or the relevant body responsible for managing cyber defense in the selected country. That institution would have to confirm that the cyber incident exceeds the functional threshold of systemic risk, and on this basis a legal opinion would also be provided by the legal advice to the government or parliament. Finally, a formal declaration of a Level 2 emergency would also require an orderly decision by the government.

Such oversight would ensure that the proposed emergency measures are strictly consistent with constitutional principles, and that on the one hand, the exercise of such emergency powers would be based on professional bodies, but on the other hand, it would also ensure clear public accountability for the government. This mechanism would ensure, in my opinion, that broad emergency powers are based on technical expertise. It maintains legal safeguards and ensures clear political accountability.[44]

6. *Conclusion*

As constitutional crises increasingly intertwine with cyber insecurity, it becomes evident that traditional emergency law paradigms no longer provide adequate protection. However, the solution to 21st-century challenges does not lie in discarding emergency powers or granting the Executive branch a 'blank check' to act without restraint. Instead, it necessitates a comprehensive constitutional modernization of these tools. This paper has demonstrated that traditional methods for defining SoE suffer from 'Constitutional Obsolescence' when faced with transparent and persistent threats, leading to a creeping erosion of democratic stability.

The institutional response to this reality requires closing the 'Double Deficit'. First, by refining the definition of emergency to fit the digital reality, we can close the 'Definition Deficit' and ensure that drastic powers are invoked only in situations of existential harm to critical infrastructure. Second, by establishing transparency mechanisms and mandatory reporting, we can close the 'Trust Deficit' and preserve the governmental legitimacy that is a critical component of national resilience.

Adopting the Graded Constitutional Model proposed in this paper allows democracies to reconcile the inherent tension between the urgent need for national security and the imperatives of the rule of law. This model ensures that the state gains the operational flexibility required in the 'Grey Zone' of cyberspace while remaining subject to a system of checks and balances tailored to the threat's intensity. In conclusion, this paper posits that legal certainty is not an obstacle to effective Cybersecurity; on the contrary, it is its essential prerequisite. Within a clear and transparent legal framework can long-term digital resilience be built–one that protects not only technological systems but the very constitutional fabric of the state (and will bring more democratic resilience).

[44] This mechanism requires extensive consideration in another paper that may discuss it, since the manner in which emergency powers are exercised constitutes a separate and complete research topic.

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PLATFORMS ARE BUILT - CAN WE STILL BUILD DEMOCRACY? ALGORITHMIC POWER AND THE LIMITS OF LIBERAL CONSTITUTIONALISM

Jovan D. Malešević

Keywords: Algorithmic Power; Liberal Law; Ex ante Regulation; Democratic Freedom; Digital Platforms.

1. *Introduction*

It is difficult today, and in some sense even impossible, to imagine a life in which we would use technology only when we needed it. Digital platforms have not changed our lives in some illusory or hypothetical sense. Through their presence, our lives have moved into places that were previously unimaginable. The ways we communicate, access services, or remain visible in society now pass through the triage of those very systems that collect, sort, and store data about us. What was until recently beyond the reach of the imagination has become infrastructural reality. Algorithmic systems are no longer tools that offer us ways of shaping reality. They are its necessary and unavoidable participants.

From this arises a question that law, power, and freedom can no longer avoid – who governs the systems that have become a precondition of our social reality, and how? The framework of liberal law rests upon the premise that freedom and power are manifested through acts and the conscious agency of subjects, phenomena regulable *post factum.* This presupposes a close connection between responsibility and the actions of subjects within a clearly defined institutional order. However, the emergence of algorithmic systems has introduced a distinct logic. The specificity of such systems lies in the fact that their primary function is not to regulate existing relations, but to define in advance the conditions under which such relations may arise at all. In doing so, they inevitably delimit the boundaries of the possible and the space of political action. Regulation is thus no longer anchored in a response to acts, but in the design and architecture of the system itself.

Against this background, the central question of this paper is whether liberal law is capable of recognising, defining, and regulating a form of power that operates prior to the emergence of the act itself. The starting premise is that the challenge of legal regulation does not lie in the slowness of its response, but in its structural limitation. Liberal law operates on the basis of a relationship between an event and its subsequent legal regulation. Algorith-

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mic systems, by contrast, operate in a preceding phase, one in which the boundaries of the possible, the permissible, and the visible are themselves constituted. Whether existing legal frameworks can reach that phase, and what is at stake if they cannot, is the question this paper sets out to examine, along a dual axis: the structural limitations of liberal law as a normative framework, and the geopolitical implications of territorial jurisdiction as a regulatory instrument.

2. *Before the Fall Was Possible*

At some point in our everyday lives, it became useful to return to the idea of paradise, not as a theological necessity, but as a structural metaphor.[1] In that sense, paradise is not a promise of salvation, but an example of a system that functions with perfect efficiency, within which reality unfolds without error and which has no need for scrutiny. Adam and Eve are thus not symbols of the Fall, but users of an environment in which authority is never questioned. Critique is unnecessary not because it is absent, but because the authority that created reality is omniscient and infallible.

Such a divine structure of the Garden of Eden can be analogously compared to the architecture of contemporary digital platforms. In the theological concept, God was absolute and vastly asymmetrical with respect to the human being created in "his [own] Image".[2] In the digital world, such asymmetry[3] is not given in advance, but technically produced.[4] This is confirmed by König and Wenzelburger, who argue that algorithms are devised within established normative boundaries and shaped according to the thinking of their creators. Value commitments are inevitably inscribed into the code, regardless of whether the authors are in a position to recognise them as such.[5] Accordingly, the digital paradise is positioned beyond the domain of critique not because of the perfection of its authors, but because that initial phase in which they operate – the design phase – remains inaccessible to everyone but them. What we today regard as a logical part of that system was, at a certain moment, a deliberate decision made by its authors.

Although we might call this 'digital perfection', such a claim would rest entirely on our

[1] The theological metaphor is deployed here structurally, not substantively to illuminate how a system can render critique superfluous not through suppression but through the foreclosure of the very conditions for recognising imperfection.

[2] *The Holy Bible. Authorized King James Version* (Salt Lake City: The Church of Jesus Christ of Latter-day Saints, 2013), 2.

[3] Knowledge asymmetry, as used here, is more a description of a concrete structural inequality than a metaphor. On one side stand those who design and administer algorithms, who are aware of the values inscribed in the code, the parameters that exist, and which hierarchies the system reproduces. On the other side are users, who merely witness the outcomes of those decisions without any insight into the logic that produced them. This asymmetry is neither incidental nor resolvable through a better user interface, as it is reproduced by the architecture of the system itself.

[4] Andrejevic Mark, "Big Data, Big Questions: The Big Data Divide," *International Journal of Communication*, 8 (2014): 1677.

[5] König Pascal D. and Wenzelburger Georg, "Between Technochauvinism and Human-Centrism: Can Algorithms Improve Decision-Making in Democratic Politics?," *European Political Science*, 21 (2022): 144.

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inability to know in advance how an algorithm 'reasons'.[6] We are not in a position to read it like a law, nor to challenge it before it begins to operate. Whereas in constitutional democracies the law must be public and intelligible, algorithmic systems meet no such requirement. Their opacity, therefore, is not a matter of technical necessity but of architectural choice.[7] Virginia Eubanks has described this mode of governance as a system that relinquishes human discretion precisely at those moments when a rule must bend in the service of equity.[8] What initially presents itself as procedural efficiency, upon closer examination, reveals the normative choices and hierarchies from which it was constructed.[9]

The paradox of digital Eden materialises precisely in the fact that its universalisation does not lead to flourishing, but to technical unquestionability. For the privileged strata of the population, the system appears as a medium of seamless functionality. For the marginalised, it resembles what Eubanks terms 'the digital poorhouse' – an assemblage of automated mechanisms that allocate, monitor, and discipline through databases and predictive models.[10] Nevertheless, in both cases the digital system preserves its aura of objectivity, unconditionally accepted as an inevitable technocratic fact.[11]

Three layers of immunity account for this structural condition. The first concerns the opacity of design, the inaccessibility of the code at the moment of its construction, what Hildebrandt identifies as the concealment of normative choices behind the appearance of technical necessity. The second is technical perfection, the system functions exactly as intended, leaving no error to be corrected – the algorithmic correlate of Weber's iron cage without bars, so seamlessly operative that the friction through which its constructed character might become legible has been eliminated. Glitches do occur, but are systematically depoliticised, absorbed as technical malfunctions rather than recognised as ruptures that make the constructed nature of the system visible. The third problem concerns what we automatically attribute to data. Although results appear objective because they are mathematically derived, we must bear in mind that data, as input reference, can be saturated with historical and structural discrimination. It is precisely in this way, as Noble and Eubanks emphasise, that through mathematical precision, supposed objectivity becomes a camouflage for all manner of bias. Taken together, these three layers form a system that is structurally beyond critique, not because it is perfect, but because the very conditions for recognising its imperfection have been systematically foreclosed. This structural condition is what Antoinette Rouvroy terms "algorithmic governmentality", a regime of power that operates not through norms or law, but through the pre-emptive reconfiguration of what is possible, bypassing the subject as a bearer of legal responsibility entirely.[12]

[6] Strandburg Katherine J., "Rulemaking and Inscrutable Automated Decision Tools," *Columbia Law Review*, 119 (2019): 1862.

[7] Nemitz Paul, "Constitutional Democracy and Technology in the Age of Artificial Intelligence," *Philosophical Transactions of the Royal Society A*, 376 (2018): 12-13.

[8] Eubanks Virginia, *Automating Inequality: How High-Tech Tools Profile, Police, and Punish the Poor* (New York: St. Martin's Press, 2018), 5.

[9] Noble Safiya Umoja, *Algorithms of Oppression: How Search Engines Reinforce Racism* (New York: New York University Press, 2018), 140-41.

[10] Eubanks Virginia, *Automating Inequality*, 12-13.

[11] Lepri Bruno *et al.*, "Fair, Transparent and Accountable Algorithmic Decision-Making Processes: The Premise, the Proposed Solutions, and the Open Challenges," *Philosophy & Technology*, 31 (2018): 2.

[12] Rouvroy Antoinette and Berns Thomas, "Algorithmic Governmentality and Prospects of Emancipa-

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The moment power ceases to be perceived as coercion, it ceases to be politically accountable. The analysis in this paper follows precisely these fault lines. We begin with the theoretical question of what algorithmic power is and within which framework it can be situated, then turn to concrete examples of algorithmic governance, and finally to the limits of existing regulatory frameworks and why they are drawn where they are. The central argument is that liberal law is not slow but mispositioned. Its *ex post* logic requires an act before law can respond. Algorithmic systems, by contrast, operate before that – before the act, before the violation, before anyone has anything to contest. Law that waits for events cannot reach the preconditions that shape reality before anything happens.

3. *The Cage Without Bars*

In the preceding chapter, we established that algorithmic systems escape critique, but that alone does not say enough. To understand why this escape is not merely a technical matter but a political one, we need to work through some more basic questions: what freedom means, what political action requires, and how power becomes accountable. These are not new problems. Legal and political theory has been wrestling with them for centuries. To make progress on them here, we will work through four frameworks. Berlin gives us the distinction between positive and negative liberty. Arendt explains what political action presupposes. Weber shows how bureaucratic logic closes off space for autonomy. Hildebrandt draws the line between technological and legal normativity. Taken together, they give us the coordinates for measuring what algorithmic power actually does. It is at those intersections that what Rouvroy calls "algorithmic governmentality" takes concrete shape.

The primary reference point is Isaiah Berlin and his 1958 lecture "Two Concepts of Liberty". Negative liberty is freedom from, an "area within which the subject – a person or group of persons – is or should be left to do or be what he is able to do or be, without interference by other persons".[13] Positive liberty is freedom to, the "desire to be governed by myself; or at any rate to participate in the process by which my life is to be controlled".[14] Berlin was not equally sympathetic to both. Positive liberty carries a risk that in the name of self-governance, one prescribed form of life may be imposed, and that, as Berlin warns, can easily become "a specious disguise for brutal tyranny".[15] What matters most for our purposes is a possibility that this distinction opens up, that negative liberty may remain formally intact while positive liberty has already eroded. Cherniss sharpens this point by drawing attention to what Berlin calls the "basic" sense of liberty, the irreducible capacity to choose between alternatives without external determination.[16] Without that foundation, neither form of liberty stands on solid ground.

The implications of this carry particular weight in the age of algorithmic governance, where algorithmic systems operate not through commands but through the calibration and

tion," *Réseaux,* 177 (2013): 163-96; Rouvroy Antoinette and Stiegler Bernard, "The Digital Regime of Truth: From the Algorithmic Governmentality to a New Rule of Law," *La Deleuziana*, 3 (2016): 6-29.

[13] Berlin Isaiah, *Two Concepts of Liberty* (Oxford: Clarendon Press, 1958), 7.

[14] *Ibid.*, 7.

[15] *Ibid.*, 8.

[16] Cherniss Joshua L., *A Mind and Its Time: The Development of Isaiah Berlin's Political Thought* (Oxford: Oxford University Press, 2013), 193-99.

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structuring of what is possible. They do not abolish choice. They construct the field within which choice becomes thinkable. Negative liberty thus remains formally guaranteed, yet what is altered is not the juridical absence of interference but the conditions under which liberty becomes intelligible and exercisable at all. If freedom consists in the choice among genuinely existing alternatives, and if an algorithmic system has pre-formatted the perception of those alternatives, then even the appearance of non-interference in human choice is undermined. The result is that liberty persists in its normative form, while its exercise is substantially reduced. Although this type of cage has no bars, it nevertheless remains a cage.

It is unambiguous that the political thought and action of Hannah Arendt do not derive from Isaiah Berlin's liberalism, and therefore the evident tension that emerges when their works are set against one another must not be overlooked. In Berlin's thought, freedom is above all the absence of interference in the individual's private space. Arendt sees it precisely the opposite, as a presence that manifests itself through shared action with others in a common public space. For Berlin, freedom is a pre-political category, bound to the individual. For Arendt, it is a public and collective phenomenon, formed only when the individual becomes part of a community. This is not a minor nuance but a fundamentally different philosophical approach. And yet, it is precisely this difference that proves most significant for this paper. Berlin's approach is recognisable in algorithmic systems through the absence of explicit prohibition and direct coercion. At the same time, however, these systems obstruct the formation of Arendt's space of appearance, the space in which something can be initiated and brought into being through action. In this way, we see how the digital age has simultaneously produced both the illusion of freedom and its real erosion.

It is important, however, to be fair to Arendt and acknowledge that she was not writing about algorithms. Her work centred on bureaucracy, totalitarianism, and a world in which human plurality was the primary political medium. Although algorithmic systems do not abolish the space of appearance but rather relocate it into the digital realm, something important is nonetheless lost in that relocation, something Arendt herself would have insisted upon. The mere formal existence of a space of appearance carries little weight if within it there is no possibility of creating something genuinely new, something that cannot be determined in advance. That structural condition is far more demanding, and it is precisely what algorithmic systems fail to meet. Where the conditions of visibility and relevance within that space are pre-structured by optimisation, unpredictability is not merely reduced but nearly eliminated. The space of appearance persists, but within it the scope of political action is significantly diminished. For Arendt, a space that forecloses the emergence of the new is not merely an impoverished public sphere, but, in the relevant sense, no public sphere at all.

With this caveat established, Arendt's work 'The Human Condition' draws a distinction between three fundamental modes of human activity: labour, work and action. The last being "the only activity that goes on directly between men without the intermediary of things or matter, [which] corresponds to the human condition of plurality, to the fact that men, not Man, live on earth and inhabit the world".[17] And as Margaret Canovan notes, unpredictability is not a defect of action but the very expression of its freedom.[18] Yet action requires a space of appearance, a shared medium within which the subject may act and become visible to others, where words and deeds can produce consequences and where behaviour can ac-

[17] Arendt Hannah, *The Human Condition*, 2nd ed. (Chicago: University of Chicago Press, 1998), 7.

[18] Canovan Margaret, "Introduction," in *The Human Condition*, edited by Hannah Arendt, XVII-XVIII.

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quire a political form.[19] Without such a space, action degenerates into mere reaction, deprived of the capacity to initiate anything new.

The defining feature of algorithmic governance is that it simultaneously threatens both of these characteristics. Through the logic of outcome optimisation, the algorithm forecloses the domain of unpredictability from which novelty might emerge. Through its capacity to regulate the public sphere in advance, determining its visibility, accessibility, and prominence, it fundamentally transforms rather than destroys the sphere. The subject remains formally able to act, yet the political meaningfulness of those actions is lost through the calibrated amplification and attenuation of the subject's visibility. This transformation carries a further implication that Arendt's political theory makes explicit. Power can come into being only when human action achieves cohesion, through plurality of opinion and shared public space,[20] while violence can completely destroy power, but never create or replace it. The result is what Arendt calls "rule by nobody", a form of domination that is diffuse, unattributable, and for precisely that reason the most tyrannical of all.[21]

The third pillar of this framework is Weber's understanding of power not as abstraction but as something visible, institutionalised, and always recognisable as coercion. In developing the concept of 'Herrschaft', he argues that human civilisation has always been built on hierarchical relations, and any attempt to reformulate or deny this would be pure illusion.[22] What changes through history is not whether domination exists by only its form. Just as the feudal system was replaced by impersonal bureaucracy, so too the modern state exercises its authority not through benevolence or charisma but through a clear system of rules, commands, and a monopoly on coercion, vested in institutions with precisely defined competences and procedures.[23] Law does not conceal power. It articulates it openly, and it is precisely this transparency captured in Weber's celebrated metaphor of the "iron cage of bureaucracy",[24] that renders his account so illuminating in relation to algorithmic governance. The individual knows the rules by which they are governed, the institutions that enforce them, and the procedures through which those rules may be challenged.[25]

Before drawing that contrast, however, a prior question must be posed, one that Weber's own typology of legitimate authority makes unavoidable. Weber distinguished three pure types of legitimate domination: traditional, charismatic, and rational-legal.[26] The last of these, grounded in formally enacted rules and the belief in their legality, is the form most characteristic of the modern state. Algorithmic systems, by contrast, place greater emphasis on a

[19] Arendt Hannah, *The Human Condition,* 199-207.

[20] Arendt Hannah, *On Violence* (San Diego: Harcourt Brace Jovanovich, 1970), 4.

[21] Arendt Hannah, *On Violence*, 38-39.

[22] Lassman Peter, "The Rule of Man over Man: Politics, Power and Legitimation," in *The Cambridge Companion to Weber*, edited by Stephen Turner (Cambridge: Cambridge University Press, 2000), 83-84.

[23] Breiner Peter, *Max Weber and Democratic Politics* (Ithaca: Cornell University Press, 1996), 131-32.

[24] Weber Max, *The Protestant Ethic and the Spirit of Capitalism*, translated by Talcott Parsons (London: Routledge, 2001), 123; Sheldon S. Wolin, "Max Weber: Legitimation, Method, and the Politics of Theory," in *Fugitive Democracy and Other Essays*, edited by Nicholas Xenos (Princeton: Princeton University Press, 2016), 207.

[25] Müller Jan-Werner, "The Molten Mass," in *Contesting Democracy: Political Ideas in Twentieth-Century Europe* (New Haven: Yale University Press, 2011), 26.

[26] Weber Max, *Economy and Society: A New Translation*, edited and translated by Keith Tribe (Cambridge, MA: Harvard University Press, 2019), 341-42.

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distinct form of legitimacy, one that may be characterised as techno-rational. They derive their authority not from the transparency of enacted rules, but from the opacity of mathematical processes. Their legitimacy rests on the claim that outputs are objective because they are computationally derived, not because they are publicly contestable. This cannot be subsumed under rational-legal legitimacy in Weber's sense, precisely because it lacks the visibility, formal rule-making, and possibility of procedural contestation that such legitimacy requires. What we have here is a new type of domination that Weber failed to anticipate, one that simultaneously invokes the authority of rationality while closing off every possibility of its current scrutiny.

What is distinctive about algorithmic systems is that they define in advance the conditions of what is possible, assessable, and visible. The weight of this lies in the fact that it unfolds without a sovereign clearly issuing a command, without an institution making a decision, and without procedures that any citizen could contest. In this respect, Weber's description of modernity as a process of "Entzauberung"[27] reaches its culmination in these very features, as algorithmic governance closes the circle. We are reshaped into inhabitants of a world without magic, governed from obscurity. Weber's warnings that bureaucratisation might reduce political life to Betrieb,[28] a technical operation devoid of normative substance, were nonetheless accompanied by visible and accountable actors. In our new reality, those subjects are gone. Social questions that once framed the basis of social policy have been reduced to algorithmic optimisation. Processes of deliberation have become processes of calibration, and politics has been transformed into mere adjustments of parameters. In Weber's iron cage, the bars were visible. In the algorithmic order, the cage has no bars and that paradoxically makes it more confining still. We are thus confronted not with the rule of man over man, but with a form of rule without a visible ruler, a domination without an attributable subject.[29]

The final theoretical approach concerns the relationship between law and technology, most fully elaborated in the work of Mireille Hildebrandt, particularly in her article 'Law as Information in the Era of Data-Driven Agency'. The central idea pertains to the epistemological distinction between legal and technological normativity. According to Hildebrandt, "the deep structure of modern law has been built on the affordances of the printing press: on the linearity and sequential processing demands of written text, which evokes the need for interpretation, reflection and contestation".[30] Law requires meaning and action in order to operate. Data-driven agency, by contrast, functions through information and behaviour. The difference between these two modalities is not merely one of degree, but of essence. A legal norm does not merely prescribe its own application. It generates a demand for judgment, entailing the exercise of human discretion in light of concrete circumstances and thereby creating a framework for possible contestation, whether through judicial proceedings, appellate review, or appeals to equity. Legal certainty does not derive from precision. It rests upon what Hildebrandt calls "a productive redundancy" – an excess of meaning that allows

[27] Weber Max, "Science as a Vocation," in *The Vocation Lectures*, edited by David Owen and Tracy B. Strong, translated by Rodney Livingstone (Indianapolis: Hackett Publishing, 2004), 30.

[28] Breiner Peter, *Max Weber and Democratic Politics*, 145-46.

[29] Berman Harold J. and Charles J. Reid Jr., "Max Weber as Legal Historian," in *The Cambridge Companion to Weber*, edited by Stephen Turner (Cambridge: Cambridge University Press, 2000), 226-27.

[30] Hildebrandt Mireille, "Law as Information in the Era of Data-Driven Agency," *Modern Law Review*, 79, 1 (2016): 2.

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shifts in interpretation, constrained not by algorithmic closure but by the interplay between justice, legal certainty, and instrumentality as the formative aims of modern positive law.[31]

Computer code, by contrast, is neither ambiguous nor polysemic in the way legal norms are. When norms are translated into code, this indeterminacy, a central feature of law, is diminished. What emerges is a technical construct operating in binary logic, foreclosing any possibility of debate about meaning or whether justice has been achieved. The problem, as Hildebrandt identifies it, lies not merely in potential bias but in hidden bias, in our inability to test assumptions and operations that nourish data-driven agency. Contestability is not an optional feature of law but a normative requirement, safeguarding against submission to norms that may not be valid or correctly applied. "If data-driven agents define a situation as real, it is real in its consequences"[32] and to the extent that such determinations are not subject to critical scrutiny, the normative foundation of the Rule of Law is placed at risk.[33] If law by design eliminates human discretion, we lose the essential nature of law, the possibility of contestation, interpretation, and application in light of concrete circumstances.

The four theoretical perspectives developed in this chapter – Berlin's two liberties, Arendt's space of appearance, Weber's visible iron cage, and Hildebrandt's epistemological distinction – share a common diagnosis. Algorithmic governance forecloses the very conditions upon which both democratic freedom and legal order depend. With this framework in hand, we can turn to concrete, what algorithmic power actually does in practice, and why existing regulatory responses have not been equal to that task.

4. *The Right to Arrive Too Late*

The fact that law arrives late is, in a certain sense, not a genuine deficiency but part of its essence. Criticism has accumulated around law's bureaucratic slowness, which is routinely identified as the central obstacle to regulating algorithmic systems. Yet this overlooks something obvious: law cannot act before the prohibited act has occurred, because if it did, it would become a system of technical command and, by extension, a form of arbitrary governance. In other words, the temporal gap between the anticipation of a behaviour by the norm and its transgression is not a hole in the law but simply the way legal normativity has always worked. As Mireille Hildebrandt observes, law does not describe behaviour nor predict it. Rather, it informs subjects of the legal consequences of their possible actions, attaching legal effects to specific acts, behaviours, or occurrences.[34] Law thus operates by structuring expectations. It enables individuals to organise their lives on the basis of anticipated consequences, rather than through the imposition of predetermined conduct. Crucially, however, law must not be reduced to mere information. As Hildebrandt further emphasises, law "does things"

[31] Hildebrandt Mireille, "Law as Information in the Era of Data-Driven Agency," 6.

[32] A modulation of "if machines define a situation as real, it is real in its consequences" in Hildebrandt Mireille, "Who Needs Stories if You Can Get the Data? ISPs in the Era of Big Number Crunching," *Philosophy & Technology*, 24 (2011): 379.

[33] Hildebrandt has developed constructive responses to this condition through the concept of "legal protection by design", proposals that nonetheless presuppose access to the design process that this paper argues is structurally foreclosed.

[34] Hildebrandt Mireille, "Law as Information in the Era of Data-Driven Agency," 8.

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with words.[35] It produces legal effects by defining the conditions under which those effects arise. Legal reality is therefore not discovered, but constituted.[36] This is precisely why legal norms remain open-textured, indeterminate, and subject to interpretation, not as a defect, but as a condition of their normative force.

From this perspective, it becomes clear that legal power operates *ex post* not because it is slow, but because such temporality is necessary for preserving the structure of normative responsibility. The liberal order presupposes a specific kind of subject, an individual who is simultaneously bound by a norm yet left with the possibility of violating it and bearing the consequences of that impermissible act. Optionality regulated in this way is not a deficiency of the liberal system but its foundation, and were we to remove it, we would lose with it the very concepts of freedom, responsibility, and political action. This is precisely what algorithmic systems lack. Whereas law derives its normative force from the possibility of breach, algorithmic systems operate by eliminating deviation. Their *modus operandi* does not consist in awaiting prohibited conduct in order to sanction it, but in precluding its occurrence altogether. As Karen Yeung has shown, design-based forms of regulation embed standards directly into technological systems, thereby enabling automatic enforcement without the need for human intervention, while allowing regulatory responses to be triggered immediately once predefined conditions are met.[37] At the same time, such systems may operate dynamically, with both the applicable standards and their execution continuously updated within data-driven environments.[38] Within such a system, the distinction between norm and sanction dissolves. Behaviour is no longer assessed after the fact. Instead, it is pre-structured through the architecture of available possibilities. In this sense, regulation by design does not operate through normativity, but through the reconfiguration of the conditions of action themselves.

A possible objection to this account of legal temporality is that it is historically and jurisprudentially incomplete. Law has never been a purely retrospective instrument. Criminal law provisions on conspiracy, regulatory licensing regimes, injunctions, and building codes, all demonstrate that preventive elements are not exceptions but something integral to law itself, a point developed by Lon Fuller in his account of the internal morality of law,[39] by Robert Alexy[40] in his treatment of rights as optimisation requirements addressed to institutions in advance of their application, and by the preventive justice scholarship of Andrew Ashworth and Lucia Zedner.[41]

The importance of these observations for this paper requires that they also be subjected to critical examination. Nevertheless, it must be emphasised that they do not dissolve the distinction advanced here, but rather sharpen it. The distinction this paper seeks to articulate

[35] *Ibid.*, 8.

[36] *Ibid.*, 9.

[37] Yeung Karen, "'Hypernudge': Big Data as a Mode of Regulation by Design," *Information, Communication & Society*, (2017): 5.

[38] *Ibid.*, 5.

[39] Fuller Lon L., *The Morality of Law* (New Haven: Yale University Press, 1964), 51-62 (on the requirement of prospectivity as an element of the inner morality of law).

[40] Alexy Robert, *A Theory of Constitutional Rights*, translated by Julian Rivers (Oxford: Oxford University Press, 2002), 47-48 (on rights as optimisation requirements addressed to legislative, executive, and judicial institutions in advance of their application).

[41] Ashworth Andrew and Lucia Zedner, *Preventive Justice* (Oxford: Oxford University Press, 2014), 3-10 (on the expansion of preventive legal measures and their tension with liberal legal principles).

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concerns fundamental differences in modes of *ex ante* operation, which cannot be reduced to the distinction between retrospective and prospective legal norms. The *ex ante* mechanisms mentioned above, ranging from building codes and conspiracy statutes to administrative licenses, function by defining in advance the norms within which the conditions are specified under which future acts may be subsumed under legal consequences. Accordingly, it is evident that enduring possibilities of harm are presupposed. Conspiracy may occur regardless of its criminalisation, just as a building may collapse despite prior regulatory frameworks. The subject is left with the possibility of transgression, and it is precisely this capacity that serves as the basis from which the normative character of legal rules emerges, as well as the space for responsibility. Algorithmic governance, by contrast, operates in a fundamentally different manner, not only in degree but in kind. It does not establish a conditional framework for categorising and evaluating actions that occur. Its function lies in redesigning the space of possibilities itself, such that certain actions become structurally unavailable or even inconceivable, leaving the actor without the possibility of transgression. Building regulations do not prevent anyone from constructing a building, but through algorithmic filtering it is possible to ensure that such a building does not exist at all, or remains entirely invisible.

The transformation from legal to algorithmic regulation is not a semantic or terminological change but a comprehensive epistemological shift. Law comes alive through text, interpretation, and the very opportunity for every norm to be contested. The algorithmic approach is fundamentally different, requiring that rules be deconstructed in full detail so that a machine can execute them without interpretation. In that process of decomposition, precisely the quality that makes law law is lost. In Hildebrandt's words, by reducing legal norms to mathematical exactness and machine-readable data points, the ambiguity and contestability of law are stripped away, the very qualities that constitute its essence rather than its weakness. Code, therefore, does not supplement norms. It introduces an entirely new logic which, however efficient it may be, is not the same as the force of law. Whereas law performs normative effects through language and interpretation, code operates through direct execution.[42] This transformation is perhaps most succinctly captured in Lawrence Lessig's well-known thesis that 'code is law', the idea that software and hardware architectures of digital environments function as systems of constraint that regulate behaviour by structuring what is possible and what is not.[43] Unlike legal norms, which presuppose the possibility of breach, code constrains behaviour by making certain actions impossible or inaccessible. It regulates not through prohibition backed by sanction, but through the design of the environment itself. The subject, once situated under a norm and capable of assuming responsibility for its violation, is reconfigured as an actor operating solely within a pre-structured field of available possibilities. In this shift, the experiential domain in which responsibility, freedom, and political argumentation were constituted is effectively displaced. As Hildebrandt further argues, the reduction of legal reasoning to computational form threatens the very requirement of contestability that underpins the Rule of Law.[44]

The practical implications of the distinction are most clearly visible in the case of the COMPAS system (Correctional Offender Management Profiling for Alternative Sanctions).

[42] Hildebrandt Mireille, "Law as Information in the Era of Data-Driven Agency," 27-28, 30.

[43] Lessig Lawrence, *Code and Other Laws of Cyberspace* (New York: Basic Books, 1999), 6, 89.

[44] Yong Ed, "A Popular Algorithm Is No Better at Predicting Crimes Than Random People," in *The Atlantic* (January 17, 2018).

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COMPAS occupies a theoretically significant position in this analysis. It does not intervene after a judicial decision has been made, but before it, structuring the informational environment within which the judge deliberates, pre-formatting the parameters of risk that the decision-maker will encounter. It is an architecture that constitutes the conditions of judicial judgment before judgment begins.

The system operates by estimating the likelihood of recidivism for individual defendants through the categorisation of variables embedded in questionnaires and statistical models, the results of which are presented to judges as actuarial assessments. Although its technical neutrality is ostensibly affirmed by the absence of race as an explicit variable, an investigation conducted in 2016 by ProPublica revealed systemic discrimination against African American defendants as compared to white defendants with comparable criminal histories. This bias is not an anomaly, but rather the product of longstanding patterns of policing and prosecution embedded in the data upon which the system relies. More fundamentally, however, the issue is not limited to bias in a narrow statistical sense. What subsequent analyses have revealed, and what is deeply troubling, is COMPAS's tendency to systematically produce a specific type of error. Defendants are more likely to be wrongly flagged as high-risk than high-risk individuals are to be wrongly released.[45] And what matters is that this is not a technical oversight but a normative choice built into the architecture of the system in advance. In other words, someone decided that one type of error is more acceptable than another, and that decision became part of the code, beyond contestation. Judicial decisions, by contrast, are open to scrutiny. A judge must provide reasons, and the opposing party has the right to challenge them. Algorithmic decisions are often accessible to no one.[46] Normative assumptions remain concealed within the design, while responsibility disperses across systems, data, and institutions, with no clear point at which anyone is specifically accountable. Traditional adjudication is structured around the judge's direct responsibility for their decision, whereas algorithmic systems evade precisely that form of control.[47] The mechanisms that sustain democratic legitimacy – reasoned decisions, publicity, personal accountability – are removed from the algorithmic framework entirely.

A similar dynamic, though operating within an entirely different institutional arrangement, can be identified in the automation of welfare systems in the United States as analysed by Virginia Eubanks.[48] Eubanks shows how digital infrastructure, used in areas such as child protection, Medicaid eligibility determination, and housing allocation, functions not merely as an administrative tool but also as a system of pre-emptive classification. Individuals are assigned risk scores and eligibility decisions before any official is in a position to assess their situation. In other words, the architecture of the system constitutes the decision before the decision-maker even enters the scene. It is precisely here that we recognise the *ex ante* logic in its clearest form. The normative choice – who receives support, who is designated as high-risk, whose claim is deprioritised – is inscribed at the level of design, before legal intervention can even evaluate it. The subjects are not found to have committed a transgression. Rather, they are directed by the system without the possibility of contesting such decisions.

Taken together, COMPAS and welfare automation systems illustrate two directions of

[45] Engel Christopher, Lorenz Linhardt and Marcel Schubert, "Code Is Law: How COMPAS Affects the Way the Judiciary Handles the Risk of Recidivism," *Artificial Intelligence and Law*, 33 (2025): 386, 394.

[46] *Ibid.*, 386, 394.

[47] *Ibid.*, 394.

[48] Eubanks Virginia, *Automating Inequality*, 12-13.

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the same structural clarification. COMPAS introduces *ex ante* logic into the space of formal adjudication, a domain defined by procedural safeguards, including the right to appeal as an indispensable condition. Welfare automation introduces the same logic into the administrative domain of law, where procedural protections are significantly weaker and subjects are less capable of challenging them. In both cases, normative choices are made at the level of design.

The ontological distinction between law and algorithm does not, therefore, lead to the conclusion that law must become faster. It reveals a form of power that does not share the linear temporality of law, nor its epistemological and normative premises. As Janssen and Kuk observe, political decision-making does not disappear, but becomes embedded in the design, modelling, and optimisation of algorithmic systems.[49] Questions once subject to political deliberation are increasingly translated into technical parameters, narrowing the space for contestation. Legal intervention thus occurs only once patterns of visibility have been stabilised, hierarchies entrenched, and the boundaries of the permissible embedded within the architecture of the system. Algorithmic power does not simply regulate differently from law. It removes the very conditions that make contestation possible, the visibility of decision-making, the attribution of responsibility, the openness to challenge, all of which are preconditions for political resistance. Law arrives too late not because it is slow, but because, by the time it intervenes, the architecture of power has already been established.

5. *The Apple Was Never Forbidden*

If one were to characterise the approach of the contemporary liberal order towards algorithmic power, it could most succinctly be described as reductive, grounded in an attempt to subsume emergent phenomena of digital technologies within an existing normative framework. Algorithmic systems are treated as new domains of public interest to be regulated through established categories such as transparency, accountability, and prohibition. This approach shifts regulatory intervention towards the phase of operationalisation, neglecting the far more significant challenges that arise at the stage of design where risks of bias and harm are generated, and where, even when harms materialise, they are interpreted as technical malfunction rather than as deficiencies in the scope of regulation itself. The European Union has responded through two principal instruments: the General Data Protection Regulation and the Artificial Intelligence Act. Rather than interrogating whether the automation of decision-making in certain domains is itself necessary or desirable, both instruments focus on how already established forms of automation may be rendered more manageable and transparent.

A key provision of the GDPR in this respect is Article 22, which stipulates that "the data subject shall have the right not to be subjected to a decision based solely on automated processing […] which produces legal effect".[50] In situations where such processing does occur, "the data controller shall implement suitable measures to safeguard the data subjects' rights

[49] Barocas Solon and Selbst Andrew D., "Big Data's Disparate Impact," *California Law Review*, 104 (2016): 670.

[50] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), [2016] OJ L 119/1, Art. 22(1).

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and freedoms", including, at a minimum, "the right to obtain human intervention",[51] and as further specified in Recital 71, "the right to obtain […] an explanation of the decision reached after such assessment and to challenge the decision".[52] Although at first glance this appears to offer solid protection to the individual, a crucial detail must be recognised that the right to an explanation is not the same as the right to understanding. Machine learning systems in practice typically produce *post hoc* justifications that explain neither how the decision was reached nor the reasoning logic of the system itself. And ultimately, the burden of initiating all of this falls on the individual. Someone wishing to contest a decision must know these rights exist, understand how to use them, and have the resources to do so. A framework that ostensibly protects everyone in practice extends that protection to those with sufficient knowledge, money, and institutional capacity to navigate so complex a situation. This is, in most cases, not the position of the ordinary citizen.

Although the GDPR may appear avant-garde in its normative reference to a 'right to explanation', this reference is confined to Recital 71, which, as such, does not possess binding legal force. A similar regulatory effort to articulate a 'right to explanation' has been undertaken within the AIA,[53] reflecting its recognised importance in the functioning of contemporary digital systems. However, as Nišević, Cuypers, and De Bruyne observe, this provision suffers from three significant shortcomings. (i) "the right to explanation is very limited in scope"; (ii) it "places the burden solely on deployers of high-risk AI systems"; and (iii) it employs "a vague standard" which "opens the door to arbitrariness […] precisely the outcome the right to explanation is intended to prevent".[54] In their words, "the AI Act is almost as much of a black box as the system it regulates".[55]

From a structural perspective, the AIA is organised around a system of risk categorisation and classification, regulating artificial intelligence according to its potential to cause harm.[56] More specifically, the degree of regulatory scrutiny intensifies as risk escalates, from minimal to unacceptable, such that systems deemed to pose the highest risk are subjected to the most stringent of transparency, human oversight, and technical robustness. This logic is not without merit.

Annex III of the AIA[57] designates as high-risk those AI systems used in the administration of criminal justice, including tools for risk assessment, recidivism prediction, and the

[51] GDPR, Art. 22(3).

[52] GDPR, Recital 71.

[53] Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence and amending Regulations (EC) No 715/2007, (EC) No 1107/2009, (EU) No 1151/2012, (EU) No 1227/2011, (EU) No 2013/34, (EU) 2019/1020, (EU) 2023/1114, (EU) 2023/988, (EU) 2024/1689 and Directives 2002/58/EC, 2005/29/EC, 2011/83/EU, 2013/36/EU, 2014/40/EU, 2014/45/EU, 2014/53/EU, 2014/65/EU, 2014/68/EU, 2014/90/EU, 2016/797/EU, 2016/1628/EU, (EU) 2018/858, (EU) 2018/1139, (EU) 2019/2144, (EU) 2020/1828 and (EU) 2023/1230 (Artificial Intelligence Act), [2024] OJ L 2024/1689, Art. 86.

[54] Nisevic Maja, Cuypers Arno and De Bruyne Jan, "Explainable AI: Can the AI Act and the GDPR go out for a date?," in *2024 International Joint Conference on Neural Networks (IJCNN)* (Yokohama: Institute of Electrical and Electronics Engineers, 2024).

[55] Nisevic Maja, Cuypers Arno and De Bruyne Jan, "Explainable AI," section II.D.

[56] Novelli Claudio *et al.*, "AI Risk Assessment: A Scenario-Based, Proportional Methodology for the AI Act," *Digital Society*, 3 (2024): 3-7.

[57] AI Act, Annex III.

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evaluation of defendants – a category that explicitly encompasses systems such as COMPAS, which we analysed in the previous chapter. This is not incidental, as it clearly indicates the European legislator's developed awareness of the normative implications involved. At the same time, however, it reveals what this regulatory framework does not require. There is a clear requirement that such high-risk systems be registered, tested, documented, and subjected to human oversight at the moment of their deployment. What is not required, however, is the justification of the normative choices that emerge at the design stage and are embedded within these systems: from the parameters of risk, to the weighting of variables, to the balance struck between liberty and security. Put more plainly, the AIA shapes the system at the moment of its deployment, yet remains beyond the reach of the architecture of power that is established at the design stage.

Article 5 of the AIA[58] addresses the regulation of prohibited practices, among which are AI-based social scoring by public authorities, real-time remote biometric identification in publicly accessible spaces, and systems that exploit psychological vulnerabilities to manipulate behaviour. These prohibitions apply regardless of the technical design or operational context. In this respect, the AIA does, to a certain extent, engage with the question of whether certain algorithmic systems ought to exist at all, and this is not an insignificant step forward. It demonstrates that liberal law retains a capacity, at least in part, to prohibit forms of algorithmic power, rather than merely subjecting them to procedural regulation. Similarly, the provisions of the GDPR on 'data protection by design' under Article 25,[59] as well as the requirement to conduct Data Protection Impact Assessment under Article 35,[60] introduce a degree of anticipatory oversight into the implementation process. Yet these mechanisms operate at the level of operationalisation – regulating how such systems are prepared for deployment, rather than addressing whether the normative choices embedded at the design stage are themselves subject to democratic contestation.

Furthermore, the compliance requirements imposed by both the GDPR and AIA entail substantial financial costs, are technically demanding, and often difficult to implement. This dynamic is particularly pronounced among smaller or resource-constrained actors, who may be "forced to divert […] scarce resources from implementation […] to meet increased government requests for more and better data".[61] As Frank Pasquale has shown, regulatory complexity in digital markets systematically advantages incumbents, where compliance demands are technically sophisticated and financially burdensome, the actors best positioned to meet them are precisely those whose dominance the regulation ostensibly seeks to constrain.[62] From this a paradox is born, because regulatory compliance itself becomes a barrier, not for those with the resources to meet its demands, but for everyone who might otherwise call the system into question. A framework conceived with the aim of democratising algorithmic governance in practice consolidates the position of those who already dominate it. This is not an argument against regulation, but against one specific structural outcome that regulation currently produces. Where

[58] AI Act, Art. 5.

[59] GDPR, Art. 25.

[60] GDPR, Art. 35.

[61] Howlett Michael, "Policy Analytical Capacity and Evidence-Based Policy-Making: Lessons from Canada," *Canadian Public Administration*, 52, 2 (2009): 155.

[62] Pasquale Frank, *The Black Box Society: The Secret Algorithms That Control Money and Information* (Cambridge, MA: Harvard University Press, 2015), 217.

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compliance complexity systematically advantages those actors with the resources to navigate it, the regulatory framework risks consolidating rather than dispersing algorithmic power.

The democratic deficit does not arise from individual instances of misuse, but from the systematic displacement of the question of their necessity from the sphere of collective decision-making. A structural feature shared by both the GDPR and the AIA lies in the fact that regulatory intervention is applied after the system has been constructed and its underlying values inscribed. As Veale and Bras have observed, "if transparency *were* meaningfully introduced into the broader processes surrounding algorithmic conception and implementation, this would shine considerably more light on policy development than implementation processes generally get".[63] The right to explanation, as currently conceived, does not bear on the prior question of whether algorithmic systems ought to be introduced at all. Instead of establishing legal oversight over the constitutive act of system design, what has been produced is a form of retrospective oversight, leaving the subject only with the possibility of requesting an explanation of how power has already been exercised.

The AIA prohibits certain apples, but does not interrogate the orchard. What the foregoing analysis demonstrates is that this is not a contingent limitation, a gap that could be closed by more precise drafting or more ambitious enforcement. Both the GDPR and the AIA intervene at the moment of operationalisation, after the system has been built and its architecture put into operation. The question of whether the apple should ever have been programmed at all, whether automating criminal risk assessment or welfare eligibility determination was ever a decision that warranted democratic deliberation, remains, within the existing framework, beyond the reach of scrutiny. The 'forbidden' fruit was never truly forbidden. What liberal law has done is foreclose our access to the very deliberation about whether such a system should have been allowed to bear fruit in the first place.

6. *The Deadlock by Design*

It is nearly impossible to find an allegory that so naturally and completely captures the logic of digital systems as 'The Truman Show'. And this is not a matter of cultural illustration but of an important structural message. Truman Burbank lives in a world without overt coercion, because Seahaven was not built on prohibitions and laws but on a design so carefully executed that it leaves no room for conflicts capable of growing into any form of political articulation. Although there are no explicitly predefined rules governing Truman's behaviour, his life is profoundly impoverished by an absence of choice. Power did not speak through commands but through the environment, through available possibilities, through everything embedded before Truman ever stepped into his world. The perfection of that power lies in having eliminated critique so imperceptibly, rendering it unnecessary because the system appeared perfect. The legal order presupposes the possibility of disobedience, one that has so many times produced its very progress. It is precisely in that moment between the awareness of a prohibited act, its transgression, and the sanction that political freedom emerges. No such moment existed in Truman's world. His resistance arose only in the act of exposing the

[63] Veale Michael and Irina Brass, "Administration by Algorithm? Public Management Meets Public Sector Machine Learning," in *Algorithmic Regulation*, edited by Karen Yeung and Martin Lodge (Oxford: Oxford University Press, 2019), 137.

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system's imperfection, when the light fell from the ceiling and everything that had until then been hidden became visible. Only then is political consciousness born in Truman, the realisation that his freedom had been pre-coded.

The diagnosis of this paper does not end at this point. In fact, it begins here. The intuitive response to this challenge would be to regulate the design phase. If democratic values are to be embedded in the system itself, then democratic processes must oversee that. Yet that answer carries within it the seed of its own problem, because in doing so it reproduces the very logic it attempts to bring to an end. A state that assumes the role of both creator and regulator of algorithmic governance would not escape the *ex ante* logic. Rather, it would internalise it. It would become a new sovereign within the same framework of normative pre-structuring, one that determines in advance what may and may not be done. The absence of the forbidden fruit would thus not result from its prohibition, but merely from a shift in the identity of the regulatory sovereign. *Quis custodiet ipsos custodes*?[64] If a corporation designing an algorithm may be deemed unaccountable because the design phase falls outside the scope of legal regulation, then the state itself would be equally exposed to the same charge. As Ian Shapiro argues, "rules of governance should be deemed unacceptable if they render revision of the status quo impossible".[65] Yet a regulatory framework that operates at the level of design risks foreclosing precisely such mechanisms at the moment of its inception.

A second tension assumes a distinctly geopolitical character. Algorithmic power operates within a transnational framework. Digital platforms do not perceive borders in the same way law does. Since data is clearly processed across multiple jurisdictions, such dispersal becomes a strategic advantage. It becomes exceptionally difficult to regulate a phenomenon that does not operate quietly within a single jurisdiction. Regulatory power, meanwhile, remains largely a matter of one jurisdiction. From that asymmetry arises a problem that hardly any national legislation can adequately address. That asymmetry became far more visible after the Schrems II judgment.[66] By its decision, the Court invalidated the EU-US Privacy Shield on the grounds that the American legal system did not provide uniform data protection equivalent to that guaranteed within the EU. Although the significance of the ruling is beyond dispute, its structural implications are more important. They indicate that even when a regulatory framework imposes normative constraints on technological actors, it does not reach into the infrastructure upon which those algorithms are built. Law acts upon them only at the surface, without penetrating the architecture. This limitation is further reflected in the broader structural ambiguities identified in the aftermath of the judgment, which, as has been observed, "generates as many ambiguities as the case resolves".[67] Rather than stabilising the relationship between law and technological power, the decision contributes to the fragmentation of regulatory authority, giving rise to what has been described as "a parallel system of ad hoc, small scale adequacy decisions made by data controllers".[68] The territorial scope of democratic accountability terminates at the boundaries of the state. Algorithmic power, by contrast, recognises no such limits.

[64] Who guards the guardians?
[65] Shapiro Ian, *Democracy's Place* (Ithaca: Cornell University Press, 1996), 235.
[66] Case C-311/18, *Data Protection Commissioner v Facebook Ireland Ltd and Maximillian Schrems* [2020].
[67] Costello Róisín Áine, "Schrems II: Everything Is Illuminated?," *European Papers*, 5, 2 (2020): 1052.
[68] *Ibid.*, 1053.

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The tradition of reflexive law developed by Gunther Teubner,[69] together with the proceduralist response advanced by Jürgen Habermas,[70] represent the most serious attempts within legal theory itself to resolve precisely this kind of meta-problem. Both frameworks were developed as responses to the recognition that law can become captured by the very social subsystems it seeks to regulate. Yet both encounter the same structural barrier. Habermas's discourse theory reconstructs legitimacy on the basis of communicative procedures. A decision is legitimate if it emerges from inclusive, rational deliberation among those affected. Yet deliberation presupposes certain conditions: the outcome must not be predetermined, the space of possibilities must remain genuinely open, and the power to set the agenda must not rest with those who already have a clearly vested interest in a particular result. It is beyond dispute that algorithmic systems fail to meet these conditions, and not at the moment of operationalisation, but at the stage of design itself. Habermas arrives too late for the same reason liberal law does. Teubner's reflexive law encounters a related difficulty. It presupposes that social subsystems retain a capacity for self-correction, that the system can recognise its failures and adjust. As this paper has argued, algorithmic systems disable precisely this capacity through the three layers of immunity identified in Chapter Two. A system structurally beyond critique cannot engage in the reflexive self-regulation that Teubner's framework requires. Both responses, however sophisticated, presuppose a systemic openness that algorithmic architecture is designed to foreclose.

This is not a technological paradox that could be resolved through further technological refinement, but a philosophical deadlock that cannot be overcome within the existing normative parameters of liberal law. The tragic irony of "The Truman Show" lies in the possibility that Truman's emancipation from Seahaven may itself have been an artefact of design, engineered to produce the spectacle of liberation. In other words, moments of recognition can be absorbed as necessary elements within the continuity of the system itself. We are therefore confronted not merely with the question of how to regulate algorithms, but with the more fundamental problem of how to design them in such a way that we might recognise that we are, in fact, living within a constructed environment. In a digital world in which no visible rupture presents itself, the category of freedom is progressively marginalised, not through its formal abolition, but through the gradual constriction of the space within which it may be exercised.[71]

7. *Conclusion*

This paper set out to examine whether liberal law is capable of recognising, defining, and regulating a form of power that operates prior to the act, the harm, and the possibility of

[69] Teubner Gunther, "Substantive and Reflexive Elements in Modern Law," *Law & Society Review*, 17, no. 2 (1983): 239-85. For a more detailed elaboration of the framework of reflexive law, see: Teubner Gunther, *Law as an Autopoietic System* (Oxford: Blackwell, 1993), 65-80.

[70] Habermas Jürgen, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, trans. William Rehg (Cambridge: MIT Press, 1996), 427-46.

[71] It should be noted that situating this critique within the liberal legal framework it seeks to analyse gives rise to a performative tension: the paper employs the conceptual resources of the very tradition whose structural limitations it identifies. This tension is not concealed but clarified. The task undertaken here is one of conceptual diagnosis rather than political prescription, and a diagnostician does not need to be the author of the pathology in order to identify it.

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political contestation. The answer is structural. Liberal law is not merely slow, it is constitutively incapable of reaching the phase at which algorithmic power is produced. Any attempt to regulate it *ex ante* reproduces the very logic it seeks to constrain. Any attempt to contain it through territorial jurisdiction encounters a phenomenon that is constitutively transnational. And the most sophisticated responses available within legal theory, deliberative proceduralism and reflexive law, presuppose a systemic openness to correction that algorithmic architecture is designed to foreclose. This paper does not resolve the aporia it identifies. But identifying an aporia is not the same as accepting it as permanent. Three directions suggest themselves as most productive for future research.

First, there is a need to develop pre-legislative democratic mechanisms – institutional forms through which the normative choices embedded in algorithmic architectures could be subjected to public deliberation before the design phase is complete. This would require moving beyond regulatory review toward forms of constituent participation in shaping the conditions of technological possibility. The theoretical resources exist, whether in participatory design theory or in various models of democratic innovation. What is clearly lacking is their translation into legal reality. The second direction concerns the need to introduce a new form of responsibility, one not strictly tied to a subject, but attached to algorithms and architectures. The literature on algorithmic torts and design liability has yet to develop, even as the problem it must confront has advanced enormously. The third question is at once the deepest, and concerns which domains of social life ought to be subjected to algorithmic governance at all, and through what processes should that question be decided? The existing regulatory framework implicitly accepts automation as a given. A more adequate response would require rendering the prior question of whether automation is democratically justified legible within the legal and political order.

Any meaningful answer presupposes an acknowledgment of the inadequacy of the existing framework. The apple was never prohibited. It was removed at the stage of design, before the law could recognise its absence or articulate the need for its existence.

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HUMAN RIGHTS IN THE EVOLUTION OF EUROPEAN SECURITY: THE ROLE OF THE CSCE/OSCE

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Keywords: CSCE/OSCE; Human Rights; European Security; Helsinki Final Act; Cold War

Summary: 1. Introduction: the Human Dimension in the Helsinki Final Act. – 2. Principle VII and the Third Basket. – 3. Early Civil Society reactions: Helsinki Watch, Charta 77, and transnational mobilisation. – 4. Belgrade (1977–1978): first frictions in the Follow-Up process. – 5. Madrid (1980–1983): between Disarmament and Human Rights. – 6. Vienna (1986–1989): norm institutionalisation. – 7. The Turning Point: The Paris Charter and the Institutionalisation of Human Rights. – 8. ODIHR's Mandate and Operational Expansion. – 9. Expanding the Human Dimension: Mechanisms and Challenges. – 10. Conclusion.

1. *Introduction: the Human Dimension in the Helsinki Final Act*

The origins of the Conference on Security and Co-operation in Europe (CSCE) must be understood within the broader diplomatic context of détente that characterized East–West relations during the early 1970s. In this period of relative easing of Cold War tensions, both Western and Eastern states increasingly sought institutional mechanisms capable of stabilizing political relations and reducing the risk of confrontation through structured multilateral dialogue.[1] Within this evolving international environment, the CSCE emerged as a diplomatic framework intended to promote cooperation among states belonging to opposing geopolitical blocs, while also incorporating neutral and non-aligned countries.

The preparatory consultations held in Helsinki between November 1972 and June 1973 established the procedural architecture that would shape the entire CSCE process.[2] Rather than functioning as a conventional diplomatic conference, negotiations were organized into thematic areas – later known as "baskets" – designed to reconcile divergent priorities. While the Soviet Union sought recognition of the post-war territorial order and political stability in Europe, Western states aimed to expand the agenda to include economic cooperation and greater societal interaction.

Despite the cooperative rhetoric that accompanied the CSCE negotiations, the motivations of the participating states remained deeply divergent. The Soviet Union viewed the

[1] Dunay Pal, *The OSCE in Crisis* (Paris: European Union Institute for Security Studies, 2006), 19.

[2] Ghébali Victor-Yves, *La diplomatie de la détente: la CSCE, d'Helsinki à Vienne (1973-1989)* (Bruxelles: Bruylant, 1989), 1-4.

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conference primarily as an opportunity to consolidate the territorial status quo and legitimize its influence over Eastern Europe,[3] while also facilitating economic and technological exchanges with the West. Western governments, by contrast, were reluctant to recognize Soviet geopolitical gains without securing reciprocal concessions and therefore insisted on the inclusion of commitments to human rights and fundamental freedoms.[4]

These provisions were conceived not merely as normative declarations but also as instruments capable of exposing the internal contradictions of authoritarian regimes within the Eastern bloc.

The basket structure thus institutionalized a form of negotiated balance. The first basket addressed politico-military questions related to European security, the second focused on economic, scientific, and technological cooperation, while the third introduced issues relating to human contacts and humanitarian cooperation. A fourth set of provisions concerned the follow-up procedures intended to ensure the continuity of the process. The mandates associated with these themes were consolidated in the Final Recommendations,[5] which were formally adopted by the participating States' Ministers of Foreign Affairs during the Helsinki meeting held between 3 and 7 July 1973.[6]

This framework culminated in the Helsinki Final Act of 1975. As Aldo Moro affirmed, it was intended to be chiefly a "gateway to the future".[7] By linking territorial security, economic cooperation, and human contacts, the CSCE created a comprehensive negotiating structure that allowed each bloc to pursue its priorities within a shared diplomatic framework. Although the commitments remained politically rather than legally binding, the principle of consensus ensured their formal endorsement by all participating states.[8]

The Helsinki Final Act was structured around four thematic baskets:

Basket I, devoted to politico-military issues and including the Declaration of Principles governing relations among participating states;

Basket II, addressing economic, scientific, technological, and environmental cooperation;

Basket III, commonly referred to as the 'human dimension,' dealing with humanitarian issues such as freedom of information, family reunification, and broader human rights concerns;

Basket IV, establishing mechanisms for follow-up meetings and implementation procedures.[9]

At the time of its adoption, the Final Act was met with skepticism in both blocs. Western critics feared it legitimized Soviet dominance in Eastern Europe, while Eastern governments

[3] *Ibid.*, 62.

[4] *Ibid.*, 71-74.

[5] Organization for Security and Co-operation in Europe, "Final Recommendations of the Helsinki Consultations," First Meeting of CSCE Ministers of Foreign Affairs, in *Osce.org* (July 3, 1973).

[6] Ferraris Luigi Vittorio, "Italia e Santa Sede alla Conferenza di Helsinki (1972–1975): considerazioni su possibili parallelismi," in *Stato, Chiesa e relazioni internazionali*, edited by Massimo Mugnaini (Milan: Franco Angeli, 2003), 278.

[7] He made this statement during the CSCE Summit in Helsinki on 1 August 1975. Cascone Andrea, edited by, *A Gateway to the Future* (Naples: Editoriale Scientifica, 2025), 82.

[8] Ghébali Victor-Yves, *La diplomatie de la détente*, 5-6.

[9] See Organization for Security and Co-operation in Europe, "Helsinki Final Act," in *Cdn.osce.org* (1975); see also Baldi Stefano and Monzali Luciano, edited by, *Italia-Helsinki 50. Dall'atto finale di Helsinki del 1975 all'OSCE di oggi* (Naples: Editoriale Scientifica, 2024).

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regarded its human rights provisions as largely symbolic. Nevertheless, the agreement represented a carefully negotiated compromise: the Soviet Union gained recognition of existing borders, while Western states secured the inclusion of human rights language that would later become a powerful tool of political pressure and transnational advocacy.[10]

2. *Principle VII and the Third Basket*

One of the most contentious elements of the negotiations concerned Principle VII of the Declaration of Principles contained in Basket I: "Respect for human rights and fundamental freedoms, including the freedom of thought, conscience, religion or belief".[11] Eastern delegations, particularly that of the Soviet Union, strongly resisted such formulations, arguing that they risked legitimizing external interference in domestic affairs. Western and neutral states – especially the Nordic countries and Austria – advocated their inclusion as indispensable components of a cooperative security framework.

The adoption of Principle VII in the Helsinki Final Act of 1975 represented a significant innovation in the diplomatic relations between East and West. For the first time, an international document dealing with European security explicitly incorporated a commitment to the protection of human rights and fundamental freedoms as an integral component of interstate relations.[12] This commitment was articulated both within the Declaration of Principles contained in Basket I and in the more detailed humanitarian provisions included in Basket III, commonly referred to as the 'human dimension' of the CSCE.[13]

The final wording of Principle VII represented a carefully crafted compromise. It incorporated language acceptable to Western delegations while remaining sufficiently ambiguous to allow interpretative flexibility for Eastern regimes. Moreover, the commitments associated with the human dimension were formulated as politically binding but not legally enforceable, thereby preserving the principle of state sovereignty while establishing a shared normative vocabulary.

The formulation of this principle reflected a delicate diplomatic compromise. Western delegations sought to emphasize civil and political rights – such as freedom of expression, religion, and access to information – while Eastern states insisted on including references to non-discrimination and socioeconomic rights. The final text incorporated elements of both approaches, allowing each side to claim partial success.

While Principle VII provided the normative foundation, Basket III translated these commitments into more concrete areas of cooperation. Its provisions addressed cross-border contacts, including family reunification and cultural exchange, as well as the circulation of information and ideas.[14]

Although framed in technical and humanitarian terms, these measures carried significant

[10] Ghébali Victor-Yves, *La diplomatie de la détente,* 60-75.

[11] Organization for Security and Co-operation in Europe, "Helsinki Final Act," in *Cdn.osce.org* (1975).

[12] Ghébali Victor-Yves, *La diplomatie de la détente*, 74.

[13] *Ibid.*, 51; see also Manton Eric, "The OSCE Human Dimension and Customary International Law Formation," in *OSCE Yearbook 2005*, edited by IFSH (Baden-Baden: 2006), 195-214.

[14] Organization for Security and Co-operation in Europe, "Final Act of the 1st CSCE Summit of Heads of State or Government," in *Cdn.osce.org* (August 1, 1975), 35-55.

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political implications, as they implicitly challenged the restrictive policies of several Eastern bloc regimes.

In essence, the texts of the third basket were more a reflection of Western liberal philosophy than of the restrictive and 'protectionist' approach of the USSR. This is partly because the Eastern countries sought refuge behind inaction, without making constructive or detailed enough counterproposal. Although the Eastern countries managed to secure preambular provisions that comprehensively covered the third basket and its four sections, the Western nations were able to neutralise the various texts.[15]

In this context, the Helsinki framework became an important instrument of political leverage. Institutions such as the U.S. Helsinki Commission, along with emerging non-governmental organizations, monitored compliance and disseminated information on violations. This process contributed to the development of a transnational network linking domestic dissidents, international advocacy groups, and supportive governments.

As Sarah Snyder has observed, the principles enshrined in the Helsinki Final Act soon became the foundation of a transnational human rights movement that linked dissidents in Eastern Europe with NGOs, journalists, and policymakers in the West.[16]

Despite the absence of enforcement mechanisms, the Helsinki commitments exerted significant political influence. Their repeated invocation in diplomatic and public discourse generated increasing pressure on states to align their practices with the principles they had formally endorsed. This dynamic – where non-binding norms produced tangible political effects – became one of the defining features of the CSCE process.

3. *Early Civil Society reactions: Helsinki Watch, Charta 77, and transnational mobilisation*

Although the Helsinki Final Act lacked formal enforcement mechanisms, it rapidly acquired significance beyond the diplomatic sphere, particularly within civil society. The provisions contained in Principle VII and Basket III provided dissidents, journalists, religious groups, and emerging non-governmental organizations with a new normative language through which they could challenge authoritarian regimes.

The human dimension, initially conceived as a conciliatory element within East-West diplomacy, thus became an unexpected catalyst for political mobilization.

Nevertheless, civil society actors rapidly recognized the potential significance of the document. Dissident movements and newly emerging monitoring groups began to invoke the language of the Final Act to hold their governments accountable for violations of human rights commitments. Helsinki Monitoring Groups such as Helsinki Watch,[17] together with dissident initiatives like Charta 77, launched in January 1977 by Václav Havel, Jan Patočka, and Jiří Hájek in Czechoslovakia[18] and the Moscow Helsinki Group, explicitly relied on the Helsinki provisions to challenge the legitimacy of authoritarian regimes.

[15] Ghébali Victor-Yves, *La diplomatie de la détente*, 242.

[16] Snyder Sarah B., "Bringing the Transnational In: Writing Human Rights into the International History of the Cold War," *Diplomacy & Statecraft* 24, 1 (2013): 104-109.

[17] Human Rights Watch, "History of the Human Rights Watch", in *Hrw.org*.

[18] Mori Valerio, *Movimento e opposizione. Charta 77 e l'interpretazione fenomenologica dei diritti umani* (Rome: Nuova Cultura, 2022), 1-209.

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The first and most influential of these initiatives was the Moscow Helsinki Group,[19] founded in May 1976 by Soviet dissidents including Yuri Orlov, Lyudmila Alexeyeva, and Anatoly Shcharansky. These activists interpreted the Final Act not as a purely diplomatic declaration but as a normative contract that citizens could legitimately invoke against their own governments.

The group systematically collected evidence of human rights violations and transmitted its reports to Western governments, journalists, and international organizations. In doing so, it helped transform the Helsinki commitments into instruments of political accountability.

4. *Belgrade (1977–1978): first frictions in the Follow-Up process*

Although the Helsinki Final Act required its public dissemination, this obligation was often resisted in practice by Eastern governments, prompting the emergence of 'Helsinki groups' whose impact became progressively more significant and ultimately transformative during the 1980s. Despite these limitations, the underlying logic of the CSCE framework contributed to advancing fundamental individual freedoms.[20]

The Belgrade Follow-Up Meeting, held between October 1977 and March 1978, represented the first formal review conference of the Helsinki Final Act. Convened in accordance with the provisions contained in Basket IV, the meeting was intended to assess the degree of implementation of the commitments adopted in Helsinki and to evaluate the broader development of East–West cooperation within the CSCE framework. As such, it constituted a crucial test of whether the CSCE would evolve into a genuine process of political monitoring or remain primarily a symbolic diplomatic forum.[21]

From the outset, the meeting revealed deep ideological divisions, particularly regarding the interpretation of human rights provisions.[22] Western delegations sought to transform the Helsinki commitments into instruments of political scrutiny, presenting documented cases of human rights violations in the Eastern bloc, including restrictions on freedom of expression, religious persecution, and the repression of dissidents.

Eastern delegations, led by the Soviet Union, firmly rejected this approach. They argued that such issues fell within domestic jurisdiction and that external scrutiny violated the principle of non-intervention. Instead, they attempted to redirect discussions toward economic cooperation[23] and other less contentious areas.

The broader context of the meeting was shaped by the growing visibility of dissident movements in Eastern Europe. In particular, the emergence of Charta 77 in Czechoslovakia and the repression of its members became central points of contention. Western delegations cited these developments as evidence of non-compliance with Helsinki commitments, while Eastern governments dismissed them as internal political matters.

Although the conference failed to produce a substantive final document, it marked a sig-

[19] United Nations, "Closure of Moscow Helsinki Group, 'yet another blow to human rights' in Russia: OHCHR," in *News.un.org* (January 26, 2023).

[20] Ferraris Luigi Vittorio, "Italia e Santa Sede alla Conferenza di Helsinki (1972-1975)," 279.

[21] Ghébali Victor-Yves, *La diplomatie de la détente,* 18.

[22] Fascell Dante, "The CSCE Follow-up Mechanism from Belgrade to Madrid," *Vanderbilt Law Review*, 13 (1980): 345.

[23] Ghébali Victor-Yves, *La diplomatie de la détente*, 18.

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nificant turning point in the CSCE process. For the first time, the implementation of human rights commitments became the subject of open diplomatic confrontation. At the same time, the meeting established an important precedent: participating states could be publicly challenged regarding their domestic practices within a multilateral framework.

Despite its limited concrete outcomes,[24] as identifiable in the Concluding Document,[25] the conference played a crucial role in transforming the CSCE into a forum of normative contestation, where human rights increasingly became a central element of European security diplomacy.

5. *Madrid (1980-1983): between Disarmament and Human Rights*

The second CSCE follow-up meeting, held in Madrid between 1980 and 1983, took place in a markedly different geopolitical context. The détente of the early 1970s had largely collapsed, giving way to renewed tensions following events such as the Soviet invasion of Afghanistan in 1979[26] and the imposition of martial law in Poland in 1981. These developments significantly shaped the diplomatic atmosphere of the conference. Despite these tensions, the Madrid meeting ultimately reaffirmed the relevance of the CSCE framework and, paradoxically, contributed to consolidating the human dimension as a central component of European security. In this context, the CSCE played a crucial role not only in managing East–West relations but also within the Western alliance itself. As Selvage argues, "the CSCE […] served […] to preserve dialogue between the US and its NATO allies at a time when the Reagan Administration's hard-line policies threatened to divide the alliance".[27]

Western delegations arrived in Madrid determined to defend and reinforce the human rights commitments established in Helsinki.[28] The United States, in particular, adopted a more assertive stance, openly criticizing repression within the Eastern bloc and linking respect for human rights to broader questions of international security. Several Western European states adopted a more cautious tone but nevertheless supported this approach, raising concerns about political repression, restrictions on religious freedom, and the suppression of civil society.

Eastern delegations responded with defensive arguments and counter-criticism, accusing Western governments of instrumentalizing human rights discourse for ideological purposes. At the same time, they sought to shift the focus of negotiations toward issues of military détente and economic cooperation.[29] Despite these efforts, the human dimension remained central to the discussions, and the conference became a forum in which Cold War rivalries were increasingly expressed through debates over the interpretation of Helsinki commitments. After prolonged and often stalled negotiations, the Madrid meeting concluded in September 1983 with

[24] Fascell Dante, "The CSCE Follow-up Mechanism from Belgrade to Madrid," 347.

[25] Organization for Security and Co-operation in Europe, "Concluding Document of the First Follow-up Meeting, Belgrade, October 4, 1977 to March 9, 1978" (Belgrade, 1978).

[26] Fascell Dante, "The CSCE Follow-up Mechanism from Belgrade to Madrid," 356.

[27] Salvage Douglas, "The politics of the lesser evil: the West, the Polish crisis, and the CSCE review conference in Madrid, 1981–1983," in *The Crisis of Détente in Europe. From Helsinki to Gorbachev 1975–1985*, edited by Leopoldo Nuti (London: Routledge, 2008), 52.

[28] Ghébali Victor-Yves, *La diplomatie de la détente*, 90.

[29] *Ibid.*, 20.

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the adoption of a Final Document[30] that reaffirmed the principles of the Helsinki Final Act. Although limited in scope, the document carried important implications for the future development of the CSCE. In particular, it introduced the idea of strengthening implementation procedures and laid the groundwork for the mechanisms that would later be developed at the Vienna follow-up meeting. It also ensured the institutional continuity of the CSCE process by mandating further negotiations. The Madrid meeting further highlighted the growing influence of civil society. While non-governmental organisations did not formally participate, Western delegations increasingly relied on reports produced by groups such as Helsinki Watch and Amnesty International.[31] These organizations contributed to shaping the international narrative surrounding the conference and reinforced the link between diplomatic negotiations and transnational human rights advocacy. Despite the tense political context, the Madrid conference confirmed the continued relevance of the CSCE as a framework for dialogue and contributed to consolidating the human dimension as a central component of European security.

6. *Vienna (1986-1989): norm institutionalisation*

The Vienna Follow-Up Meeting (1986–1989) marked a decisive turning point in the evolution of the CSCE process. Convened in a rapidly changing international context shaped by Mikhail Gorbachev's reforms and the gradual loosening of ideological constraints within the Soviet bloc, the meeting created new opportunities for advancing the institutionalization of the human dimension. Unlike the earlier conferences in Belgrade and Madrid – largely characterized by confrontation and limited outcomes – the Vienna negotiations produced a substantive concluding document that significantly strengthened the CSCE's normative and procedural framework.[32]

By the mid-1980s, the geopolitical environment surrounding the CSCE had begun to shift. Policies such as *glasnost* and *perestroika* encouraged a more flexible Soviet approach and facilitated a less confrontational negotiating climate. While Eastern delegations continued to emphasize the principle of non-intervention, they demonstrated greater openness to discussions on transparency, implementation procedures, and confidence-building measures. Western states, in turn, sought to capitalize on this opening to deepen the commitments established in Helsinki and reaffirmed in Madrid.

The Vienna Concluding Document,[33] adopted in January 1989, represented the most significant outcome of the meeting.[34] It introduced important innovations that transformed

[30] Organization for Security and Co-operation in Europe, "Concluding Document of the Madrid Meeting," in *Cdn.osce.org* (1983).

[31] Commission on Security and Cooperation in Europe, *Implementation of the Final Act of the Conference on Security and Cooperation in Europe: Findings and Recommendations Five Years After Helsinki* (Washington: U.S. Government Printing Office, 1980), 123. To better understand the relationship between the CSCE and other NGOs, see Tudyka Kurt, "Non-governmental organizations and the OSCE," in *OSCE Yearbook 2001*, edited by IFSH (Baden-Baden: 2002), 471-74.

[32] Snyder Sarah, "The foundation for Vienna," *Cold War History*, 10 (2010): 493.

[33] Organization for Security and Co-operation in Europe, "Concluding document of the Vienna meeting," in *Cdn.osce.org* (Vienna, 1986).

[34] For a deep analysis of the Vienna Concluding Document, see Gehler Michael, "The Concluding Document of the Vienna CSCE Follow-up Meeting, 15 January 1989: An Analysis of Its Drafting and an Interpre-

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the human dimension from a largely declaratory framework into a more structured system of political engagement.[35] Among the most notable developments was the creation of procedures allowing participating states to raise concerns about the human rights practices of others and to request official clarification – later known as the Vienna Mechanism.[36] This represented the first formalized instrument through which states could question each other regarding the implementation of human dimension commitments.

The document also expanded and clarified the catalogue of civil and political rights, including provisions on freedom of expression, religion, association, and peaceful assembly. At the same time, it reaffirmed the universal character of human rights, explicitly recognizing that respect for fundamental freedoms could not be treated as an exclusively domestic matter.

Another important development was the gradual opening of the CSCE process to civil society. Although non-governmental actors were not yet formally integrated, the Vienna meeting acknowledged their growing relevance and encouraged broader access to discussions on the human dimension. This reflected the increasing influence of transnational advocacy networks that had emerged since the mid-1970s.

The Vienna meeting thus marked a transition from the articulation of shared principles to the development of mechanisms capable of sustaining political dialogue and scrutiny. While the CSCE remained committed to consensus and avoided legally binding enforcement, the introduction of structured procedures created a form of peer review that increased political pressure on participating states.

Finally, the Vienna process laid the groundwork for subsequent institutional developments. In particular, it mandated the organization of a Conference on the Human Dimension, which would later contribute to the creation of institutions dedicated to monitoring democratic governance and human rights within the CSCE framework.

In this sense, Vienna can be understood as the moment in which the CSCE evolved from a forum of normative affirmation into a system of structured political engagement, paving the way for the institutional transformation that would follow in the early post–Cold War period.

7. *The Turning Point: The Paris Charter and the Institutionalisation of Human Rights*

The period between 1989 and 1992 represents a decisive turning point in the evolution of the CSCE process, as the collapse of communist regimes across Central and Eastern Europe and the progressive dissolution of the Soviet bloc fundamentally altered the political environment in which the organization operated. In this context, it was quite understandable that the CSCE emerged as the first international arena in which the ongoing transition could find a constructive, and potentially evolutionary, dimension, progressively moving beyond its original function as a diplomatic conference to assume a more structured role in managing the political transformation of post-communist Europe.[37]

tation in Comparison with Other Declarations," in *Freedom and Security: Europe and the World in the 21st Century*, edited by Michael Gehler, Maximilian Graf and Hannes Swoboda (Leiden: Brill, 2025), 56-69.

[35] Ghébali Victor-Yves, *La diplomatie de la détente*, 107.

[36] Organization for Security and Co-operation in Europe, "Vienna Mechanism," in *Odihr.osce.org* (December 1, 1989).

[37] Ghébali Victor-Yves, *The OSCE in Post-Communist Europe: towards a Pan-European Security Iden-*

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At the center of this transformation was the consolidation of the human dimension as a core pillar of European security. What had initially emerged in the Helsinki Final Act as a set of politically binding but non-enforceable commitments evolved into a more institutionalized framework aimed at promoting democratic governance, the rule of law, and the protection of fundamental rights.

The Charter of Paris for a New Europe,[38] adopted in November 1990, symbolized this shift. The document proclaimed the end of the era of confrontation and affirmed democracy as the only legitimate form of government among participating states. This represented a clear departure from the cautious language of the Helsinki Final Act and marked the emergence of a shared normative vision grounded in democratic principles.

The Charter also reinforced the idea that human rights were no longer a purely domestic matter, but a legitimate concern for all participating states. In doing so, it further consolidated the link between internal political structures and international security that had gradually developed throughout the Helsinki process.

Beyond its normative significance, the Paris Charter introduced important institutional innovations. It strengthened the organizational structure of the CSCE through the creation of a permanent Secretariat, the establishment of regular high-level meetings, and the development of mechanisms for monitoring the implementation of commitments. The CSCE thus began to evolve into a more permanent and operational institutional framework.

One of the most significant developments of this period was the establishment of the Office for Free Elections in Warsaw in 1991, later renamed in 1992 as the Office for Democratic Institutions and Human Rights (ODIHR).[39] This institution was tasked with supporting participating states in strengthening democratic institutions, monitoring electoral processes, and promoting compliance with human dimension commitments. Its activities soon expanded beyond election observation to include areas such as judicial reform, minority rights, freedom of religion, and the protection of civil society.[40]

Unlike earlier mechanisms, ODIHR introduced continuity, technical expertise, and practical implementation tools. Through election observation missions, country assessments, and technical assistance programs, it enabled the CSCE to move from general normative commitments toward more concrete forms of application.

The establishment of ODIHR also carried significant symbolic value. Its location in Warsaw – within a region undergoing profound political transformation – reflected the CSCE's commitment to supporting democratic change in post-communist Europe.

Although its mandate remained politically rather than legally binding, ODIHR quickly gained credibility.[41] Its reports and monitoring activities played an important role in shaping international assessments of democratic developments, reinforcing its position as a central actor in the institutionalization of the human dimension.

tity, 1990-1996 (Bruxelles: Bruylant, 1996), 351; see also Dunay Pal, "History and background of the CSCE/OSCE," 21; see also Cascone Andrea, *A Gateway to the Future*, 59-62.

[38] Organization for Security and Co-operation in Europe, "Charter of Paris for a New Europe," in *Cdn.osce.org* (Paris, 1990).

[39] Ghébali Victor-Yves, *The OSCE in Post-Communist Europe*, 357.

[40] Organization for Security and Co-operation in Europe, in *Odihr.osce.org*.

[41] Moreover, the transformation of the CSCE into the Organization for Security and Co-operation in Europe (OSCE) in 1995 further reinforced this institutional development, consolidating the organization's role as a regional actor in the promotion of democratic governance and human rights protection.

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8. *ODIHR's Mandate and Operational Expansion*

One of the most prominent activities developed by ODIHR during the 1990s was election observation, which rapidly became a defining feature of the OSCE's engagement with democratic transitions across the post-communist space. Free and fair elections were widely recognized as a fundamental element of democratic legitimacy, and international monitoring was seen as an essential instrument for ensuring transparency and public confidence in newly established political systems.

ODIHR organized and coordinated numerous election observation missions across Central and Eastern Europe, the Balkans, and the former Soviet republics. These missions typically involved the deployment of international observers tasked with assessing electoral procedures, monitoring campaign conditions, and evaluating the overall integrity of the voting process. In addition to direct observation, ODIHR also provided technical recommendations aimed at improving electoral legislation, administrative procedures, and institutional frameworks governing democratic participation.

Although the reports produced by these missions carried no formal legal authority, they quickly acquired significant political influence. Their findings often shaped international perceptions of electoral legitimacy and were frequently used by governments, international organizations, and civil society actors as reference points in evaluating democratic development.

9. *Expanding the Human Dimension: Mechanisms and Challenges*

As ODIHR consolidated its activities, its mandate gradually expanded beyond election monitoring to encompass a broader range of issues related to democratic governance and human rights protection. During the 1990s, the organization developed programs addressing topics such as judicial independence, rule of law reforms, minority rights, religious freedom, gender equality, and the protection of civil society organizations.

Particular attention was devoted to the promotion of tolerance and the prevention of discrimination, especially in societies experiencing ethnic tensions or political instability. Through seminars, training programs, and technical advisory missions, ODIHR sought to strengthen national institutions responsible for safeguarding human rights and to encourage the development of legal frameworks consistent with international standards.

This expansion of activities reflected a broader conceptual shift within the OSCE: human rights were increasingly understood not merely as individual protections but as essential components of stable and democratic political systems. Consequently, the human dimension came to encompass a wide range of institutional practices aimed at promoting democratic resilience and preventing political crises.

Parallel to the operational activities of ODIHR, the OSCE also refined and expanded the procedural mechanisms originally introduced during the Vienna and Moscow meetings. These instruments provided participating states with formal channels through which concerns regarding human rights violations could be raised within the diplomatic framework of the organization.

The Vienna Mechanism, established in 1989, allowed participating states to request information from one another concerning the implementation of human dimension commitments. Through written inquiries and diplomatic exchanges, states could initiate discussions regarding specific cases of alleged violations.

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The Moscow Mechanism, adopted in 1991,[42] represented an even more significant innovation. It allowed groups of participating states to appoint independent experts tasked with investigating serious human rights concerns within a member state. In certain circumstances, these investigations could proceed even without the consent of the state concerned – remarkable development in the context of traditional principles of sovereignty and non-intervention.

Although these mechanisms were used relatively sparingly, they represented a significant evolution in the institutional architecture of the OSCE. For the first time, a regional organization had created procedures through which states could collectively examine the human rights practices of their peers within a structured diplomatic framework.

Another important innovation during the 1990s was the establishment of regular Human Dimension Implementation Meetings[43] (HDIMs), held annually in Warsaw. These meetings soon became the largest human rights conferences in the European region, bringing together representatives of governments, international organizations, and non-governmental actors.

The HDIM format reflected one of the distinctive characteristics of the OSCE system: the inclusion of civil society actors within an intergovernmental diplomatic forum. Non-governmental organizations were granted the opportunity to present statements, raise concerns, and engage directly with government delegations. This participatory model distinguished the OSCE from many other international organizations and reinforced the transnational dimension that had characterized the Helsinki process since the 1970s.

Through these meetings, civil society organizations were able to bring attention to a wide range of issues, including freedom of the media, minority rights, electoral integrity, and the protection of human rights defenders. The open nature of the discussions created an environment in which governments could be publicly questioned regarding their compliance with OSCE commitments, thereby strengthening the culture of accountability that had gradually emerged within the organization.

Despite these significant developments, the human dimension of the OSCE also faced a number of structural challenges by the end of the 1990s. Political divisions among participating states increasingly complicated the process of reaching consensus on sensitive issues, particularly as some governments began to challenge the legitimacy of international monitoring activities.

Countries such as Russia, Belarus, and several Central Asian states expressed growing skepticism toward ODIHR's election assessments and human rights reports, arguing that they reflected a Western-centric interpretation of democratic standards. At the same time, the non-binding nature of OSCE commitments limited the organization's capacity to respond effectively to persistent or systemic violations.

Budgetary constraints and institutional limitations further restricted the expansion of ODIHR's operational capabilities. Nevertheless, the 1990s are often regarded as the 'golden decade' of the OSCE's human dimension. During this period, the organization played a central role in supporting democratic transitions, promoting electoral integrity, and strengthening the participation of civil society in international human rights diplomacy.

Through these activities, the OSCE consolidated its position as a unique hybrid institu-

[42] Organization for Security and Co-operation in Europe, "Moscow Mechanism," in *Odihr.osce.org* (1991).

[43] Organization for Security and Co-operation in Europe, "Human Dimension Implementation Meetings," in *Odihr.osce.org*.

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tion – combining elements of diplomatic dialogue, normative monitoring, and technical assistance – within the broader architecture of European security governance.

10. *Conclusion*

The evolution of the CSCE/OSCE demonstrates a significant transformation in the conceptualization of European security, in which human rights became progressively integrated into its normative and institutional framework. Rather than remaining a set of politically binding but weak commitments, the principles established in the Helsinki Final Act generated mechanisms of political scrutiny and transnational mobilization that reshaped patterns of state behaviour.

The follow-up process and the institutional developments of the early 1990s – particularly the Charter of Paris and the establishment of ODIHR – marked the transition from normative affirmation to partial institutionalization. This shift embedded human rights within a system combining diplomatic dialogue, monitoring practices, and technical assistance.

At the same time, the OSCE model reveals the structural limits of a framework based on consensus and non-binding commitments. Its effectiveness has depended less on formal enforcement than on processes of peer review, reputational pressure, and the involvement of transnational actors.

The CSCE/OSCE experience thus illustrates how international norms can acquire practical relevance even in the absence of legal coercion. By linking human rights to questions of political legitimacy and stability, it contributed to redefining the foundations of European security.

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SECRET SURVEILLANCE AND ARTICLE 8 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS: THE JURISPRUDENCE OF THE EUROPEAN COURT OF HUMAN RIGHTS

Selma Metiljević-Lončarić

Keywords: European Court of Human Rights; Article 8 ECHR; Secret Surveillance; Right to Privacy; Bulk Interception; Procedural Safeguards; National Security

1. *Introduction*

The rapid advancement of technology has undoubtedly acted as a catalyst for social and economic progress across the globe. However, it has also facilitated the generation and collection of vast amounts of personal data, which has increasingly been subject to state monitoring. Especially after events such as 9/11 and later similar attacks across Europe, governments have used this as justification to significantly expand their surveillance programs to prevent and combat the threats of terrorist and cyber-attacks. The 2013 Snowden revelations revealed the scale of these programs and offered a look into how surveillance has outgrown existing legal frameworks.[1] These revelations have increased already existing anxieties around the loss of privacy. As the online world becomes increasingly present in our lives, it is the task of the European Court of Human Rights (ECtHR) to update legal principles and keep up with the ever-increasing threat to privacy.

[1] Heiring Elena-Mathilde, "Mass Surveillance and the Right to Privacy: The Approach of the European Court of Human Rights on Surveillance and the Right to Privacy," *Retskraft - Copenhagen Journal of Legal Studies,* 6 (2022-23): 93-97.

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According to the ECtHR Guide on Article 8, the right to respect for private and family life, home, and correspondence is established under Article 8 of the European Convention on Human Rights (ECHR). The ECtHR has adopted a broad interpretation of these rights, recognizing that it is not restricted to the 'inner circle' of personal life, but expands also to social life, including the development of relationships with other people and even professional activities. Under Article 8 of the ECHR, the State has a negative obligation to abstain from arbitrary interference with these rights, unless such interference is justified under the conditions laid out in Article 8(2). These conditions require that state interventions must be in accordance with the law, pursue a legitimate aim (e.g. national security, prevention of crime), and be necessary in a democratic society.[2]

Secret surveillance is specific because it relies on the surveillance subject remaining unaware that it is happening. Therefore, this lack of notification can be interpreted as depriving individuals of their right to obtain an effective remedy, as they cannot challenge an interference with their rights if they are not aware of its existence. The ECtHR has accordingly concluded that the existence of legislation that permits secret surveillance can constitute an interference with rights protected by Article 8, for all those potentially affected.[3] In practice, this means that the ECtHR has deviated from its usual practice and allowed *in abstracto* challenges to surveillance laws, to ensure that these types of measures do not become effectively unchallengeable or outside of the reach of judicial supervision.

The key tension that is considered by the ECtHR is the balance between the national security interests of a country and the right to individual privacy of its citizens. The ECtHR acknowledges that states must be able to effectively counter threats to democratic institutions, however it also warns that such a surveillance system may "undermine or even destroy democracy, under the cloak of defending it". The ECtHR explains that, because the risk of abuse is high, state powers do not have a free hand and that surveillance must be supported by adequate and effective safeguards.

This paper addresses the following research question: How does the European Court of Human Rights case law impact the human right to privacy, and in what way does it provide an adequate legal basis for the protection of the right to privacy in the online world?

To answer this, the paper is organized as follows. Section 2 sets out the legal framework under Article 8 ECHR, with particular emphasis on the 'quality of law' requirement and the role of procedural safeguards. Sections 3–5 trace the evolution of ECtHR jurisprudence through three landmark judgments, namely *Klass v. Germany*, *Roman Zakharov v. Russia*, and *Big Brother Watch and Others v. the United Kingdom*, highlighting the Court's increasing focus on independent oversight and end-to-end safeguards in the context of bulk interception. Section 6 synthesizes the procedural safeguards developed in the case law, while Section 7 examines how the ECtHR evaluates national security justifications and the limits of executive discretion. Section 8 concludes by assessing the extent to which the ECtHR's approach provides an effective legal basis for protecting privacy in the digital age.

[2] European Court of Human Rights, *Guide on Article 8 of the European Convention on Human Rights: Right to Respect for Private and Family Life, Home and Correspondence* (Strasbourg: Council of Europe, 2025).

[3] *Ibid.*, 68.

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2. *Article 8 ECHR and Secret Surveillance: Legal Framework*

The legal framework of Article 8 consists of two paragraphs: the first defines the fundamental right to respect for private and family life, home, and correspondence, and the second prescribes the conditions under which a public authority may legitimately interfere with that right. The ECtHR interprets the first paragraph broadly to ensure effective protection of rights, while it interprets the second paragraph narrowly so that limitations to rights are the exception.[4] Once an applicant demonstrates that an interference with Article 8 has occurred, the onus of proof shifts to the State to justify the measure as lawful, legitimate, and necessary in a democratic society.

The ECtHR has consistently adopted a broad understanding of 'private life', encompassing not only physical and psychological integrity, but also personal development and the right to establish and develop relationships with others, including social and professional activities. In the context of surveillance, the ECtHR has long recognized that the interception of communications, the collection of metadata, and the monitoring of electronic correspondence such as emails fall within the scope of Article 8 protection.

2.1. *Interference and the 'Quality of Law'*

In surveillance cases, the ECtHR has developed a specific approach to the concept of interference. Due to the secret nature of surveillance measures, the "mere existence of the law" permitting such measures may itself constitute an interference with Article 8 rights, as the resulting "threat of surveillance" can affect free communication.[5] This demonstrates the difficulty individuals face when attempting to demonstrate that they have been subjected to secret monitoring.

For an interference to be compatible with Article 8, it must be 'in accordance with the law', which goes beyond the formal existence of a domestic legal basis. The Court examines the 'quality of the law', meaning whether the law is accessible to the citizen, foreseeable in its effects, and compatible with the rule of law.[6] Foreseeability does not mean individuals must know when they are being monitored. Instead, it requires that the law be sufficiently precise to prevent arbitrary interference by public authorities.

To meet this standard, the Court has identified six minimum safeguards that must be set out in legislation: 1. the nature of the offences which may give rise to an interception order; 2. the categories of people liable to have their communications intercepted; 3. limits on the duration of surveillance measures; 4. procedures for examining, using, and storing the data obtained; 5. precautions to be taken when communicating the data to other parties; 6. the circumstances in which recordings may or must be erased or destroyed.[7]

[4] Korff Douwe, *The Standard Approach under Articles 8-11 ECHR and Article 2 ECHR* (London: London Metropolitan University, 2008), 1.

[5] *Roman Zakharov v. Russia* [GC], no. 47143/06, judgment of 4 December 2015, para. 171.

[6] *Huvig v. France*, no. 11105/84, judgment of 24 April 1990, Series A no. 176-B, para 26.

[7] *Weber and Saravia v. Germany* (dec.), no. 54934/00, decision of 29 June 2006, para. 95.

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2.2. *Legitimate Aim, Necessity, and Procedural Safeguards*

An interference must also pursue one of the legitimate aims listed in Article 8(2), most commonly national security or the prevention of disorder or crime. However, the central element of the ECtHR's analysis is whether the measure is "necessary in a democratic society". Necessity requires that the interference correspond to a "pressing social need" and be proportionate to the legitimate aim pursued. It is not sufficient for the measure to be merely useful or desirable.[8]

The ECtHR has repeatedly emphasized that powers of secret surveillance are tolerated only when they are "strictly necessary" for safeguarding democratic institutions, because of the inherent risk that such measures may undermine democracy under the cloak of defending it.[9] Because individuals subjected to surveillance are typically unaware of the interference and cannot participate in the decision-making process, procedural safeguards are particularly important.

Therefore, the ECtHR considers procedural safeguards to be "especially material" when determining whether a State has remained within its margin of appreciation.[10] It looks for effective and independent control mechanisms, preferably judicial in nature, at key stages of the surveillance process. Such oversight is regarded as offering the best guarantees of independence and proper procedure, ensuring that the broad discretion afforded to executive authorities remains subject to effective supervision.[11]

3. *Klass v. Germany: Acceptance of Secret Surveillance and Minimum Safeguards*

The 1978 judgment in *Klass and Others v. Germany* is the foundational authority for ECtHR jurisprudence on secret surveillance.[12] The case challenged German legislation (the G 10 Act) that gave authorities the power to monitor telecommunications without a mandatory requirement to notify subjects afterward.

3.1. *The Necessity Paradox*

The ECtHR acknowledged that democratic societies are threatened by "highly sophisticated forms of espionage and terrorism".[13] It accepted that surveillance could be "necessary in a democratic society" to protect national security. However, it warned that such powers characterize a "police state" and are tolerable only if strictly necessary.[14] It highlighted the paradox that a system intended to protect democracy carries the risk of "undermining or even destroying" it.[15]

[8] Korff Douwe, *The Standard Approach*, 3.

[9] *Szabó and Vissy v. Hungary*, no. 37138/14, judgment of 12 January 2016, para. 73.

[10] European Court of Human Rights, *Guide on Article 8*, 16.

[11] *Klass and Others v. Germany*, no. 5029/71, judgment of 6 September 1978, Series A no. 28, para. 55.

[12] De Hert Paul and Malgieri Gianclaudio, "Article 8 ECHR Compliant and Foreseeable Surveillance: The ECtHR's Expanded Legality Requirement Copied by the CJEU. A Discussion of European Surveillance Case Law," *Brussels Privacy Hub Working Paper*, 21 (2020): 5.

[13] *Ibid.*, para. 48.

[14] *Ibid.*, para. 42.

[15] *Ibid.*, para. 49.

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3.2. *Legality and Administrative Oversight*

Because of the risk of abuse, the Court insisted that surveillance regimes be supported by "adequate and effective guarantees".[16] In *Klass and Others*, the Court found the German system provided these through: limitability (surveillance was restricted to factual indications of serious crimes); duration (measures remained in force for a maximum of three months); independent oversight (while judicial control was excluded, it was replaced by the Parliamentary Board and the G 10 Commission, which exercised continuous supervision).

3.3. *The Question of Notification*

The ECtHR concluded that subsequent notification is not an absolute requirement. It reasoned that "the fact of not informing the individual once surveillance has ceased cannot itself be incompatible" with Article 8, as secrecy ensures the "efficacy of the 'interference'". However, the state must inform the person as soon as notification can be made "without jeopardizing the purpose of the restriction".[17] This approach established that while states have a "fairly wide margin of appreciation" in choosing security policies, they must ensure executive power is subject to effective control.

4. *Roman Zakharov v. Russia: Moving to Legislative Assessment and Oversight*

The 2015 Grand Chamber judgment in *Roman Zakharov v. Russia* represents a 'blockbuster' moment in ECtHR jurisprudence, serving as the leading authority for assessing surveillance in the digital age. While earlier cases often focused on specific instances of abuse, *Zakharov* marked a shift toward *in abstracto* assessment of the 'quality of law' within domestic surveillance frameworks. By finding systematic faults in the Russian legislative regime, the ECtHR signaled that it would no longer approach these questions timidly.[18]

4.1. *Challenges* In Abstracto *and Victim Status*

Zakharov clarified when an individual can claim to be a 'victim' of a violation under Article 34 without proving they were monitored. The Court established that the "mere existence of legislation" permitting secret surveillance is an interference for all potential users, provided they can show they belong to a targeted group or that the law affects everyone by instituting a system where any person can have their communications intercepted. This rule is intended to ensure that the inherent secrecy of surveillance does not result in state measures being "effectively unchallengeable and outside the supervision of the national judicial authorities".[19]

[16] *Ibid.*, para. 50.

[17] *Ibid.*, para. 58.

[18] Milanovic Marko, "Blockbuster Strasbourg Judgment on Surveillance in Russia," *EJIL:Talk!*, (December 7, 2015).

[19] Zakharov, para. 171.

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4.2. *Technical Direct Access and the Role of Gatekeepers*

A central concern in the Court's assessment was the Russian SORM system, which granted law-enforcement agencies direct technical access to all mobile communications. Unlike systems where a service provider must verify a warrant before facilitating interception, the Russian regime required no such external validation. The Court highlighted this absence of "gatekeeping" as a critical failure.

The Court considers that the requirement to show an interception authorization to the communications service provider before obtaining access to a person's communications is one of the important safeguards against abuse by the law-enforcement authorities, ensuring that proper authorization is obtained in all cases of interception.[20]

The interception equipment also did not maintain any logs or records of the monitoring activities, rendering internal or external oversight bodies incapable of detecting unlawful or unauthorized interceptions.[21]

4.3. *The Requirement for Independent Oversight*

The judgment highlighted that secret surveillance must be subject to "effective control" through independent supervision at three stages: when the measure is first ordered, while it is being carried out, and after it has been terminated. While the ECtHR does not strictly mandate judicial authorization as an absolute requirement, it maintains that judicial control is highly preferable because it offers the best guarantees of independence and a proper procedure.[22]

In *Zakharov*, the ECtHR found that Russian law was deficient because judicial involvement was limited solely to the initial authorization stage, with the courts possessing no continuous supervisory function.[23] Furthermore, the prosecutorial supervision that existed was deemed inadequate because prosecutors lacked the necessary independence from the executive and were technically unable to monitor activities that left no digital logs.[24] Consequently, the ECtHR concluded that the Russian system did not meet the quality of law requirement, as it failed to provide effective safeguards against arbitrary interference made possible by direct executive access to communications.[25]

5. *Big Brother Watch and Others v. the United Kingdom: The Modern Challenge of Bulk Interception*

The Grand Chamber judgment in *Big Brother Watch and Others v. the United Kingdom* represents a definitive response to the legal challenges posed by mass surveillance in the post-Snowden era. While privacy advocates argued that mass surveillance is inher-

[20] *Ibid.*, para. 269.
[21] *Ibid.*, para. 272.
[22] *Ibid.*, 233.
[23] Milanovic Marko, "Blockbuster Strasbourg Judgment".
[24] *Zakharov*, para. 285.
[25] *Ibid.*, para. 300.

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ently disproportionate, the ECtHR ‘normalized’ these capabilities by ruling that bulk interception regimes do not by themselves fall outside the State’s margin of appreciation.[26] The ECtHR acknowledged that the modern digital landscape involves a “proliferation of threats” from international actors, many of whom use sophisticated technology to evade detection, thus making bulk interception of “vital importance” for identifying national security risks.[27]

5.1. *The Shift to “End-to-End Safeguards”*

The ECtHR recognized that the six traditional minimum safeguards established in *Weber and Saravia* were no longer sufficient when it came to modern intelligence practices.[28] Instead, it introduced a requirement for “end-to-end safeguards”, necessitating a global assessment of the surveillance process at every stage, from the collection of data to its final destruction.[29] Under this framework, the domestic legal basis must clearly define eight fundamental requirements: 1. The grounds on which bulk interception may be authorized; 2. The circumstances in which an individual’s communications may be intercepted; 3. The procedure for granting authorization; 4. The procedures for selecting, examining, and using intercept material; 5. The precautions taken when communicating material to other parties; 6. Limits on duration, storage, and the circumstances for erasure or destruction; 7. Procedures for supervision by an independent authority; 8. Procedures for independent *ex post facto* review.[30]

5.2. *Deficiencies in the United Kingdom Regime*

In applying this new standard to the United Kingdom’s then-operative RIPA regime, the ECtHR identified three fundamental deficiencies that led to a unanimous finding of a violation of Article 8. First, the ECtHR found a lack of independent authorization, because warrants were issued by the Secretary of State rather than a body independent of the executive.[31] Second, the ECtHR criticized the failure to include categories of selectors (search terms) in the warrant applications, noting that these selectors determine which communications are filtered for human analysis.[32] Finally, the ECtHR highlighted the absence of prior internal authorization for the use of “strong selectors” linked to identifiable individuals, such as specific email addresses, which constitutes a particularly serious interference with privacy.[33]

[26] *Big Brother Watch and Others v. the United Kingdom* [GC], nos. 58170/13, 62322/14 and 24960/15, judgment of 25 May 2021, para. 340. Heiring Elena-Mathilde, “Mass Surveillance and the Right to Privacy,” 106-109.

[27] *Big Brother Watch and Others*, para. 424.

[28] *Ibid.*, para. 341.

[29] *Ibid.*, para. 350.

[30] *Ibid.*, para. 361.

[31] *Ibid.*, para. 377.

[32] *Ibid.*, para. 381.

[33] *Ibid.*, para. 382.

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5.3. *Freedom of Expression and Journalistic Protection*

The judgment also established critical standards for compliance with Article 10 in the context of mass surveillance.[34] The ECtHR found that the UK regime failed to provide adequate safeguards for confidential journalistic material and sources.[35] It specifically mandated that:

Before the intelligence services use selectors or search terms known to be connected to a journalist, or which would make the selection of confidential journalistic material for examination highly probable, the selectors or search terms must have been authorized by a judge or other independent and impartial decision-making body invested with the power to determine whether they were "justified by an overriding requirement in the public interest".

While Big Brother Watch accepts bulk interception as a legitimate tool, it highlights that state powers are not unrestricted and that they must be balanced by robust, independent, and transparent oversight to ensure that security measures do not "undermine or even destroy democracy under the cloak of defending it".[36]

6. *Procedural Safeguards and the Rule of Law*

The central pillar of ECtHR jurisprudence on secret surveillance is the establishment of robust procedural safeguards to maintain the rule of law.[37] Because individuals are typically unaware of monitoring and cannot participate in the decision-making process, the ECtHR requires that surveillance regimes provide "adequate and effective guarantees against abuse".[38] These safeguards are "especially material" in determining if a State has remained within its margin of appreciation.[39]

6.1. *Quality and Accessibility of Law*

For any interference with Article 8 to be valid, it must be "in accordance with the law", a requirement that goes beyond the existence of a domestic legal basis to encompass the 'quality of the law'. The law must be compatible with the rule of law, accessible to the citizen, and foreseeable in its application.[40] In the context of surveillance, this requires the domestic legal framework to clearly define the scope of executive discretion and the manner of its exercise.[41]

To ensure foreseeability and prevent arbitrary interference, the Court initially identified six minimum safeguards that must be set out in statute: the nature of the offenses, categories of people liable to be monitored, limits on duration, procedures for handling data, precautions for communicating data, and circumstances for data erasure.[42] In response to the high degree of intrusion in modern practices, the Court expanded these in *Big Brother Watch and Others*

[34] *Ibid.*, para. 448.
[35] *Ibid.*, para. 458.
[36] *Ibid.*, para. 339.
[37] European Court of Human Rights, *Guide on Article 8*, 11.
[38] *Klass and Others*, para. 50.
[39] European Court of Human Rights, *Guide on Article 8*, 11.
[40] *Zakharov*, para. 228.
[41] European Court of Human Rights, *Guide on Article 8*, 160.
[42] *Weber and Saravia*, para. 95.

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(2021) into a more comprehensive list of eight fundamental requirements for bulk interception regimes, emphasizing the need for clarity at every stage of the surveillance process.[43]

6.2. *The Necessity of Independent Oversight*

The Court maintains that secret surveillance must be subject to "effective control" by an authority independent of the executive.[44] While the Court has stopped short of mandating judicial authorization as an absolute requirement in all cases, it has consistently held that judicial control is "highly preferable" because it offers the best guarantees of independence, impartiality, and a proper procedure.[45]

Effective oversight must occur at three distinct stages: when the measure is first ordered, while it is being carried out, and after it has been terminated. In systems like the Russian SORM, where law-enforcement agencies have direct technical access to communications without the 'gatekeeping' role of a service provider, the need for independent supervision is at its greatest.[46] The Court has noted that: The rule of law implies, *inter alia*, that an interference by the executive authorities with an individual's rights should be subject to an effective control which should normally be assured by the judiciary, at least in the last resort, judicial control offering the best guarantees of independence, impartiality and a proper procedure.[47]

6.3. *Effective Remedies and the Notification Dilemma*

The availability of an effective remedy under Article 13 is a vital safeguard against the abuse of monitoring powers. The Court has traditionally held that the right to a remedy is inextricably linked to subsequent notification, as individuals can rarely challenge measures they do not know exist. Consequently, states are generally required to inform the subject as soon as notification can be made "without jeopardizing the purpose of the restriction".[48]

However, in the context of bulk interception, the Court has developed a more pragmatic approach. It acknowledges that a mandatory notification requirement might be impractical for large-scale preventive surveillance.[49] In such cases, the absence of notification can be 'compensated' for by an independent oversight body, such as the Investigatory Powers Tribunal (IPT) in the United Kingdom, provided that this body has extensive jurisdiction to examine complaints, possesses the power to issue legally binding decisions, and can conduct a fair, adversarial procedure even in the absence of the applicant's knowledge of specific monitoring.[50]

Ultimately, these procedural safeguards ensure that "security-driven" state power does

[43] *Big Brother Watch and Others*, para. 361.

[44] *Klass and Others*, para. 55.

[45] *Zakharov*, para. 233.

[46] *Ibid.*, para. 269.

[47] *Klass and Others*, para. 55.

[48] *Ibid.*, para. 58.

[49] *Big Brother Watch and Others*, para. 358.

[50] *Ibid.*, para. 359. Murray Daragh, Fussey Pete, McGregor Lorna and Sunkin Maurice, "Effective Oversight of Large-Scale Surveillance Activities: A Human Rights Perspective," *Journal of National Security Law & Policy,* 11 (2021): 1-25.

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not bypass democratic standards, requiring a global assessment of the regime to ensure it remains within the bounds of what is "necessary in a democratic society".[51]

7. *Justification and Judicial Review*

The ECtHR plays a critical role in reviewing the justifications provided by State authorities for intrusive surveillance regimes. National authorities typically cite threats such as terrorism, espionage, and cybersecurity risks to justify the expansion of monitoring powers.[52] The ECtHR acknowledges that modern digital landscapes involve a "proliferation of threats" from international actors who use sophisticated technology to avoid detection, thereby granting States a "fairly wide margin of appreciation" in choosing to operate surveillance systems for national security.

7.1. *The Limits of "Security-Driven" Power*

While the ECtHR allows discretion in the choice of security policy, it maintains a stricter oversight regarding the operation of these systems. It insists that "security-driven" state power cannot bypass democratic standards or operate with unfettered discretion.[53] The Court has repeatedly emphasized that a surveillance system set up to protect national security carries an inherent risk of "undermining or even destroying democracy under the cloak of defending it".

To counter this risk, the ECtHR applies a 'strict necessity test' in the context of Article 8. As clarified in *Szabó and Vissy v. Hungary* (2016): Given the character of the interference in question and the potential of cutting-edge surveillance technologies to invade citizens' privacy, the Court considers that the requirement "necessary in a democratic society" must be interpreted in this context as requiring 'strict necessity' in two aspects. A measure of secret surveillance can be found as compliant with the Convention only if it is strictly necessary, as a general consideration, for the safeguarding the democratic institutions and, moreover, if it is strictly necessary, as a particular consideration, for the obtaining of vital intelligence in an individual operation.[54]

7.2. *Deference vs. Robust Scrutiny*

Critical assessments of recent case law, such as *Big Brother Watch*, suggest that the ECtHR has moved toward a more 'proceduralized' approach, focusing on whether domestic law provides adequate safeguards rather than questioning the inherent proportionality of mass surveillance itself.[55] Critics argue that by 'normalizing' bulk interception, the ECtHR may have failed to address the broader question of whether the security benefits truly out-

[51] *Big Brother Watch and Others*, para. 360.
[52] *Ibid.*, para. 345.
[53] *Klass and Others*, para. 49.
[54] *Szabó and Vissy*, para. 73.
[55] Heiring Elena-Mathilde, "Mass Surveillance and the Right to Privacy," 105-111.

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weigh the massive invasion of privacy for millions of innocent individuals.[56] Nevertheless, the ECtHR serves as a vital safeguard by insisting on independent oversight and accountability, ensuring that any exercise of executive power remains subject to effective judicial or quasi-judicial control to prevent arbitrary abuse.

8. *Conclusion*

The jurisprudence of the ECtHR surrounding Article 8 provides the definitive legal framework for evaluating whether modern surveillance regimes align with the rule of law. From the foundational principles established in *Klass v. Germany* to the rigorous legislative assessments in *Roman Zakharov v. Russia* and the modern standards for mass data collection in *Big Brother Watch and Others v. the United Kingdom*, the Court has developed a sophisticated set of criteria to protect the individual in an increasingly monitored digital world.

The transition from a focus on individual instances of abuse to a robust *in abstracto* assessment of domestic legislation highlights the ECtHR's recognition of the systemic risks posed by technologically advanced surveillance. By mandating 'end-to-end safeguards', including independent authorization, continuous supervision, and effective remedies, the ECtHR ensures that state monitoring is not ordered without due and proper consideration.

While the ECtHR has stopped short of declaring bulk surveillance inherently incompatible with the ECHR, its recent rulings signal a significant shift toward a stricter approach regarding institutional and procedural safeguards.[57] The ECtHR's evolving case law serves as a reminder that in a democratic society, the pursuit of security must never undermine the fundamental values it seeks to protect. By insisting on transparency and independent supervision, the ECtHR ensures that the right to private life remains a living protection capable of adapting to the challenges of the digital age.

[56] *Ibid.*, 108.
[57] *Ibid.*, 111-12.

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TAX SECRECY AND CYBERSECURITY: TAXPAYER DATA PROTECTION UNDER PRESSURE

Igor Mirjanić

Keywords: Tax secrecy; Taxpayer Data Protection; Confidentiality; Cybersecurity; Artificial Intelligence.

Summary: 1. Introduction. – 2. Tax Secrecy and the Principle of Confidentiality of Tax Information. – 3. Ways of the Taxpayer Data Protection. – 4. Legal Framework in Bosnia and Herzegovina. – 5. Digitalization of Tax Administrations and New Threats. – 6. The Role of AI. – 7. Conclusion.

1. *Introduction*

Every tax administration collects, processes, retains, and manages a substantial volume of personal data and information regarding taxpayers. This is a prerequisite for the lawful assessment of a taxpayer's tax liability, ensuring, above all, the accuracy of such assessment – whereby the taxpayer is required to pay the exact amount of tax due under the law, neither more nor less. Moreover, such processing is necessary to enable the tax authority to collect and monitor tax payments in accordance with the principle of legality.

The data concerning taxpayers held by the tax authority primarily relate to revenues, expenditures, profits, income, assets, or the taxpayer's account balances. These data constitute the taxpayer's professional sphere. However, the tax authority may also obtain various other types of information that fall within the realm of the taxpayer's personal rights and privacy, such as marital status, age, the existence of children born out of wedlock, and similar matters.[1] In addition to these categories, the tax authority may acquire technical data relating to inventions, blueprints, business strategies, and other proprietary information.

The tax authority uses various methods to collect information regarding taxpayers. Firstly, taxpayers are legally mandated to self-report specific information to the tax authority. Secondly, in certain instances, it is in the taxpayer's own interest to submit information – notwithstanding the absence of a legal obligation – when such data form the basis of a particular claim or request. Thirdly, the tax authority collects information from third parties that are duty-bound to provide such data; these may include other public authorities (such as the real estate register, the intellectual property office, courts, etc.) or private law entities (banks,

[1] Ilić Popov Gordana, "Podaci i informacije u poreskom postupku i pravna sigurnost u Republici Srbiji," in *Vladavina prava i pravna država u regionu*, edited by Goran Marković (Istočno Sarajevo: Univerzitet u Istočnom Sarajevu Pravni fakultet, 2013), 873, 886.

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insurance companies, private pension funds, etc.). Fourthly, information may be furnished by third parties who are under no legal obligation to do so, including any natural or legal persons possessing relevant knowledge (for instance, a neighbour aware of a taxpayer's undisclosed rental income).

As a general rule, the tax authority is entitled to request the provision of specific information (relevant for taxation purposes) from any third party in possession of such data, who is subsequently obliged to disclose it to the tax authority. An exception to this rule applies only to members of certain professions who acquire data concerning a taxpayer in the course of their professional activities and may invoke professional secrecy. Consequently, such individuals – including lawyers, members of the clergy, medical practitioners, and similar professionals – may refuse to disclose data and information to the tax authority.

In addition to the restrictions on data collection arising from professional secrecy, the tax authority's power to request information is further limited by the principle of necessity; it may only seek data and information requisite for the assessment of tax liability, and is prohibited from requesting extraneous information. This may be illustrated by an example provided by Ilić Popov concerning the marital status of a taxpayer.[2] Given that income taxation in the Republic of Srpska (as in Serbia, to which the author's example refers) is based on a schedular system – characterized by the separate taxation of distinct income sources without aggregating total global income – the tax authority is not entitled to demand information regarding a taxpayer's marital status. However, should the taxpayer claim a tax credit or allowance based on the support of a spouse, they are then obliged to substantiate that fact, thereby enabling the tax authority to acquire information concerning their marital status.

The primary objective of this paper is to analyse the intersection of tax secrecy and cybersecurity within the context of the rapid digitalization of tax administrations. This research seeks to address a central research question: How do modern cybersecurity threats and the integration of artificial intelligence redefine the traditional protective scope of taxpayer confidentiality, and is the existing legal and institutional framework in Bosnia and Herzegovina resilient enough to safeguard sensitive data against these evolving risks? By examining the dual role of technology as both a guardian and a threat, the paper aims to propose necessary legal and technological adaptations required to maintain the fundamental trust between taxpayers and the State.

2. *Tax Secrecy and the Principle of Confidentiality of Tax Information*

Having examined the scope of data and information acquired by the tax authority concerning the taxpayer, it is necessary to address the mechanisms for the protection of such data. To that end, we shall first establish the definition of secrecy in general and the concept of tax secrecy in particular.

A secret (whether official, tax, military, state, business, or otherwise) is considered to be data that is known – and permitted to be known – only to a specific number of persons. In legal theory, a secret is defined based on two elements: the factual and the normative. The factual element is reflected in the fact that the data is known only to a restricted circle of per-

[2] *Ibid.*, 877.

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sons. The normative element is manifested through the existence of legal norms that prohibit the disclosure of such data outside the circle of persons who possess it and are authorised to know it.[3] The concept of tax secrecy refers to measures within tax legislation that restrict the tax administration from disclosing information acquired during the taxation process to any third party, unless the taxpayer provides consent.[4] Rogić Lugarić interprets tax secrecy somewhat more broadly, emphasizing that the term refers to provisions in national tax law aimed at protecting the confidentiality of the taxpayer's (personal) data and preventing its unauthorised disclosure. Regarding the classification of secrecy, tax secrecy is regarded either as an official secret or as a type of professional secret concerning the obligation to preserve data from the personal and family life of an individual acquired by certain persons in the performance of their profession.[5]

Tax secrecy is recognized as a fundamental tax principle and a cornerstone of taxpayer rights, although its conceptual scope, substantive content, and precise terminology lack a uniform global definition. Historically, this principle was established to incentivize taxpayer participation in fiscal proceedings. The underlying rationale was that taxpayers would be more inclined toward transparency and the disclosure of relevant facts if they were assured of the discretion of tax officials.[6] In other words, in the event of unauthorised use of data by the tax administration or in cases of data breaches, the taxpayer's trust in the tax authority is inherently undermined. Such a breach of trust results in the collection of less information, as taxpayers, fearing for the security of their confidential data, will hesitate to provide the comprehensive information necessary for the tax authority to lawfully assess tax liability or enforce the collection of tax debt. This, consequently, has a detrimental effect on the collection of public revenues. Therefore, it is in the interest of both the taxpayer and the tax authority (and thus, a matter of public interest) that data pertaining to tax proceedings be maintained as an official secret and that any unauthorised use of such data be strictly prevented.[7] Consequently, this principle was intended to foster voluntary tax compliance and function as a necessary counterweight to the increasingly expansive powers of tax administrations in the gathering of fiscal information. In broader terms, the concept of tax secrecy represents a point of friction between the often competing interests of individual taxpayers and the state's revenue authorities.[8]

The distinction between tax secrecy and tax confidentiality can fundamentally be established by defining the former as the regulatory framework governing the collection of fiscal data, whereas the latter pertains to the protocols for restricting access to such data once acquired. Consequently, if confidentiality is interpreted as a mechanism for limiting

[3] Ilić Popov Gordana, "Krivično delo odavanja službene tajne u srpskom poreskom pravu," *NBP. Nauka, bezbednost, policija*, 2 (2014), 2.

[4] Anđelković Mileva, "Poverljivost versus transparentnost u savremenom poreskom pravu," *Strani pravni život*, 3 (2017), 83.

[5] See Rogić Lugarić Tereza, "Porezna tajna: sigurnost prošlosti, sjena budućnosti," *Hrvatska i komparativna javna uprava*, 15, 4 (2015), 817.

[6] See Rogić Lugarić Tereza and Irena Klemenčić, "Tax Secrecy and Its Limitations: Is There a Balance?," *SSRN Scholarly Paper No. 3222507*, (2018), 101.

[7] See Ilić Popov Gordana, "Podaci i informacije u poreskom postupku i pravna sigurnost u Republici Srbiji," 888.

[8] See Rogić Lugarić Tereza and Irena Klemenčić, "Tax Secrecy and Its Limitations: Is There a Balance?," 101.

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access to sensitive information, a pivotal legal question arises whether the protection of such confidentiality grant taxpayers an inherent right to demand that their information remains undisclosed by default.[9]

The principle of confidentiality of tax information is regarded as one of the fundamental principles of tax law, derived from the constitutional principle of the rule of law.[10] Tax secrecy and tax confidentiality fall within the ambit of the taxpayer's fundamental rights. Considerations of legal certainty and the rule of law necessitate the protection of the taxpayer against any misuse of their data held by the tax authority.[11]

Regarding the right to the confidentiality of taxpayer data, diverging opinions persist. Kristoffersson and Pistone state that, besides the numerous differences existing across national borders and despite the more intensive protection under some tax systems, there is a fairly broad consensus as to the fact that at present no general right to keep confidentiality in tax-relevant information exists at the worldwide level.[12] This leads us to conclude that the protection of tax confidentiality is to be perceived as an important value within a tax system, but not as a generally protected human right.

We maintain that this approach necessitates a fundamental shift, whereby the right to data secrecy should be established as a cornerstone taxpayer right within every legal system. A similar perspective is shared by Bentley, who, in his classification, categorizes the right to confidentiality of tax information as a secondary legal and administrative right.[13] This right is derived both from the aforementioned constitutional principle of the rule of law and from the constitutionally guaranteed fundamental human rights to privacy and human dignity.

The public interest in maintaining tax secrecy is reflected, as previously noted, in preserving the relationship of trust between the tax authority and the taxpayer. However, the public interest manifests in another manner as well: should a taxpayer suffer damages (pecuniary or non-pecuniary) due to the disclosure or misuse of data or information constituting a tax secret, they would be entitled to seek compensation from the state, thereby depleting public funds. Consequently, considering the breadth of data and information concerning taxpayers held by the tax authority, the rule of tax secrecy serves a multi-faceted protective purpose. It safeguards the taxpayer's personal integrity, professional integrity, and technological processes, as well as the overarching public interest.[14]

3. *Ways of the Taxpayer Data Protection*

As Ilić Popov emphasises, regarding data and information concerning taxpayers, it is essential to ensure: (1) data security (encompassing protection against disclosure to unau-

[9] See Kristofferson Eleonor and Pasquale Pistone, "Tax Secrecy and Tax Transparency: General Report," in *Tax Secrecy and Tax Transparency: the relevance of confidentiality in tax law*, edited by Eleonor Kristoffersson *et al.* (Bristol: Peter Lang, 2013), 3.

[10] See Popović Dejan, *Poresko pravo* (Belgrade: Pravni fakultet Univerziteta u Beogradu, 2022), 84-87.

[11] See Ilić Popov Gordana, "Podaci i informacije u poreskom postupku i pravna sigurnost u Republici Srbiji," 888.

[12] Kristofferson Eleonor and Pasquale Pistone, "Tax Secrecy and Tax Transparency: General Report", 5.

[13] Bentley Duncan, *Taxpayers Rights: Theory, Origin and Implementation* (Amsterdam: Kluwer Law International, 2008), 319.

[14] See Ilić Popov Gordana, "Krivično delo odavanja službene tajne u srpskom poreskom pravu," 3.

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thorised persons, as well as protection against alteration and erasure), (2) data privacy (the taxpayer's right to control to whom, in what manner, and which data become accessible), (3) data confidentiality (the prohibition of data disclosure without the taxpayer's consent), (4) data availability (ensuring that only authorised users may access the data), and (5) data integrity (the accuracy and up-to-dateness of the data).[15]

The regime of tax secrecy is also subject to the general framework for the protection of personal data, which is established on European soil by the General Data Protection Regulation (GDPR). This regulation is directly applicable in the European Union, while candidate countries are obliged to align their legislation with it, whereby this legal act extends its influence across almost the entire continent. According to the Regulation, the state is entitled to disclose data, including protected information, when the public interest in such disclosure outweighs the private interest in non-disclosure. States invoke this justification when granting access to information of public importance upon request, as well as when publishing lists of taxpayers with outstanding tax liabilities (either all debtors or a specific number of the largest debtors). Nevertheless, in doing so, the state must be guided by the principles of data minimisation, proportionality, and purpose limitation. We advocate the position that tax transparency in the domain of publishing lists of the largest debtors is justified.

What remains contentious, in our view, is the vulnerability of the entire dataset concerning taxpayers (rather than merely data regarding the amounts of tax debt) held by the tax authority. These data are susceptible to misuse, and the disclosure of such information to third parties could result in substantial damage to the taxpayer. As Anđelković points out, given the vast quantity of information and facts currently collected on natural and legal persons, it is highly certain that taxpayers are unable to detect the unauthorised disclosure or misuse of data held by tax authorities.[16]

Data and information concerning taxpayers are further jeopardised by the increasing volume of international exchange of information and the emphasis on tax transparency. While the transparency of certain data can undoubtedly contribute to a more efficient fight against tax evasion, excessive transparency may prove exceptionally hazardous. Numerous international agreements on the exchange of tax information exist globally to regulate these matters, and the possibility of exchanging information and data is also provided for under national legislation. Sharing confidential information and taxpayer data with other states constitutes a factor that exacerbates the risk of misuse or the disclosure of protected data, given the expansion of the circle of entities to which they are accessible. As a rule, foreign tax authorities must respect the confidentiality of taxpayer information and maintain such data as a tax secret. However, once shared, the state that originally collected the data no longer exercises any control over them. Furthermore, it is a matter of fact that not all states globally maintain equivalent standards and practices regarding the protection of tax secrecy.

Additionally, a significant step towards narrowing the confidentiality of taxpayer information and data was taken in 2009, when bank secrecy was abolished as a standard in international tax cooperation. The imposition of this rule by the G20 onto other states within the framework of the fight against tax evasion has limited their sovereignty, while tax confidentiality – hitherto a generally accepted right of taxpayers – has been significantly suppressed in favour of tax transparency. In this sense, there is a justified concern that privacy, as a funda-

[15] Ilić Popov Gordana, "Podaci i informacije u poreskom postupku i pravna sigurnost u Republici Srbiji," 886.

[16] Anđelković Mileva, "Poverljivost versus transparentnost u savremenom poreskom pravu," 82.

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mental societal value, is gradually eroding in the contemporary era of global communication and information networks.[17]

In addition to tax legislation, tax secrecy is also protected under criminal law. In fact, provisions regarding tax secrecy within tax laws constitute *lex specialis* in relation to the provisions on the protection of official secrets in criminal law, given that, as previously noted, tax secrecy is a specific form of official secrecy. It is common practice to prescribe terms of imprisonment for public officials who misuse data they are duty-bound to preserve as secret, or who enable third parties to acquire such data and information. Alongside criminal liability, there is also disciplinary liability for officials who breach the obligation to maintain tax secrecy, as well as civil liability (in the form of damages). Furthermore, there are specific criminal offences related to cybercrime committed by individuals outside the state organisation, which will be discussed subsequently.

The question may be raised as to what constitutes an effective mechanism for preventing the leakage of confidential information. Let us consider a scenario in which a company bribes a tax official to provide data concerning a competing enterprise. If the information in question is exceptionally valuable, the bribe amount may be significant enough for the official to disregard their duties and accept any potential penalties, calculating that the ultimate benefit from this unlawful act would outweigh the harm. This danger is further exacerbated in the context of international exchange of information, as not all countries maintain the same data protection standards, nor do they all prosecute cases of disclosure of official or tax secrets with equal efficiency.

The unauthorized disclosure of fiscal data is widely recognized as a primary threat to the integrity of confidential tax information. Regardless of the established level of confidentiality within a specific jurisdiction, any failure by tax authorities to maintain information within a secure and restricted environment renders the entire system susceptible to breaches, thereby compromising taxpayer rights. Under such conditions, *ex post* legal remedies prove inadequate, as they are often unable to provide full restitution for the resulting harm. Consequently, the right to confidentiality necessitates proactive and immediate safeguards to ensure its practical efficacy.[18]

4. *Legal Framework in Bosnia and Herzegovina*

In Bosnia and Herzegovina, there are three laws regulating tax procedures, in accordance with the constitutional division of tax jurisdictions. These are the Law on Tax Procedure of the Republic of Srpska,[19] the Law on Indirect Taxation Procedure of Bosnia and Herzegovina,[20] and the Law on the Tax Administration of the Federation of Bosnia and Herzegovina.[21] All three laws contain provisions regarding tax secrecy.

[17] See *Ibid*.

[18] See Kristofferson Eleonor and Pasquale Pistone, "Tax Secrecy and Tax Transparency: General Report", 5-6.

[19] Official Gazette of the Republic of Srpska No. 78/20 and 37/22.

[20] Official Gazette of Bosnia and Herzegovina No. 89/05 and 100/13.

[21] Official Gazette of the Federation of Bosnia and Herzegovina No. 33/02, 28/04, 57/09, 40/10, 29/11, 27/12, 7/13, 71/14, 91/15, and 44/22.

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In the Republic of Srpska, it is prescribed that the Tax Administration is obliged to ensure the security and confidentiality of tax information and data collected from taxpayers, which, if disclosed, could cause harm to the taxpayer. Furthermore, tax officials are duty-bound to maintain as an official secret any data and information obtained in the course of their work. Simultaneously, the Law stipulates cases in which, and the entities to whom, the Tax Administration is obliged to provide taxpayer data and information held as a secret. Such data and information may be submitted to other administrative bodies in the Republic of Srpska, courts, prosecutor's offices, the police, other tax administrations within Bosnia and Herzegovina, as well as to foreign tax authorities. The Law further defines what is not considered a tax secret: data and information whose disclosure is consented to by the taxpayer; data and information provided in an aggregated form that cannot be linked to a specific taxpayer; data and information that may be used during investigations concerning tax-related criminal offences; and data regarding unpaid tax debt published in the media or on the Tax Administration's website. A particularly noteworthy provision is that the Tax Administration is obliged to provide data and information regarding the unpaid tax debt of a specifically identified taxpayer to any person who proves a legal interest in obtaining such information; such legal interest is deemed to exist for third parties who have a specific claim against the taxpayer.[22]

International legal assistance in tax matters is regulated in such a manner that priority in application is given to international agreements concluded between Bosnia and Herzegovina and other states. In the absence of an international treaty with a particular state, the Tax Administration may provide the data and information it holds concerning a specific taxpayer to the tax authority of that state, provided that: (1) reciprocity exists, (2) the provision of data does not jeopardize the public interest, (3) there is no risk of disclosure of such information and data, and (4) the provision of information and data will not cause harm to the taxpayer (in this context, the correct and lawful assessment of tax in the other state is not considered as harm).[23]

In the Federation of Bosnia and Herzegovina, tax secrecy is regulated in a similar manner, including the conditions for sharing information and data with the tax authorities of other states.[24] The Law of the Federation of Bosnia and Herzegovina additionally prescribes that tax officials of the Tax Administration are obliged to preserve tax secrets, as well as to ensure that experts and specialists engaged in tax proceedings do not disclose tax secrets and that they adhere to the rules on archiving information concerning taxpayers.[25]

At the level of the common institutions of Bosnia and Herzegovina, within the domain of indirect taxes (VAT, excise duties, and customs), the issue of confidentiality of taxpayer data and information is regulated in a similar manner. Additionally, this law stipulates that the Indirect Taxation Authority of Bosnia and Herzegovina is obliged to undertake all measures to guarantee the confidentiality and appropriate use of taxpayer data and information, and that any person who, in any way, becomes acquainted with such data is duty-bound to maintain it as a secret and respect its confidentiality. The disclosure of these data or their misuse is considered a serious breach of official duty.[26]

[22] Article 4.
[23] Article 14.
[24] Articles 5 and 6.
[25] Article 7.
[26] Article 52.

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Regarding the general normative framework for the protection of personal data, at the beginning of 2025, Bosnia and Herzegovina enacted a new Law on the Protection of Personal Data, through which the domestic legal framework was aligned with EU legislation (GDPR). As previously noted, in addition to tax laws, tax secrecy is also protected by criminal laws. Accordingly, the criminal offence of disclosure of official secrets is prescribed within all legal systems in Bosnia and Herzegovina.

In conclusion, the legal framework for the protection of confidential taxpayer data in Bosnia and Herzegovina may be regarded as satisfactory. This framework is established upon a multi-faceted legal basis, whereby individuals who violate taxpayer confidentiality are subject to criminal, civil, and disciplinary liability. Furthermore, in addition to the general data protection regime, a specialized tax secrecy regime is in place. However, the counterpoint to this regulatory structure is the actual enforcement of these provisions. To date, there has been no recorded judicial or administrative practice regarding the application of these legal instruments in Bosnia and Herzegovina. It may be inferred that such a necessity has not yet arisen, given the absence of publicly available data concerning the theft or leakage of confidential taxpayer information.[27] This outcome may, inter alia, be attributed to a robust legal framework that exerts a preventive influence on potential perpetrators.

5. *Digitalization of Tax Administrations and New Threats*

The digitalisation of all spheres of public administration undoubtedly brings numerous advantages, but also certain drawbacks. The case of the tax administration is no different. The benefits are manifold, both for the tax administration itself and for the taxpayers.

The digitalization of tax administration has fundamentally altered the processes by which governments collect, manage, and process taxpayer information. The adoption of electronic filing systems, automated reporting, and digital payment platforms has yielded substantial improvements in efficiency, accuracy, and accessibility, enabling tax authorities to serve citizens more effectively while reducing administrative burdens. Nevertheless, this rapid technological transition has concurrently increased the exposure of tax authorities to a diversifying array of cybersecurity threats, such as data exfiltration, ransomware, phishing campaigns, and illicit access to sensitive financial and personal records.

While data, of course, has a large role to play in tax administration, relying solely on ever-larger data sets being processed by tax administrations raises several concerns. The first problem is privacy and data ownership. The potential amalgamation of a large amount of data underlying tax computation can raise 'big brother' concerns since it can be seen as po-

[27] There was only one case known to the public: some media reports from January 2024 alleged a compromise of taxpayer data resulting from a cyberattack on the electronic systems of the Tax Administration of the Republic of Srpska, with subsequent allegations that this data was offered for sale on the dark web. However, these media assertions remain unsubstantiated by empirical evidence, and the Tax Administration officially denied any liability. Furthermore, expert analyses suggest that the incident did not constitute a direct breach of the Tax Administration's core infrastructure; rather, it involved the theft of user credentials through external methods independent of the tax authority's systems. ("Hakeri upali u Poresku upravu RS: Prodaju podatke na crnom tržištu", in *Capital.ba*. (January 23, 2024); Petrović Branko, "Kako sam na Darknet-u kupio podatke građana Republike Srpske i shvatio koliko je bitno provjeriti izvor informacije", in *BrankoPetrovićblog.ba*, (January 27, 2024).

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tentially allowing the piecing together of personal information on an individual's patterns of expenditure, whereabouts, and relationships. Gathering such large amounts of data may raise issues of trust and needs to be carefully explained, justified, and protected (legally and practically). The second problem is data security. Despite tax administrations putting great efforts into data confidentiality, there always remains a risk to the security of large data sets. The risks of deliberate compromise might be expected to rise as people seek to breach increasingly old legacy systems and as technology allows the quicker exploitation of stolen data.[28]

A fundamentally significant concept regarding cybersecurity is cybersecurity maturity. It signifies the extent to which an entity incorporates governance frameworks, institutional policies, technological safeguards, and human-centric strategies to mitigate cyber risks. Within tax administrations, an advanced maturity level reflects the deployment of comprehensive technological defences – including encryption, secure authentication protocols, and intrusion detection systems – in synergy with rigorous compliance practices. However, human factors remain a primary determinant of this maturity. Systematic staff training and awareness initiatives, coupled with strict adherence to operational protocols, fortify policy compliance and enhance the efficacy of technical controls. Active employee engagement is essential to mitigate vulnerabilities associated with social engineering, insider threats, or inadvertent errors, thereby ensuring the sustained protection of sensitive taxpayer datasets. Ultimately, cybersecurity maturity is not a static state but a continuous evolution that requires constant vigilance and innovation to uphold the integrity of contemporary digital tax systems.

In response to the expanding volume and diversifying utility of incoming datasets, tax administrations are increasingly prioritizing investments in data governance frameworks and protective safeguards. These measures are designed to ensure that information is archived and utilized in an appropriate manner, maintaining robust security against both internal vulnerabilities and external threats. This is evident from the OECD data. Protecting data from unauthorised access is a key priority for tax administrations as data breaches, internally and externally, can undermine trust in the wider tax system. Nearly all administrations control user data access and security, and 94% have both cybersecurity units and hire external parties to test the security of systems. Moreover, 87% of administrations have systems in place that automatically detect unauthorised data access, and 85% employ a Data Privacy Officer.[29] Three-quarters of administrations report having in place a data ethics framework to guide the appropriate and responsible use of data.[30]

At this point, we shall address cybercrime as one of the most sophisticated forms of criminality. In the context of computer data, this form of crime includes personal data theft, identity theft, misuse of personal data, information theft, attacks on computer networks, fraud, and, consequently, the theft of taxpayer data. The perpetrator of the criminal offence can carry out their intent at any time and in any place, maintaining almost complete anonymity. For this very reason, perpetrators of these crimes are more difficult to detect and prosecute, and the computer data of institutions such as the tax administration are nowadays a highly

[28] OECD, *Tax Administration 3.0: The Digital Transformation of Tax Administration* (OECD Publishing, 2020), 24.

[29] OECD, *Tax Administration Digitalisation and Digital Transformation Initiatives* (OECD Publishing, 2025), 27.

[30] *Ibid.*, 28.

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attractive target.[31] Given the highly developed information technology of today, there is a significant risk of disclosure and misuse of citizens' personal and tax data, which necessitates the protection of the entire system of personal and tax data by the state. The criminal offence involving the theft of taxpayer data is part of cybercrime, organised crime, and terrorism, and is understood as a crime against the state.[32]

Tax administration databases are characterized by the absence of an absolutely secure system of protection against unauthorized access. In such circumstances, *ex post* protection of taxpayer rights is usually insufficient to compensate taxpayers for the damage incurred.[33]

6. *The Role of AI*

The integration of emerging technologies – most notably artificial intelligence, blockchain, and cloud computing- within tax ecosystems presents a dual-natured paradigm for cybersecurity. While these innovations substantially enhance the velocity, precision, and transparency of fiscal operations, they concurrently broaden the digital attack surface. This expansion introduces novel vulnerabilities and complex entry points that malicious actors can systematically exploit.

Alongside the digitalisation of tax administrations, there is an increased role for data analytics and AI-driven automation, which can assist tax administrations in modernising processes such as the pre-filling of tax returns, data sharing, and withholding tax calculations as well as the wider provision of digital taxpayer services.[34] Data presented in the OECD Report show that already 17% of administrations report having started using artificial intelligence as part of their data governance.[35] Moreover, around 70% of tax administrations also indicated using artificial intelligence for data analysis.[36] Tax administrations are also looking at new and innovative approaches as to how they store, manage, and use data, including the use of network analysis (which is used by 72% of analysed tax administrations), machine learning (61%), robotic process automation (54%), and cloud storage (52%).[37]

AI can assist in several ways in preserving the confidentiality of taxpayer data and information and in countering cyberattacks on tax administration databases. One such method is the implementation of AI models that would monitor the database, analyse user and network behaviour, and detect any anomaly – such as the mass export of data at unusual times or from an unknown IP address – well in advance of an actual system attack, thereby triggering an alarm. Furthermore, in addition to their monitoring role, AI models can play an active part in isolating an attack when it occurs, prior to human intervention. AI could independently

[31] Dimić Suzana and Vanda Božić, "Krađa podataka poreskih obveznika kao oblik cyber kriminaliteta," in *Zbornik radova Međunarodnog naučnog skupa "Izazovi i perspektive razvoja pravnih sistema u XXI vijeku"*, (Banja Luka: Pravni fakultet Univerziteta u Banjoj Luci: 2020), 406.

[32] See *ibid.*, 406.

[33] Dimitrijević Marina, "Oporezivanje u miljeu digitalnotehnoloških novina", in *Zbornik radova Kopaoničke škole prirodnog prava - Slobodan Perović*, II (Kopaonička škola prirodnog prava - Slobodan Perović, Belgrad, 2022): 229-43.

[34] OECD, *Tax Administration Digitalisation and Digital Transformation Initiatives*, 27.

[35] *Ibid.*, 28.

[36] *Ibid.*, 33.

[37] *Ibid.*, 34.

isolate compromised segments of the database as soon as a threat is detected, thus acting much faster than the personnel tasked with database maintenance. The most advanced form of utilizing artificial intelligence for the protection of tax administration databases would involve the use of Natural Language Processing (NLP) algorithms to analyse threat reports from the Dark Web and open sources in order to predict new attack vectors before they even materialise.

On the other hand, if misused, artificial intelligence poses a significant threat to tax administration databases. For instance, malicious AI bots can scan database infrastructure at high speeds to discover vulnerabilities that can be exploited for an attack.[38] Furthermore, by utilizing Large Language Models (LLMs), attackers can create personalized, grammatically perfect, and contextually relevant messages targeting database administrators. These attacks have a drastically higher success rate compared to traditional spam campaigns. Additionally, AI models can generate intelligent password guesses by analysing leaked databases, thereby drastically shortening the time required for brute-force attacks on hashed passwords within the databases. In addition to these, there are other dangers, such as the unintentional sharing of sensitive information by artificial intelligence or data leakage through AI model outputs.

While AI-enabled threat activity previously involved attempts by threat actors to use consumer-grade AI tools to augment existing operations, rather than achieve breakthrough capabilities, the emergence of stand-alone malicious AI systems since the beginning of 2025 is of particular concern. As a predictable trend, Large Language Models (LLMs) are leveraged to craft more convincing phishing emails, with reportedly over 80% of all phishing emails identified between September 2024 and February 2025 using AI to some extent. AI is notably used in vishing and online fraud involving impersonation, with the use of deepfakes, as well as for malware development.[39]

Tax administrations in Bosnia and Herzegovina have not yet implemented artificial intelligence in their operations, nor is this stated as an objective in their strategic documents, which we consider a significant oversight. As a rule, the tax administration must always remain one step ahead of the (malicious) taxpayer in order to prevent tax evasion and safeguard public revenues. By analogy, we would add that the tax administration must always remain one step ahead of any attacker targeting its databases, in order to protect both the public interest and the private interests of its taxpayers.

7. *Conclusion*

We have observed that the tax administration collects, processes, stores, and manages a vast array of data and information concerning taxpayers, which are of a diverse nature – pro-

[38] While the most sophisticated AI models are programmed to detect potential misuse and terminate access for users attempting to facilitate cyberattacks, a recent case from Mexico demonstrates that even the most prominent AI models are not entirely infallible in this regard. In December 2025, a group of hackers utilized Anthropic's Claude to identify and exploit vulnerabilities, bypass defences, and establish backdoors while simultaneously performing data analysis. This coordinated effort enabled them to seize control of government infrastructure before exfiltrating 195 million identities from nine Mexican state systems, encompassing tax records, vehicle registrations, and vital property and birth details (Nilesh Christopher, "How our AI bots are ignoring their programming and giving hackers superpowers", in *Latimes.com* (March 5, 2026).

[39] ENISA, *ENISA Threat Landscape 2025*, (2025), 14-15.

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fessional, technical, and private. Consequently, in most legal systems, including those within Bosnia and Herzegovina, there are multiple forms of protection for such data – criminal, civil, and disciplinary. These protective mechanisms aim to prevent the misuse or dissemination of confidential data, which could cause substantial harm primarily to the taxpayer, but also to the state by eroding trust and, consequently, reducing public revenues. Therefore, protecting the confidentiality of tax information serves not only a private interest but a public one as well. Furthermore, we conceptualize tax secrecy as a fundamental taxpayer right, derived from the constitutional principles of the rule of law and the constitutionally guaranteed fundamental human rights to privacy and human dignity.

The digitalisation of the tax administration has introduced new challenges in safeguarding confidential data. Privacy is increasingly jeopardised by the collection of ever-growing volumes of taxpayer information, as well as by the digital processing, storage, and exchange of such data. Perhaps a more significant issue than the threat to privacy is the vulnerability of digital data to various cyberattacks. In this context, artificial intelligence presents additional challenges. Although it is a highly beneficial tool that can significantly enhance the operations of the tax administration – particularly the protection of confidential taxpayer data – artificial intelligence is also a powerful instrument in the hands of malicious actors targeting database security. For this reason, it is imperative that the tax administration always remains one step ahead of any attacker of its databases, in order to protect both the public interest and the private interests of its taxpayers.

Regarding Bosnia and Herzegovina, we believe that the legal framework for tax secrecy is satisfactory, but there is room for improvement, and there is a notable lack of enforcement cases in practice. Given that tax administrations in Bosnia and Herzegovina lag behind in the implementation of state-of-the-art digital technologies, this creates opportunities for malicious individuals and criminal organisations to compromise taxpayer data. Therefore, we maintain that the development and implementation of new technologies focused on taxpayer data protection must be a priority. Additionally, it is necessary to re-examine the scope and structure of the data collected by the tax administration. Certain information and data may not be essential and should not be collected or stored. Such an approach would contribute to a more robust protection of taxpayer rights.

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EMERGENCY POWERS AND CONSTITUTIONS. A EUROPEAN OVERVIEW

Valeria Piergigli

Keywords: Emergency; War; Constitutions.

Summary: 1. *We live in Times of Emergency*: an Overused Formula. – 2. Emergencies and States of Emergencies. Lexical and Semantic Profiles. – 3. Emergencies and Constitutions: Approaches and Trends in Europe. – 4. Focus on Selected Constitutional Models: France and Spain. – 5. The Models and the Use of Emergency Powers in Practice. – 6. Concluding Remarks. Emergency Powers in the Interpretation of the Venice Commission.

1. We live in Times of Emergency*: an Overused Formula*

In recent decades, the term 'emergency' has become increasingly common, not only in everyday language, but also in public debate and scientific literature. First of all, we need to try to clear the field of 'false emergencies', *i.e.* all those situations which, although they require urgent intervention by the institutions, are not actually emergencies. It is not easy to define the concept of emergency, but we can attempt to focus on its main items.

In contrast to everything that can be classified as normal and ordinary, emergencies consist of exceptional and extraordinary circumstances, events that constitute a break, a parenthesis destined to close with a return to the pre-existing normal order or, in any case, to something similar. If this is true, critical situations – however serious – that are cyclical or structural in nature, such as those related to economic and financial conditions, the irreversible degradation of ecosystems and climate change,[1] and the increase of migration flows to the more developed countries of the West cannot be legally considered and treated as emergencies. Nor can crisis situations, that are destined to become chronic or even permanent, even if they were originally emergencies, be considered emergencies. In other words, the concept of a 'permanent emergency' is a contradiction in terms.[2]

Real emergencies are mostly sudden circumstances of difficulty or danger, of a temporary nature even if not short-lived, abnormal and serious, unforeseen or unpredictable, which require

[1] Carducci Michele, "Cambiamento climatico (diritto costituzionale)," in *Digesto delle discipline pubblicistiche, Aggiornamento*, edited by Raffaele Bifulco, Alfonso Celotto, Marco Olivetti (Turin: Utet, 2021), 51 ff.; Bifulco Raffaele, "*Rule of law* ed emergenza climatica," *Federalismi.it*, 5 (2025): 1 ff.

[2] Navot Suzie, "Emergency as a state of mind - The case of Israel," in *The Rule of Crisis Terrorism, Emergency Legislation and the Rule of Law*, edited by Pierre Auriel, Olivier Beaud, Carl Wellman (Berlin: Springer, 2018), 1 ff.

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timely intervention to protect overriding public interests, such as health, safety and security of citizens, public order, territorial integrity and independence of the state. In short, emergencies are legally relevant events, in the face of which the law and political decision-makers, sometimes with the support of appropriate technical and scientific knowledge, cannot remain indifferent. On the contrary, prompt action by the public authorities to contain and combat the situation is essential in order to prevent the aggravation or spread of the harmful consequences of the original event or even simply to ward off the threat of probable or possible future events of similar intensity and nature. Therefore, in emergency circumstances, the temporary adoption of exceptional measures and the possible establishment of a state of crisis, with inevitable consequences on the functioning of the state institutions, are considered legitimate as well as appropriate.[3]

Hence the widespread choice, especially on the part of contemporary legal systems based on pluralist democracy and the separation of powers, to entrust the constitution or the law with more or less detailed regulation of emergency situations. In this regard, solutions vary from country to country, but the objective is, in any case, to contain and limit the exercise of extraordinary powers, to protect a core set of constitutional guarantees and to allow the restoration of the *status quo ante* as soon as possible. In fact, within the framework of a democratic constitutional state governed by the rule of law, what characterizes (or should characterize) emergency regimes are the temporary nature of the derogations introduced to the established power and constitutional normality, the necessity, adequacy, reasonableness and proportionality of the measures adopted to effectively respond to the emergency, and the oversight on the use of derogatory powers.

The context is not irrelevant, as the approach to the issue may vary considerably depending on whether exceptional measures are taken within a democratic or authoritarian system. While popular legitimacy of power, checks and balances, and constitutional guarantees are the cornerstones of a democratic system, from which it is possible to deviate only temporarily and under very specific conditions, the opposite is true in autocratic systems. Here, the rule – and not the exception – is the concentration of power in a monocratic body, without real democratic investiture and (self-)empowered to operate, both in normal and extraordinary circumstances, in the absence of real counterpowers and limits.

It is undeniable that a margin of uncertainty can remain, even regardless the distinction mentioned above. In fact, only once the emergency period is over, it is possible to assess whether the activation of the exceptional regime actually contributed to the safeguarding of democratic institutions or, on the contrary, facilitated their overthrow, accompanied by the establishment of an order antithetical to the previous one. This is the distinction between 'commissarial dictatorship' and 'constituent dictatorship', to borrow the well-known theory developed by Carl Schmitt[4] in the early decades of the last century, with regard to the establishment, for emergency reasons, of a regime with concentrated powers aimed, respectively, at protecting and preserving the existing system or at overturning it.

Nor can it be ruled out that the management of an emergency situation in a given legal system, even if theoretically attributable to the *genus* of democratic constitutional state, may represent a pretext, whether accidental or provoked, for promoting the transition to an autocratic approach to power. This is particularly evident in democratically fragile or unstable sys-

[3] Richard Albert and Roznay Yaniv, edited by, *Constitutionalism Under Extreme Conditions. Law, Emergency, Exception* (Berlin: Springer, 2020).

[4] Schmitt Carl, *La dittatura. Dalle origini dell'idea moderna di sovranità alla lotta di classe proletaria* (Rome-Bari: Laterza, 1921, Italian translation 1975).

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tems, or in those characterizing by the phenomenon of democratic retrogression or backsliding. There are numerous examples of this in all continents. Suffice to mention, in more recent times, the experience of Turkey, after the failed *coup d'état* in July 2016, which was followed by the proclamation of a state of emergency by the President of the Republic, constitutional reform in 2017 and the introduction of a presidential system without adequate checks and balances. Let's consider too the authoritarian change in Tunisia, where the declaration of a state of emergency motivated by the Covid-19 health crisis and the dissolution of Parliament by the Head of State in July 2021 were the precursors to the adoption, exactly one year later, of a new constitution that radically subverted what had seemed to be the most significant achievements of the movement known as the 'Arab Spring' and which had been enshrined in the 2014 constitution, now definitively outdated. And finally, although the examples could go on, it is unforgettable the situation in Hungary, which has long been openly considered by its own rulers to be an illiberal democracy, where the declaration of a state of emergency and the assumption of full powers by the Prime Minister to deal with the Covid-19 pandemic in the spring of 2020 was followed, in the spring of 2022, practically without interruption, by the establishment of a state of emergency originating from the Russian-Ukrainian war.

Starting from the lexical and semantic profiles underlying contemporary emergencies (para. 2) and the framing of the phenomenon within the European constitutions (para. 3), this contribution aims to analyze some of the best-known constitutional models (para. 4) and verify their application in the light of experience (para. 5). Finally, given that emergencies and the reactions of public authorities to emergencies can represent a stress test even in so-called consolidated democracies, we will attempt to formulate some concluding reflections, also in light of the recommendations expressed on several occasions by the Venice Commission (para. 6).

2. *Emergencies and States of Emergencies. Lexical and Semantic Profiles*

A considerable variety of terminology characterizes the legal approach to the issue of emergency (*rectius*: emergencies). The Anglo-Saxon system uses the notion of 'emergency' to refer generically to any situation that requires immediate intervention measures (so-called emergency powers), while the expression 'state of emergency' designates a specific legal institution that involves the suspension of the ordinary constitutional regime, and 'martial law' is equivalent to what, in continental law, is usually referred to as a 'state of *siege*'.

In the French legal system, the notion of '*urgence*' refers to both emergencies and any generic situation of necessity, but only emergencies in the strict sense can justify, in certain limited cases, the establishment of an '*état d'urgence*' and the derogation from the ordinary regime, including the separation of powers and the exercise of fundamental freedoms. Expressions and institutions such as '*état de siege*' and '*pleins pouvoirs*', in which power is exercised by the military authorities or by the President of the Republic respectively, are also specific to the French tradition. The 'full powers' or extraordinary powers of the Head of State were referred to in Article 48 of the Weimar Constitution of 1919, a historical example of crisis management, sadly famous for contributing to the fall of the Republic and opening the doors to Nazi regime. Emergency, urgency, state of necessity and state of exception, and also state of crisis, *état de siege*, state of tension, state of police and of public danger are the terms most commonly used in comparative law, which cannot be superimposed or transferred literally from one legal system to another. Indeed, the automatic and superficial transposition of these linguistic expressions,

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based on the simple assonance of their names, seriously risks to compromise any comparison between institutions which, while sharing the need to deal with extraordinary events, are in fact characterized by different disciplines. Thus, for example, the above-mentioned formula *état d'urgence*, which can be translated as 'state of emergency', is not at all similar to the apparently similar expression used in Italy in the 2018 Civil Protection Code.

The term 'state of emergency' is ambiguous too. It should be noted that the expression can be used as a synonym for emergency, and in this sense it refers to a situation that is particularly serious and problematic in the sense indicated above. However, in a technical meaning, the same formula is used with reference to the legal situation that follows the official ascertainment of the factual situation. On the basis of the declared state of emergency, the most appropriate measures will then be taken to avoid harm to the community and protect the established order. In this regard, the experience shows that, when an emergency occurs, the legal system can react by formally establishing a state (or regime or system) of emergency (or exception), whether or not predefined in advance by constitutional or legislative sources, or by resorting to ordinary bodies and procedures (the so-called business as usual model). In both cases, measures may be taken that alter the normal regime of constitutional powers and weaken certain rights and freedoms, to the point of totally or partially suspending the constitution, which temporarily nullifies the effectiveness of constitutional guarantees.[5]

To be more precise, although they are frequently used interchangeably, the terms 'state of emergency' and 'state of exception' refer to distinct concepts. Thus, a state of emergency relates to the exercise of an established power, and the aim is the confirmation of constitutional legality. Conversely, a state of exception implies the exercise of constituent power, and its purpose is to break constitutional legality. Therefore, static and conservative purposes, or dynamic and subversive purposes, would characterize each situation respectively.

The declaration (or proclamation) of a state of emergency has the legal advantage of informing both institutions and citizens that, as a result of the emergency, temporary exceptions to the previous ordinary regime may occur. At the same time, however, the introduction of the derogatory regime and the official declaration of a state of emergency, possibly accompanied by the suspension of the constitution, seem to evoke a sort of regression to the past, i.e. to the time when the King was the absolute holder of powers and prerogatives that could be exercised without parliamentary participation and control. For this reason, there is substantial opposition on the part of contemporary democratic legal systems to formalizing emergency regimes through the declaration of a state of emergency, both in the presence of external threats and internal dangers to the state.

Is it possible to draw up a taxonomy of emergencies? As a first approximation and from a descriptive point of view, if we take into account the dimension and the involvement of different states, emergencies are traditionally divided into *external* (or international) and *internal*, to which transnational and global emergencies should be added, since critical situations are often no longer confined to individual countries or portions of territory, but tend to affect vast geographical or geopolitical areas. Based on their origin, i.e. the event that triggers them, emergencies can be grouped by type. In this respect too, with the exception of the generalized discipline of the state of war, the constitutional and legislative lexicon is multifaceted and rather complex. On the one hand, there are *political* emergencies that arise from human activity and are aimed at challenging the established order and institutional continuity. On

[5] De Vergottini Giuseppe, *Diritto costituzionale comparato* (Milan: Cedam-Wolters Kluwer, 2022), 279 ff.

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the other hand, there are *technical* emergencies, caused by natural events and therefore politically neutral, which pose problems for the protection and safety of the population.[6]

The former include situations of a warlike nature, such as wars, revolutions, *coups d'état*, insurrections, popular uprisings, but also economic, financial, environmental and climatic crises, ecological disasters, as «unintended but foreseeable consequences»[7] of human choices and behaviours. The latter usually include natural calamities, such as earthquakes, floods, volcanic eruptions, epidemics and health crises. Moreover, taking inspiration from the crisis caused by the Coronavirus pandemic and its effects in terms of restrictions on civil liberties, as well as the distribution of power between political bodies and between the state and local authorities in many countries around the world, a further type of emergency has recently proposed. It can be defined as 'hybrid', as it originates from technical circumstances but it is capable of producing significant and long-lasting consequences on a political level, ultimately affecting the normal institutional order.[8] The factual and legal scenario of emergencies therefore appears to be extremely heterogeneous.

Even the war emergency, which appears easier to identify, requires some clarification from a terminological point of view in light of the conceptual evolution of the phenomenon, leaving aside the notion of 'Cold War' which, for almost fifty years after the end of the Second World War, served to designate the political, ideological and military confrontation between the major world powers (the USA and the USSR) and their allies. Alongside traditional warfare – aggression, conquest, defence – understood as an armed conflict between two or more states aimed at the annihilation of one of the parties, what is striking – once again – is the lexical and semantic heterogeneity underlying post-modern conflicts. These conflicts do not seem to fit into the classic definition of war, although the use of weapons and military apparatus by states or non-state organizations cannot be ruled out. Let's think to situations such as international terrorism or the operations of stabilization and reconstruction variously supported by the international community and commonly known as peace-keeping, peace-building, peace-making or peace-enforcement missions.[9]

There are also expressions in which the term war is accompanied by adjectives intended to emphasize the legitimacy of the purpose for which the conflict is initiated and conducted. In this regard, while the concept of 'holy war' is not uncommon in certain contexts, more widespread and commonly accepted is the use of formulas that refer to the idea of lawful or legal, just, preventive war, or that replace the term 'war' with seemingly more neutral and nuanced circumlocutions. We then speak of international police operations, of the use of armed forces abroad, of military actions motivated by the *raison d'État*, of humanitarian or peace missions, of low-intensity conflicts. Not to mention the so-called hybrid wars, i.e. forms of hostility, not necessarily fought between sovereign states, which employ unconventional methods and exacerbate the often asymmetrical confrontation between the belligerents on the diplomatic, economic and technological levels.

[6] Piergigli Valeria, *Diritto costituzionale dell'emergenza* (Turin: Giappichelli, 2023).

[7] Pizzorusso Alessandro, "Emergenza, stato di," in *Enciclopedia delle scienze sociali* (Roma: Istituto della Enciclopedia italiana,1993), 552.

[8] Vedaschi Arianna, "Covid19 and the Notion of "Emergency": Towards, New Patterns?," in *Blog-iacl-aidc.org* (September 7, 2021).

[9] Vedaschi Arianna, "Il dinamismo del concetto di guerra: una sfida per il diritto," *Meridiana*, 110 (2024): 143 ff.

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3. *Emergencies and Constitutions: Approaches and Trends in Europe*

It has been already said that emergencies are legally relevant events, i.e. phenomena that disrupt the normal order and to which the law and political actors cannot remain indifferent. Emergencies require a timely and effective response from public authorities, which must protect citizens and the fundamental interests of the state from effects that could prove irreparably harmful, without renouncing, at least within the framework of democratic systems, the values that inspire liberal constitutionalism.

Yet, at first glance, emergencies and the law seem to be irreconcilable elements. Can events that are not always fully predictable or even unpredictable be regulated by specific rules, in a general and abstract way? What could be the most suitable sources for their regulation?

In a hypothetical top-down ranking, emergency powers may be entrusted to: a) the constitution, which may refer to subordinate sources for further details, b) pre-designed legislative provisions, c) *ad hoc* legislative provisions, i.e. specifically approved for the management of a particular emergency. It is also possible that, in the absence of express constitutional and legislative norms, the executive may decide for the self-assumption of emergency powers, subject to *ex post* ratification by Parliament. However, it is widely believed in contemporary constitutionalism that the prerequisite for the exercise of extraordinary powers must be sought implicitly within the constitution. The "doctrine of necessity" as an unwritten and external source of law, which was frequently invoked during the 19th-century monarchies and which does not seem to offer sufficient guarantees for the safeguarding of democratic values, cannot be accepted.[10]

In concrete terms, approximately 90% of the constitutions in force around the world contain provisions dedicated to emergencies and their management. Explicit provisions governing states of emergency, variously defined in lexical terms, are also found in most of the constitutions of the European Union countries, although not always with the same level of detail and frequently with reference to other legislative sources (constitutional, organic, cardinal and ordinary laws) for more specific regulation.[11] Exceptions to this are the constitutions of Italy, Belgium, Austria, Denmark and Sweden, which limit their focus to the state of war. The decision to constitutionalize emergencies appears to be linked to the rationalization of parliamentary form of government and the strengthening of guarantee institutions in the post-war constitutions. Consequently, the constitutions identify the conditions for states of emergency, define the procedure for their declaration and termination, provide for the organization and distribution of powers, without prejudice to the maintenance of certain fundamental guarantees. Apart from a general homogeneity in the regulation of the state of war, the constitutional approach to other emergencies reveals considerable heterogeneity, which makes it impossible, even from this point of view, to reduce them to a common taxonomy.

The *factual circumstances* that justify the formal declaration of a state of emergency may be internal or international, political or technical, as explained above, and may affect the entire national territory or limited areas. Where references are not limited to wars, armed attacks and unspecified public emergencies, the constitutions frequently mention: imminent danger to the sovereignty, independence and unity of the state, to territorial integrity, to democratic

[10] Gross Oren and Ní Aoláin Fionnuala, *Law in times of crisis. Emergency powers in Theory and Practice* (Cambridge: Cambridge University Press, 2006).

[11] Khakee Anna, *Securing Democracy? A Comparative Analysis of Emergency Powers in Europe*, Policy Paper no. 30 (Geneva Centre for the Democratic Control of Armed Forces, 2009).

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institutions or the constitutional order, to internal order, security, life, health and property, as well as the threat of terrorist attacks and the occurrence of industrial or ecological accidents, disasters, calamities or natural catastrophes and the spread of infectious diseases.

The *declaration procedure* is usually divided into the stages of proposal, approval, proclamation and publication. In some legal systems, this procedure is initiated or authorized by the Parliament, sometimes by an absolute majority or a qualified majority of two-thirds or three-fifths of its members, possibly on the initiative of or after consultation with the executive (Bulgaria, Greece, Portugal, Slovenia, Slovakia, Lithuania), but more frequently the reverse is provided. Therefore, unless the procedure is entirely determined by the President of the Republic in consultation with certain institutional bodies (*e.g.* Article 16 of the French Constitution), a state of emergency is generally declared by the Government (by the Prime Minister in urgent cases) or by the President of the Republic on the initiative or after consultation with the Government, which then informs Parliament. The parliamentary assembly then intervenes subsequently to approve or reject the declaration of a state of emergency (Latvia, Romania, the Netherlands, Malta). Sometimes, it is expressly provided that, in the event of a negative vote, the activation of the state of emergency will have no effect or will be considered null and void (Cyprus and the Czech Republic). In some of the situations mentioned above, if Parliament is unable to meet or there are reasons of particular urgency, the resolution on the state of emergency is adopted by a special permanent parliamentary committee, subject to ratification as soon as possible by the plenary session of the legislative assembly (Portugal), or by the President of the Republic, who is required to notify the legislative body immediately (Slovenia, Bulgaria, Greece, Lithuania). In general, it is expressly provided that states of emergency, in their various forms, are temporary: normally lasting from fifteen days to six months, the emergency regime can only be prolonged by an act of parliament.

Sometimes, depending on the type of emergency, there is a different allocation of powers relating to the introduction of a state of crisis, with a shifting of the center of gravity towards the Parliament in particularly serious circumstances, especially those that jeopardize the fundamental values of the legal system. Thus, the German constitution of 1949, as amended in 1968, distinguishes between states of emergency, state of tension and state of defence – not only on the basis of their internal or international origin, or on the basis of their political or technical nature – but first and foremost according to a gradation of levels of intensity for national security (or threat to security), which corresponds to the activation of increasing institutional guarantees, starting with the progressive involvement of the legislative body in the management of the crisis. The prominence of Parliament reaches its peak in the 'state of defence', which is comparable to a state of war and is declared by the President of the Republic, at the request of the Government and with the approval of the upper house (*Bundesrat*), followed by confirmation of the lower house (*Bundestag*) with a law approved by a two-thirds majority of votes and in any case equal to at least the majority of MPs. A variation on the model mentioned above is the option adopted by the Spanish Constitution of 1978 which, as it will be discussed later (para. 4), classifies states of emergencies – states of alarm, exception and *siege* (*alarma, excepción, sitio*) – according to the source of danger from which each arises and whose assessment has important implications for the balance of powers, similar to the German system.

Similar provisions are found in more recent constitutional provisions. For example, the Czech constitutional law no. 110/1998 grants the government the power to declare a state of emergency in the event of a natural disaster, environmental or industrial accident, or other situation that may threaten life, health, property, internal order or security, specifying that

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strikes in defence of economic and social rights or interests do not constitute an emergency situation. Where sovereignty, territorial integrity or democratic institutions are threatened, the power to ascertain such circumstances belongs to the Parliament on the proposal of the government; furthermore, parliamentary approval must be expressed by an absolute majority of each assembly. The constitution of Estonia, after granting the President of the Republic both the power to propose to Parliament the declaration of a state of war or emergency and the power to declare war in order to repel an attack, recognizes the Government's power to declare a state of emergency, in all or part of the national territory, in the event of a disaster or natural calamity or to prevent the spread of an epidemic. However, it is Parliament that, by an absolute majority, may, on the proposal of the President of the Republic or the Government, declare a state of emergency for no more than three months in the event of a threat to the constitutional order of the Republic, i.e. for reasons of national defence, and it is always Parliament that declares a state of war on the proposal of the President of the Republic. The Constitution of Poland takes a slightly different approach, distinguishing between a state of war, a state of emergency in the event of a threat to institutions, security or public order, and a state of natural disaster. In the first two situations, the power to declare a state of emergency belongs to the President of the Republic, on the proposal of the Council of Ministers, who is obliged to submit his decision to Parliament within 48 hours, which may annul it by an absolute majority of votes and with the participation of at least half of the MPs. Instead, in the event of a disaster or accident, the Council of Ministers has the power to declare a state of natural disaster in order to prevent or remove any harmful consequences, without any intervention of the Parliament. Following the reforms of 2020 and 2022, the Hungarian Constitution assigned the declaration of a state of war and a state of emergency to Parliament, while the Government decides on a state of emergency. In this regard, it is interesting to note that a state of danger is linked to natural disasters or industrial accidents, but also to events "of an armed conflict, war, situation of humanitarian catastrophe in a neighbouring country" (Article 51), i.e. situations that immediately remind to the war unleashed by Russia against Ukraine in 2022, which may pose risks to neighbouring countries, such as Hungary.

The declaration of a state of emergency, however named, affects the *structure and functioning of constitutional bodies*, generally resulting in the temporary transfer of powers to the executive and/or the Head of State. These bodies are competent for the adoption of ordinances or decrees with the force of law or, in any case, for taking unspecified measures or regulatory powers, up to including derogations or suspensions of existing laws. Where this power is granted to the President of the Republic, its exercise may be subject to a proposal and countersignature by the Government (Croatia, in the event of a threat to the independence, unity and existence of the state). Sometimes, the President can act, on the proposal of the Government, only if Parliament is unable to meet and with the obligation to submit the measures adopted to the legislative assembly for the ratification (Poland, Slovenia, Croatia). If the Government adopts ordinances with the force of law, the constitution may provide for them to be subject to the veto of the President or Vice-President of the Republic, in addition to their expiry at the end of the emergency period (Cyprus). It is also possible, if Parliament is unable to meet because it has been dissolved or its term of office has expired, that its powers will be assumed, according to an express constitutional provision, by *ad hoc* bodies, such as a joint committee of both Chambers (German Constitution) or a standing committee acting as an emergency parliament with reduced legislative functions (Spain). Parliament retains both the power to approve or reject, with amendments if necessary, the legislative acts adopted by the executive, and the

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power to delegate the latter to take any measures it deems appropriate. Finally, as the European ones adopt parliamentary or semi-presidential systems of government, with the sole exception of the presidential republic of Cyprus, the principle of the Government's political accountability before the Parliament remains firmly established everywhere.

Frequent reference is made for *restrictions and/or suspensions of fundamental rights*, unless the option of completely excluding the possibility of suspension prevails, as specified in the constitutions of Belgium and Luxembourg. In this regard, the approach of the constitutions is multifaceted and rather asymmetrical. In fact, sometimes the formula that generically provides for the possibility of temporarily limiting the exercise of human rights is accompanied by an analytical explanation of the single rights that cannot be restricted. In general, these rights are: the right to life, the prohibition of torture, the rights to a fair trial and the presumption of innocence, the principle of legality of crimes and penalties, the right to privacy, the freedom of opinion and worship (Bulgaria and Croatia), together with the right to citizenship, the principle of equality and non-discrimination, the right to compensation for moral or material damage suffered as a result of unlawful conduct by others, family rights, the right to health, the prohibition of extradition, the right to one's national identity, the right to address state and local public offices in the official language and to receive a response in the same language (Estonia). Sometimes, conversely, the rights that may be derogated from (the Netherlands) or restricted in the event of war or other emergencies (Lithuania) are listed. The Polish regulations is more detailed, distinguishing between rights that cannot be restricted in a state of war or emergency and rights that may be restricted in the event of a natural disaster.

The Cypriot and Greek constitutions use the concept of suspension rather than restriction or limitation, and provide in largely overlapping terms for the possibility of suspending, in emergency situations, the right to life as a result of an act of war, the prohibition of forced labour, personal freedom and freedom of movement, the right to domicile and confidentiality of correspondence, freedoms of opinion, assembly and association, the right to fair compensation in the event of expropriation, the right to choose a job and the right to strike, to which the Greek constitution adds the power to suspend clauses concerning the establishment of military courts and special courts for political offences. The Slovenian constitution refers indiscriminately to the power to temporarily "suspend or restrict" fundamental rights, with some exceptions, in situations of war or emergency, while the Spanish constitution allows both the suspension of certain individual guarantees in the context of investigations for terrorist acts and the general suspension of some rights. However, as it will be discussed in more detail (para. 4), general suspension, i.e. imposed on the entire population or large communities of citizens, can only take place if a state of exception or *siege* has been declared, whereas the declaration of a state of alarm only allows the restriction – not suspension – of constitutional rights. Conversely, the Portuguese constitution lists the rights that cannot be suspended during a state of *siege* or emergency; these are the rights to life, personal integrity, personal identity, civil capacity and citizenship, as well as the non-retroactivity of criminal law, the right to a judicial defence, the freedom of conscience and religion.

Modalities and conditions governing the application of the constitutional provisions summarised above may be regulated in detail in the measures adopted by the executive to manage the emergency or in the act declaring a state of emergency, provided that the constitution does not refer in this regard to a law or a constitutional law or, in any case, to a law requiring a particularly high majority for approval. In some cases, it is specified that the restrictions must be necessary, appropriate and proportionate to the situation to be addressed, avoiding discriminatory treatment (Croatia and Poland) and without leading to the elimination of the right itself (Romania).

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As it can be seen, most of the constitutions of the EU member states provide for regulations, sometimes quite detailed, governing the conditions for exercising freedoms in times of war or other emergencies. However, it should be noted that not all constitutions that contain an emergency statute also deal with (or are required to deal with) the fate of individual and collective freedoms in such circumstances. Any omission in this regard does not prevent the introduction of restrictive, derogatory or suspensive measures, provided that such measures, like all those that may be taken during a state of emergency, are aimed at preserving, and not subverting, the established order.

The general and almost always explicit prohibition to amend the Constitution serves to *guarantee the fundamental values* and the continuity of the legal system during any state of emergency. Moreover, the prohibition of dissolving the Chambers is generally mentioned, together with the provision of their regular or extraordinary convening during states of emergency. Alongside the prolongation of the Chambers, the extension of the mandate of the President of the Republic (Slovenia) and of the representative local bodies (Estonia) is sometimes enshrined. Furthermore, for the purpose of constitutional guarantee, there are provisions establishing: a) the exclusion of referendums on the act introducing the state of emergency, as well as on the act authorizing its extension or declaring its termination (Hungary and Estonia), b) the judicial review over the declaration of a state of emergency and the consequent decisions (Slovakia), c) the prohibition of amending the laws on the election of the national Parliament, local assemblies and the President of the Republic, as well as the legislative sources on the production of emergency law (Poland). Finally, the Hungarian constitution prohibits the suspension of the Constitution and the limitation of the functions of the Constitutional Court.

4. *Focus on Selected Constitutional Models: France and Spain*

At this point, the investigation turns to two constitutional models, those of France and Spain. The analysis is useful, not only to highlight the different approaches taken by the respective constitutions, but also to test the application of those formal provisions to the emergencies in practice.

The French constitution devotes three provisions to emergency situations. Article 35, as amended in 2008, regulates the 'state of war' and the possibility of military intervention abroad, emphasizing in both cases the role of Parliament and dialogue with the executive. In fact, the Parliament authorizes the declaration of war and must be informed of any Government decision to send armed forces outside the national borders. Parliamentary authorization is also required if a mission abroad is extended beyond four months, without prejudice to the Government's faculty to ask the National Assembly (i.e. lower Chamber) to take the final decision. Worthy of note, on the other hand, is the explicit rejection of war of conquest and the use of armed force against other peoples, which is found in the preamble to the 1946 constitution, in turn referred to in the preamble to the current 1958 constitution, and which echoes the repudiation of war of aggression enshrined, among others, in the Italian constitution.

Article 36 provides for a 'state of *siege*' to be declared by the Council of Ministers for a period of twelve days, which may only be prolonged with the authorization of Parliament.

Finally, the wording and contents of Article 16 are significantly different from the abovementioned provisions. Inspired by Article 48 of the Weimar Constitution, Article 16 emphasizes the role of the Head of State and gives him/her the almost exclusive decision to assess

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the extraordinary circumstances summarily indicated in the constitutional text and to exercise the related exceptional powers. According to the constitution, in situations that seriously and immediately threaten "the institutions of the Republic, the independence of the nation, the integrity of the territory or [the] fulfilment of international commitments", interrupting the regular functioning of constitutional public powers, the President of the Republic is empowered to take the "measures required by the circumstances", after a (mandatory but not binding) consultation with the Prime Minister, the Presidents of both the Chambers of Parliament and the Constitutional Council (*Conseil constitutionnel*) and after informing the nation with a message. These measures are aimed at restoring constitutional normality "as swiftly as possible", thereby implicitly ruling out any reform of the constitution itself, while the Parliament shall sit as of right and the dissolution of the National Assembly is prohibited. The aforementioned constitutional amendment of 2008 added a time limit, in the sense that the exercise of exceptional powers cannot exceed thirty days, unless a different opinion of the Constitutional Council, which rules on the request of the Presidents of the assemblies or a parliamentary minority and, in any case, *ex officio* after sixty days have elapsed. Overall, the model identified in Article 16 is a generic emergency model in terms of its objective assumptions, weak from a procedural point of view, and extremely vague and flexible in its application, as it is ultimately left to the interpretation and discretionary assessment of the authority managing the emergency, albeit in compliance with the mild requirements indicated above. On the other hand, the President of the Republic is not accountable for acts performed in the exercise of his functions, in addition to the fact that the exercise of the powers conferred by Article 16 are expressly exempt from the requirement of Government countersignature (Article 19). Therefore, it is not conceivable that forms of political or judicial control could be activated against the President of the Republic, without prejudice to the power of the Chambers to initiate impeachment proceedings, but only where there is evidence of a "breach of his duties patently incompatible with his continuing in office" (Article 68, paragraph 1).

The constitutional provisions are supplemented by law no. 55-385 of 3 April 1955, which has been amended several times over the years. Enacted before the current constitution came into force, due to the need to manage the uprisings that broke out in Algeria at various times (1955, 1958 and 1961), this law provides for the declaration of the *état d'urgence* by decree of the Council of Ministers for a period of twelve days, unless extended by law of Parliament "both in case of imminent danger resulting from a serious threat to public order and of events which, by their nature and gravity, constitute a public disaster" (Article 1). The *état d'urgence* may cover the whole or part of the national territory, including Corsica and the overseas territories and departments.

Differently from France, Spain chose to lay down precise and rigorous constitutional rules for emergency situations. In doing so, the Spanish drafters implicitly were inspired by the German constitution as amended in 1968. At the same time, however, they drew on the constitutional tradition that had been consolidated on this issue during the 19th century until the advent of the Second Republic (1931), not without the adjustments made necessary after the fall of the Franco regime in the mid-1970s by the affirmation of the democratic principles. The 1978 Constitution grants the King, with the authorization of the *Cortes Generales* (Parliament), the power to declare war and conclude peace (Article 63, paragraph 3). The powers relating to the procedure for declaring the states of emergency (Article 116) are distributed between the executive and the legislature. The latter provision refers to a specific organic law, not only for detailed regulations, but above all for the identification of the conditions that may give rise to the specific emergency situations contemplated by the constitution. Article

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116 establishes a gradation of states of crisis – distinguished as states of *alarma*, *excepción* and *sitio* – which is reflected in the procedure to be followed for their respective proclamation, in the different rules regarding their duration, contents and legal effects, and in the role assigned to the executive and the Congress, while the Senate is not involved in any of these procedures. In summary, while the participation of Congress is subsequent to the declaration of the *estado de alarm*a, which is the responsibility of the Council of Ministers without prejudice to the obligation for the Government to immediately inform the Congress, which may decide to extend it, the intervention of the latter is preventive when it comes to authorizing the *estado de excepción* and, again, the balance between the two bodies changes in the *estado de sitio*, which sees Congress take a central role, voting by absolute majority on the declaration proposed by the Government. Whatever state of emergency is declared, it is expressly forbidden to dissolve the Congress or interrupt the normal functioning of the Chambers and other constitutional powers, including the Government and its officials, for whom the principle of accountability enshrined in the constitution and laws remains firm. In the event that, in one of the emergency situations, the Congress is unable to meet because it has been dissolved or its term of office has expired, its functions shall be assumed by its standing committee. Furthermore, limited to the cases of a state of *excepción* and a state of *sitio*, Article 55, paragraph 1, provides – as already mentioned – for the possibility of suspending the rights explicitly set out. Finally, to complete the constitutional picture, it is worth mentioning the express prohibition on amending the constitution in any of the situations indicated in Article 116, as well as in times of war, and the reference to the law to regulate the exercise of jurisdiction in the event of a state of *sitio*.

In order to implement the constitutional provisions, the organic law no. 4/1981, required by Article 116 of the constitution, regulated the conditions, contents, powers, limitations and control mechanisms for each of the situations indicated by the constitutional provision. In this regard, it should be noted that the modulation of the rules governing the three states of emergency within the organic law does not depend on the severity or intensity of the danger to be faced, ascertained according to a quantitative criterion, but rather on the need to prepare different mechanisms for different situations, so that political decision-makers are given the opportunity to decide, on the basis of a qualitative assessment, the most appropriate solution for each of the emergency circumstances that may actually arise. The '*estado de alarma*' relates to serious alterations to normality and may consist of natural or man-made disasters (calamities, health crises, paralysis of public services, significant shortages of basic necessities). It is declared by decree of the Council of Ministers, which specifies its territorial limit, effects and duration, which may not exceed fifteen days, in accordance with Article 116 of the constitution. Any prolongation of the state of alarm, at the request of the Government, must be expressly authorized, but without any particular majority, by the Congress, which may contribute to define its limits and conditions. The '*estado de excepción*' presupposes a situation of serious disturbance of public order, i.e. of the political and constitutional order, which cannot be maintained or restored by ordinary powers. In such circumstances, at the request of the Government, the Congress may authorize the declaration of a state of exception, specifying its effects, the financial penalties, its territorial scope and its duration, which may not exceed thirty days, unless extended under the same conditions for an equal period of time. Finally, the '*estado de sitio*' may be declared by the Congress by an absolute majority, on the exclusive proposal of the Government, in the event of insurrections or acts of force, real or potential, that can jeopardize the very foundations of the state, such as sovereignty, territorial integrity or the constitutional order. The declaration must specify the geographical

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extent, conditions and duration which, unlike the states of emergency mentioned above, are not predetermined by the legislature. Following the declaration, the Government assumes extraordinary powers and may utilize the designated military authority, which remains subordinate to the directives of the executive. Civil authorities are responsible for all functions not conferred on the military, with which they are nevertheless required to cooperate. If a state of *excepción* or *sitio* has been declared, the authorities may decide, as already mentioned, to suspend a wide range of fundamental rights (Article 55, paragraph 1 of the Constitution).

Important corollaries to the aforementioned provisions are the laws on the national civil protection system (law no. 17/2015), on national security (law no. 36/2015), as well as the organic laws on national defense (organic law no. 5/2005) and the protection of citizens' security (organic law no. 4/2005): a veritable regulatory arsenal in which the Government plays a leading role, albeit in relation to regional and local administrations, other state powers, civil society, and the armed forces.

5. *The Models and the Use of Emergency Powers in Practice*

An examination of the French and Spanish experiences on the use of emergency powers reveals interesting points for comparative reflection. As illustrated above, both legal systems regulate emergency situations, albeit in different ways; in both countries, constitutional provisions are supplemented by primary sources of law. Despite these similarities, individual emergencies have been managed in slightly different ways in the two countries. For their part, the constitutional guarantee bodies – the *Conseil constitutionnel* and the *Tribunal constitucional*, for France and Spain respectively – have contributed to the interpretation of emergency powers, revealing a substantial asymmetry in this respect as well.

In France, unlike the other constitutional provisions mentioned above and which have never been applied, Article 16 has been used only once: during the Algerian War in 1961, President De Gaulle resorted to extraordinary powers in an attempt to quell the uprisings that had broken out in the then French colony. After those events, Article 16 has never been applied again. Yet France, like other European democracies (and not only), has had to deal with numerous circumstances over time that can be variously classified as emergencies: from movements for independence in some overseas territories, to social, political, economic and cultural protests that were sometimes accompanied by violent actions, to political terrorism in the 1970s, to the terrorist attacks following September 11, 2001, and the Covid-19 health emergency in more recent history.

Given that none of these circumstances could justify a state of war, or even a state of *siege*, why was it decided not to invoke Article 16? How, using what legal provisions and with what results, if not by resorting to the mechanisms established by the constitution, were the various emergency situations dealt with?

On several occasions, the aforementioned law no. 55-385 was applied, specifically to quell the unrest that broke out in New Caledonia (1985) and in the suburbs of some large cities in France (2005), with the consequent strengthening of the administrative powers of the Minister of the Interior and the prefects. In 2015, following the Islamist attacks in Paris, at the headquarters of the satirical newspaper Charlie Hebdo and in several public places, including the Bataclan, the *état d'urgence* was declared for the first time across the entire country, without even considering the possibility of invoking Article 16 of the Constitution. Therefore, alongside various legislative measures, which had been introduced since 2001 to

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make criminal law and criminal procedure more repressive, the use of the 1955 law, which had been repeatedly amended and supplemented, enabled France to manage the difficult challenge that it faced in that moment, alongside other Western countries, with the aim of combating international terrorism and ensuring internal security. The *état d'urgence*, declared by the Council of Ministers pursuant to law no. 55-385, was repeatedly extended with parliamentary authorization and maintained for a total duration of approximately two years, until the definitive transposition of most of the measures adopted in law no. 2017-1510 for the strengthening of internal security and the fight against terrorism. The legislature thus contributed to the so-called normalization of the emergency, i.e. making permanent the measures dictated by emergency situations. Furthermore, in 2015, the Government decided to activate – similar to what the United Kingdom had done after the 2005 terrorist attacks in London – the derogation procedure provided for by the ECHR (Article 15).

During the health emergency of 2020, French lawmakers chose to disregard, once again, the model based on Article 16 of the Constitution, as well as the framework of the 1955 law, which was considered unsuitable for addressing a crisis such as Covid-19 due to its security-oriented approach, especially in light of the reforms that had taken place. However, along the lines of the aforementioned law, *ad hoc* legislation was hastily approved to amend the 2000 Public Health Code and introduce the *état d'urgence sanitaire* (Law no. 2020-290), which was declared by the Council of Ministers with effect throughout the national territory for an initial period of two months, and extended several times with specific legislative authorizations until 2022. Thus, with the health emergency, there was a double departure from the constitutional model and from the model outlined in the 1955 law, leading to a state of emergency tailored to the specific needs of the current health crisis. Similar to what has been seen in most countries affected by the pandemic, in France too the management of the health emergency has led to significant restrictions on numerous freedoms in order to protect public health. It has also enabled the Government and the Prime Minister to assume a preferential role and the simultaneous marginalization of Parliament, especially in the initial and most critical phase of the emergency. When dealing with emergency management, the Constitutional Council has taken a deferential approach toward political bodies, confirming in principle the constitutional legitimacy of emergency regulations. However, with regard to anti-terrorism legislation, the *Conseil constitutionnel* specified that derogations from the regime of freedoms must be reasonable and proportionate to the actual seriousness of the circumstances and that it is up to the legislature to strike the right balance between security interest and the protection of individual rights (*e.g.*, DC 2004-292 and DC 2005-532). With regard to the management of the health emergency, the *Conseil* recognized the legitimacy of introducing a 'new' state of emergency, seeking not to interfere more than strictly necessary in the sphere of political discretion and to refrain from taking openly confrontational positions. Thus, for example, in a series of judgments between 2021 and 2022 concerning preventive measures relating to laws on the extension of the *état d'urgence*, the introduction of the green pass and mandatory vaccination for certain categories of workers, the *Conseil* broadly recognized the legitimacy of the powers exercised by the Government and the fair balance achieved by the legislature between the constitutional purpose of protecting health and other rights, which had therefore been appropriately restricted.

Not even in Spain, where the constitutional model for emergencies – as illustrated – is precise and detailed, has a state of *excepción* or *sitio* ever been invoked, nor has a state of war ever been declared. Incidents of domestic terrorism, mainly attributable in the 1970s and 1980s to the actions of the armed Basque independence movement (ETA), were dealt with through

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the application of police measures and legislative interventions that modified criminal law and criminal procedure in order to suppress terrorist crimes. The political response to post-2001 Islamic terrorism and the 2004 Madrid train station bombing took the form – as in France – of adapting existing sanctions legislation to the new terrorist threats. Therefore, internal and international emergencies did not lead to the invocation of the constitutional clause on states of emergency. The first occasion, which remained an isolated precedent for a long time, when it was decided to activate a state of alarm throughout the country dates back to December 2010-January 2011, when a massive strike by air traffic controllers led to the interruption of air traffic and the paralysis of an essential public service. More recently, the Covid-19 health emergency has once again led to the activation of Article 116 of the Constitution.

Therefore, the reaction of the Spanish institutions to the pandemic emergency has been different from that seen in France. The Government activated a state of alarm throughout the country three times between 2020 and 2021, making use of the prolongations authorized by the Congress, in accordance with Article 116 of the Constitution and the aforementioned organic law no. 4/1981. Similar to what has been seen elsewhere, in Spain too, the emergency led to a temporary shift in the balance of powers which showed a centralization of the Government and the Prime Minister, and a decline in the role of Parliament, while dialogue between the central state and the regions (*Comunidades autónomas*) was not easy, especially in the initial phase of the emergency. In Spain, too, there have been significant restrictions on the exercise of fundamental freedoms, to the point of raising doubts as to whether these were actually restrictions and limitations or rather suspensions. As already mentioned, the Spanish constitution provides for the possibility of suspending certain rights in the event of a state of *excepción* or *sitio* (Article 55, paragraph 1), but not during an *estado de alarma*. This aspect has fueled a lively doctrinal debate and a bitter confrontation, both at the political and judicial levels, on the adequacy and constitutionality of the regime that has been activated. The *Tribunal constitucional*, which was appealed by a parliamentary minority, took a far from complacent stance toward the decisions taken by political bodies, going so far as to dismantle much of the strategy adopted by the Government to manage the health crisis. In particular, in the most emblematic decision concerning the constitutionality of the first state of alarm (judgment no. 148/2021), the Tribunal used a material and quantitative rather than a formal and qualitative conception of the mechanism of suspension and declared a partial unconstitutionality of the decree that had ordered the first state of alarm. According to the majority of judges, in fact, there is a relationship between the limitation and suspension of rights, in the sense that every suspension translates into a limitation, but not vice versa. Consequently, the Tribunal did not doubt the necessity, suitability and proportionality of the measures taken by the Government to stem the spread of infection, in line with what had been experienced elsewhere, but considered that the restrictions imposed in general on the enjoyment of certain rights (freedom of movement, freedom of assembly in private places) were so pervasive, drastic and intense that they had, actually, caused their emptying, deprivation and cessation, albeit temporary and with exceptions. In addition to declaring the partial illegitimacy of the first state of alarm, the constitutional judges went so far as to suggest to political bodies that the most appropriate way to manage the health emergency should have been a state of *excepción*, thus placing the Government and Parliament in a serious dilemma should a similar situation arise in the future, without prejudice, of course, to any reform of the organic law on states of emergency or perhaps of the constitution itself. However, more recently, with a sort of overruling the Tribunal has established, in relation to the issue of public health, that the intensity of the restric-

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tions imposed on fundamental rights is not a determining criterion for distinguishing between limitation and suspension and that even intense restrictions are legitimate provided that they comply with the principle of proportionality (judgment no. 136/2024).

6. *Concluding Remarks. Emergency Powers in the Interpretation of the Venice Commission*

The diversity of approaches to emergencies in the legal systems examined above does not detract from the importance of a fact that, actually, brings together and links the experiences of many countries, which over time have found (and continue to find) themselves, facing situations variously defined as crises or emergencies. This is what is commonly referred to as the 'normalization of emergencies', a widespread and multi-faceted phenomenon that tends to blur the perception and distinction between normality and exception, with obvious risks for fundamental freedoms and the maintenance of the rule of law. Let's consider, in a first sense, what happens when ordinary instruments are preferred to deal with emergency situations without too much fuss, or, in a second sense, when the exceptional measures occasioned by the occurrence of a particular emergency are prolonged over time.

Faced with the risks and challenges that states of emergency pose today, what is the role of international organizations? In this regard, it should be noted that the actions taken by the UN, and in particular by the Security Council, have been largely ineffective, especially since 1989 and the end of the East-West bipolarization. Many scholars have pointed out that the different emergencies affecting the planet would require a deep modernization and rationalization of the United Nations system and its specialized agencies in order to promote effective collaboration between the national, regional and international levels, as was the case after the Second World War. Nor does the analysis of the role of the European Union seem to lead to more encouraging results at present. In areas such as safety and public health protection, the EU has no powers other than those aimed at supporting, complementing and encouraging the actions of member states, with an explicit duty to refrain from harmonizing national laws and regulations. On the other hand, the lack of a common European model for emergency management has also contributed to the heterogeneity of the responses offered by individual legal systems during the Covid-19 pandemic, but it is clear that any reform of the EU Treaties in this regard would require the willingness of all the member states and their readiness to further cede their sovereignty. While awaiting reforms at the international and European level, which seem far from being approving, legal systems faced with emergency situations should not neglect to constantly monitor compliance with values and institutions, first and foremost the separation of powers and the guarantee of fundamental rights, which constitute the most significant achievements of liberal constitutionalism.

The Venice Commission, an independent advisory body of the Council of Europe, has on several occasions addressed the problems that the establishment of a state of emergency is likely to cause, even in consolidated democracies, reiterating the need to respect certain core elements of the rule of law.[12] Already in a 1995 study,[13] the Commission focused in particular

[12] Castellà Andreu Josep Maria, "Preserving Democracy and the Rule of Law in Pandemic. Some Lessons from the Venice Commission," in *Populism and Contemporary Democracy in Europe. Old Problems and New Challenges,* edited by Josep Maria Castellà Andreu and Marco Antonio Simonelli (Barcelona: Palgrave Mcmillan, 2022) 253 ff.

on the principle of legality and judicial guarantees, conceived as the cornerstone of the concept of the rule of law. The advisory body returned to this concept, which could be dangerously distorted in times of crisis, on subsequent occasions.[14] In a list presented by the Commission itself as non-exhaustive and non-definitive, it was specified that the fundamental elements of the rule of law must include the principles of legality and legal certainty, the separation of powers and the mechanism of checks and balances, equality before the law and the principle of non-discrimination, the due process of law and the guarantee of independent and impartial judges, the protection of fundamental rights and the defence of democratic institutions. Is it possible to legitimately derogate from the above indicators, and if so, which ones, in a state of emergency? The Commission's answer is affirmative, but accompanied by some *caveat*: derogations, in the form of limitations and even suspensions, from the regime of rights and freedoms are admissible, according to the exceptions laid down in Article 15 of the ECHR, as well as from the principle of separation of powers with the consequent concentration of activities in a restricted body that usually coincides with the national executive, provided that the derogations introduced are temporary, proportionate to the circumstances, appropriate and necessary to restore normality as quickly as possible. Furthermore, it was added that, in any case, the system of checks and balances must be safeguarded: both by Parliament with regard to the activities carried out by the Government and the public administration, and by judges and Constitutional Courts with regard to the exercise of emergency powers.

More recently, the reports mentioned above were followed by further documents, the drafting of which was prompted by the spread of the pandemic in 2020. In a collection of opinions and reports,[15] the Commission specified that, without prejudice to the margin of national appreciation in assessing whether, in concrete terms, the conditions for establishing a state of emergency are met, that appreciation cannot be exempt from supervision by the bodies of the Council of Europe, including, if necessary, the European Court of Human Rights. In other words, the margin of appreciation of states in this area cannot be considered unlimited. Furthermore, that document emphasized the need of constitutional regulation of states of emergency, which is considered capable of offering greater guarantees for respect for the rule of law, unlike what can be seen in the presence of regulations entrusted to ordinary legislation or to specific interventions dictated by the urgency of dealing with specific emergencies. This was followed by a further recommendation to avoid – during a state of emergency – constitutional reforms, even if aimed at introducing an *ad hoc* emergency clause, in accordance with the provisions of many constitutions in force.

In a subsequent document on respect for democracy, human rights and the rule of law in emergency situations,[16] the Commission made reference to previous studies, focusing on a number of aspects, including: the principles governing states of emergency (rule of law, proportionality, necessity, temporariness, effectiveness of controls), the conditions for declaring states of emergency and exercising emergency powers, the measures that can be taken in practice and the consequences of such measures, for example with regard to the enjoyment

[13] CDL-STD (1995)012. Emergency Powers.

[14] CDL-AD (2011)003. Report on the Rule of Law; CDL-AD (2016)007. Rule of Law Checklist and, more recently, CDL-AD (2025)002. The Updated Rule of Law Checklist.

[15] CDL-PI (2020)003. Compilation of Venice Commission. Opinions and Reports on State of Emergency.

[16] CDL-PI (2020)005. Respect for Democracy, Human Rights and the Rule of Law During States of Emergency - Reflections.

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of fundamental rights, including electoral rights, and the distribution of power between state bodies and local authorities. In view of the derogations that a state of emergency is likely to bring about in the enjoyment of rights and freedoms and in the relations among constitutional powers, the Commission reiterated the need of constitutionalizing the states of emergency, guaranteeing the effectiveness of controls, both political and judicial, and ensuring the continuity, transparency, accuracy and completeness of information even in times of crisis.

In short, in the opinion of the Venice Commission, it is legitimate and necessary for any state to defend citizens and institutions during emergencies, but without contradicting the principles of the rule of law and without endangering the values of constitutional democracy. These arguments were confirmed in the concluding section of a report published shortly afterwards, which focused on the measures taken by EU member states in response to the health emergency and their impact on democracy, fundamental rights and the rule of law[17] (Interim Report on the Measures Taken in the EU Member States as a Result of the Covid-19 Crisis and Their Impact on Democracy, the Rule of Law and Fundamental Rights, 2020). According to that document, nine EU countries had declared a state of constitutional emergency *de jure* (Spain, Portugal, Bulgaria, Hungary, Finland, the Czech Republic, Estonia, Luxembourg and Romania); the declaration was issued mainly by the executive branch and only in two countries (Bulgaria and Portugal) by the Parliament. On the other hand, five countries, each for different reasons, opted to declare a state of emergency on the basis of ordinary legislation (Germany, Latvia, France, Italy and Slovakia), despite the fact that some of them have a fairly detailed constitutional emergency statute (France, Germany and Slovakia). Finally, thirteen countries had resorted to a *de facto* state of emergency, mostly using ordinary public health legislation that had been adapted to better manage the pandemic situation (Austria, Belgium, Croatia, Cyprus, Denmark, Greece, Ireland, Lithuania, Malta, the Netherlands, Poland, Slovenia, Sweden, and the United Kingdom). Even within this category of countries, it should be noted that some of them have detailed constitutional provisions relating to different types of emergencies, but have chosen not to use them, preferring to use ordinary legislation (Lithuania, Cyprus, Greece, Ireland, the Netherlands and Poland).

In conclusion, while the Commission clearly favours the constitutional model of states of emergency because of the greater protection it seems to offer against possible abuses, it nevertheless insists on the need to limit the exercise of emergency powers by providing for certain fundamental guarantees, which consist of "[s]trict limits on the duration, circumstances, and scope of [emergency] powers", without neglecting that "State security and public safety can only be effective secured in a democracy which fully respects the Rule of Law. This requires parliamentary control and judicial review of the existence and duration of a declared emergency situation in order to avoid abuse".[18]

[17] CDL-AD (2020)018. Interim Report on the Measures Taken in the EU Member States as a Result of the Covid-19 Crisis and Their Impact on Democracy, the Rule of Law and Fundamental Rights.

[18] CDL-AD (2011)003. Report on the Rule of Law, para. 51.

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INSTITUTIONAL RESILIENCE OF BOSNIA AND HERZEGOVINA TO CYBER THREATS: AN OVERVIEW OF JURISDICTIONS AND THE LEGAL FRAMEWORK

Željka Piljagić

Keywords: Cyber Security; Securitization; Institutional Resilience; CERT Team; Bosnia and Herzegovina.

1. *Introduction*

The rapid development of information and communication technologies in recent decades has led to massive changes in how state institutions, businesses, individuals, and society as a whole function. Alongside digitalization and technological progress, the field of security has expanded significantly. It is no longer limited exclusively to physical space but now includes cyberspace as a new and increasingly important dimension of modern security challenges, risks, and threats.

According to relevant international reports, Bosnia and Herzegovina faces serious challenges in this area. These challenges stem from a complex constitutional structure, the lack of a strategic approach, and unequal capacities between the entities. Attacks such as Distributed Denial of Service (DDoS), AI-powered social engineering, malware campaigns, phishing attacks, and attacks on critical infrastructure have become a daily occurrence in both developed and developing countries.[1] Consequently, cyber security is increasingly viewed as a vital part of national security, and institutional resilience to cyber threats is seen as a key indicator of a country's readiness.

For Bosnia and Herzegovina, cyber security remains a largely unexplored field with many questions that state institutions have yet to answer. This situation is often attributed to the country's institutional and security system, which is characterized by a complex constitutional arrangement, divided jurisdictions, and constant political disagreements that prevent consensus on many issues, including cyber security. Security responsibilities are distributed

[1] ENISA, *ENISA Threat Landscape 2025* (Athens: European Union Agency for Cybersecurity, 2025), 2-5.

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among the state, entity, and cantonal levels, making it very difficult to establish a unified and coordinated approach.[2] In such an environment, developing mechanisms to effectively prevent, detect, and respond to cyber incidents is a highly complex task.

Although international organizations and European Union institutions have pointed out the need for BiH to strengthen its cyber security capacities for years, progress remains very modest. BiH is still the only country in Europe that has not established a national CERT/CSIRT team with a clear mandate and authority to coordinate responses to cyber incidents at the state level.[3] This situation makes the fast and efficient exchange of information—which is essential for a successful response to increasingly frequent and sophisticated cyber attacks—nearly impossible.

At the same time, statistical data and reports from relevant institutions and organizations monitoring cyberspace indicate a constant growth in the number of cyber incidents and cyber-related crimes. Cybercrime, which includes financial fraud, unauthorized access to information systems, misuse of personal data, and online sexual exploitation of children, is becoming one of the fastest-growing forms of crime.[4] Under these circumstances, institutional readiness and regulatory alignment in this field gain special importance.

Based on the above, the subject of this paper is the analysis of the resilience of Bosnia and Herzegovina's institutions to cyber threats, with a special focus on the existing institutional and regulatory framework. The aim of the research is to determine to what extent existing institutions and legal and strategic documents contribute to effective protection against cyber threats, and to identify key weaknesses affecting the overall level of cyber security in BiH. The paper is based on the assumption that one of the primary reasons for the low resilience of BiH institutions is the misalignment of institutional jurisdictions, the lack of a unified cyber security strategy, and the absence of a CERT/CSIRT team. The research methodology is based on a qualitative analysis of relevant legal and strategic documents, reports from domestic and international institutions, and available statistical data on cyber attacks in BiH, in order to present the actual situation in this field.

2. *Theoretical and Conceptual Framework of Cyber Security and Institutional Resilience*

The term 'cyber' (cyberspace) refers to a space that is widespread and interconnected by digital technologies, established through computer-digital technology. Today, the term is used for everything related to the internet.[5] Cyber security is a relatively new but extremely significant field of modern security studies, focusing on the protection of information systems, networks, data, and digital services from various threats in cyberspace. There are many definitions of cyber security, ranging from those viewing it only as protection against attacks to much broader interpretations. After analyzing numerous definitions, Craigen et

[2] European Commission, *Bosnia and Herzegovina 2024 Report* (Luxembourg: Publications Office of the European Union, 2024), 44.

[3] Nagyfejeo Eva and Puello Sarah, *Cybersecurity Capacity Review: Bosnia and Herzegovina* (Oxford: Global Cyber Security Capacity Centre, 2019), 7.

[4] Council of Europe, *Cybercrime and Electronic Evidence: Towards More Effective International Cooperation* (Strasbourg: Council of Europe Publishing, 2021), 1-2.

[5] Organization for Security and Co-operation in Europe (OSCE), *Smjernice za strateški okvir cyber sigurnosti u Bosni i Hercegovini* (Sarajevo: OSCE Mission to BiH, 2019), 5.

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al. proposed the following: "Cybersecurity is the organization and collection of resources, processes, and structures used to protect cyberspace and cyberspace-enabled systems from occurrences that misalign de jure from *de facto* property rights".[6] In the broadest sense, cyber security can be defined as the pursuit of the absence of threats in cyberspace.[7]

To understand what cyber security is and how it became a vital aspect of security, we must look back through history to the first attempts to understand and define it. In modern security studies, two major groups of theories have attempted to explain the evolution of security from its primary forms to the present day. Traditional theories were primarily focused on the state and its military power, with the central debate revolving around liberals and realists regarding the causes of war and the possibilities of peace between states. Critical theories challenged the core assumptions of traditional theories and expanded the scope of research from military aspects of security to other non-military dimensions. This gave rise to the Copenhagen School of Security Studies, which provided two key contributions directly related to this topic: securitization theory and the sectoral approach to security. Through the sectoral approach, the Copenhagen School advocated for expanding the concept of security beyond the military sector to include the economic, environmental, political, and societal sectors. Initially, the cyber security sector was not part of the Copenhagen School's analytical framework. However, with the development of the Internet, the growing number of users, and the increasing threats originating from cyberspace, a gradual securitization of these threats occurred. As early as the 1990s, awareness of cyber threats and their potential consequences began to emerge. In this context, cyber threats are viewed not merely as a technical issue, but as a factor that can jeopardize the functioning of state institutions, social stability, and citizen trust in the state and its bodies. Like all other sectors, the cyber security sector has its own referent object, which in this case is the information network.

Securitization theory explains why some dangers are treated as security threats while others are not. According to this theory, security is not just an objective state but the result of a socio-political process where an issue is presented as an existential threat. When political actors successfully label a phenomenon as a threat to the survival of a reference object (state, society, institutions, or individuals), the issue becomes 'securitized'. This moves it out of regular political procedures and justifies extraordinary measures.[8] The securitization process begins when actors possessing political and social capital present a specific threat or phenomenon as an existential threat to the security of the state. However, the process is only complete when the relevant audience accepts this interpretation.[9]

Regarding the securitization of cyber security, several key characteristics can be identified: Cyber attacks are presented as national security threats rather than just technical issues or forms of crime; The sector becomes institutionalized through the establishment of national CERT/CSIRT teams and specialized agencies; Legal frameworks are transformed through the adoption of cyber security strategies, laws on critical infrastructure protection, and information security acts.

[6] Craigen Dan, Diakun-Thibault Nadia and Purse Robert, "Defining Cybersecurity," *Technology Innovation Management Review*, 4, 10 (2014): 17.

[7] Ejdus Filip, *Međunarodna bezbednost: teorije, sektori i nivoi* (Beograd: Službeni glasnik, 2012): 106-16.

[8] Buzan Barry, Wæver Ole and de Wilde Jaap, *Security: A New Framework for Analysis* (Boulder: Lynne Rienner Publishers, 1998), 21.

[9] Buzan Barry, Wæver Ole and de Wilde Jaap, *Security*, 25.

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The securitization of cyberspace can be observed as a process in which, alongside the state, international organizations and cyber security experts represent cyber threats as existential dangers to the state, the economy, or society. This is, on one hand, justified because contemporary literature views cyber threats as transnational, complex, and unpredictable, with significant economic and social consequences for states, organizations, and individuals.[10] However, viewed in this light, the securitization of cyber security can have numerous consequences – both positive and negative. Positive examples include the increased presence and role of the state and its bodies in the digital sphere, including the adoption of laws and strategies, the protection of critical infrastructure, and greater oversight of the private sector. Furthermore, securitization justifies extraordinary measures, such as surveillance, restrictive laws, and increased budgets for security institutions. On the other hand, a problem arises regarding the potential expansion of state surveillance and the limitation of privacy, the militarization of cyberspace, and a decrease in transparency and democratic control – all in the name of security. In the case of cyber security, we are not only discussing successful securitization but also potential hypersecuritization. This term, first introduced by Buzan, refers to the overemphasis of threats to justify the implementation of emergency or extraordinary measures.

In the case of Bosnia and Herzegovina, the process of cyber-securitization is still in its early stages and faces numerous challenges. International organizations and domestic actors increasingly point to cyber threats as a factor that significantly affects national security. At the same time, BiH institutions and relevant authorities that should address this issue remain hesitant. According to international reports, BiH still lacks a comprehensive state-level cyber security strategy and a unified national CERT.[11] The OECD notes a lack of political consensus regarding the legal framework for cyber security and the establishment of a national institution responsible for this sector.[12] Although certain initiatives exist, coordination between different levels of government and existing CERT teams remains limited, which negatively impacts the overall capacity to respond to cyber incidents. Considering these various initiatives, it can be concluded that a discourse exists in BiH that treats cyber threats as a security issue, but the institutional and regulatory framework is not yet fully developed, meaning that the securitization process is incomplete. Threats from this sector are recognized as important, but extraordinary measures to address them have not yet been taken. This raises the question of whether those in Bosnia and Herzegovina who have the social capital to highlight these threats as existential truly understand the danger, or if all steps taken so far have merely been a reaction to pressure from international organizations and developed countries, or simply a requirement for EU accession. The future development of the cyber security sector will certainly depend on the adoption of a state strategy, the establishment of a coordinated system of CERT teams, and alignment with European standards.

Resilience theory is also vital for this research. As an interdisciplinary field, resilience in the context of modern security studies refers to the ability of a system, society, institution, or state to absorb disruptions, adapt to changes, and continue functioning despite crises and threats. The modern theoretical foundations of resilience are most commonly linked to the work of Canadian ecologist C. S. Holling. In his work Resilience and Stability of Ecological

[10] Vidović Nikola and Beriša Hatidža, "Ekonomski aspekti sajber sigurnosti: Socio-finansijske posljedice sajber napada," *International Journal for Contemporary Security Studies*, 1, 1 (2025): 150.

[11] European Commission, *Bosnia and Herzegovina 2023 Report* (Brussels: European Commission, 2023), 85.

[12] OECD, *Western Balkans Competitiveness Outlook 2024: Bosnia and Herzegovina* (Component 15) (Paris: OECD Publishing, 2024), 170.

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Systems, he defined resilience as the ability of a system to withstand disturbances without losing its basic structure and functions.[13] Later, this concept was expanded from ecology to social, political, and security phenomena. In the context of cyber security, institutional resilience involves more than just the technical protection of information systems; it also requires an adequate legal framework, clearly defined jurisdictions, trained personnel, and efficient coordination mechanisms.[14] The resilience of institutions in cyberspace is not reflected solely in the ability to prevent attacks, but also in the capacity to respond quickly and effectively, minimize consequences, and ensure continuity of operations. For this reason, there is an increasing emphasis on a proactive approach, which includes prevention, education, and the continuous improvement of response capacities in crisis situations.[15] The role of the state in strengthening institutional resilience is particularly significant, as it bears the responsibility to establish a regulatory and institutional framework that enables coordinated action among various actors. In this sense, the establishment of national CERT/CSIRT teams, the adoption of national cyber security strategies, and the alignment of legislation with international standards are key prerequisites for effective protection of cyberspace.

Given the transnational nature of cyber threats, no state can independently ensure the complete protection of its cyberspace. Therefore, international cooperation and the application of shared standards and recommendations are crucial for strengthening institutional resilience. In this context, the Budapest Convention on Cybercrime serves as a key international instrument for harmonizing criminal and procedural frameworks in the fight against cybercrime. Its application is particularly significant for states with complex institutional structures, such as Bosnia and Herzegovina, as it provides a clear regulatory framework for international cooperation and information exchange.

Based on the theoretical and conceptual framework presented above, the following chapters will analyze the institutional and regulatory framework of cyber security in Bosnia and Herzegovina. The aim is to determine which institutions in BiH are responsible for cyber security, assess the current regulatory environment, and examine how these factors affect the resilience of BiH institutions to cyber attacks. Given the lack of scientific literature on cyber security specifically in the context of Bosnia and Herzegovina, this paper uses a descriptive-analytical method to explain the current situation. Furthermore, a qualitative approach is applied to evaluate 'resilience' by comparing existing solutions in BiH with internationally recognized standards.

3. *The Institutional and Regulatory Framework of Cyber Security in Bosnia and Herzegovina*

3.1. *Institutional and Regulatory Framework at the Level of Bosnia and Herzegovina*

The institutional framework for cyber security in Bosnia and Herzegovina is characterized by the absence of a unified and functionally complete system that would enable coordinated ac-

[13] Holling Crawford S., "Resilience and Stability of Ecological Systems," *Annual Review of Ecology and Systematics*, 4 (1973): 14.

[14] Linkov Igor, Palma-Oliveira Jose Manuel and Keisler Jeffrey, edited by, *Resilience and Risk: Methods and Application in Environment, Cyber and Social Domains* (Dordrecht: Springer, 2017), 9.

[15] Boin Arjen and van Eeten Michel, "The resilient organization: A critical appraisal", *Public Management Review*, 15, 3 (2013): 429.

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tion and response to cyber threats. Considering the state's constitutional structure, defined by the General Framework Agreement for Peace in BiH (specifically Annex IV), Bosnia and Herzegovina consists of two entities, and jurisdictions in this field are distributed among multiple institutions. According to Article III/3 of the Constitution of BiH,[16] all governmental functions and powers not expressly and explicitly listed as the jurisdiction of the institutions of Bosnia and Herzegovina automatically belong to the entities. Since the field of security is not included in the list of exclusive jurisdictions of BiH institutions, it is considered, according to this general rule, a jurisdiction that originally belongs to the Republic of Srpska and the Federation of BiH.

Despite this primary entity jurisdiction, there are certain bodies and organizations at the level of BiH's joint institutions that have developed over time and deal, directly or indirectly, with cyber security issues. These institutions include: The Ministry of Security of Bosnia and Herzegovina, which coordinates activities in the areas of critical infrastructure protection, the fight against cybercrime, and international cooperation; The State Investigation and Protection Agency (SIPA), which has the authority to detect and investigate high-tech crimes; The Intelligence-Security Agency of BiH (OSA/OBA), which, within its mandate, monitors security threats, including those originating from cyberspace; The Personal Data Protection Agency of BiH, as an independent regulatory body in the field of data protection.

The Ministry of Security of Bosnia and Herzegovina holds a central role in creating security policies, including those related to cyber security. Its jurisdiction includes coordinating activities between various security agencies, as well as cooperating with international organizations and European Union institutions. However, the Ministry of Security of BiH lacks the operational capacity for direct response to cyber incidents, and no CERT/CSIRT team with a clear mandate and authority in this field has been established within its structure.

The State Investigation and Protection Agency (SIPA) is one of the key institutions for combating cybercrime at the level of joint institutions. Within SIPA, there are organizational units responsible for investigating crimes related to the misuse of information technologies, particularly in cases with a transnational character. Nevertheless, SIPA's role is primarily repressive and focused on criminal investigations, while preventive and coordination functions in the field of cyber security remain underdeveloped.

In the context of cyber security, the Intelligence-Security Agency of Bosnia and Herzegovina (OSA/OBA) plays a significant role in monitoring, assessing, and analyzing security threats that could endanger the constitutional order, territorial integrity, and institutional stability of the state. With the development of the digital space, cyber threats – including cyber espionage, hybrid operations, and attacks on critical infrastructure – have become part of the broader security spectrum addressed by the agency. Although its role is not operational-technical in terms of incident management (which is typically the responsibility of CERT bodies), OSA/OBA is crucial in risk assessment, early warning, and coordination with other domestic and international security actors.

On the other hand, the Personal Data Protection Agency in Bosnia and Herzegovina holds a regulatory and supervisory role in protecting the right to privacy and the security of personal data processing, which is inextricably linked to cyber security. In an environment of increasingly frequent cyber attacks – especially those involving unauthorized access to databases and leaks of sensitive information – the agency's role is reflected in monitoring law

[16] Ustav Bosne i Hercegovine, Aneks IV Opšteg okvirnog sporazuma za mir u Bosni i Hercegovini, *Službeni glasnik BiH*, no 25/09, art. III(3).

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enforcement, processing reports of data misuse, and strengthening information security standards within both public and private entities. Although it is not a traditional security institution, the Agency represents a vital part of the system that can contribute to improving the overall security situation in cyberspace, given the critical importance of protecting personal data, corporate information, and state institutional records.

However, one of the fundamental problems in developing a cyber security system at the level of joint institutions is the fact that, for many years, Bosnia and Herzegovina has lacked a comprehensive national cyber security strategy. Despite years of initiatives and proposals to improve security in cyberspace, a state-level CERT has still not been established, indicating significant difficulties in coordination between different levels of government. The lack of a unified framework leads to a situation where entities and individual institutions develop their own systems and mechanisms for cyber protection, resulting in an inconsistent approach and uneven levels of readiness across various government levels. Such an institutional model hinders the establishment of an effective system for incident management, information sharing, and a coordinated response to cyber threats. This situation is particularly problematic in scenarios requiring rapid information exchange and synchronized action among multiple institutions, which is a primary prerequisite for effective cyber incident management. In the context of European integration, developing a unified regulatory and institutional cyber security framework at the state level is a vital task. Through directives such as NIS and NIS2, the European Union sets standards for protecting critical infrastructure, mandatory incident reporting, and the establishment of national CSIRT/CERT structures. Consequently, Bosnia and Herzegovina faces the future task of aligning its legislation and institutional mechanisms with these international standards.

At the level of BiH joint institutions, the regulatory framework indirectly related to cyber security includes several laws in the fields of criminal law, personal data protection, electronic communications, and the information society. The Law on Personal Data Protection of BiH is particularly significant, as it regulates the processing and protection of personal data, as well as the jurisdiction of the Personal Data Protection Agency of BiH. Although this law is not primarily focused on cyber security, it represents a vital segment of the broader information security system, especially in the context of digital data protection and privacy. In the field of criminal law, certain forms of cybercrime are regulated by the Criminal Code of Bosnia and Herzegovina, as well as by entity-level criminal legislation. These regulations criminalize acts such as unauthorized access to computer systems, interference with the operation of information systems, computer fraud, and other high-tech crimes. It is essential to note that Bosnia and Herzegovina is a signatory to the Convention on Cybercrime (Budapest Convention),[17] which it officially signed on February 9, 2005. Although the Convention entered into force on January 9, 2006, committing the state to adopting legal regulations and implementing measures to combat cybercrime, full harmonization of domestic legislation has not yet been achieved. The stagnation in this process is also highlighted in the latest European Commission Report for 2025, which emphasizes that Bosnia and Herzegovina must further align its legal framework with the EU *acquis* and European standards. The report specifically stresses the necessity of signing the Second Additional Protocol to the Budapest Convention, as well as completing the strategic framework, which is currently established only at the level of the entity of the Republic of Srpska.[18]

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

[18] European Commission, *Bosnia and Herzegovina 2025 Report*, SWD(2025) 751 final (Brussels: European Commission, 2025), 45.

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3.2. *Institutional and Regulatory Framework at the Entity Level: The Republic of Srpska*

In contrast to the state level, the Republic of Srpska has made certain progress in building institutional capacities in the field of cyber security over the past period. A key role in this process is played by the Ministry of the Interior of the Republic of Srpska (MUP RS), which includes a specialized High-Tech Crime Unit, organizationally located within the Criminal Police Administration. This unit was established with the task of processing information on all forms of high-tech crime, as well as performing proactive and reactive collection, assessment, and analysis of intelligence data.[19] The role of the Ministry of the Interior in the cyber security system has both a repressive and a preventive character. In addition to the criminal prosecution of perpetrators, the Ministry participates in activities to raise awareness of cyber threats, cooperates with educational institutions, and exchanges information with other security agencies and international partners. In this way, the role of police structures complements technical and institutional protection mechanisms, making the cyber security system functionally linked between its preventive and repressive components.

The establishment of CERT of the Republic of Srpska, which operates within the Agency for Information and Communication Technologies of the Republic of Srpska, is of particular importance. CERT of the Republic of Srpska was founded in 2011 as an organizational unit of the Agency for Information Society, within the Information Security Department. With the adoption of the new Law on Republican Administration, this team was institutionally moved to the Ministry of Scientific and Technological Development, Higher Education, and Information Society. Since 2023, CERT of the Republic of Srpska has been operating within the Emergency Response Department, which is part of the Information Security Sector of the Agency for Information and Communication Technologies of the Republic of Srpska. The primary jurisdiction of CERT involves continuous monitoring of the Republic of Srpska's cyberspace, protecting the information systems of republican authorities, and detecting, analyzing, and processing computer security incidents. Since April 2020, CERT of the Republic of Srpska has held the status of an accredited member of the international association of CERT teams, 'Trusted Introducer', which indicates its involvement in international cooperation and information exchange in the field of cyber security.[20] CERT RS represents the first functional team of its kind in Bosnia and Herzegovina, tasked with monitoring cyber threats, responding to incidents, and providing technical support to the institutions of the Republic of Srpska. The cooperation between CERT RS, the Ministry of the Interior of the Republic of Srpska, and other institutions enables a more efficient response to cyber incidents within entity-level jurisdictions.

Although the existence of CERT RS represents a significant step toward strengthening institutional resilience, its scope is limited to the entity level. The lack of a national CERT/CSIRT team means that there is no mechanism for coordination between the entities and joint institutions, which diminishes the overall effectiveness of the cyber security system in BiH.

The primary regulatory act in the field of cyber and information security in the Republic of Srpska is the Law on Information Security. This law regulates the principles of information system protection, information security measures, the jurisdictions of institutions, and the obligations of public sector bodies regarding the prevention of and response to security

[19] Ministarstvo unutrašnjih poslova Republike Srpske, "O nama - Visokotehnološki kriminalitet," in *Mup.vladars.rs* (Accessed February 7, 2026).

[20] CERT - AIKT. "O CERT-u," in *Cert.aikt.rs*, Accessed February 9, 2026.

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incidents.[21] The law provides for the establishment of institutional mechanisms for coordination and incident management, as well as the implementation of technical and organizational protection measures. In addition to the law, the regulatory framework is supplemented by bylaws, such as the Decree on Information Security Measures, which provides more detailed standards for protection, risk management procedures, and the obligations of institutions regarding the protection of information resources.[22] These acts serve as operational instruments for applying legal provisions in practice.

Criminal law protection of cyberspace is ensured by the Criminal Code of Republic of Srpska, which contains specific criminal offenses against the security of computer data. These offenses include, among others, unauthorized access to computer systems, interference with system functioning, destruction or alteration of data, as well as various forms of computer fraud. Legal solutions in this area are based on international standards, primarily the Council of Europe Convention on Cybercrime (Budapest Convention), which was ratified by Bosnia and Herzegovina.[23]

3.3. *Institutional and Regulatory Framework at the Entity Level: Federation of Bosnia and Herzegovina*

Unlike the Republic of Srpska, which developed a regulatory framework and institutional mechanisms for cyber incident management relatively early, the Federation of BiH (FBiH) lacks a unified entity-level law on information or cyber security. Furthermore, there is no central CERT with jurisdiction over this entity.

Security responsibilities in FBiH are distributed between the federal level and ten cantons, which further complicates coordination in the field of cyber security. According to analyses from international and domestic reports, most cantons do not have specific strategic or regulatory documents addressing cyber security, nor do they have specialized institutional mechanisms for cyber incident management.[24] This structure leads to varying levels of readiness and capacity, which impacts the overall (non)resilience of the system within the entity.

On the institutional level, the Federal Ministry of the Interior, specifically the Federal Police Administration (FUP), plays a significant role. It includes the Department for Combating Terrorism and Computer Crime.[25] Their responsibilities include the detection, investigation, and prosecution of cybercrime offenses, as well as cooperation with prosecutor's offices, cantonal police authorities, and international partners. However, these units primarily have a repressive function, while the entity level lacks an institution with the preventive, coordinating, and technical mandates typically held by national or entity-level CERTs.

An additional challenge is the complex internal structure of the Federation of BiH, which includes both federal and cantonal levels of government. This organization further compli-

[21] Zakon o informacionoj bezbjednosti, *Službeni glasnik Republike Srpske*, no. 70/1.

[22] Uredba o mjerama informacione bezbjednosti, *Službeni glasnik Republike Srpske*, no. 91/12.

[23] Simović Miodrag, Simović Vladimir and Jovašević Dragan, "Criminal Offenses against Security of Computer Data in the Republika Srpska according to the Criminal Law of 2017," in *Archibald Reiss Days*, edited by Biljana Simeunović-Patić (Belgrade: University of Criminal Investigation and Police Studies, 2020), 285.

[24] Miotto Nicolò, *The Importance of Cybersecurity for Bosnia and Herzegovina* (Sarajevo: Center for Security Studies, 2022), 13.

[25] Federalno ministarstvo unutrašnjih poslova, "Početna stranica," in *Fmup.gov.ba* (Accessed 7 February 2026).

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cates the establishment of a unified approach to cyber security and leads to an inconsistent level of protection across different cantons. In practice, this means that institutional capacities and the degree of readiness to respond to cyber threats vary significantly within the same entity. All the above leads to the conclusion that there is significant room for improvement in the Federation of BiH, particularly regarding the adoption of relevant laws, the harmonization of cantonal legislation, and potentially the establishment of a CERT team for this entity. This would help avoid the most common vulnerability in cyber security: the 'weakest link in the chain', whether it be a poorly protected institution, canton, or entity.

Furthermore, it is important to mention the specific position of the Brčko District of BiH which, according to Article 6, Paragraph 4 of the Constitution of BiH, is defined as a unit of local self-government under the sovereignty of Bosnia and Herzegovina, with territory held in joint ownership (condominium) by the entities, and having its own institutions.[26] However, within the context of this paper, the status of the District will not be analyzed separately. This is because the Brčko District currently lacks developed cyber security capacities and specialized operational units for fighting high-tech crime, making it an equally vulnerable part of the country's already fragmented security system.

4. *Analysis of Bosnia and Herzegovina's Institutional Resilience to Cyber Attacks*

In this paper, the analysis of cyber incidents in BiH is based on secondary data sources, primarily reports from international organizations (ENISA, OECD, European Commission) and regional non-governmental organizations operating in this sector. This approach is necessary because domestic institutions either do not maintain systemic records of cyberattacks at all, or have only recently begun to do so, making the existing data still unsuitable for comprehensive analysis.

According to a report published by the Cybersecurity Excellence Center (CSEC) and BIRN BiH, Bosnia and Herzegovina was exposed to over 9.2 million cyber threats in just one month in 2022, clearly illustrating the intensity and continuity of digital attacks in the region. A particularly concerning fact is that BiH is the only country in the Western Balkans that still lacks a functional national CERT (Computer Emergency Response Team), leaving state institutions, the economy, and citizens without a centralized point for incident response and defense coordination. Empirical data collected through 'honeypot' systems indicate that DDoS attacks are the most prevalent form of malicious activity, accounting for a significant portion of registered incidents. In addition to these, frequent attempts to compromise databases, attacks on web servers, and sophisticated phishing campaigns have been recorded. A relevant example illustrating the complexity of the situation is a discovered phishing campaign originating from official state domains (.ba), which was initially identified by the Spanish national CERT. This case further confirms the international dimension and the necessity for cross-border cooperation in this field. Although data suggest that a significant number of attacks originate from Brazil, the Netherlands, and the United States, experts caution that this may not be entirely accurate. Hackers frequently use VPNs to mask their true locations, making it difficult to identify the actual perpetrators. This inherent anonymity complicates

[26] Ustav Bosne i Hercegovine, Aneks IV Opšteg okvirnog sporazuma za mir u Bosni i Hercegovini, *Službeni glasnik BiH*, no 25/09, art. VI(4).

the detection and proof of attacks, requiring more advanced methods of cyberspace monitoring. The lack of a unified legal solution and strategic documents directly affects the protection of critical infrastructure, including the energy, healthcare, and rule-of-law sectors, which remain vulnerable to potentially destructive actions by external actors.[27]

The same institutions analyzed cyber attacks in BiH from January to August 2023 using the 'DecoyNET Honeypot' system. Data show that during this period, the most frequent attacks targeted private companies, directly increasing their operational costs and threatening their revenues. Of particular concern are sophisticated ransomware attacks, such as the one on the major gas company 'Sarajevogas', where customer data were compromised at the very beginning of the heating season. Although the number of DDoS attacks has technically decreased, media outlets remained primary targets, preventing citizens from accessing reliable information at critical moments. Victims express growing frustration over the slow reaction of law enforcement agencies, which leads to the loss of key digital evidence and makes it harder to find the perpetrators.[28]

According to available reports, the most frequently recorded forms of cyber incidents in Bosnia and Herzegovina include: Phishing attacks targeting citizens and public institutions; Malware and ransomware attacks on small and medium-sized enterprises (SMEs); Unauthorized access to internet portals and institutional websites; Misuse of personal data and the compromise of user accounts.

The lack of publicly available and continuous data on cyber attacks represents a key obstacle to detailed scientific research in this field within BiH. Data are often fragmented across different locations, levels of government, and various institutions, without a centralized registry that would allow for a complete insight into the actual situation. Even in cases where official reports exist, such as those on the website of the Ministry of the Interior of the Republic of Srpska, they are mostly limited to short timeframes. Meanwhile, at the level of the Federation of BiH and the level of joint institutions, publicly available statistical reports on this type of crime are almost non-existent.

The analysis of the current situation unequivocally indicates that the key cyber security challenges in Bosnia and Herzegovina stem from the lack of adequate and harmonized legal regulations, as well as the absence of a national strategy to define a systemic response to cyberspace threats. While establishing a single CERT team at the level of joint institutions is one possible option, an effective solution could also be a decentralized system of entity-level CERTs, provided there is a coordinating body to enable rapid information exchange. However, even with a complete legal and institutional framework, the human factor remains a major obstacle. There is an evident shortage of expert personnel and insufficient capability of existing staff to respond to complex attacks. This problem is further complicated by the 'brain drain' – the migration of qualified experts to the private sector, where working conditions are significantly more favorable. Another issue is that we do not approach cyber security from a scientific perspective, as we still lack specialized tracks in secondary schools and degree programs at universities dedicated exclusively to cyber security. The shortage of technical tools and equipment, though also a concern, seems negligible compared to the lack of expert personnel in this field, which will take years to develop.

[27] Mahmutović Aida and Hodžić Enes, *Izvještaj o cyber sigurnosnim prijetnjama u Bosni i Hercegovini* (Sarajevo: CSEC and BIRN BiH, 2022), 8-14.

[28] Puharić Predrag et al., *Bosna i Hercegovina: Izvještaj o cyber sigurnosnim prijetnjama* (Sarajevo: CSEC and BIRN BiH, 2023), 8-15.

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Based on the aforementioned reports, it can be concluded that while cyber attacks definitely exist in BiH, no major attack has yet occurred that resulted in the complete disabling of key institutions or the compromise of large-scale data. We can conclude that the relatively low intensity of serious attacks to date is more a consequence of a current lack of geopolitical or economic interest from attackers, rather than the strength of domestic defense mechanisms. This suggests that facing a more severe crisis is merely a matter of time. It remains to be seen how Bosnia and Herzegovina and its institutions will address this issue in the future; however, based on the current situation, BiH is definitively not prepared to defend its institutions or its citizens against major cyber attacks.

5. *Conclusion*

The analysis of the theoretical-conceptual and institutional framework of cyber security in Bosnia and Herzegovina shows that this field is in a phase of gradual development, accompanied by significant structural and regulatory challenges. Theoretically, cyber security is increasingly viewed through the lens of securitization and institutional resilience, indicating its growing importance in contemporary security studies. It can be concluded that cyber security in Bosnia and Herzegovina represents an area with a clear public discourse on threats, but which lacks an adequate regulatory and operational response.The key challenge lies in the deep institutional and political complexity of the state. While the Republic of Srpska has established a functional system through the ICT Agency and an operational CERT team, the levels of the Federation of BiH and joint institutions still lack centralized coordination mechanisms and strategic documents. Without a national CERT and a clear strategy, the institutional resilience of BiH is unable to reach a satisfactory level. The country's critical infrastructure remains exposed to serious risks, which is not only an internal security issue but also an internationally recognized fact, given that BiH is considered one of the most vulnerable nations within the European context.

Based on the concept of institutional resilience, it is evident that the effective protection of cyberspace requires a clear regulatory framework, a functional division of jurisdictions, trained personnel, and coordinated action among all relevant authorities. In this context, the most important thing right now for BiH is to set priorities and move forward with the adoption of a national strategy, the establishment of CERT teams, and the harmonization of legal regulations. Aligning laws within the state itself, and subsequently with international conventions, represents the foundation for any serious progress in the cyber sector.

Overall, institutional resilience to cyber threats in Bosnia and Herzegovina has not yet reached a level that would enable an efficient and coordinated response to modern digital challenges. The future of this sector primarily depends on the political will to strengthen cooperation between institutions at various levels and to adopt solutions that enable an efficient response to cyber threats. Ultimately, all of this remains just a dead letter on the page if BiH fails to build its own network of cybersecurity experts capable of protecting the system in practice.

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DETERRING TERROR THROUGH CIVIL LAW: A FRAMEWORK FOR STRATEGIC TORT LITIGATION

Boaz Segal

Keywords: Tort Law, Terrorism, Civil Liability, Deterrence, Extra-territorial Jurisdiction

1. *Introduction: The Barghouti Example*

On August 25, 2001, a deadly shooting attack occurred on Route 443 in Israel, in which Sharon Ben-Shalom and Yaniv Ben-Shalom, a married couple, were murdered, along with Doron Yosef Suwary – Sharon's brother. At the time of the attack, Sharon and Yaniv's two young daughters, Efrat Moshe Ben-Shalom and Shahar Moshe Ben-Shalom, were also in the vehicle. Sharon shielded her daughters with her body, saving their lives while sustaining fatal gunshot wounds. Efrat and Shahar survived, but suffered injuries from shrapnel. The attack was particularly shocking due to its outcome: a brother, a sister, and her husband were all killed at a young age, and two toddlers were left orphaned.

According to the court's judgment,[1] Ahmad Taleb Mustafa Barghouti (hereinafter: 'Ahmad') was one of the central participants in the execution of the attack. At the time, Ahmad served as the personal driver and bodyguard of Marwan Barghouti-the commander of Fatah in the West Bank and the leader of the Tanzim and the Al-Aqsa Martyrs Brigades, which functioned as militant arms of Fatah (hereinafter: 'Barghouti'). Ahmad held both

[1] CivC (DC Jer) 3361-09 *Estate of the Deceased Sharon Ben Shalom v. the Palestinian Authority*, in *Nevo.co.il* (November 17, 2017).

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logistical and operational responsibilities, with direct access to weapons and financial resources.

According to the indictment to which he pleaded guilty, Ahmad played an integral role in the planning and execution of the attack. He approved the inclusion of Muhammad Matzlach (also known as 'Abu Sattah') in a Tanzim cell engaged in planning shooting attacks. Ahmad provided Abu Sattah with an MP-5 submachine gun loaded with ammunition, knowing it was intended for use against Israeli civilians. Abu Sattah then transferred the weapon to the operatives who carried out the attack. Following the attack, Ahmad transferred a payment of $500 to the attackers, which he had received from Ali Barghouti – a financial operative connected to Marwan Barghouti.

On May 20, 2004, Marwan Barghouti was convicted by the Tel Aviv District Court of premeditated murder in connection with three separate terrorist incidents that resulted in the deaths of five individuals. The court determined that Barghouti served as the leader of Fatah in the West Bank and commanded its field operatives. As part of these roles, he exerted influence over the terrorist cells and their commanders and ensured they received weapons and funding to support their operations. He was sentenced to five life sentences and additional lengthy prison terms.

Following the attack, the plaintiffs filed a tort claim in the Jerusalem District Court seeking both compensatory and punitive damages from the defendants for the harm caused by the attack. The plaintiffs alleged that not only the direct perpetrators, but also the Palestinian Authority and Marwan Barghouti bore legal responsibility.

The District Court ruled that both Barghouti and the Palestinian Authority were indeed liable for the damages suffered by the plaintiffs. The court found that at the time of the attack, the Palestinian Authority possessed various weapons and had approved requests from terrorist organizations to fund and procure weapons. Among those organizations were the Al-Aqsa Martyrs Brigades – the group to which the perpetrators of this particular attack belonged.

The court further found that Barghouti acted as the liaison between the terrorist organizations and Yasser Arafat, then Chairman of the Palestinian Authority. Barghouti relayed funding requests to Arafat, and after receiving approval, transmitted the authorized aid to the militant groups. The District Court concluded that both Barghouti and Arafat were aware that the requested weapons and funds were intended to carry out terrorist attacks against Israeli civilians.

As for damages, the District Court awarded punitive damages totaling NIS 62 million, to be divided such that the Palestinian Authority would bear 40% of the total amount, while Barghouti and the direct perpetrators would be jointly and severally liable for the remaining 60%.

Following an appeal, the Supreme Court of Israel issued its ruling on March 10, 2021[2]:

The Supreme Court upheld the District Court's ruling with respect to the liability of the defendants and confirmed that punitive damages were appropriate in this civil action. However, the Court reduced the amounts awarded, as follows:

The District Court had awarded NIS 10 million in punitive damages for each of the estates of the three deceased victims, and NIS 6 million each to Efrat and Shahar.

[2] CivA 71-18 *The Palestinian Authority v. Estate of the Deceased Sharon Ben Shalom*, in *Nevo.co.il* (March 10, 2021).

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The Supreme Court revised these awards, holding that the defendants were to pay NIS 3 million for each of the victims' estates (instead of NIS 10 million), and NIS 1 million to each of the two injured daughters (instead of NIS 6 million).

This case, in which the Court addressed in a holistic and systematic way the relevant heads of tort, including punitive damages, I refer to as the 'Barghouti example', used to assist in the presentation of the forthcoming arguments. Thus, the following fundamental question emerges: in what manner can tort law be structured to support the war against terrorism? The goal of the present Article is to investigate how tort law can be leveraged as an additional tool in the deterrence toolkit of counterterrorism. My argument is that tort law is capable of playing an important deterrence role in the war on terrorism. I elaborate on how it is possible to structure tort procedures as a tool in the war against various circles of the world of terrorism, to make tort law an effective deterrence tool.

The Article proceeds as follows: Section B lays the conceptual groundwork for a tort-based approach to counterterrorism by identifying and defining three concentric categories of terror operatives – perpetrators, dispatchers, and enablers – and clarifying their respective roles within the architecture of terrorist activity. Section C contends that, under existing legal frameworks, tort liability can meaningfully deter such actors, both directly and indirectly, thereby supplementing the deterrent effect of criminal and administrative regimes. Section D proposes a normative and procedural blueprint for adapting tort law to the unique challenges of terrorism cases. Section E anticipates and responds to potential objections to the proposed framework. Finally, Section F offers concluding observations and outlines avenues for further scholarly and legislative development.

2. *The Anatomy of Terror: Perpetrators, Dispatchers and Enablers*

This section is devoted to defining the concept of 'terror operatives' by mapping the three distinct circles of actors involved in terrorist activity. It does not yet analyze how tort law can deter these actors but rather lays the conceptual foundation necessary for such an analysis. A clear understanding of who the relevant operatives are – and the nature of their affiliation with terrorist acts – is essential for constructing an effective tort-based deterrence framework. The term 'terror operatives', as used throughout this article, encompasses the following three concentric circles: *perpetrators*, *dispatchers*, and *enablers*.

The term *perpetrator* refers to the individual terrorist or group of terrorists who physically carry out the attack. In the Barghouti example, this individual was Ahmad himself.

The *dispatchers* are those who orchestrate and plan the attack behind the scenes – they form the operational and ideological infrastructure that enables terrorism to materialize. This category includes organizations such as Al-Qaeda, ISIS, the Taliban, Hezbollah, and, in the Barghouti case, the Palestinian Authority.

Finally, *enablers* are those actors who could have reasonably prevented the terrorist act but failed to do so, thereby indirectly facilitating its occurrence. This category often includes financial institutions, such as banks that allow the transfer of funds from donors to terrorist organizations, which rely heavily on financial resources to support their operations. In some instances, these institutions also serve as channels for money laundering or concealment of funding sources. A bank that fails to implement adequate oversight and compliance mechanisms risks becoming a passive instrument of terrorist financing. Charitable organizations

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may likewise function as enablers: although their stated purpose is humanitarian, insufficient due diligence can lead to the inadvertent diversion of funds to terrorist groups instead of the civilian populations they aim to support.

Together, these three categories form the full ecosystem of terrorist operations – from execution, to planning, to indirect facilitation – and thus constitute the primary focus of this Article's legal and normative analysis.

3. *Deterring Terrorism through Tort: the Role of Compensatory and Punitive Damages*

Tort law can serve as a meaningful deterrent to terror operatives by imposing significant monetary liabilities on those held responsible for committing acts of terrorism, as well as on individuals, organizations, or states that supported such acts – whether directly or indirectly. While these financial sanctions may not always dissuade those already within the perpetrator circle, they hold particular deterrent potential for the broader circles: the dispatchers and the enablers. These are the actors who assist terrorists or their sponsors prior to the attack, often by providing logistical, financial, or ideological support. When a court finds a person, organization, or state liable in a tort action, they may be required to pay substantial compensation to the victims. This economic burden – sometimes in the form of punitive damages or enhanced compensatory awards – can make involvement in terror-related activities prohibitively costly. By targeting dispatchers and enablers, tort law indirectly obstructs the operational capabilities of individual perpetrators, undermining the support networks that enable terrorism to function in practice.

Deterrence through tort law can be effectively applied across all three circles of terrorism. *Perpetrators*, or their estates in the case of deceased attackers, can be subject to civil lawsuits in which courts may impose substantial monetary damages for their direct involvement in acts of terrorism. *Dispatchers* – such as terrorist organizations – can be held civilly liable as well, and upon judgment, any assets under their control may be subject to seizure and forfeiture in order to satisfy the court's ruling. The same applies to *enablers* – including banks, corporations, or even governments – that knowingly or negligently provided direct or indirect financial or logistical support to terrorists or their sponsors.[3] These entities can also face tort claims and be compelled to pay significant compensation. As a result, financial institutions and other potential enablers are more likely to adopt stricter compliance policies, conduct enhanced due diligence, and exercise greater caution in vetting clients and transactions – particularly where there is a risk of exposure to liability for aiding terrorism, even unintentionally.

Returning to our example, it is known that the PA budget includes an item called payment to *shaheeds*[4] and security prisoners. In other words, the PA chose to pay people for perpetrating acts of terrorism.[5] It is reasonable to assume that this payment policy serves

[3] See *infra* Section 4.1. for a discussion about how a foreign government difficulty may arise because of its immunity.

[4] One who has given his life for his religious belief or a higher cause, especially one who is killed in battle for Islam. *Shahid*, in *Encyclopedia.com* (last visited July 1, 2025).

[5] To ensure its payments to security prisoners, released security prisoners, the families of *shaheeds*, and the wounded, the PA enacted, among others, two laws. See "Law for Support of Prisoners in Israeli Prisons No. 14,

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as an incentive for terrorists to continue to perpetrate acts of terrorism. Among others, the policy provides security prisoners and the families of *shaheeds* with financial security in the form of a monthly salary, which is proportional to the severity of the attack perpetrated by them. Put simply, the longer the terrorists' prison term is, the higher their monthly salary. This PA policy creates a direct, open relationship between the severity of the attack and the size of the salary it pays security prisoners (for those surviving the attack) and their estate (for those killed in the course of the attack). This payment policy has been met with sharp criticism, and several countries have condemned it and halted the transfer of financial aid to the PA because of it.[6]

Nevertheless, the PA continues to defend this policy and annually allocates some 7% of its budget, for a total of some 300 million dollars,[7] for payments to security prisoners and their families. The imposition of tort liability on the PA in such cases, obligating it to pay heavy sums of money, is likely to contribute to their deterrence. Yet, for the damages to create effective deterrence, as suggested in this Article, they must contain two elements: tort compensation for the damage caused and punitive damages.

3.1. *Deterrence by Making Victims Whole - Tort Compensation as Remedy*

Tort law can serve as an important tool for terror victims to receive compensation for the harm they endured, both physically and emotionally. This compensation may include not only pecuniary damages, for example, for medical expenses and loss of salary, but also non-pecuniary damages like pain and suffering. Victims who survived terror attacks frequently endure not only physical harm requiring long-term medical treatment but also emotional harm, such as severe psychological trauma. The families of the victims of terror attacks are also liable to suffer from psychological trauma, in addition to the loss of the financial support that had been provided by the murdered person.[8] Tort lawsuits may provide injured parties

An-Najah Nat'l U.", in *Maqam.najah.edu* (2004); "Released Prisoners Law No. 19", in *Palestinian News and Info. Agency* (2004). See also "Law of Released Prisoners No. 19", in *Info.wafa.ps* (2004).

[6] For example, Germany expressed concern that funds transferred by it to the PA would be used to fund terrorism and promised to investigate their destination. See Ahren Raphael, "In First, Germany Admits PA is Likely Paying Terrorists' Families", in *Timesofisrael.com* (September 5, 2016). The UK suspended the transfer of funds to the PA in 2016 because of similar concerns. See Hawkes Steve, "Taxpayer Funded Terrorists: Britain Suspends Millions of Aid Payments to Palestine Amid Claims Cash is Handed to Terrorists," in *TheSun.com* (October 7, 2016). Australia changed the allocation of payments transferred by it in the course of 2018 because of concerns that they would be used to finance salaries to terrorists. See "Reallocation of Aid to the Palestinian Authority," in *Dfat.gov.au/news* (July 2, 2018). Norway expressed concern that aid funds would be transferred for these purposes and was satisfied with a promise by the PA that it would refrain from doing so. See "Abbas Confirms PA Still Paying Terrorists' Salaries - Report," in *Timesofisrael.com* (May 7, 2016). The U.S. froze the transfer of funds to the PA as long as these payments continued by enacting the Taylor Force Act, Pub. L. No. 115-141, §§ 1002-07, 132 Stat. 347, 1143-47 (2018). In this context, it should be added that the 'reallocation game' is problematic. Money is fungible. The money from Norway can be used to fund lunch for kindergarten students and the money saved from the kindergartens' budget is used to pay terrorists.

[7] Neuer Hillel and Rovner Dina, "Alternative Report of United Nations Watch to the 99th Session of the Committee on the Elimination of Racial Discrimination for Its review of State of Palestine 7," in *Unwatch.org* (July 12, 2019).

[8] Restatement (Second) of Torts para. 46 cmt. j (A.L.I. 1965), which recognizes an exception to the presence requirement for family members in cases of extreme and outrageous conduct.

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with a means of receiving compensation for their harm. This incentive is especially important when government compensation programs are lacking or are or insufficient.[9]

I argue that the considerable deterrence achieved by tort law as a result of compensation awarded to the injured party is the main motive for initiating legal proceedings. The incentive of potential plaintiffs lies in the possibility of receiving compensation. In this way, tort law generates more plaintiffs who, in turn, increase awareness of the war against terror.

3.2. *Deterrence by Hitting Terrorists Harder - Tort Compensation as Sanction*

Tort law can impose not only tort compensation on terror operatives, but also punitive damages. The latter are accorded as part of the tort proceedings to punish the tortfeasor and deter others from perpetrating similar acts. This award to the injured party is intended to compensate the plaintiff for losses incurred as a result of the tortious conduct of the tortfeasor. In general, there is no place for the imposition of punitive damages in tort law because tort law aspires to generate optimal rather than maximum deterrence.[10] Tort law does not aspire to bring society to a situation of zero damages because it usually deals with accidents that are the outcome of socially desirable activities like driving, medical treatment, and manufacturing, whereas maximum deterrence is warranted only for behaviors intended to cause harm. From the deterrence standpoint, tortfeasors should be aware of the duration of the damage caused by them, and no more (to avoid overdeterrence), and injured parties know that if they endure harm, the compensation they receive will be the equivalent of the duration of the harm, and no more, no less.

By contrast, in tort lawsuits enacted as a remedy for terrorism, the situation is different because it deals with behavior aimed at intentionally inflicting severe harm.[11] Consequently, in such cases, the aspiration must be maximum deterrence because there is no danger of either overdeterrence of the tortfeasor (society aspires to prevent acts of terrorism entirely) or underdeterrence of the injured person (people are not interested in being murdered in acts of terrorism).

Moreover, in tort lawsuits initiated as a remedy for terrorism, punitive damages can serve as a deterrent in the following way: the essence of tort law is the awarding of compensation to the injured party. This compensation mechanism is essential because of the effective incentives it provides to the victims of terrorism to file tort lawsuits. According to this argument, the main advantage of tort law is the compensation of the injured party. Potential plaintiffs have an incentive because of the high compensation they hope to receive through tort proceedings, so tort law generates more plaintiffs who, in turn, bring about better deterrence of terror operatives. The component of significant punitive damages in tort law motivates injured parties to sue terror operatives, leading to more efficient deterrence. I suggest that deterrence is the only justification for awarding punitive damages,[12] without resorting to the punitive purpose.[13]

[9] See *infra* Section 4.5.

[10] See also Wilcox Vanessa, "Punitive Damages in England," in *Punitive Damages: Common Law and Civil Law Perspectives*, edited by Helmut Koziol and Vanessa Wilcox (New York: Springer, 2009), 7.

[11] See *Philip Morris USA v. Williams*, 549 U.S. 346, 357 (2007), for a justification of punitive damages when the tortious event causes many damages to many injured persons, not all of whom are parties to the proceedings.

[12] See Galligan Jr. Thomas C., "Augmented Awards: The Efficient Evolution of Punitive Damages," *La. L. Rev.*, 51 (1990): 17, for an explanation of the deterrent purpose.

[13] See Ghiardi James D., *Punitive Damages: Law and Practice* (St. Paul, Minn.: West Group, 2010), show-

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I argue that punitive damages can be awarded in tort law when the following two cumulative conditions exist: *first, there is no fear of overdeterrence of the tortfeasor*. As noted above, in tort lawsuits instituted as a remedy for terrorism, the tortfeasor is sued for behavior perpetrated out of ideological motives intended to inflict severe bodily harm. Therefore, the aspiration must be maximum deterrence to completely rid society of the tort feasance. Therefore, there is no fear of overdeterrence of the tortfeasor. Concerns raised in the academic literature that punitive damages lead to excessive deterrence, the paralysis of industry, and loss of welfare do not apply in this case.[14] *Second, there is no fear of underdeterrence of the injured party*. As noted, the awarding of punitive damages for harms resulting from the terrorist activity does not raise concerns of underdeterrence of the injured party because people do not seek to place themselves in danger of being murdered by terrorist activity. When these two conditions are met simultaneously, the conclusion follows that *the harmful activity is one for which optimal deterrence is maximum deterrence*.

4. *Toward a Systematic Tort Law Regime against Terrorism*

This section outlines a preliminary blueprint for a tort law framework grounded in six foundational pillars: (a) challenging sovereignty: the case for extra-territorial civil jurisdiction in terrorism litigation; (b) liability in the shadows: stretching tort law's reach in terror cases; (c) bridging the evidentiary gap: tailoring civil procedure to combat terror through tort Law; (d) from judgment to payment: using legislative leverage to enforce civil liability in terror cases; (e) a two-tier approach: state compensation and cost recovery from the circles of terror; (f) building a global tort law front: legal cooperation as a weapon against terrorism.

4.1. *Challenging Sovereignty: The Case for Extra-Territorial Civil Jurisdiction in Terrorism Litigation*

Extra-territorial jurisdiction refers to the authority of a country to exercise judicial power beyond its territorial boundaries.[15] In the context of tort lawsuits filed as remedies for terrorism-related harm, the expansion of extra-territorial jurisdiction entails allowing national courts to adjudicate claims and impose civil liability on individuals, organizations, or even foreign states that perpetrate, aid, or abet acts of terrorism – even when such acts occur entirely outside the forum state's borders.[16] This expansion is especially significant when the targeted acts produce harm to that country's citizens or interests. The recognition and implementation of such jurisdiction reflect an evolving understanding that terrorist activity

ing the need for both purposes together; Mitchell Polinsky Alan and Shavell Steven, "Punitive Damages: An Economic Analysis," *Harv. L. Rev.*, 111 (1998): 109 showing same.

[14] See Sunstein Cass R., "Assessing Punitive Damages (with Notes on Cognition and Valuation in Law)," *Yale L.J.*, 107 (1998): 2084, for these concerns in the literature.

[15] As a rule, the jurisdiction of a country is limited to its own borders. International law, however, allows for extra-territorial jurisdiction as long as this is not prohibited, as in a situation of enforcement in another country's territory. See S.S. Lotus (*Fr. v. Turk.*), Judgment, 1927 P.C.I.J. (ser. A) No. 10, at 44-45 (Sep. 7).

[16] See *id.* at 45-46.

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often transcends borders, and that traditional territorial limits on legal authority may be inadequate to address the global nature of this threat.

The adoption of extra-territorial jurisdiction can be pursued through a comprehensive, multi-faceted approach. For example, countries may enact domestic legislation explicitly authorizing their courts to assert jurisdiction over foreign defendants who engage in or support terrorism that causes harm to their nationals, regardless of where the act occurred. In addition, countries can work through diplomatic and multilateral channels to establish international treaties that confer reciprocal extra-territorial jurisdiction over terrorist offenses. These treaties can create a shared framework for addressing cross-border terrorism by obligating signatory states to recognize and enforce each other's civil judgments – particularly when the liable parties reside or hold assets within their territories. Such mutual recognition mechanisms enhance the enforceability of tort verdicts and reduce the risk that perpetrators or enablers of terrorism will evade financial liability by exploiting jurisdictional gaps.

In the U.S., legislation that regulates this issue consists of three laws: (1) The Foreign Sovereign Immunities Act (FSIA) (1976) constitutes the federal legal framework for understanding when and how tort claims against foreign countries can be filed in US courts.[17] It grants immunity to foreign countries from lawsuits against them and it enshrines the basic principle, whereby a sovereign country is not subject to the jurisdiction of another and is immune from legal proceedings in another country, thereby preserving its sovereignty.[18] But the law includes several exceptions through which a foreign country can be sued, including activities of a commercial nature.[19] If a country controls a commercial company operating in the U.S., it can be sued for its activity. Other exceptions concern damage caused on U.S. territory,[20] and terrorist activity, allowing countries that have been declared by the U.S. Department of State to support terrorism to be sued for terror acts that caused damage to American citizens or their property.[21] In sum, the FSIA provides the basis for determining whether a foreign sovereign state is immune from the jurisdiction of U.S. courts and sets the limits of sovereign immunity.[22]

(2) The Anti-Terrorism Act (ATA) (1990) is a fundamental legal tool for managing the fight against terrorist activity using civil law.[23] It is intended to give American citizens the possibility to file tort claims against terrorist organizations and their supporters, including also against states and private entities that have been found involved in terrorist activities

[17] *See* Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1602-1611 (1976).

[18] 28 U.S.C. § 1604 (2016).

[19] *Id.* § 1605(a)(2) (2016).

[20] *Id.* § 1605(a)(5).

[21] 28 U.S.C. §§ 1605A-1605B (2016).

[22] See, for example, *Owens v. Republic of Sudan*, 412 F. Supp. 2d 99 (D.D.C. 2006), which dealt with the bombing of the US embassies in Kenya and Tanzania in 1998. The lawsuit was filed under the authority of the FSIA for providing material support to the terrorist organizations that carried out the attacks. The court found Sudan responsible for providing support to al-Qaeda, which carried out the bombings, and imposed on Sudan an obligation to pay compensation to the victims and their families. Also see *Rubin v. Islamic Republic of Iran*, 2011 U.S. App. LEXIS 6758 (7th Cir. 2011), which dealt with a tort claim filed by victims of a suicide attack by Hamas in Jerusalem. American citizens who were seriously injured in this attack filed a tort claim against Iran in the Federal District Court in Washington, claiming that Iran had a hand in it with the training and support it provided to Hamas. In imposing liability, the court based its jurisdiction in this case on the FSIA.

[23] See Antiterrorism Act of 1990, 18 U.S.C. §§ 2331, 2333 (1990).

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against Americans.[24] This law served as the basis for lawsuits against an enabling circle when banks and companies accused of providing financial support to terror organizations were sued based on it, including banks that transferred funds to terror organizations.[25] The law was also used in lawsuits against countries such as Iran, which was accused of supporting terrorism that harmed American citizens.[26] In conclusion, the ATA is intended to deter entities in the various circles of the terrorist world by giving American citizens the possibility to use private law and to file tort claims for damages caused to them as a result of international terror acts.

(3) The Justice Against Sponsors of Terrorism Act (JASTA), 2016,[27] is a significant amendment to the FSIA and the ATA. Its purpose is to expand the ability of terror victims to file tort claims against foreign countries that sponsor terrorism, especially in the case of events that occurred on U.S. soil. A key feature of this law is its broad applicability. Whereas the FSIA provides immunity to certain countries from lawsuits in the US, as long as they are not on the U.S. State Department's list of countries that support terrorism, JASTA allows foreign countries to be sued even if they are not on that list. This is a significant expansion of the limits of tortious liability because it allows tort claims against countries for their support of terrorism without an official declaration by the American government.[28] In summary, JASTA reduces the scope of immunity granted to foreign countries and officials in cases of terror acts, allowing U.S. citizens to file tort claims against foreign countries that support terrorism even if they are not designated as state sponsors of terrorism by the U.S. government.

In Israel, the main law covering this issue is the 2008 Foreign States Immunity Law.[29] According to section 2 of this law "a foreign state shall have immunity from the jurisdiction of the courts in Israel",[30] but section 5 qualifies this immunity by stating that "a foreign state shall not have immunity from jurisdiction in a lawsuit due to a tort resulting in damage to the body or tangible property, provided that the wrongdoing was committed in Israel".[31]

[24] *Ibid.*, § 2333(a).

[25] One of the well-known rulings is *Miller v. Arab Bank, PLC*, 372 F. Supp. 3d 33 (E.D.N.Y. 2019). The plaintiffs in this case were victims of American terrorist attacks and their families who claimed that the Arab Bank facilitated the transfer of funds to Hamas leaders and charitable organizations affiliated with Hamas, and that these funds were used to carry out and encourage attacks. The bank was accused of managing the accounts of known Hamas operatives, making payments to the families of suicide terrorists, and financing charities that were used for terrorism. A jury found the Arab Bank responsible for providing material support to Hamas. It was a significant case because it was the first time a financial institution was held liable under the ATA. Once liability was imposed, the Arab Bank agreed to settle the compensation amount as part of a compromise, the details of which remain confidential.

[26] See, for example, *Peterson v. Islamic Republic of Iran*, 2023 U.S. Dist. LEXIS 49039 (S.D.N.Y. Mar. 22, 2023), which dealt with tort claims by American victims of an attack that occurred in Beirut in 1983 against American marines. The court found Iran responsible for providing support to the Hezbollah organization, which carried out the attack, and awarded significant compensation to the injured.

[27] *See* 28 U.S.C. § 1605B.

[28] Based on this law, tort claims were filed by the families of the victims of September 11th and several thousand survivors against Saudi Arabia. The prosecutors claimed that Saudi Arabia aided the planners and perpetrators of the attack. See, e.g., *Ashton v. Kingdom of Saudi Arabia*, No. 1:17-cv-02003, 2017 WL 1056098 (S.D.N.Y. 2017).

[29] See Foreign States Immunity Law, 5768-2008 (Isr.).

[30] *Ibid.*, para. 2.

[31] *Ibid.*, para. 5.

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The possibility of filing tort claims against terrorist actors is more limited in Israeli law than in American law. Israeli law limits this possibility in relation to wrongs committed in Israel, whereas American law allows these lawsuits to be filed even for acts committed outside the U.S. Included amongst these are provisions that specifically allow lawsuits to be filed against certain designated countries that finance terrorism, regardless of where the terror act took place.[32]

The expansion of extra-territorial jurisdiction faces challenges, however. For example, the implementation of the concept is liable to create tension between states for being perceived as harming national sovereignty. Moreover, the determination and expansion of jurisdiction over international cases can be inherently complex. Enforcement of rulings can be difficult, especially if it involves the seizing of assets held in other countries or extradition. Therefore, while extra-territorial jurisdiction can empower countries seeking to deter operatives engaging in terrorism by means of tort law, it must be part of a broad, multi-faceted approach to the war on terrorism. Such a strategy must include a combination of diplomacy, international cooperation, military activity, and intelligence-sharing, rather than only legal cooperation.

4.2. *Liability in the Shadows: Stretching Tort Law's Reach in Terror Cases*

In order for tort law to serve as an effective deterrence mechanism against terrorist activity, the traditional boundaries of tortious liability may need to be thoughtfully and deliberately expanded. Such expansion is necessary to allow the imposition of civil liability not only on the direct perpetrators of terrorist acts, but also on the broader circles of involvement, particularly enablers and dispatchers – those who facilitate, support, or orchestrate terrorism behind the scenes.[33] By stretching the contours of liability to encompass these indirect actors, tort law can target the infrastructure that sustains and enables terrorism, thereby increasing the deterrent effect at multiple levels of the terror ecosystem.

However, any such doctrinal extension must be approached with great caution. Expanding liability too broadly or without adequate safeguards may risk undermining legal certainty, triggering diplomatic frictions, or entangling courts in politically sensitive determinations. The challenge, therefore, is to craft legal standards that are both rigorous and flexible – sufficiently expansive to reach culpable enablers and dispatchers, yet grounded in clear principles of foreseeability, proximity, and causation. This calibrated approach ensures that tort law remains a credible and principled tool in the broader legal response to terrorism.

It will be recalled that the circle of enablers includes people or bodies that make it possible for terrorists to receive financial support. This may be done by means of direct financing,

[32] See 28 U.S.C.S. para. 1605A (LexisNexis 2025). The National Defense Authorization Act (NDAA) is passed annually and reflects the priorities and challenges facing the U.S. military and the broader national security landscape at that time. The 2008 NDAA achieved considerable public acclaim for its focus on improving the treatment of combat-injured veterans and reforming aspects of defense procurement. See National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-191, para. 1083, 122 Stat. 3, 338 (2008). This amendment introduces a federal cause of action against foreign state sponsors of terrorism, allowing victims and their families to seek compensation.

[33] The American law allows imposing tortious liability on foreign countries even if they are not officially declared as supporting terrorism by the U.S. government. It also allows submitting tort claims against terrorist actors for acts committed outside the U.S. See *infra* Section 4.1.

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or indirectly by means of activities such as money laundering or the supply of resources.[34] As for the circle of dispatchers, this category includes all those who extend practical help to terrorists, such as offering those engaging directly in terrorism: a safe haven, training, logistic support, or help fundraising.[35]

In Israel, Section 12 of the Torts Law Ordinance states that "[f]or the purposes of this Ordinance, any person joins himself or aids in, counsels, or solicits any act, or omission, done or about to be done by any person, or commands, permits or authorizes them, shall be deemed liable for such act or omission".[36] Based on this Ordinance, the Supreme Court determined that the payments made by the PA to terrorists and their families amount to "ratification" and therefore, the PA was also responsible for committing an act of terrorism.[37]

This being the case, the tort liability of these parties must be expanded, given that they had the ability to prevent an act of terrorism and did not do so. This category can also include security companies, building owners, and even government agencies, although the imposition of liability in this manner must be carried out carefully because it may be controversial.

To expand tort liability appropriately, several issues must be taken into account. First, tort legislation must clearly define what constitutes 'enabling' or 'sponsoring' terrorism, to ensure that these categories are not used for unjustified purposes, such as frivolous lawsuits or overdeterrence of innocent parties. Defendants must also have the right to a fair procedure, including the ability to appeal court rulings against them. When facing challenges in enforcing such a legal scheme for expanded liability, in particular with respect to tortfeasors located in other countries, international cooperation and mutual legal assistance are vital.

To summarize, expanded tort liability in lawsuits intended as a remedy for terrorism may constitute a deterrent by creating significant legal and financial risks for entities considering direct or indirect involvement in such activity.[38] At the same time, it must be ascertained that the basic principles of justice and effective deterrence are respected.

[34] According to the ATA, banks and other financial institutions can be held liable if they knowingly provide financial services to organizations involved in terrorist activity. Section 18 U.S.C. para. 2333 of the ATA allows victims of international terrorism to claim civil damages in US courts. The provision has been interpreted to include secondary parties such as banks that may knowingly assist a terrorist organization by providing financial services.

[35] Thus, for example, a key section in JASTA, which allows countries to be sued even if they are not on the US State Department's list of sponsors of terrorism, is Section 5, which amends the FSIA by adding a new exception to sovereign immunity in cases involving acts of terrorism in the U.S.

[36] Israeli Tort Law Ordinance, 5728-1968, SH 541 1 (Isr.).

[37] CivA 2362-19 A v. Palestinian Authority (Apr. 17, 2022) (Isr.).

[38] The expansion can also be done through the identity of the victim. See, for example, cases that dealt with non-citizen victims, such as *Peterson v. Islamic Republic of Iran*, 264 F. Supp. 2d 46 (D.D.C. 2003), which dealt with a lawsuit filed by the families of U.S. Marines who were killed in the 1983 attack in Beirut, Lebanon. *Id.* at 48. In this attack, which occurred during a peacekeeping mission of international forces, 241 U.S. Marines were killed when a suicide bomber detonated a truck full of explosives near their residence. *Ibid.* at 48, 56. This case included family members of different nationalities, who represented the multi-national composition of the forces stationed in Beirut at the time. *Id.* at 49. Most of the victims were Americans, but they also included French, Italian, British, and other forces. The court ruled that Iran and Hezbollah supported and participated in the planning and execution of the attack. *Id.* at 58. According to the court decision, compensation of approximately 2.65 billion dollars was awarded to the victims and their families. These claims are also relevant in the case of mass disasters. See *Havlish v Islamic Republic of Iran* [2018] EWHC (Comm) 1478 (Eng.) (dealing with a lawsuit filed by family members and victims of the September 11, 2001, attacks). The plaintiffs claimed

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4.3. *Bridging the Evidentiary Gap: Tailoring Civil Procedure to Combat Terror Through Tort Law*

This section addresses the procedural challenges unique to tort litigation arising from acts of terrorism. Given the complexity and opacity of terrorist operations, and the often-transnational character of such cases, it may be necessary to adapt certain rules of civil procedure – particularly those governing evidence and testimony – to ensure the effective functioning of tort law in this domain. Such adaptations must simultaneously promote access to justice for victims and safeguard the defendants' fundamental right to a fair trial.

Evidence and testimony are central pillars of any tort proceeding. In terrorism-related claims, the burden of proof lies primarily with the plaintiffs – typically the victims or their families – who must establish the liability of the alleged tortfeasors. However, this burden is often rendered extraordinarily difficult due to the clandestine nature of terrorist activity, the use of proxies or front organizations, and the lack of transparency in state or non-state actors who support terrorism. To address this evidentiary gap, the following procedural tools and reforms may be considered: Lenient Standards of Evidence: Courts may adopt more flexible evidentiary standards, allowing the admission of indirect or circumstantial evidence that, while not conclusive, can help construct a coherent factual narrative. Such an approach recognizes the inherent difficulty in obtaining direct evidence against terrorist operatives and their enablers; Use of Classified or Sensitive Information: Terrorism-related litigation may involve intelligence materials or state secrets. Courts may need to authorize the partial or conditional use of classified evidence, such as allowing a claimant's counsel to review sensitive documents in camera or under protective orders, without compromising national security or public safety; Expert Testimony on Terrorism: The appointment of expert witnesses specializing in terrorism can provide critical context to judicial proceedings. Such experts can assist the court in understanding organizational structures, funding mechanisms, and logistical networks associated with terrorist entities, thereby aiding in the attribution of liability; Remote Testimony Mechanisms: To accommodate witnesses located in foreign jurisdictions – or those unable to travel due to security or logistical constraints – civil procedure rules may permit testimony via videoconferencing or other secure digital platforms. This flexibility is especially pertinent in cross-border litigation involving international terror networks; Witness Protection Measures: Given the risks involved, particularly in lawsuits targeting violent extremist organizations, it is imperative to implement witness protection programs. These may include anonymity orders, relocation assistance, and psychological support for witnesses and their families to encourage their participation in legal proceedings; International Evidentiary Cooperation: Effective litigation may require evidence gathering from multiple jurisdictions. Mechanisms such as mutual legal assistance treaties, joint investigation teams, and shared intelligence databases can facilitate the cross-border collection of

that Iran and other parties actively supported and assisted al-Qaeda in planning and carrying out the attacks. In 2011, the United States District Court for the Southern District of New York accepted the lawsuit and ruled in favor of the plaintiffs. The Court found that there were connections and coordination between elements in Iran and al-Qaeda, including training received from terrorists in Iran. As part of the verdict, the court demanded that Iran pay billions of dollars in compensation to the families of the victims. However, as in many cases of judgments against Iran, there is great difficulty in enforcing the compensation and obtaining the funds from the defendant country.

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admissible evidence, including financial records, communication logs, and travel documents.

While these procedural accommodations are essential for ensuring that tort claims arising from terrorist acts are both viable and meaningful, they must be carefully balanced against the rights of defendants. Fundamental principles such as the right to confront witnesses, to access and challenge the evidence presented, and to appeal judicial findings must remain intact. The overarching goal is to ensure that the pursuit of deterrence and accountability through tort litigation does not come at the expense of procedural justice.

4.4. *From Judgment to Payment: Using Legislative Leverage to Enforce Civil Liability in Terror Cases*

Efficient collection mechanisms are needed to enable securing the restitution from the tortfeasor and its transfer to the injured party.[39] Below, I describe a mechanism adopted in the US and Israel, which in certain circumstances can meet this challenge.

The U.S. is among the countries extending financial aid to the Palestinian Authority. Since 1993, the U.S has transferred $41 billion in international aid to the West Bank and Gaza Strip.[40] In a terrorist attack in Tel Aviv in 2016, an American army veteran, Taylor Force, was killed while vacationing in Israel with his wife, who was also wounded.[41] Force's death reverberated throughout the U.S. His family revealed that the terrorist who perpetuated the attack was receiving a stipend for the murder from the PA, which was receiving American financial aid.[42] Thus, the financial aid to the PA, funded by American taxpayers, was paying Force's murderer for his act.

This discovery shook Force's family, who decided to rally broad support to change the legal reality in the U.S. As a result, in July 2017, Congressman Doug Lamborn introduced

[39] On the challenge regarding the execution of the judgments, see *Rubin v. Islamic Republic of Iran*, 33 F. Supp. 3d 1003, 1005 (N.D. Ill. 2014) (dealing with an attempt by victims of terrorism to expropriate assets of the State of Iran located in the US to receive compensation). In this case, the plaintiffs were victims and families of victims of an attack in Jerusalem. *Id.* at 1006. The plaintiffs won damages from the state of Iran in U.S. federal court but faced difficulties in collecting the funds because Iran held no available assets in the US, with the exception of some artwork on display at the University of Chicago. *Ibid.* The question raised before the Supreme Court was whether the art collections at the University of Chicago could be used to pay the damages. The Supreme Court ruled that the art collections are not considered assets that can be redeemed. Another example of enforcement difficulties, in the United States is *Flatow v. Islamic Republic of Iran*, 67 F. Supp. 2d 535-37, 542 (D. Md. 1999) (involving Alyssa Flatow, an American student, who was killed in a hit-and-run action when the bus she was traveling in collided with a van loaded with explosives). The U.S State Department determined that the Islamic Jihad carried out the attack and that it was Iran that provided material support and resources to the Islamic Jihad to carry out this attack. The court held Iran responsible for the attack in light of its material support for the Palestinian Islamic Jihad and awarded the Flatow family 247.5 million dollars in damages and punitive damages. The appeals court confirmed the finding of the lower court that Iran was responsible for the attack but referred to a number of issues related to the enforcement of the judgment against Iran. The court discussed the challenges related to the collection of the judgment from the assets of a foreign country.

[40] "West Bank and Gaza Aid: USAID Generally Ensured Compliance with Anti-terrorism Policies and Addressed Instances of Noncompliance," *U.S. Gov't Accountability Off.*, Gao.gov (December 7, 2023).

[41] Wootliff Raoul, Ari Gross Judah and Staff Tol, "Jaffa Terror Victim Was U.S. Army Vet, Vanderbilt Student," in *Timesofisrael.com* (March 8, 2016).

[42] Press Release, Sens. Ted Cruz, Tom Cotton and Colleagues, Senators Introduce Taylor Force "Martyr Payment" Prevention Act to Target Palestinian Terror Payments, in *Cruz.senate.gov* (April 6, 2017).

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the Taylor Force Act in the American Congress.[43] Following the legislative process, it was signed into law by President Trump in March 2018.[44]

The Taylor Force Act limits the power of the US President and Secretary of State, vested in them by virtue of Chapter 4, Part II of the Foreign Assistance Act,[45] to extend special international assistance exceeding the limit determined in Chapter 32, Part I[46] for development in special cases that are justifiable for economic, political, or security reasons serving American interests. When the US President decides this is indeed the case, the Secretary of State is responsible for its implementation and for determining the policy with regard to the selected countries.[47]

The Taylor Force Act directs that the U.S. Secretary of State has the power to approve such federal assistance, as determined in Chapter 4, Part II of the Foreign Assistance Act,[48] to the PA, the Palestine Liberation Army, or any other entity demanding it, limited to situations meeting the following four cumulative conditions: (a) the entities that are candidates for assistance are adopting concrete steps to put a halt to terrorist attacks in their jurisdiction against Israeli and American citizens[49]; (b) the entities have halted all payments to all persons concerning whom it was determined, subsequent to a fair proceeding, that they perpetrated an act of terrorism against an Israeli or American citizen, or have halted all payments to the family of the person who perpetrated such an act of terrorism and was killed in so doing[50]; (c) the entity cancelled or took action equivalent to canceling all injunctions and laws regulating a payment policy according to which a stipend is paid to persons based on the length of time they were under arrest for perpetrating an act of terrorism[51]; and (d) the entity publicly condemns acts of terrorism perpetrated by its members and takes concrete steps to investigate such deeds and apprehend collaborators.[52]

Such a tort scheme has a few exceptions. According to the Taylor Force Act, the limitations on foreign aid do not apply to hospitals in East Jerusalem, to water and sanitation services, or to any program designated to vaccinate children.[53] So, the purpose of the law is not to punish innocent people in desperate need of assistance, but rather to exert external, international pressure with the aim of creating incentives to change a policy that harms innocent American and Israeli citizens.

Israel has adopted provisions similar to those in the Taylor Force Act. For example, Section 1 of the Israeli Law on Freezing Revenues Designated for the Palestinian Authority determines the following with regard to money paid by the latter to fund terrorism-related activity[54]:

[43] H.R. 1164, 115th Cong., in *Congress.gov* (2017).

[44] Cortellessa Eric, "Trump Signs Into Law Bill Slashing PA Funds Over Terrorist Stipends", in *Timesofisrael.com* (Mar. 23, 2018, 10:57 PM).

[45] Foreign Assistance Act of 1961, 22 U.S.C. para. 2346.

[46] 22 U.S.C. ch. 32, pt. 1.

[47] 22 U.S.C. para. 2346(b).

[48] *Ibid.*, para. 2346.

[49] Taylor Force Act, Pub. L. No. 115-141, para. 1004(a)(1)(A), 132 Stat. 347, 1143-47 (2018) (codified as amended at 22 U.S.C. para. 2378c-1(a)(1)(A) (2018)).

[50] *Ibid.*, para. 1004(a)(1)(B).

[51] *Ibid.*, para. 1004(a)(1)(C).

[52] *Ibid.*, para. 1004(a)(1)(D).

[53] *Ibid.*, para. 1004(b).

[54] See para. 1, Law on Freezing Revenues Designated for the Palestinian Authority Due to Payments

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The purpose of this law is to reduce terrorist activity and to eliminate the economic incentive for terrorist activity by setting provisions for the freezing of funds paid by the Palestinian Authority in connection with terrorism, out of the funds transferred by the Israeli government to the Palestinian Authority according to the provisions under implementing laws.[55]

This law determines that at the close of each year, the Minister of Defense will present, to the cabinet for ratification, data on the total amount of funds transferred by the PA to finance terrorism-related activity during that year, as well as data on the effects of freezing such funds on the strength of this law in that year as it concerns Israeli national security and external relations. On the basis of this data, and following ratification by the cabinet, a percentage of the tax money transferred by the Israeli government to the PA, equivalent to one-twelfth of the total amount of funds passed on by the latter to fund terrorism-related activity in the previous year, will be frozen each month.[56] If the data presented by the Minister of Defense to the cabinet shows that in the year in question, the PA did not transfer funds to support terrorism-related activity, the cabinet is entitled to decide to transfer the frozen funds to the PA.[57]

4.5. *A Two-Tier Approach: State Compensation and Cost Recovery from the Circles of Terror*

To ensure that terror victims indeed receive the damages awarded to them, governments can set up funds for the compensation of victims of terrorism. Funds of this kind may be specific to a particular terrorist incident[58] or may be general and relevant to all terrorist acts.[59] Such funds may be financed through general tax revenues or through more specific sources such as fines and punishments to be imposed on the various circles of the terrorist world. Terror victims or their families will therefore be able to submit a claim to the fund, when they present proof of their damages, and the costs incurred because of these damages. The fund can then assess these claims and provide compensation accordingly.

In the next step, the fund may file a claim for participation to be reimbursed from the relevant terrorist actors. This claim can be filed against the circle of perpetrators, of dispatchers, and of enablers, as stated in Section B above. The existence of such a fund may even result

Linked to Terrorism, 5778-2018 (Isr.), which reflects a law freezing money transferred by the Israeli government to the PA and allocated by the latter to fund terrorism-related activity.

[55] See *ibid.*

[56] *Ibid.*, para. 4(a).

[57] *Ibid.*, para. 4(b).

[58] See, *e.g.*, "VCF 2023 Annual Report," *September 11th Victim Comp. Fund*, in *Vcf.gov* (February 12, 2024). The September 11th Victim Compensation Fund (VCF) was established by the U.S. government to provide compensation to victims of the terrorist attacks on September 11, 2001, and to people who later developed health problems as a result of exposure to waste and toxic conditions at the attack sites. Initially, this fund operated between 2001 and 2004 but it was reactivated in 2011 to provide compensation for new cases and to continue support in view of ongoing health problems related to the attacks.

[59] In the U.S. see, for example, the fund established to compensate victims of state-sponsored terrorism under the Justice for United States Victims of State Sponsored Terrorism Act, 34 U.S.C. para. 20144; see also in the U.S., the Office for Victims of Crime (OVC), which is relevant to victims of terrorism because it administers various programs that assist victims of terrorism and mass violence, *Ovc.ojp.gov* (last visited Oct. 23, 2024). For Israel, see, for example, Victims of Hostile Actions (Pensions) Law, 5730-1970, LSI 24 131 (1959-60) (Isr.); Fallen Soldier's Families (Pensions and Rehabilitation) Law, 5710-1950, LSI 4 115 (1949-50) (Isr.).

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in better preventive measures against potential terrorist actors because they may be required to pay into the fund even in the event of a terrorist act that was unsuccessful and caused no damage.

Why would the victims of terrorism prefer compensation from the terrorist entities over rewards offered to them by the state? It may be argued that the state pays relatively quickly and there are no difficulties in collecting on a claim for damages caused by terrorism. According to the model proposed in this Article, methods that established government compensation funds would obligate these funds to submit reimbursement claims against the relevant terrorist actors. In this way, both the goals of compensating the injured party and of charging the tortfeasor are achieved.

This concept faces some challenges. For example, the damages awarded to the injured parties may be very high, taking into consideration the harms caused by terror attacks. Moreover, the process of litigating and calculating damages is likely to be a long, complex process, necessitating a significant administrative mechanism, and in turn, involving operating expenses.

To summarize, although a damages fund for victims of terrorism can provide important support for victims, set tort proceedings in motion, and function to a certain extent as a deterrent, it is unlikely to be sufficient. A comprehensive approach to the deterrence of terror operatives must also include enforcement by the other branches of law, joint intelligence efforts, and international cooperation.

4.6. *Building a Global Tort Law Front: Legal Cooperation as a Weapon Against Terrorism*

International cooperation is widely recognized as a cornerstone in the global effort to combat terrorism, particularly given the inherently transnational nature of terrorist threats. No single country, operating in isolation, possesses the full capacity to prevent, deter, or respond comprehensively to the multifaceted challenges posed by terrorism. This holds true not only in the realm of criminal enforcement, but also in the civil dimension – specifically, in the development of tort-based remedies for victims of terrorism.

A coordinated global legal response can take shape through the establishment of an international framework for tort litigation against terrorists and their enablers – what may be conceptualized as an emerging *'international tort law'* for terrorism. This would require close cooperation among states to align legal standards and procedural mechanisms, thereby enabling more effective and harmonized civil litigation across borders.

One of the central instruments in achieving this goal is the negotiation and ratification of international treaties that define shared legal principles and standards for tort liability in terrorism cases. Such treaties could address several key components: Unified definitions of tortious conduct in the context of terrorism, including standards of liability for direct perpetrators, dispatchers, and enablers; Recognition of extra-territorial jurisdiction, allowing courts in one jurisdiction to hear claims involving terrorist acts or entities connected to other territories; Exceptions to sovereign immunity, enabling lawsuits against state sponsors of terrorism under clearly delineated circumstances; Mutual recognition and enforcement of judgments, whereby court rulings rendered in one signatory state would be acknowledged and enforceable in others.

This harmonization can be pursued either through the amendment of existing treaties –

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most of which currently focus on cooperation in criminal matters – or through supplementary protocols to broader anti-terrorism conventions that include provisions for civil remedies. In addition, bilateral or multilateral agreements could be established among like-minded states committed to expanding the legal front against terrorism.

A further avenue for cooperation lies in the sharing of intelligence and evidentiary materials. Access to data regarding the operations, affiliations, and financing of terrorist organizations can be invaluable in building civil claims. However, such cooperation must be carefully structured to safeguard classified information, protect sources and methods, and preserve the procedural rights of defendants – particularly the right to confront and challenge the evidence against them.

Despite the promise of international legal cooperation, this path is fraught with institutional and normative challenges. Legal systems across the globe differ substantially in their doctrines, evidentiary rules, standards of liability, and procedural safeguards. These differences may complicate the effort to reach consensus on core principles of an international tort regime. Moreover, divergent political interests, geopolitical alignments, and variations in states' institutional capacities may further hinder the implementation and enforcement of such norms.

Nonetheless, the strategic importance of legal cooperation cannot be overstated. In the civil sphere, just as in criminal enforcement, a fragmented and insular approach is inadequate to meet the scale and sophistication of contemporary terrorism. Building a cohesive legal infrastructure for civil accountability represents not only a means of providing justice to victims, but also a powerful tool of deterrence against those who plan, support, or profit from acts of terror. An international tort law front – though ambitious – may prove indispensable in the broader campaign to suppress and delegitimize terrorism through law.

4.7. *Concluding Remarks*

To conclude, this infra Section has explored the foundational question of how tort law can be designed and structured to serve as an effective deterrent against terrorism. Recognizing the evolving role of civil liability in the broader legal arsenal against terror, we have proposed a preliminary, integrative framework – a tort-based deterrence scheme composed of six interdependent pillars. Together, these elements form a comprehensive legal architecture intended to enhance the deterrent capacity of tort law vis-à-vis terror operatives and their support networks.

Each of these six pillars addresses a distinct facet of the challenge: from jurisdictional reach and evidentiary adaptations, to the recalibration of liability rules and the mobilization of international cooperation. While this Article has outlined their basic contours, each pillar warrants deeper, independent exploration, both doctrinally and normatively. Future research may further refine this structure, test its feasibility in different legal systems, and evaluate its practical implications for courts, victims, and policymakers alike.

Ultimately, the development of a coherent tort-based strategy against terrorism offers not only a path toward justice and redress for victims, but also a means to alter the calculus of those who perpetrate, enable, or finance terror. As such, tort law – properly adapted – holds significant untapped potential in the global fight against terrorism.

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5. *Money Can't Buy Fear? Tort Law in the Face of Terrorist Motivation*

This section examines the central challenges facing the proposal to harness tort law as a deterrent mechanism against terrorism and offers initial responses to each. As argued in Section C, tort law holds the potential to generate effective deterrence by imposing hefty monetary sanctions on individuals, entities, or states found responsible for committing acts of terrorism or for directly or indirectly supporting such acts. However, one significant challenge stems from the fact that not all terror operatives – particularly those within the perpetrator circle – are motivated by financial interests. Terrorism is a complex and multifaceted phenomenon, driven by a wide range of ideological, psychological, socio-economic, and political factors that often resist rational, cost-based deterrence strategies. These underlying motivations include, among others: Individual beliefs: Many terrorists are motivated by deep-set religious or political ideologies. They are convinced that their ideal is just and essential, even if it results in causing harm to innocent people; Psychological factors: Certain people are more susceptible than others to ideas promoting violence and terrorism. This susceptibility may arise from feelings of alienation, a desire for identity, or a need to belong to something greater than themselves. Some may also have personal characteristics that make them more prone to violence; Socio-economic factors: Poverty, inequality, lack of education, and unemployment can make certain people more susceptible to extremist ideologies. They are liable to view terrorism as a way of expressing their frustration and achieving a certain degree of control over their life circumstances; Political factors: Certain people are motivated by political defiance, objections, or resistance. They may feel downtrodden by their government or perceive a wrong that in their opinion can be rectified only by violent means; Identity and belonging: Belonging to a terrorist group may give a strong sense of identity and belonging, especially for people feeling alienated and excluded from local mainstream society; Exposure to violence: People growing up in environments where violence is rampant are liable to view acts of violence and terrorism as legitimate means for solving disputes or achieving goals; Propaganda: Terrorist organizations often have sophisticated propaganda systems intended to enlist supporters. The Internet and social media have made it easier for these groups to reach potential recruits; Peer pressure and social dynamics: Once people are involved in a group, they can be pressured or persuaded to participate in activities they might not have considered independently.[60] Additionally, many terrorist organizations are skilled at hiding their assets, making it difficult to collect damages from them. Moreover, legal and practical obstacles may be encountered in attaining legal jurisdiction and enforcing court rulings against certain plaintiffs, in particular those residing abroad. In such an event, it may be difficult to enforce court rulings against terrorists and countries financing terrorism. In light of all this, the effectiveness of financial remedies to generate deterrence may be fairly questioned.

My response is that, nevertheless, significant monetary sanctions can serve as a deterrent even at the implementation level. The proof is that at times, the incentive to perpetuate acts of terrorism is the money itself, so the implementation level itself is affected by monetary considerations.[61]

[60] On policy documents of countries and international organizations relating to countering radicalization, see Directive 2017/541, of the European Parliament and of the Council of 15 March 2017 on Combating Terrorism and Replacing Council Framework Decision 2002/475/JHA and Amending Council Decision 2005/671/JHA, 2017 O.J. (L 88) 6 (EU).

[61] A Hamas terrorist admitted under investigation that monetary incentives also led Hamas members to

Furthermore, tort laws can produce an effective deterrent against other circles in the world of terrorism, especially the enablers, which include banks, corporations, and governments. The understanding of the organizations in the circle of dispatchers and enablers as social actors, characterized by external attribution and intent, leads to the conclusion that they attach great importance to not being found and labeled to have behaved negligently in support of terrorism, and were charged by the law. This threat can deter them, direct their behavior, and may counteract many failures caused by greed. Although the operator may aspire to act inefficiently, he will find it difficult to realize these ambitions because the deterred organization is encouraged not to allow it.

7. *Summing up and looking ahead: Civil Liability in the Fight Against Terrorism*

This Article explored a fundamental question: how can tort law be designed and deployed as an effective legal mechanism to deter terrorism and hold accountable those involved in its execution, support or facilitation?

Although terrorism has traditionally been addressed through criminal law, international legal instruments, and dedicated anti-terrorism statutes, this Article argues that tort law – properly structured and innovatively applied – can play a vital and underutilized role in the broader deterrence architecture.

To that end, the Article develops a preliminary framework for a comprehensive tort-based response to terrorism, grounded in six interdependent pillars: (a) The granting of extra-territorial jurisdiction, enabling domestic courts to assert authority over foreign terror actors whose actions cause harm beyond their own borders; (b) The expansion of the boundaries of tort liability, so as to include not only direct perpetrators but also dispatchers, funders, and enablers operating in the shadows; (c) Adapted evidentiary rules, which would allow civil proceedings to overcome the unique challenges of proving liability in complex terrorism contexts; (d) Robust enforcement mechanisms, aimed at securing the actual collection of monetary damages awarded in tort judgments; (e) A statutory compensation fund, to ensure timely redress for victims while enabling cost-recovery efforts to be pursued independently by the state; and (f) International legal cooperation, essential for information sharing, cross-border enforcement, and harmonization of tort-based counter-terrorism measures.

The Article concludes by calling for future research to focus on the doctrinal refinement and practical implementation of this proposed tort framework. In addition, empirical study of its deterrent effect – especially *vis-à-vis* different categories of terror actors – will be crucial in assessing its viability and improving its design. As long as terrorist activity persists, the development of innovative legal tools, including tort law, remains a moral and strategic imperative.

commit the October 7, 2023 massacre against Israeli civilians. According to him, they were promised 10,000 dollars each if they brought back hostages. Zeiton Yoav and Turgeman Meir, "I shot her body. Whoever Brings a Kidnapped Person Gets an Apartment and $10,000: Documentation from Terrorist Interrogations," in *Ynet.co.il* (October 10, 2023).

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CONSTITUTIONAL IDENTITY AND THE DYNAMICS OF THE CRISIS IN BOSNIA AND HERZEGOVINA: THEORETICAL AND IRENIC PERSPECTIVES

Edin Škrebo

Keywords: Constitutional Crisis; Constitutional Identity; Bosnia and Herzegovina.

1. *Introduction*

This text explores the concept of constitutional identity within the constitutional framework of Bosnia and Herzegovina (henceforth BiH), presenting it as an ideal and irenic instrument for addressing the recurrent institutional crises that have long affected the country's constitutional system. Rather than conceiving constitutional identity as a marker of exclusion or as a vehicle for entrenched political claims, this analysis approaches it as a unifying normative reference capable of tempering conflict and fostering institutional dialogue in a deeply fragmented polity.

Against the backdrop of a constitutional order shaped by post-conflict compromise and persistent ethnic segmentation, this contribution highlights the largely untapped potential of constitutional identity in legal discourse in BiH. As it has not yet been fully theorised or utilised in domestic debates, constitutional identity can serve as a neutral and conciliatory framework, grounded in shared constitutional values and principles rather than zero-sum ethnic competition. In this sense, it provides a conceptual framework through which tensions between ethnic-territorial arrangements and democratic standards can be addressed without jeopardising the fragile constitutional equilibrium.

The core argument is that BiH's constitutional identity, as reflected in its Constitution, legal rulings, institutional practices, and international commitments, can serve as a conciliatory framework to foster social cohesion and resolve institutional deadlock. By emphasising universal principles such as human dignity, equality, the rule of law and the protection of fundamental rights, constitutional identity provides a shared normative language through which institutional conflicts can be reframed and managed without confrontation.

Accordingly, this text proposes the hypothesis that a civic and pluralistic interpretation of BiH's constitutional identity, grounded in the fundamental principles of liberal democracy, can serve as a normative benchmark for resolving constitutional and institutional crises.

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This approach is in line with the case law of the European Court of Human Rights (henceforth ECtHR) and the country's path towards European Union (henceforth EU) integration.

Accordingly, the contribution investigates whether – and to what extent – constitutional identity can serve not only as an analytical category, but also as a practical and pacifying resource for overcoming institutional paralysis, mitigating ethnic polarisation, and supporting the gradual evolution of BiH towards a more stable, civic, and inclusive constitutional order.

In this light, moving beyond a purely ethnic or national interpretation of BiH's constitutional identity would enable the country to address the concerns repeatedly raised by the ECtHR regarding its constitutional framework, in particular those relating to electoral representation and, more generally, the political rights of minorities outside the three constituent peoples (Bosniaks, Croats, Serbs), as well as citizens who choose not to declare any specific ethnic affiliation.[1]

Rather than viewing BiH's identity as solely and exclusively defined by the ethnic power-sharing arrangements codified in Annex IV of the General Framework Agreement for Peace (henceforth GFAP), this text advocates a dynamic reading of constitutional identity that emphasises fundamental rights, judicial independence and democratic participation. This approach could strengthen both internal legitimacy and external credibility in the EU accession process, where constitutional resilience and alignment with European constitutional principles remain decisive criteria.[2]

The study examines the constitutional text and, partially, the jurisprudential interpretation of BiH's identity by the ECtHR, focusing on historical cases and subsequent case law on equality, minority rights and institutional balance.

The Dayton Peace Agreement (henceforth DPA), signed in December 1995, was primarily a conflict resolution instrument aimed at ending a devastating war rather than a project of democratic governance.[3] Annex IV of the DPA, which serves as the Constitution of BiH, institutionalised a consociational model of governance rooted in ethnic representation.[4] The Constitution recognises "Bosniaks, Croats and Serbs as constituent peoples (along with others) and citizens of Bosnia and Herzegovina",[5] incorporating ethnicity as the primary axis of political and institutional organisation.[6]

[1] See ECtHR, *Sejdić and Finci v. Bosnia and Herzegovina*, Nos. 27996/06, 34836/06, December 22, 2009; ECtHR, *Zornić v. Bosnia and Herzegovina,* No. 3681/06, July 15, 2014; ECtHR, *Pilav v. Bosnia and Herzegovina*, No. 41939/07, June 9, 2016; ECtHR, *Baralja v. Bosnia and Herzegovina*, No. 30100/18, October 29, 2019; ECtHR, *Pudarić v. Bosnia and Herzegovina*, No. 55799/18, December 8, 2020; ECtHR, *Kovačević v. Bosnia and Herzegovina*, No. 43651/22, August 29, 2023 and ECtHR (Grand Chamber), *Kovačević v. Bosnia and Herzegovina*, No. 43651/22, June 25, 2025.

[2] Sekulić Tatjana, *The European Union and the Paradox of Enlargement. The Complex Accession of the Western Balkans* (London: Pelgrave, 2020), 175.

[3] Opinion on the Draft Amendments to the Constitution of Bosnia and Herzegovina (sent as a preliminary Opinion to the authorities of Bosnia and Herzegovina on 7 April 2006 and endorsed by the Commission at its 67th Plenary session, Venice, June 10, 2006).

[4] Merdzanović Adis, *Democracy by Decree: Prospects and Limits of Imposed Consociational Democracy in Bosnia and Herzegovina* (Stuttgard: *ibidem* verlag, 2015), 121 ff.; Pepić Ivan, "Conceptualizing Asymmetric Consociations: Evidence from Bosnia and Herzegovina," *Nationalism and Ethnic Politics*, (2015): 1-23.

[5] Constitution of BiH, Preamble.

[6] Banović Damir, Gavrić Saša and Mãrina Barreiro Marino, edited by, *The Political System of Bosnia and Herzegovina. Insititutions, Sctors, Processes* (Berlin: Springer, 2021), 1-24; Begić Zlatan and Delić Zlatan, "Constituency of peoples in the constitutional system of Bosnia and Herzegovina: Chasing fair solutions," *Interna-*

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This framework reflects the dual nature of the Dayton constitutional agreement: both a peacekeeping mechanism and a provisional framework for state-building. It sought to reconcile the need to share power among formerly warring groups with the aspiration to build a functional, democratic, and sovereign state. However, by constitutionalising ethnicity, the DPA effectively transformed ethnic affiliation into a structural category of the constitutional order rather than a social or political variable.[7]

Thus, the constitutional identity that emerged from Dayton seemed to embody an ambivalent compromise: peace through division and unity through fragmentation.[8] This created a political identity based not on citizenship but on membership of ethnically defined communities (known as constituent peoples). This identity was further reinforced by the institutional design, which expressly outlined the Constitutional Charter and subsequently reinforced the practice.[9]

In particular, Article V of the Constitution of BiH defines the Presidency of the country as a collegial body in which the three main ethnic groups (Bosniaks, Croats and Serbs) are represented, elected within the electoral districts of the two entities that make up the federal state (the Federation of Bosnia and Herzegovina and the Republika Srpska). According to the same ethnic criteria, the House of Peoples, which, together with the House of Representatives, constitutes the Parliamentary Assembly of BiH, is composed of a total of fifteen members, representing the three largest ethnic communities in the country with five delegates for each of them.

In addition to this strict ethnic and territorial division provided for in the Constitution – considering that the representatives of the Bosniaks and Croats must be elected in the territory of the Federation of Bosnia and Herzegovina and those of the Serbs in the electoral districts of the Republika Srpska or by the parliamentary assemblies of the two entities, as is the case for the representatives of the House of Peoples – there is also a practice that has led to the 'ethnicisation' of certain positions within the institutions, even though this is not expressly required or provided for by the Constitution. This is the case, for example, with regard to the judges of the Constitutional Court and, in part, with regard to the composition of the Council of Ministers.[10]

Regarding this perspective – as briefly described above – it is easy to understand how the ethnic factor appears to be the most compelling element in defining the constitutional identity of BiH. Certainly, this idea is confirmed in the Constitution and, in part, in the case law of the Constitutional Court. However, the concept of 'ethnicity' is not the only one that defines the constitutional identity of the country. In fact, the constitutional text itself clearly outlines the elements that constitute and underpin not only the constitutional identity of

tional Journal of Constitutional Law, 11, 2 (2013): 447-65; Yee Sienho, "The New Constitution of Bosnia and Herzegovina," *European Journal of International Law*, 7 (1996): 176-92.

[7] Marko Joseph, "United in Diversity?: Problems of State- and Nation-Building in Post-Conflict Situations: The Case of Bosnia-Herzegovina," *Vermont Law Review*, 30 (2006): 518-26; Keil Soeren, *Multinational federalism in Bosnia and Herzegovina* (Farnham: Ashgate, 2016).

[8] Bieber Florian, "Power Sharing as Ethnic Representation in Post-conflict Societies: The Case of Bosnia, Macedonia, and Kosovo," in *Nationalism After Communism: Lessons Learned*, edited by Alina Mungiu-Pippidi and Ivan Krastev (Budapest: Central European University Press, 2004), 231-47.

[9] Marković Goran, *Bosanskohercegovački federalizam, Službeni glasnik* (Beograd-Sarajevo: University Press, 2012), 87-138.

[10] Marko Joseph, "Five Years of Constitutional Jurisprudence in Bosnia and Herzegovina: A First Balance," *European Diversity and Autonomy Papers*, 7 (2004): 1-38.

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BiH, but also the project of rebuilding the state, its institutions and, even more so, society, namely the concepts of the protection of fundamental freedoms and human rights. It is precisely these concepts that constitute the potential common legal 'language' among the ethnic groups of BiH, beyond their differences.

This paper proposes to reconstruct the lexicon that makes up this 'language' through the constitutional text and, in part, through the jurisprudence of the Constitutional Court, as a possible ideal tool for resolving the crises affecting BiH.

2. *Constitutional Identity: an Attempt of Definition*

The general theoretical development of the concept of constitutional identity plays a central role in this work's attempt to define the constitutional identity of BiH as a potential tool for social cohesion and the resolution of internal disputes within the country. This is not merely a question of terminology, as it provides the basis for the reconstruction of BiH's constitutional identity. In particular, establishing the object of constitutional identity and identifying its sources has a direct impact on the potential for reshaping BiH's current rigid ethnic-consociational institutional architecture within a more dynamic, inclusive and pluralistic regulatory framework.

From a strictly lexical standpoint, the term constitutional identity suggests that identity is attributable to the constitutional text, which is understood as the document that structures a legal system. However, public-law scholarship does not unanimously endorse this interpretation; in academic debates, multiple subjects emerge as potential bearers of constitutional identity, including the text itself, constitutional practice, the principles underlying constitutionalism, the political community and the people.[11]

Nevertheless, the main theoretical reconstructions can be categorised into two main orientations.

The first approach, rooted in the continental European tradition, identifies constitutional identity with the axiological core of the constitutional text: a kind of normative essence comprising the values and principles that constitute its underlying structure. This view, present in the work of Schmitt and Bilfinger, posits that identity is embedded in the constitution and protected by substantive limits to constitutional amendment.[12]

According to Schmitt and Bilfinger, constitutional identity is a doctrine designed to identify the fundamental principles of the constitutional order, as a normative core that constitutes an insurmountable limit on the amendment powers of the constitution.[13] Along these lines, recently, the German Federal Constitutional Court has recognised constitutional identity as a legal principle that safeguards the constitution's essence, attributing an immutable

[11] Rosenfeld Michel, *The Identity of the Constitutional Subject: Selfhood, Citizenship, Culture, and Community* (London: Routledge, 2009); Jacobsohn Garry Jeffrey, *Constitutional Identity* (Harvard: Harvard University Press, 2010); Maes Christophe, "The notion of constitutional identity and its role in European integration," *European Parliament Study*, (2024): 11-41; Szente Zoltán, "Constitutional identity as a normative constitutional concept," *Hungarian Journal of Legal Studies*, 63, 1 (2022): 3-20; Tushnet Mark, "How do constitutions constitute constitutional identity?," *I-CON*, 8, 3 (2016): 671-76.

[12] Schmitt, Carl, *Constitutional Theory* (Durham/London: Duke University Press, 2008), 121-23.

[13] Schmitt Carl, *Constitutional Theory*, 128.

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character to it that is immune from modification: a position that has become central in the context of European integration.[14]

Within these theories, Schmitt's contribution remains fundamental. In *Constitutional Theory*, he links constitutional identity to the limits of constitutional amendment, arguing that only revisions which preserve the constitution's overall identity and continuity may be considered genuine amendments. An amendment that alters the constitution's intrinsic core instead produces a 'new constitution' resulting from a new exercise of constituent power.[15] From this perspective, constitutional identity functions as an implicit substantive limit on the constitution itself, preventing constituted powers from altering the fundamental principles of the legal order and safeguarding its essence during the amendment process.[16]

From another perspective, two of the most influential recent formulations of the concept of constitutional identity can be found in contemporary U.S. constitutional scholarship, in the work of Rosenfeld and Jacobsohn. Although they start from different premises, both authors attribute a synthesising and mediating function to constitutional identity, between the various components of society and the foundational principles of the constitutional order.

For Rosenfeld, constitutional identity derives from three elements: (a) the mere fact of possessing a constitution, (b) its material content, and (c) the cultural context in which it operates. Through a dialectical approach based on the tension between 'sameness' and 'selfhood', Rosenfeld describes identity as a dynamic process that unifies those belonging to the same constitutional order. This process balances equality among constitutional systems with the specificity of individual states. This process unfolds throughout the entire constitutional life cycle – from drafting and interpretation to the continuous construction of the constitutional order – and is made possible by three discursive tools: (a) negation, (b) metaphor and (c) metonymy.[17] Negation enables distancing from pre-constitutional identities, while metaphor constructs a shared, positive identity. Metonymy connects constitutional identity to national identities while distinguishing them. Thus, Rosenfeld conceives of constitutional identity as a flexible and adaptable synthesis that can harmonise the multiple identities present in society, ensuring a balance between constitutional unity and social pluralism.[18]

Similarly, Jacobsohn elaborates on the concept of constitutional identity, emphasising its normative and historical dimensions. For Jacobsohn, a constitution's identity is primarily defined by the values and principles that make it unique and serve as substantive limits on the power of constitutional amendment. However, he rejects the idea of identity as a static or essentialist concept: it is neither an abstract entity nor an unchangeable national heritage. Instead, constitutional identity emerges through experience as the result of a dialogue – often dissonant – between the constitution and society, and between the constitution's own internal elements. This 'dissonant constitution' is characterised by tensions, conflicts and attempts at resolution, which constitute the driving force of constitutional transformation and

[14] Polzin Monika, "Constitutional identity, unconstitutional amendments and the idea of constituent power: The development of the doctrine of constitutional identity in German constitutional law," *International Journal of Constitutional Law*, 14, 2 (2016): 411-38.

[15] Preuss Ulrich K, "The implications of "Eternity Clauses": the German Experience," *Israel Law Review*, 44, 3 (2011): 438.

[16] Schmitt Carl, *Constitutional Theory*, 131.

[17] Rosenfeld Michel, *The Identity*, 130 ff.

[18] *Ibid.*, 135.

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identity formation. Thus, constitutional identity emerges as a dynamic concept, shaped not only by jurisprudence, but also by broader political and social processes.[19]

Despite their divergent approaches, the two authors converge on one crucial point: constitutional identity is a dynamic, synthesising element that enables the understanding and governance of the complexity of pluralistic societies. For Rosenfeld,[20] it emerges as the result of a discursive balance among identities, while for Jacobsohn[21] it is the outcome of the interaction between constitutional principles and social demands. In both cases, constitutional identity is not a source of division, but a means of constructing a shared vision of the values that underpin the constitutional order; values through which society can recognise itself in a broad and inclusive manner.[22]

This interpretation is particularly relevant in the case of BiH, where ethnic fragmentation has been translated into rigid constitutional categories, and where the risk of misappropriating the identity of the three constituent peoples is very real. In order to avoid nationalist distortions or the political instrumentalisation of the concept of constitutional identity, this study confines the notion to the value-based core of the constitutional text. In this way, identity becomes a legal parameter, not a means of exclusion.[23]

Determining the source of constitutional identity therefore requires clarifying whether identity-bearing principles are derived from the text (normative) or from the people (sociopolitical). The former option, adopted in this analysis, allows identity to be rooted in stable elements such as fundamental values, eternity clauses, substantive limits to amendment and consolidated judicial interpretations. Not all constitutional norms define identity; only those whose modification would entail a radical transformation of the constitutional order may be considered part of its essential core.[24]

Here, the role of jurisprudence is decisive. Constitutional identity is not only a product of the text, but also of judicial interpretation. Through this process, courts identify and clarify the scope of supreme principles, sometimes compensating for the absence of explicit eternity clauses. Similarly, constitutional preambles, especially those with normative or prescriptive content, serve as 'tables of values', guiding interpretation and contributing to the constitution's legal identity. In the BiH's case, for example, the preamble outlines an identity oriented towards protecting human rights, upholding the rule of law, and embracing pluralism. This reflects the international and post-conflict nature of the constituent process.

The methodological approach to identifying constitutional identity adopted here must therefore combine the following elements: (a) analysis of the limits to amendment, both substantive and procedural; (b) examination of preambles as indicators of values; (c) study of the constituent process and its historical and political motivations; and (d) interpretation by constitutional and supranational courts. This multi-layered approach is particularly well-suited to systems such as that of BiH, which are characterised by a constitutional text that is heavily

[19] Jacobsohn Garry Jeffrey, *Constitutional Identity*, 145.

[20] Rosenfeld Michel, *The Identity*, 131.

[21] Jacobsohn Garry Jeffrey, *Constitutional Identity*, 140 ff.

[22] *Ibid.*, 381.

[23] Nikolić Aleksa, "Federalism as a Key Factor of Constitutional Identity of Bosnia and Herzegovina," *The Federalist Debate*, XXXVII, 2 (2024): 40-42.

[24] Gebey Berihun Adugna, "The Identity of the Constitutional Subject and the Construction of Constitutional Identity: Lessons from Africa," *Faculty of Laws University College London Law Research Paper*, 2 (2023): 1-25.

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influenced by international law, a pluralistic society and a legal order that is constantly in dialogue – and sometimes in tension – with European values.[25]

In conclusion, reconstructing the constitutional identity of BiH requires a dynamic, legally grounded reading of identity, anchored in the constitutional text and capable of transcending the seemingly dominant ethnic paradigm. A value-based constitutional identity focused on fundamental rights, equality, democracy and the rule of law can become a parameter of internal cohesion and an instrument for aligning the BiH's constitutional order with the Copenhagen criteria and the EU acquis. This would provide a solid normative foundation for necessary constitutional reforms and credible advancement of the accession process.

3. *Framing BiH's Constitutional Identity within Constitutional Text*

This section examines the content of the Constitution of BiH, beginning with the Preamble, to identify the fundamental principles that shape the country's constitutional identity. These principles stand as an alternative to the mere logic of ethnic division and the principle of consociational model that emerges at first glance from the constitutional text.

The Constitution of BiH reflects a deliberate effort to ground the post-war state in universal principles of human dignity, freedom, and equality.

Its Preamble explicitly recalls the goals and values on which the constitutional order rests. From the outset, it affirms that BiH is founded on respect for human rights and fundamental freedoms, a normative response to the atrocities of the 1992-1995 conflict and the Srebrenica genocide.[26]

Paragraphs two, seven, and eight of the Preamble reinforce this orientation by dedicating the Constitution to peace, justice, tolerance, and reconciliation; by committing the state to full respect for international humanitarian law; and by drawing direct inspiration from the Universal Declaration of Human Rights and other major human rights instruments. These references elevate the protection of human rights to the apex of the constitutional hierarchy.

The historical and political context of the Dayton negotiations explains the Preamble's structure. The drafters not only defined the state's ultimate purposes but also the means to achieve them: democratic procedures ensuring peace and coexistence in a pluralistic society. It also reaffirms sovereignty, territorial integrity, and political independence as core constitutional values. While it does not provide a detailed catalogue of principles, it offers a coherent normative framework guiding both institutions and citizens. The deliberate absence of precise definitions reflects the compromises reached at Dayton, where deep divisions over the nature of the state led the framers to adopt an open, value-based preamble to be interpreted by future institutions, especially the Constitutional Court.[27]

[25] Martí Jose Luis, "Two different ideas of constitutional identity: identity of the constitution v. identity of the people," in *National Constitutional Identity and European Integration*, edited by Alejandro Saiz Arnaiz and Carina Alcoberro Llivina (Cambridge: Intersentia, 2013), 17-36.

[26] Sekulić Tatjana, *Violenza etnica. I Balcani tra etnonazionlaismo e democrazia* (Roma: Carocci, 2002), 21. ICTY, *Prosecutor v. Radislav Krstić*, Case No. IT-98-33, April 19, 2004; ICTY, *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18, April 6, 2009; ICTY, *Prosecutor v. Ratko Mladić*, Case No. IT-09-92, November 22, 2017.

[27] Montanari Laura, "La composizione della Corte costituzionale della Bosnia ed Erzegovina tra influenza del fattore etnico e garanzie internazionali," in *Le Corti costituzionali: composizione, indipendenza, legittimazione*, edited by Marina Calamo Specchia (Turin: Giappichelli, 2011), 113-35; Šarčević Edin, "Dejtonski ustav: karakteristike i problemi," *Status. Magazin za političku kulturu i društvena pitanja*, 13 (2008): 153-68.

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Jurisprudence confirms that the Preamble possesses binding constitutional force. The Constitutional Court has held that it forms an integral part of the Constitution, subject to the same amendment procedures and binding upon all state and entity acts. Far from being a merely aspirational statement, it establishes the legal and axiological foundations of the constitutional order.[28]

In the post-war legal framework, the Preamble thus operates as a civic charter of values guiding BiH toward an effort to peaceful and democratic coexistence in a multi-ethnic society. The respect for human rights, equality, and freedom constitutes the normative core of BiH's constitutional identity. These principles not only repudiate the country's violent past but also provide a constitutional basis for its European future.

In the Preamble, the framers of the Constitution of BiH set out the fundamental principles and values guiding the state's legal and institutional order. The Preamble serves as a normative 'map' for interpreting the rest of the constitutional text: what Kelsen termed the "constitutional norms in the strict sense".[29] It provides the conceptual framework within which subsequent provisions must be read, clarifying how the principles it proclaims are developed throughout the Constitution.

Among the provisions reflecting BiH's constitutional identity, particular attention goes to Article II, though the analysis begins with Article I, which establishes the State's democratic foundations. Article I declare that "Bosnia and Herzegovina shall be a democratic state, which shall operate under the rule of law and hold free and democratic elections". This clause continues the Preamble's conviction that democratic institutions are essential for peace and coexistence in a pluralistic society. Democracy, expressed through periodic elections and adherence to the rule of law, is thus both a defining principle of the constitutional order and a means of rebuilding a society fractured by conflict: a legal foundation and a moral compass for civic reconstruction.

Democracy, however, cannot function without the protection of fundamental rights and freedoms. Accordingly, Article II is entirely devoted to human rights, declaring that "Bosnia and Herzegovina shall ensure the highest level of internationally recognized human rights and fundamental freedoms". This obligation goes beyond a formal commitment, requiring compliance with the highest international standards. The Constitution therefore provides for judicial protection before the Constitutional Court and establishes a Human Rights Commission to ensure implementation. Article II(6) obliges all state and entity organs to respect these rights, while Article II(8) mandates cooperation with international human rights mechanisms, including the International Criminal Tribunal for the Former Yugoslavia.

Article II(2) guarantees the enjoyment of rights "without discrimination on any ground", reaffirming equality and non-discrimination as essential components of BiH's constitutional identity. Together with the Preamble's references to dignity, liberty, and equality, this provision illustrates the interdependence of constitutional values – dignity, liberty, equality, democracy, and the rule of law – forming a coherent system of principles aimed at ensuring peace, justice, tolerance, and reconciliation.

Article II(7) adds an external dimension by requiring BiH to remain or become a party to the international treaties listed in Annex I, thereby incorporating major human rights instruments into the domestic legal order. Particularly significant is the direct applicability and constitutional supremacy of the European Convention on Human Rights (henceforth

[28] Constitutional Court of Bosnia and Herzegovina, U-7/97, December 22, 1997 and U 5/98-III, July 1, 2000, para. 19.

[29] Kelsen Hans, *Teoria generale del diritto e dello Stato* (Ivrea: Edizioni di comunità, 1963), 265.

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ECHR), recognized even before BiH's accession to the Council of Europe in 2002. This arrangement anchors the BiH constitutional system in international human rights standards.[30]

Annex I, titled "Additional Human Rights Conventions to be applied in Bosnia and Herzegovina", complements Article II by listing fifteen international treaties. Initially, their direct applicability was disputed, but Constitutional Court rulings – particularly AP-1999/08 and U-9/09 – confirmed that the Annex I is an integral and enforceable part of the Constitution.[31] Together with the Preamble and Articles I and II, Annex I shows that human rights and fundamental freedoms constitute the binding framework of the entire constitutional system.

These principles – linked with democracy, equality, dignity, and liberty – form the cohesive and meta-normative foundation of BiH's constitutional identity, designed to transcend ethnic divisions and align the country with European constitutional standards.

The limits on constitutional revision further consolidate this identity. Article X(2) provides that "no amendment may eliminate or diminish any of the rights and freedoms referred to in Article II", establishing an eternity clause that safeguards human rights as inviolable pillars of the constitutional order. Thus, while procedural rules on constitutional revision may change, the substantive guarantees of rights and freedoms, together with the Preamble and Annex I, are constitutionally entrenched.[32]

As some constitutional theorists observe, eternity clauses preserve a constitution's fundamental values and constrain governmental power.[33] In BiH, they protect democracy, equality, and human rights as the immutable core of the constitutional order. In this sense, the Preamble, Articles I, II, X and Annex I collectively embody a civic and pluralist constitutional identity. Capable of transcending ethnic divisions, ensuring internal reconciliation, and serving as a normative bridge toward integration into the European constitutional space.

4. *Defining the Constitutional Identity of BiH in The Context of The Judicial Protection of Rights and Freedoms*

The distinctive relationship between the constitutional order of BiH and the ECHR offers a crucial lens through which to understand the country's constitutional identity. The interplay between domestic and international frameworks underscores that the human rights

[30] Pajić Zoran, "A Critical Appraisal of Human Rights Provisions of Dayton Constitution of Bosnia and Herzegovina," *Human Rights Quarterly*, 20, 1 (1998): 128-33; Vehabović Faris, "Bosnia and Herzegovina. Impact of the case law of the European Court of Human Rights on postconflict society of Bosnia and Herzegovina," in *The impact of the EcHR on the democratic change in Central and Eastern Europe. Judicial Perspectives*, edited by Iulia Motoc and Ineta Ziemele (Cambridge: Cambridge University Press, 2016), 80-109.

[31] Constitutional Court of Bosnia and Herzegovina, AP-1999/08, October 13, 2010, para. 20; Constitutional Court of Bosnia and Herzegovina, U-9/09, November 26, 2010, paras. 55-57.

[32] Ademović Nedim, Marko Joseph and Goran Marković, edited by, *Ustavno pravo Bosne i Hercegovine* (Sarajevo: Konrad Adenauer Stiftung, 2012), 11-12; Vranješ Nevenko and Marko Joseph, "Izmjene Ustava Bosne i Hercegovine," in *Citizens, Constitution, Europe. Glossary of essential constitutional concepts in BiH*, edited by Maja Sahadžić *et al.* (Sarajevo: Univerzitet u Sarajevu - Pravni Fakultet, 2023), 229-34.

[33] Jacobsohn, *Constitutional Identity*, 367; Preuss, *The implications*, 445; Von Bogdandy Armin and Schill Stephan, "Overcoming absolute primacy: Respect for national identity under the Lisbon Treaty," *Common Market Law Review*, 48, 5 (2011): 1417-53.

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and fundamental freedoms protected by the ECHR form the very core of BiH's constitutional order.[34] The Constitution expressly mandates that the State "shall ensure the highest level of internationally recognized human rights and fundamental freedoms", and further declares that "the rights and freedoms set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms shall apply directly in Bosnia and Herzegovina".[35] Through this direct incorporation, the ECHR and its Protocols operate automatically within the domestic legal system, without the need for transposition, from the moment the Constitution entered into force. Notably, this arrangement allowed the Convention to guide the protection of rights even before BiH joined the Council of Europe in 2002, ensuring robust standards of protection during the fragile post-conflict period.[36]

In the hierarchy of legal sources, the Constitution also provides that the ECHR "shall have priority over all other law".[37] Early doctrinal debates questioned whether this clause implied the Convention's supremacy even over the Constitution itself.[38] The Constitutional Court resolved this issue by clarifying that, while the ECHR prevails over ordinary legislation, it does not supersede the Constitution, which remains the supreme legal act. In cases assessing the conformity of constitutional provisions with the ECHR, the Court held that the Convention "cannot have a higher status than the Constitution, because the European Convention, as an international document, entered into force by virtue of the Constitution of Bosnia and Herzegovina".[39] This position, reaffirmed and extended in 2015 to the constitutions of the two Entities, confirmed that the ECHR occupies a central yet constitutionally subordinate place within the domestic order: one that must nevertheless inform constitutional interpretation.[40]

In its jurisprudence, the Constitutional Court consistently employs the ECHR not only as a normative benchmark but also as an interpretive instrument when assessing the constitutionality of domestic law. By integrating internationally recognized rights into national adjudication, the Constitution establishes a legal system permeable to international human rights standards. Incidental appeals further ensure legislative compliance with both the Constitution and the ECHR, effectively 'opening' the domestic order to international norms and requiring national law to be interpreted in harmony with the Convention.[41]

Among the international instruments incorporated into BiH's constitutional framework, the ECHR holds a unique and elevated status. Unlike the other treaties listed in Annex I, it

[34] Milinković Igor, "The Universal Protection of Human Rights and Eastern Europe: Bosnia and Herzegovina," *Central European Journal of Comparative Law*, 6, 1 (2025): 333-60.

[35] Constitution of BiH, Art. II.

[36] Montanari Laura, "La tutela dei diritti in Bosnia ed Erzegovina: il complesso rapporto tra Camera dei diritti umani, Corte costituzionale e Corte di Strasburgo," in *Corti nazionali e Corti europee*, edited by Giuseppe Franco Ferrari (Naples: Edizioni Scientifiche Italiane, 2006), 708-43; Živanović Miroslav, edited by, *Ljudska prava u Bosni i Hercegovini. Pravo, praksa i međunarodni standardi ljudskih prava* (Sarajevo: Centar za ljudska prava Univerziteta u Sarajevu, 2014).

[37] Constitution of BiH, Art. II(2).

[38] See Constitutional Court of of Bosnia and Herzegovina, U-5/04, March 31, 2006; U-13/05, May 26, 2006, and AP-2678/06, September 29, 2006.

[39] Constitutional Court of Bosnia and Herzegovina, U-5/04, January 27, 2006, para. 14.

[40] Constitutional Court of Bosnia and Herzegovina, U-14/12, March 26, 2015, para. 49.

[41] Montanari Laura, "La composizione della Corte costituzionale della Bosnia ed Erzegovina tra influenza del fattore etnico e garanzie internazionali," 113-34.

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is directly applicable and functions both as a source of rights and as a standard for constitutional review. This dual role underscores the centrality of human rights and fundamental freedoms within the BiH constitutional system. By granting the ECHR a direct and authoritative role, the Constitution ensures that these rights are not merely declaratory but fully enforceable, shaping both normative content and judicial practice.[42]

The primacy of the ECHR thus highlights the substantive core of BiH's constitutional identity. Together with Article II and Annex I, it embeds human rights and fundamental freedoms at the heart of the legal order, providing both procedural and substantive protection. From the early role of the Human Rights Chamber to the present jurisdiction of the Constitutional Court, the institutional architecture guarantees effective enforcement of rights, confirming that these guarantees are the foundation of the constitutional structure. In this sense, the ECHR operates not only as an international treaty but as a constitutive element of BiH's legal identity: anchoring democratic governance, sustaining pluralism, and fostering peace and reconciliation in a post-conflict society.[43]

Although the courts of BiH – and the Constitutional Court in particular – have never explicitly invoked the term constitutional identity in their jurisprudence, the contours of this concept clearly emerge from the structure, competences, and mechanisms established to protect rights and freedoms. BiH possess a distinct constitutional identity rooted in the protection of human rights and fundamental freedoms, which form the cornerstone of its legal order. This centrality is reflected not only in the constitutional text and its First Annex but also in the institutional mechanisms created under both the Constitution and the GFAP.

Between 1996 and 2004, citizens could seek redress for human rights violations or discriminatory treatment before either the Constitutional Court or the Human Rights Chamber, a body established within the Human Rights Commission under Annex VI of the GFAP. Article II(1) of the Constitution mandated that BiH and its Entities "shall ensure the highest level of internationally recognized human rights and fundamental freedoms" and, to that end, established the Human Rights Commission. The Commission comprised the Office of the Ombudsman and the Human Rights Chamber, both designed to provide the broadest protection of rights. The Chamber's jurisdiction extended to alleged violations of the ECHR and its Protocols, as well as to discrimination by public authorities or officials. The Ombudsman investigated complaints and prepared cases for the Chamber, which served as the adjudicatory organ.[44]

Composed of fourteen judges – six appointed by domestic institutions and eight by the Council of Europe's Committee of Ministers – the Chamber possessed authority to accept applications, prioritize cases, and issue binding decisions, including injunctions, compensa-

[42] Kulenović Nedim, "Court as a Policy-Maker? The Role and Effects of the Constitutional Court of Bosnia and Herzegovina in Democratic Transition and Consolidation," *Analitika. Center for Social Research*, (2016): 39-53.

[43] Vehabović Faris "Bosnia and Herzegovina. Impact of the case law of the European Court of Human Rights on postconflict society of Bosnia and Herzegovina," in *The impact of the EcHR on the democratic change in Central and Eastern Europe. Judicial Perspectives*, edited by Iulia Motoc and Ineta Ziemele (Cambridge: Cambridge University Press, 2016), 90.

[44] Banović Damir, "Individual Identity, Collective Identity and Human Dignity. What Are the Best Models to Accommodate Different Identities?," in *Ethnic Diversity, Plural Democracy and Human Dignity. Challenges to the European Union and Western Balkans*, edited by Mario Krešić *et al.* (Berlin: Springer, 2023), 91-109; Smailhodžić Amina, "The Role of the Institution of Human Rights Ombudsman of Bosnia and Herzegovina in Promoting the Rule of Law in Bosnia and Herzegovina," *Kriminalističke Teme*, 3, 4 (2020): 1-17.

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tion, and provisional measures. In the early post-war years, this body played a vital role in ensuring that human rights protection was concrete rather than declaratory.[45]

As domestic institutions matured, the competences of the Human Rights Commission were gradually transferred to the Constitutional Court, a process completed in January 2004. Since then, the Constitutional Court has functioned as the sole national authority for the protection of human rights and fundamental freedoms, with appellate jurisdiction over all other courts. In fulfilling this role, it relies on Article II of the Constitution, the ECHR, and the catalogue of rights in Annex I.[46]

Although the Constitutional Court has never expressly adopted the vocabulary of constitutional identity, its structure, powers, and jurisprudence demonstrate that human rights and fundamental freedoms constitute the immutable core of BiH's constitutional order. The dual system of protection initially established – through the Human Rights Commission and the Constitutional Court – was deliberately designed to safeguard these principles. After 2004, this responsibility was consolidated in the Constitutional Court, which became the exclusive guarantor of rights and freedoms.

Today, the Constitutional Court stands as the ultimate internal protector of human rights, providing citizens with enforceable remedies against violations and discrimination. Its appellate jurisdiction ensures that constitutional guarantees are not merely symbolic but binding and effective. The Court's design and practice embody the conviction that the protection of rights forms the backbone of BiH's legal order: essential to maintaining peace and coexistence in a pluralistic society. By upholding these values, the Court gives concrete effect to the Constitution's normative foundations, confirming that human rights and fundamental freedoms are both the cornerstone and the defining expression of the country's constitutional identity.

5. *Constituent Peoples and Constitutional Identity*

The prominent role accorded to the constituent peoples within the institutional architecture of BiH has often been interpreted as implying that these ethnic groups hold a special and even defining status in the country's constitutional identity. The term constituent peoples appear only once in the constitutional text, in the final paragraph of the Preamble, which states that "Bosniacs, Croats, and Serbs, as constituent peoples (along with Others), and citizens of Bosnia and Herzegovina hereby determine […] the Constitution […]". This provision divides the population into two categories: the three constituent peoples – Bosniaks, Croats, and Serbs – and the 'Others', comprising all other minorities or citizens who do not identify with one of the main ethnic groups.[47] Although the Preamble seems to recognize both categories as co-determinants of the constitutional framework, subsequent provisions reveal the predominance of the constituent peoples within the institutional structure.[48]

[45] Aybay Rona, "Appendix I: A New Institution in the Field: The Human Rights Chamber of Bosnia and Herzegovina," *Netherlands Quarterly of Human Rights*, 15, 4 (1997): 529-45.

[46] Milinković Igor, "The Universal Protection of Human Rights and Eastern Europe: Bosnia and Herzegovina," *Central European Journal of Comparative Law*, 6, 1 (2025): 333-60.

[47] Begić Zlatan and Delić Zlatan. "Constituency of peoples in the constitutional system of Bosnia and Herzegovina," 450-51.

[48] Trnka Kasim, "Specifičnosti ustavnog uređenja Bosne i Hercegovine," *Journal for Constitutional Theory and Philosophy of Law*, 9 (2009): 45-71.

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In the legislative and executive branches, this predominance is particularly evident. The House of Peoples of the Parliamentary Assembly is composed of fifteen delegates – five Bosniaks, five Croats, and five Serbs – elected through entity-based mechanisms that ensure ethnic parity and protect vital national interests through the ethnic veto.[49] The House of Representatives, though not explicitly subject to ethnic quotas, mirrors these divisions through the territorial allocation of seats between the Federation of Bosnia and Herzegovina and Republika Srpska. A similar pattern exists in the Presidency, composed of three members – one Bosniak, one Croat, and one Serb – elected from their respective entities.[50] Even where not constitutionally required, ethnic representation has become the guiding principle of institutional composition.[51]

This consociational model was designed to reconcile former adversaries and ensure post-war stability by guaranteeing equal participation of the three constituent peoples in decision-making processes.[52] While indispensable in the immediate aftermath of conflict, this system has produced lasting asymmetries, often limiting the political participation of 'Others' through electoral rules that tie ethnicity to territory.[53] Yet the centrality of the constituent peoples in political representation should not be conflated with the country's constitutional identity. Unlike fundamental rights and freedoms – explicitly entrenched as immutable principles – the special status of the constituent peoples derives from a historical and political compromise rather than from the Constitution's normative core. The constitutional amendment procedure itself protects human rights and freedoms but not ethnic predominance, confirming that the role of constituent peoples is functional, not identity-defining.[54]

Were the primacy of constituent peoples to be considered part of BiH's constitutional identity, it would risk clashing with the other defining element of that identity: the protection of human rights and the principle of non-discrimination enshrined in Article II of the Constitution and the ECHR, which applies directly and serves as a standard for constitutional review. A constitutional order that privileges certain ethnic groups cannot fully coexist with one that rests on universal rights and equality. Accordingly, the institutional prominence of the constituent peoples must be understood as a pragmatic compromise necessary for peace and governance, not as a foundational constitutional principle.[55]

This interpretation finds confirmation in the jurisprudence of the ECtHR.[56] Although the Constitutional Court has never explicitly sanctioned the role of constituent peoples within the institutional system of BiH, it has nevertheless addressed certain aspects of this

[49] Constitution of BiH, Art. IV (1).

[50] Constitution of BiH, Art. V.

[51] Banović Damir, Gavrić Saša and Mãrina Barreiro Marino, edited by, *The Political System*, 31-44; Yee Sienho, "The New Constitution of Bosnia and Herzegovina," 180-82.

[52] Merdzanović, *Democracy by Decree*, 33 ff.

[53] Trnka Kasim, "Daytonski ustavni poredak protiv tradicionalnih vrijednosti bosansko-hercegovačkog društva i države," in *Ustavno pravni razvoj Bosne i Hercegovina (1910-2010)*, edited by Edin Mutapčić (Tuzla: Univerzitet u Tuzli, 2011), 237-48.

[54] Šarčević Edin, "Dejtonski ustav: karakteristike i problemi," 153-166; Woelk Jans, *La transizione costituzionale della Bosnia ed Erzegovina. Dall'ordinamento imposto allo Stato multinazionale sostenibile?* (Padova: CEDAM, 2008), 97-121.

[55] For a view that is antithetical to the one proposed, refer to: Nikolić, Aleksa, "Federalism as a Key Factor of Constitutional Identity of Bosnia and Herzegovina," *The Federalist Debate*, 37, 2 (2024): 40-42.

[56] See note No. 1.

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concept. In its landmark ruling U-5/98-III, the Court examined whether the provisions of the entity constitutions – which define Republika Srpska as the "State of the Serb people" and the Federation of BiH as composed solely of Bosniaks and Croats – were compatible with the State Constitution. The Court found that these formulations violated the principle of collective equality among the constituent peoples, which prohibits any privilege or predominance of one group over others and requires coexistence rather than segregation. Both entity constitutions were therefore declared incompatible with the State Constitution, and the Court affirmed that the constituent peoples are constitutive of the entire territory of BiH.

However, while case U-5/98 established the principle of collective equality, later decisions recognized the legitimacy of ethnic-based arrangements in certain institutions.[57] In cases such as AP-2678/06, AP-2127/09, AP-1945/10, and AP-3464/18, the Constitutional Court upheld the exclusive eligibility of constituent peoples to the Presidency and the House of Peoples, reasoning that such differential treatment pursued the legitimate aim of preserving peace and the equilibrium established at Dayton.[58]

The ECtHR, by contrast, rejected this reasoning. In its landmark judgment *Sejdić and Finci v. Bosnia and Herzegovina*, the Court held that excluding 'Others' from standing for election to the Presidency and the House of Peoples constituted unjustified racial discrimination, in breach of Articles 14 and 3 of Protocol No. 1 and Article 1 of Protocol No. 12 of the ECHR. Subsequent cases – *Zornić*, *Pilav*, *Šlaku*, *Pudarić*, and *Kovačević* – reaffirmed that BiH's ethnic-based system is incompatible with the Convention's guarantees of equality and democratic participation. While acknowledging that power-sharing mechanisms may remain necessary in a divided society, the ECtHR emphasized that they must evolve to reflect democratic progress and ensure full political inclusivity.[59]

Despite their differing approaches, both courts converge on a crucial point: the need for gradual constitutional evolution toward greater inclusivity. The Constitutional Court has itself recognized that ethnic-based power-sharing should remain a temporary measure, pending conditions for constitutional reform, while the ECtHR has affirmed that BiH can preserve the spirit of power-sharing through alternative, non-exclusive mechanisms. As the Strasbourg Court observed, "there exist mechanisms of power-sharing which do not automatically lead to the total exclusion of representatives of other communities".[60]

In conclusion, although the role of the constituent peoples remains central to the institutional functioning of BiH, it cannot be considered the essence of the country's constitutional identity. This is because the central role that the constituent peoples play within the current constitutional structure represents a historically contingent political compromise, essential for peace but not constitutive of the normative essence of the state.

On the contrary, the protection of fundamental rights, the rule of law and the prohibition of discrimination – principles enshrined in Article II of the Constitution – constitute the

[57] Palermo Francesco, "Bosnia Erzegovina: la Corte costituzionale fissa i confini della (nuova) società multietnica," *DPCE*, IV (2000): 1479-86; Constitutional Court of Bosnia and Herzegovina, U-5/98 III, June 30, - July 1st, 2000.

[58] Constitutional Court of Bosnia and Herzegovina, AP-2678/06, 29 September 2006; Constitutional Court of Bosnia and Herzegovina, AP-2127/10, September 12, 2010; Constitutional Court of Bosnia and Herzegovina, AP-1945/10, June 29, 2010; Constitutional Court of Bosnia and Herzegovina, AP-3464/18, July 17, 2018.

[59] See note No. 1.

[60] ECtHR, *Sejdić and Finci v. Bosnia and Herzegovina*, para. 48.

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true foundation of BiH's constitutional identity. As human rights and fundamental freedoms, they constitute the unalterable core of the Constitution of BiH and are specially protected not only within the national legal system of BiH, but also within the international treaties that are directly applicable within the country's legal system, as contained in Annex I. The BiH's long-term constitutional path must therefore go beyond ethnic consociationalism towards a moderate civic and pluralistic democracy, aligning its structure with the fundamental values of the European constitutional tradition. Where the role of the constituent peoples can be reconciled with all citizens of BiH and with the human rights that this legal system places at its core.

6. *Conclusions*

A close reading of the Constitution of BiH reveals that its constitutional identity is not primarily based on ethnic categories, but on the primacy of human rights and fundamental freedoms as set out in Article II. The Preamble anticipates this orientation by affirming respect for "human dignity, liberty, and equality" and committing the constitutional order to "peace, justice, tolerance, and reconciliation", thereby framing the Constitution as an instrument of post-war reconstruction and long-term stabilisation.

Article II(1) operationalises these principles by obliging the state and its entities to guarantee the highest level of internationally recognised human rights. The direct incorporation of the ECHR and its Protocols, which take precedence over all other domestic legislation, and the Constitutional Court's power of review, confirm the centrality of protecting rights within the BiH's constitutional system. This framework aligns BiH with the values of Article 2 TEU, embedding the domestic constitutional order within a broader European normative space.

Against this background, the institutional prominence of the constituent peoples, as reflected in the composition of the Presidency and the House of Peoples, should not be understood as constituting the core of constitutional identity. Rather, it should be seen as a pragmatic and historically contingent arrangement designed to secure peace and maintain institutional balance in the aftermath of conflict. While these mechanisms were necessary in the context of Dayton, they cannot be regarded as defining elements of constitutional essence; rather, they are transitional compromises that address a specific historical emergency.[61]

This distinction is crucial when considering constitutional identity as a tool for resolving institutional controversies. Article X(2) of the Constitution explicitly prohibits any amendment that would "eliminate or diminish the rights and freedoms set forth in Article II", thereby enshrining fundamental rights as the unalterable core of the constitutional order. By contrast, institutional arrangements based on ethnic predominance remain open to revision in principle. Constitutional identity therefore operates as a normative hierarchy that can guide conflict resolution by distinguishing between what is structurally essential and what is historically contingent.

A rights-based constitutional identity provides an effective alternative to the logic of ethnic representation, which has consistently resulted in decision-making deadlock, institution-

[61] Piergigli Valeria, "Bosnia and Herzegovina: in Search for the Constitutional Identity?," in *Proceedings of the conference. Twenty years after Dayton. The constitutional transition of Bosnia and Herzegovina*, edited by Ludovica Benedizione and Valentina Rita Scotti (Rome: LUISS, 2016), 121-28.

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al paralysis, and secessionist rhetoric. Although ethnic power-sharing mechanisms tend to present political conflict as a zero-sum game, the logic of fundamental rights is universal and non-exclusive, and is therefore inherently compatible with pluralism. As such, it provides a common normative language through which disputes can be addressed without reinforcing ethnic polarisation.

In this sense, constitutional identity can serve as an interpretative and operational criterion for managing recurring political crises. When institutional functioning is undermined by ethnic vetoes, boycotts or challenges to the constitutional order, reference to entrenched rights and international obligations derived from the ECHR and the EU integration process can act as both an external constraint on abuses of power and an internal resource for restoring a minimum level of consensus.

Furthermore, a rights-based constitutional identity does not necessitate the abandonment of ethnic or cultural identities. Instead, it offers a framework in which such identities can coexist within a shared legal order based on dignity, equality, and the rule of law. By shifting the focus from ethnic entitlement to rights-based inclusion, constitutional identity can mitigate intergroup tensions and reframe political competition within legally bounded and institutionally manageable parameters.

From this perspective, constitutional identity has normative and performative value. It has the potential to gradually shift the focus of the BiH political system from ethnic antagonism to the development of a functional and inclusive state. Aligning it with the foundational values of the EU enhances its capacity to function as a benchmark for institutional reform and a stabilising factor in the country's accession process.

While this potential remains largely unrealised, it is firmly embedded in the constitutional text and reinforced by the case law of the ECtHR. Therefore, a constitutional identity centred on fundamental rights is the most credible legal instrument for overcoming institutional stalemates, containing secessionist pressures, and transforming BiH from an ethnically divided state into a political community based on shared rights and the rule of law.

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OVERCOMING CONSTITUTIONAL ANAEMIA AT THE ECTHR: FROM CULTURALIST APPROACHES TO DIGNITARIAN ADJUDICATION OF ROMA CLAIMS

Bujar Taho

Keywords: Antigypsyism; Group Vulnerability; Culturalist Approaches to Non-Discrimination; Constitutional Equality; Human Dignity.

1. *Introduction*

This paper seeks to show that the European Court of Human Rights (ECtHR)'s approach to Roma rights is closely connected to ongoing debates on constitutional crisis and security within the European legal order. Over the last two decades, the ECtHR has been elaborating an extensive body of case law on the rights of Roma[1] individuals that often, though not always, instinctively relies on a differential non-discrimination argument. This is often done by submissively accepting stereotypical and colloquial language brought forward by parties in a particular case without properly assessing its broader legal and policy implications. This has further contributed to the transformation of the principle of non-discrimination into a purpose in itself, thereby distancing it from its core objective of guaranteeing everyone equal protection of the law. Among the cases handled by the ECtHR, there are a few with signifi-

[1] The term 'Roma' is used here as an umbrella designation for those who self-identify as Roma and for other similarly perceived groups, whose presence in Europe has been documented since the Byzantine period. In the Romàni language, Rom carries early civic and political connotations of belonging and refers specifically to a Roma adult (Roma man or husband) and is arguably etymologically linked to *cives Romanus* (Roman citizen) in the Byzantine period, a status that was claimed or attributed to various Byzantine peoples in a manner arguably analogous to the concept of European citizenship. It should be noted, however, that Romàni is linguistically unrelated to Romanian. See Mathisen Ralph W., "Peregrini, Barbari, and Cives Romani: Concepts of Citizenship and the Legal Identity of Barbarians in the Later Roman Empire," *The American Historical Review*, 111, 4 (2006), 1011-40.

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cant implications for the definition of the Roma's collective identity as well as their quest for integration and equal protection. More specifically, the Court has recognized a right to a "gypsy way of life",[2] and has introduced the phrase "Roma marriage" after granting *ad hoc* legal effect to "a marriage [presumably] entered into as per the Roma rites".[3] Whereas these rulings have seemingly provided redress for the concerned Irish-Traveller and Roma applicants, an inside look reveals how exclusively relying on a differential non-discrimination argument gives way to cultural relativist judgments that are oblivious to an essential dimension of a commonly shared humanity, that of being a livelihood-seeker or as Catherine Dupré conceptualises it, a worker.[4] This, however, does not mean that the ECtHR should abandon its differential non-discrimination approach, but rather identify complementary interpretation tools in order to neutralize its unintended, far-reaching divisive, biased and often counterproductive effects. To this end, I argue that resort to the principle of human dignity as a proportionally-neutral, dialogical and equalizing tool for interpretation of human rights, both in their individual and collective dimension,[5] carries transformative potentials for avoiding the differential non-discrimination's inherited divisive effects while ensuring redress for applicants' short as well as long term legitimate interests. This is crucial for safeguarding the supremacy of the ECtHR within Europe's current multi-layered and fragile constitutional adjudication, which is further endangered by the AI and cyber turn.[6]

Doris Farget is among the first scholars to examine ECtHR jurisprudence establishing a right to 'a gypsy way of life', arguing that it has construed a stereotyped, restricted, and distorted definition of Roma cultural identity.[7] According to Farget, the judicial depiction of all members of Roma communities as vulnerable and living a nomadic life is founded on societal stereotypes on what she called *Romanity*, portraying Roma as people looking for exceptions, living in unauthorized sites and misbehaving. Nevertheless, she almost seems to excuse the

[2] *Connors v. the United Kingdom*, ECtHR, 2004.

[3] *Muñoz Díaz v. Spain*, ECtHR, 2009.

[4] Dupré Catherine, *The Age of Dignity: Human Rights and Constitutionalism in Europe* (Oxford and Portland, OR: Hart Publishing, 2015).

[5] See McCrudden Christopher, "Human Dignity and Judicial Interpretation of Human Rights," *European Journal of International Law* 19, 4 (2008): 655-724; Carozza Paolo G., "Human Dignity in Constitutional Adjudication," in *Comparative Constitutional Law*, edited by Tom Ginsburg and Rosalind Dixon (Cheltenham, UK: Edward Elgar Publishing, 2011), 459-72; Daly Erin, *Dignity Rights: Courts, Constitutions, and the Worth of the Human Person* (Philadelphia: University of Pennsylvania Press, 2012); McCrudden Christopher, "In Pursuit of Human Dignity: An Introduction to Current Debates," in *Understanding Human Dignity*, edited by Christopher McCrudden (Oxford and New York: Oxford University Press, 2013), 1-58; Brownsword Roger, "Human Dignity from a Legal Perspective," in *The Cambridge Handbook of Human Dignity: Interdisciplinary Perspectives*, edited by Marcus Düwell, Jens Braarvig, Brownsword Roger and Mieth Dietmar (Cambridge: Cambridge University Press, 2015), 1-22; Becchi Paolo, "Human Dignity in Europe: Introduction," in *Handbook of Human Dignity in Europe*, edited by Paolo Becchi and Klaus Mathis, (Cham: Springer, 2019), 1-36.

[6] See Yeung Karen and Harkens Adam, "How Do 'Technical' Design-Choices Made When Building Algorithmic Decision-Making Tools for Criminal Justice Authorities Create Constitutional Danger?," *Sweet & Maxwell*, (2023):1-17; Simoncini Andrea and Longo Erik, "Digital Constitutionalism and Fundamental Rights," in *The Oxford Handbook of Digital Constitutionalism*, edited by Giovanni De Gregorio, Oreste Pollicino and Peggy Valcke (Oxford: Oxford University Press, 2024).

[7] Farget Doris, "Defining Roma Identity in the European Court of Human Rights", *International Journal on Minority and Group Rights,* 19 (2012): 291-316.

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Court and even other actors involved in the judicial process as being unable to undo the existing stereotypes in the society. Farget concludes that improved cooperation with Roma themselves and greater access to justice would generate more meaningful arguments in better explaining the needs and solutions concerning the Roma living conditions and cultural identity. More recently, Emma Várnagy corroborates earlier critiques of the ECtHR's approach to group vulnerability and to stereotypical police categorization of conduct as "purely gypsy behaviour", concluding that the Court has failed to develop effective judicial tools to address vulnerability and stereotypes in cases of anti-Romani police violence.[8]

While I agree with Farget's analysis on the ECtHR's too restrictive construction of Roma collective identity, I claim a different root cause of the problem and propose another solution engaging the Court itself. In the first part of this article, unlike Farget, I argue that the judicial conceiving of Roma as an unalterable nomadic group is a result of a submissive differential non-discrimination argument that the Court applies and not simply due to prevailing stereotypes in society. I further claim that recognition of separate rights for Roma based on unjustifiable cultural relativist grounds creates a form of internal constitutional crisis, or what Professor Joseph E. David terms "constitutional anaemia."[9] David's notion describes a condition in which the norms of traditional constitutionalism fail to keep pace with social realities, leaving constitutional order formally operational but normatively weakened, much like a body suffering from anaemia, where vital functions persist despite a diminished capacity to sustain healthy circulation. Here, I refer specifically to an invisible type of constitutional crisis originating within the court itself rather than from external political intrusion.

The ECtHR jurisprudence has contributed to such constitutional erosion by perpetuating a prejudicial and stagnant image of Roma identity, thereby impairing their dignity, integrity, and personal development through "implicitly denying the existence of a (morally significant and yet dynamic) common humanity",[10] which risks being embodied also in the automated constitutionalism. In the second part of the article, I maintain that it is not only possible and desirable but also imperative for the Court itself to avoid these inherited consequences of the differential non-discrimination approach by being more attentive to the power of language in law,[11] and the growing danger of automated discrimination,[12] employing interpretative tools (such as the principle of human dignity) as a proportional yardstick for assessing cultural relativist claims.[13] The third and last part focuses on the functional

[8] Várnagy Emma, "'Purely Gypsy Behaviour' and the Construction of Roma Identity", *Romani Critical Studies,* 6, 1 (2024), 4-23. See also, Khanna Vandita, "Roma Vulnerability before the European Court of Human Rights: Towards a Structural Account", *Netherlands Quarterly of Human Rights*, 42, 4 (2024): 340-62; Henrard Kristin and Farkas Lilla, *The Rights of Roma in European Courts* (Oxford: Oxford University Press, 2025).

[9] David Joseph E., "Constitutional Crises and the AI," lecture at the Winter School on Constitutional Crisis and Cyber Security, University of Milano-Bicocca, Milan, March 2, 2026.

[10] Donnelly Jack, "Cultural Relativism and Universal Human Rights," *Human Rights Quarterly,* 6, 4 (1984): 404.

[11] Berman Harold J., *Law and Language: Effective Symbols of Community*, edited by John Witte (Cambridge: Cambridge University Press, 2013).

[12] Alon-Barkat Saar, Busuioc Madalina, Schwoerer Kayla and Weißmüller Kristina S., "Algorithmic Discrimination in Public Service Provision: Understanding Citizens' Attribution of Responsibility for Human versus Algorithmic Discriminatory Outcomes," *Journal of Public Administration Research & Theory*, 35, 4 (2025): 469-88.

[13] Donnelly Jack, "Cultural Relativism and Universal Human Rights".

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utility of 'the principle of human dignity', serving not only interpretative purposes but also ensuring constitutional resilience.[14]

2. *Differential Non-Discrimination on Cultural Ground*

With the adoption of Protocol 12 of the ECHR, providing for a general prohibition of discrimination, the Court has become more accessible by categories of individuals that are much exposed to discrimination, among others the Travellers and the Roma. The wide range of cases adjudicated based on non-discrimination grounds includes claims related to segregation in education, forced eviction from formal or informal settlements, uninformed sterilization of women, ethnically/racially motivated violence, etc.[15] A majority of these rulings has marked significant positive changes in the legal and policy frameworks pertaining to protection of human rights of Roma individuals. Among these achievements are the denouncing of school segregation and the acknowledging of systemic social and economic disadvantages and discrimination faced by the Roma, which have served as a justification for the adoption of European and national policies aimed at protecting against discrimination and facilitating social and economic inclusion up to 2030.[16]

However, the principle of non-discrimination, in addition to equal treatment of those similarly situated, demands also differential treatment of others differently situated. In this regard, the ECtHR has stated that "the right not to be discriminated against in the enjoyment of the rights guaranteed under the [Convention] is also violated when States…fail to treat differently persons whose situations are significantly different".[17] A differential non-discrimination argument justifies differential treatment by emphasizing protected grounds that distinguish individuals, such as race, colour, language, social origin, association with a national minority, property, or other status.[18] However, in claims involving Roma and Travellers (often confusingly and derogatorily labelled 'Gypsies'), distinctions are frequently drawn based on racially stereotyped behaviour framed as a distinct 'category'[19] which I term gypsyism. This approach risks overlooking more relevant grounds, such as income-generating patterns, which arguably fall under 'social origin' or 'property' in Article 14. Moreover, I suggest that this trend has contributed to a judicial bias towards a far-reaching cultural relativist approach to the enjoyment of human rights, generating unintended and potentially counterproductive effects, and, over time, placing the constitutional order under strain. As Dieter Grimm observes, constitutional systems may enter crisis, not only through formal rupture but also through gradual substantive erosion.[20]

[14] Dupré Catherine, *The Age of Dignity.*

[15] European Court of Human Rights, "Factsheet - Roma and Travellers," European Court of Human Rights, October 2024.

[16] European Commission, A Union of Equality: EU Roma Strategic Framework for Equality, Inclusion and Participation for 2020–2030, Communication from the Commission to the European Parliament and the Council, COM(2020) 620 final (Brussels, October 7, 2020; Brussels: European Commission, 2020).

[17] *Thlimmenos v. Greece,* ECtHR, 2000, para. 44*; Pretty v. United Kingdom*, ECtHR, 2002, para. 88.

[18] European Convention on Human Rights, art. 14.

[19] Surdu Mihai and Kovats Martin, "Roma Identity as an Expert-Political Construction," *Social Inclusion,* 3, 5 (2015): 10.

[20] Grimm Dieter, *Constitutionalism*: *Past, Present, and Future* (Oxford: Oxford University Press, 2016), 230-55. See also, David Joseph E., "Constitutional Crises and the AI".

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2.1. *The Right to a 'Gypsi Way of Life'*

In *Connors v. the UK*, the ECtHR interpreted Article 8 (right to respect for private and family life) to entail an independent right to a 'gypsy way of life'[21] arguably relying on a radical cultural relativist approach, which regards culture as the sole basis for the validity of a moral right or rule.[22] The complaint concerned eviction of an Irish-traveller family from an authorized traveller residential site where they lived for 13 years on the grounds that they and their guests misbehaved, thus creating considerable troubles at the site. The Court held that authorities could not evict 'gypsy' individuals from local authority traveller sites without proper justification.[23] The Court further stated that "the vulnerable position of 'gypsies' as a ['transient population'][24] means that some special consideration should be given to their needs and their different lifestyle" which entails an obligation on the states to facilitate "the gypsy way of life".[25] Before deciding this case, however, one of the dissenting judges in *Buckley v. The UK* (1996) had restated submissively the applicant's claim that "living in a caravan and travelling are vital parts of Gypsies' cultural heritage and traditional lifestyle".[26] Few years later, in *Chapman v. the UK* (2001), the Court adopted this view holding that "measures affecting the applicant's stationing of her caravans [in her own land] impacted the right to respect for her home and her ability to maintain her identity as a 'Gypsy' and to lead a private and family life in accordance with that identity".[27] Subsequently, in *Winterstein and Others v. France* (2013) the Court, dealing with claims from French-travellers (referred to as *gens du voyage*), reaffirmed that "the concept of 'home' within the meaning of Article 8 depends on the existence of sufficient and continuous links with a specific place and that it included "caravans, cabins and bungalows […] regardless of the lawfulness of the occupation under the domestic law".[28] In other words, the Court has practically interpreted 'the right not to have one's home life interfered with' to include also a right to live permanently and even unlawfully in caravans (or other substandard buildings/locations) based on presumed cultural beliefs.

In all these cases, the ECtHR's interpretations of the term 'gypsy' (referring to British-travellers, French-*gens du voyage* as well as Roma) and of the phrase 'gypsy way of life' are related stereotypically and exclusively to the idea of a nomadic lifestyle supposedly important to all Travellers and Roma for cultural reasons.[29] This assumption is problematic for at least three reasons. Firstly, in addition to legitimizing a derogatory exonym imposed on Roma by outsiders (and internalized by some Roma and travellers), it removes the occupational foundation of the term 'gypsy' as defined in the British legislation and case law as well as linguistic studies.[30]

[21] *Connors v. the UK*, ECtHR, 2004.
[22] Donnelly Jack, "Cultural Relativism and Universal Human Rights".
[23] *Connors v. the UK*, ECtHR, 2004, para. 95.
[24] *Ibid.*, para. 88.
[25] *Ibid.*, para. 84.
[26] *Buckley v. the UK,* ECtHR, dissenting opinion of Judge Lohmus, 1996, para. 26.
[27] *Chapman v. the UK,* ECtHR, 2001, para. 71.
[28] *Winterstein v. France*, ECtHR, 2013, para. 69.
[29] Farget Doris, "Defining Roma Identity".
[30] Hancock Ian, *We Are the Romani People* (Hatfield: University of Hertfordshire Press, 2002); See also, UK Highways Act 1959, s. 127(c).

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Secondly, it fails to realize that a nomadic life, in the first place, may be a survival way of seeking livelihood, rather than a free choice founded on particular cultural beliefs. Thirdly, it has given legal acceptance to otherwise stereotypical and colloquial language for identifying Roma and other itinerant livelihood seekers. By ignoring these three elements, the Court has arguably established a paradoxical right to a nomadic way of life construing Roma based on a perceived racialized behaviour (gypsyism), rather than genuine dimensions of ethnicity. While accepting that nomadism created significant hardship and destitution that most 'gypsies' (including the applicants in all the above cited cases) had become settled communities, it nevertheless made it a duty for states to facilitate preservation of nomadic lifestyle on unassessed and dubious cultural grounds. In so doing, the Court has arguably contributed to a constitutional strain by racialising certain low-skilled itinerant occupations, thus reinforcing a rigid and ostracized category of second-class citizens.

2.1.1. *Occupational and Socio-Economic Foundations of Nomadism*

Despite the fact that British law and linguistics studies define the term 'gypsy' primarily based on occupational patterns, the ECtHR has framed it merely on a cultural belief in nomadism, while stripping the latter of its work-related basis. With regard to British law, a 1959 British statute until 1980 referred to 'gypsy' as an equivalent term for a hawker or an itinerant trader.[31] Moreover, a 1967 British case emphasized that "being a gypsy was not an unalterable status, and a person might have been a gypsy at one time and not a gypsy at another time".[32] More importantly, another 1994 British case clarified that gypsies are "persons who wander or travel for the purpose of making or seeking their livelihood not persons who move from place to place without any connection between their movement and their means of livelihood".[33] In other words, both British law and case law suggest that there is no occupationally independent cultural foundation of the terms 'gypsy' (and for that matter, nomad).

Ian Hancock, a professor in linguistics and of Roma origin, despite noting the derogatory and demeaning connotations of the term 'gypsy', also supports its occupational foundation that the ECtHR has neglected. According to Hancock, today's Roma are descendants of the multi-ethnic medieval European peasantry who used to make their living by offering itinerant services within the Greek-speaking Byzantine Empire.[34] The term 'gypsy', according to Hancock, may have been a (mocking) reference for an inhabitant of 'Little Egypt', a territory near the western coast of Greek-Peloponnesus during the Byzantine Empire era where a part of the Roma population settled for a while. In the course of various migration waves within the Balkans and westwards, Roma were initially associated with the Greek-*Athinganos*, and then with the Egyptian-*Gifties*, the Iranian-Scythians, and later and still today with the English-travellers and French-*gens du voyage*, based on seemingly shared (occupational) traveling patterns.[35] Such confusion, according to Hancock, has strengthened the idea that 'gypsies'

[31] UK Highways Act 1959, s. 127 (c).

[32] *Mills v. Cooper*, Queens' Bench Division, UK, 459-460 (1967).

[33] *R v. South Hams, ex parte Gibbs*, (1994), as cited in *Connors v. the UK*, 2004, para. 57.

[34] Hancock Ian, "Mind the Doors! The Contribution of Linguistics," in *All Change! Romani Studies through Romani Eyes*, edited by Damian Le Bas and Thomas Acton (Hatfield: University of Hertfordshire Press, 2010), 5-26.

[35] *Ibid.*

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were people defined by behavioural and occupational patterns rather than ethnicity, history, or place.[36] Leaving aside for a moment its derogatory and racial/racist connotations, an accurate understanding of the word 'gypsy' could only be construed by considering the work-related purpose of travelling of certain categories of (European medieval) itinerant workers and traders (musicians, craftsmen, horse breeders, etc.), irrespective of their ethnicity.

As a result, by dismissing the job-related foundation of the word 'gypsy' in the 'gypsy [nomadic] way of life' the ECtHR has arguably ignored an essential human dimension of certain itinerant breadwinners, which Dupré conceptualises as workers.[37] This in turn has neglected the genuine needs marked by ostracization of the itinerant traders, seasonal workers, or other mobile self-employed individuals broadly labelled as transient communities (i.e. Roma, English-travellers, French-*gens du voyage,* and alike).

2.1.2. *Nomadism as a Forced Choice Impairing Personal Development*

Although nomadism may in some contexts represent a voluntary lifestyle choice pursued for leisure, spiritual reasons, or livelihood, this does not reflect the experience of all Roma, including the applicants before the ECtHR, who often resort to it as a survival strategy. The Court has acknowledged that traditional travelling entailed hardship, displacement, and harassment, yet failed to recognise that it functioned as a survival strategy for income generation, and paradoxically held that authorities have a duty to facilitate this practice on cultural grounds. More specifically, the Court in *Connors* described the applicant and his family as:

"gypsies [leading] a traditional travelling lifestyle until they suffered so much from being moved on with ever increasing frequency and harassment that they settled on the gypsy site run by the local authority [where they lived] permanently for thirteen years".[38]

The description further indicates that, due to the antisocial behaviour of others living on the site, the applicant left and moved into a rented house for a while but gave up tenancy and returned to the site when offered two plots for the family at the same local authority site.[39] Meanwhile, a 2002 British case cited by the Court in *Connors* emphasized that "the nomadic way of life [was] ending for most gypsies [and that] council sites [were] becoming permanent residences for most of the families".[40] Similarly, a 2002 research report also cited in the *Connors* judgment mentioned that increased difficulties in travelling and "a desire for a more comfortable lifestyle and education for children" had led many gypsies to settle.[41] These developments clearly indicate the applicant's genuine need and demand for running a settled life, which was also a significant trend within the (formerly) itinerant workers and their families.

In sharp contrast to this demand and tendency, the Court in *Connors* decided that despite the fact that many 'gypsies' have settled, "the possibilities of living in a trailer is attractive for

[36] *Ibid.*

[37] Dupré Catherine, *The Age of Dignity;* See also, Rory O'Connell, "The Right to Work in the ECHR", *European Human Rights Law Review,* (2012): 176-190.

[38] *Connors v. the UK*, ECtHR, 2004, para. 9.

[39] *Ibid.*

[40] *Ibid.*, para. 51.

[41] *Ibid.*, para. 58.

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cultural reasons".[42] It relied on a 2002 research report, which claimed that the trend of abandoning nomadism should not be considered as 'unidirectional' as individuals may return to traveling again given that "nomadism appears to be a spiritual and cultural state of mind, rather than a day-to-day reality".[43] This statement is arguably unfounded because it is oblivious to the occupational basis of nomadism, which is related to shepherding and defined as roaming to find pastures for flocks or herds.[44] Additionally, the cited report went so far as to argue that due to "the stability discovered on many residential sites, it seems entirely appropriate to see them as a form of specially adapted housing for Gypsies and other Travellers".[45] In the early 2010s, in *Winterstein* the Court reaffirmed the right to live permanently and even unlawfully in caravans by interpreting the concept of 'home' to include "caravans, cabins and bungalows […] regardless of the lawfulness of the occupation under the domestic law".[46] In other words, it introduced the idea that nomadism and caravanning life is an innate and unalterable trait of 'Gypsies' and that traveller residential sites be acknowledged as special housing for 'Gypsies' (alternatively, Roma, Travellers), irrespective of whether they are settled or need to become so.

Moreover, the ECtHR reiterated that,

"[living in] a caravan is an integral part of the identity of travellers, even where they no longer live a whole nomadic existence, and that measures affecting the stationing of caravans affect their ability to maintain their identity and to lead a private and family life in accordance with the tradition".[47]

In so doing, the Court reinforced the *Connors*' construction of nomadism as an inherent and fixed behavioural characteristic of Gypsyism (and by extension of being a Roma). By framing Roma and various 'itinerant breadwinners' (so called travellers and *gens du voyage*) as inherently and unalterably transient communities (or 'Gypsies'), the Court has frozen their cultural identities, denying social mobility, territorial belonging, and ultimately the full development of their collective identity and personality as equal citizens within a dynamic human society. More recently, in *Hirtu* (2020), the Roma applicant claimed that his family was "living in a caravan because of poverty [and that] caravans and other mobile homes are not applicant's traditional abode".[48] This argument clearly questions the legitimacy of facilitating a nomadic lifestyle (such as caravan housing) on alleged cultural grounds. Encouraging Roma to return to a nomadic lifestyle, after having abandoned it in search of better living conditions, may itself constitute a form of institutionalised segregation and exclusion, thus signalling a substantive erosion of European values and constitutionalism.

Furthermore, the right to live permanently – and even unlawfully – in caravans as recognized by the Court, arguably conflicts with the right to adequate housing, which the UN Committee on Economic Social and Cultural Rights describes as the right "to live in security, peace and dignity".[49] As Martin Heidegger suggests, dwelling is the essential core of human being but

[42] *Ibid.*, paras. 58-60.

[43] *Ibid.*, para. 60.

[44] "Nomad," Online Etymology Dictionary.

[45] *Connors v. the UK*, ECtHR, 2004, para. 63.

[46] *Winterstein v France,* ECtHR, 2013, para. 69.

[47] *Ibid.*, para. 70.

[48] *Hirtu and Others v. France*, Application no. 24720/13, Applicant's Observations on Government's Observations, para. 28 (2020).

[49] Office of the United Nations High Commissioner for Human Rights, The Right to Adequate Housing - Factsheet No. 21/Rev 1 (2014), 3.

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"not every building [or location used for work-related purposes] is a dwelling".[50] Heidegger illustrates this by stating that "the truck driver is at home in the highway, [and] the chief Engineer is at home in the power station, but yet [none of them do] dwell there".[51] Not making a distinction between *being at home* in a workplace (or in a location that enables access to workplace) and *having a home* or dwelling in an adequate housing led the Court to license caravans as 'gypsy home'. This is a reminder of what Gloria Jean Watkins (better known as bell hooks) named as "a radical political dimension" of the concept of 'homeplace for *slaves*' (racialized and dehumanized workers, arguable in a similar fashion with 'gypsies') as intractably linked with the 'slave hut' or the wooden shack.[52] As Sandra Fredman notes equality demands that laws do not treat some individuals as second-class citizens, demean them, or assume them less capable without good reason, thereby safeguarding fundamental human dignity.[53]

Finally, under the constitutional principle of equality, governments have a duty not only to refrain from discrimination but also to remove economic and social obstacles that limit citizens' freedom and equality, undertaking positive measures through legislation and public programs to improve their conditions.[54] This suggests that governments should address the structural social and economic disadvantages that compel certain itinerant breadwinners into unstable and substandard housing/living conditions, rather than legitimizing caravans and other substandard and ostracized sites as "special housing adapted for Gypsies/Travellers [and Roma]".[55] By acknowledging a right to a nomadic way of life, the Court essentially authorized the States to refrain from lifting occupational travellers out of hardship, destitution, segregation and ostracization and facilitated the maintenance of insecure, unstable, and degrading working and living conditions.

Despite being well-intentioned, and founded upon a legitimate concern for the privacy, this judicial reasoning can potentially entrench rather than help improve the situation of occupational travellers while locking them in a vicious circle of poverty, illiteracy, ostracization that further reinforces racism. The Court's paradoxical reasoning emerged from a differential non-discrimination approach loosely and submissively based on cultural grounds (treating culture as frozen in a mythical past), without proper assessment. This clearly indicates the need for the Court to develop adequate tools for assessing the justifiability of cultural relativist claims to universal human rights.[56]

2.1.3. *The Role of Colloquial Language in Legal Interpretation*

Following the establishment of a right to 'a gypsy [nomadic, caravanning, and informal] way of life' in the *Connors* case, the ECtHR introduced a similarly problematic phrase,

[50] Heidegger Martin, *Poetry, Language, Thought* (New York: Perennial Classics, 2009 [originally published 1971]), 143.

[51] *Ibid.*

[52] Watkins Gloria J. (bell hooks), "Homeplace (A Site of Resistance)," in *Yearning: Race, Gender, and Cultural Politics* (Boston, MA: South End Press, 1990).

[53] Fredman Sandra, *Discrimination Law* (Oxford: Oxford University Press, 2011), 19.

[54] Constitution of the Republic of Italy, art. 3, para. 2 (1948); See also, Fredman Sandra, *Discrimination Law*.

[55] *Connors*, para. 63, refering to p. 52 of the cited report 2002.

[56] Donnelly Jack, "Cultural Relativism and Universal Human Rights".

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'Roma marriage', in the *Muñoz Diaz v Spain* (2009). The phrase played a seemingly peripheral role in that judgment, yet it judicially reinforces an unalterable conception of the Roma cultural identity as alien to the mainstream legal framework. In the *Muñoz* case, the ECtHR held that the refusal of survivor's pension to a (Roma) widow on the ground that she was not validly married to her deceased husband violated Article 14 in conjunction with Article 1 of Protocol 1 of the Convention. The Court added that "it is disproportionate […] to refuse to recognize the effects of the 'Roma marriage' when it comes to the survivor's person".[57] This statement seems to rely on the applicant's assertion that Roma rites were the only rites recognized by her community at the time of her marriage in 1971 and that in good faith, she was unable to give her consent to marriage in other forms. It is important to note that only religious marriage existed in Spain at the time of marriage and ten years after, whereas a civil marriage was only possible if apostasy was granted.[58]

In spite of its ruling, the Court's reiteration of the colloquial phrase 'Roma marriage' might lead to misconceptions while running the risk of being used as a cultural relativist justification for other archaic and highly disputed practices still present in some Roma communities which are similarly indefensible on cultural grounds (i.e. underage marriage, uncertified marriage, or alike). Thus, one should not lose track of the fact that the phrase 'Roma marriage' – which in the *Muñoz* case referred to as a (non-religious and non-civil) marriage solemnized presumably according to Roma rites in 1971 and dictated by then restricted religious regulation of civil marriage – does not convey any legitimate (colloquial, let alone legal) meaning in today's society. This kind of disclaimer is necessary in order to avoid the amplification of such an expired colloquial phrase into a right to enter into a 'Roma marriage' in the future along the lines of the right to 'a gypsy way of life'. The Court has arguably facilitated this risk by attributing legal significance to otherwise colloquial (and most importantly derogatory) phrases such as a 'gypsy way of life' or 'Roma/Gypsy marriage.' In this context, Chirițoiu and Tesăr in their *Introduction: Roma Marriage-Making, Between the Constraints of "Tradition" and the "Choices" of Liberalization* caution against static or essentialised understanding of Roma culture, highlighting the diversity and agency within Roma communities that such labels tend to obscure.[59]

Underestimating the immense power of the colloquial language in legal discourse[60] has led to further toleration of demeaning stereotypes against Roma and their collective identity. For example, in *Aksu v. Turkey* (2012), the ECtHR defended academic freedom by ruling that the use of the word 'gypsy' in books financed by public authorities as a metaphor for 'miserly behaviour' and 'thief' does not amount to discrimination against Roma. Despite a remarkable dissent by Judge Gyulumyan,[61] the Court merely added that it would have been preferable to label the analogy of these words with the word 'gypsy' as "pejorative" or "insulting" rather than "metaphorical".[62] A comparison with the *Garaudy* case, where the

[57] *Muñoz Díaz v. Spain,* 2009, para. 69.

[58] *Ibid.*, para.75.

[59] Chirițoiu Ana and Tesăr Cătălina, "Introduction: Roma Marriage-Making, Between the Constraints of 'Tradition' and the 'Choices' of Liberalization," *Martor,* 25 (2020): 9-14.

[60] Berman Harold J., *Law and Language*.

[61] Judge Gyulumyan, dissenting opinion in *Aksu v. Turkey*, ECtHR, 2012, paras. 24-26.

[62] *Aksu v. Turkey*, ECtHR, 2012.

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Court held that Holocaust denial is not protected under the Convention,[63] reveals a significant inconsistency in judicial responses to antisemitism and antigypsysism. Such unfounded interpretations of the Roma collective identity (indivisibly associated with the derogatory term 'gypsy' which is further stripped of its occupational basis) emerging from *Buckley*, and gradually receiving its shape in *Chapman*, *Connors*, *Muñoz*, *Aksu, Winterstein* and ultimately in *Hirtu* clearly, indicates that the culturalist differential non-discrimination argument is not able to maintain the equality of citizens,[64] inclining towards a radical cultural relativist approach to human rights inherently characterised by divisive and ostracizing effect. This cultural relativist approach has construed Roma, as Tina Magazzini has stated, as "both the victims and responsible of exclusion" ignoring that marginalization is systemic and structurally rooted in the economic and political power relations while assuming that Roma identity contravenes the order regulating society as a whole.[65] Moreover, this stagnant and degrading cultural relativist approach has arguably been transposed in further policy cycles affecting Roma[66] including, among others, the 2020 EU Roma Strategic Framework for equality, inclusion, and participation up to 2030.[67]

3. *Assessment of the Culturalist Approach and Its Contribution to a Constitutional Anaemia*

3.1. *Othering in Judicial Reasoning and the Erosion of Constitutional Equality*

The notion of "constitutional anaemia"[68] is manifested here as an erosion of citizens' constitutional equality, stemming from the recognition of a right to 'a gypsy way of life'. Its danger lies in its potential to operate as a licence for planning and legitimizing substandard and segregated housing for those categorised as 'transient population', without regard to their human dimension as dynamic livelihood-seekers. This in turn, may further encourage and legitimize the persistence of ghettoized camps or slums, paradoxically justified under the right to respect for privacy and a family life. This approach would be detrimental to the integration and equal protection of Roma, risking to undo positive results already achieved such as the prohibition of Roma segregation in education,[69] while undermining the legitimacy and authority of the ECtHR as a constitutional guardian. The ECtHR supposition that facilitation of gypsysism would challenge racism against Roma and non-Roma low-skilled itinerant livelihood-seekers (i.e. travellers/*gens du voyage*) in today's society is entirely unfounded. This is evident when 'gypsyism' is defined in dictionaries as the state of being a 'gypsy'

[63] *Garaudy v. France*, ECtHR, 2003.

[64] Cartabia Marta, "The European Court of Human Rights: Judging Non-discrimination," *I-CON*, 9, 3-4 (2011): 808-14; See also Fredman Sandra, *Discrimination Law*, 26.

[65] Magazzini Tina, "Cultural Institutions as a Combat Sport: Reflection on the European Roma Institute," *The Age of Human Rights Journal,* (2016): 50-76; Alexiadou Elisavet Athanasia, "Identifying a Human Rights Approach to Roma Health Vulnerabilities and Inequalities in Europe: From Concept to Action", *Human Rights Review*, (2023): 1-19.

[66] Surdu Mihai and Kovats Martin, "Roma Identity as an Expert-Political Construction".

[67] European Commission, "A Union of Equality".

[68] David Joseph E., "Constitutional Crises and the AI".

[69] *D.H. and Others v. Czech Republic*, ECtHR, 2007; *Sampanis and Others v. Greece*, ECtHR, 2008; *Orsus and Others v. Croatia*, ECtHR, 2010.

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or alternatively as a racial/ethnic slur for practices and "habits ascribed to gypsies, such as deception, cheating, flattery",[70] or even "miserly and thieving behaviour" as the Court also accepted in the *Aksu* case.[71]

In the meantime, other European institutions such as ECRI, the EU Parliament, the Council, and the Commission have framed the protection of human rights of Roma individuals through 'prohibition of antigypsysism'. Thus, ECRI defines antigypsyism as "a specific form of racism, and ideology founded on racial superiority, a form of dehumanisation and institutional racism nurtured by historical discrimination, [against Roma] which is expressed, among others, by violence, hate speech, exploitation, stigmatisation and the most blatant kind of discrimination".[72] There is broad consensus in both scholarly and policy-oriented discourses that antigypsyism is rooted in the contemptuous, stereotypical, distorted, and caricatured racialisation of Roma as 'Gypsies', (a term mentioned in the explanatory notes used by European institutions when referring to Roma), notwithstanding the absence of any informed self-determined way of life (beyond survival strategies) that can meaningfully be described as 'gypsy' or 'gypsyism'.[73] As with the N-word, occasional internalization or self-identification by some Travellers or Roma with racial slurs does not legitimise these terms, particularly given their long history as externally imposed and racialized labels.

In direct contrast to ECRI and EU institutions, the ECtHR has never explicitly recognised antigypsyism in its case law concerning discrimination against Roma. On the contrary, it has tended to assume the existence of a (defensible or tolerable) gypsyism, or as framed by the Court in *Connors* (2004) a 'gypsy way of life'. Paradoxically, the duty of the states to facilitate gypsyism [travelers' way of life] was reaffirmed in *Winterstein* (2013),[74] despite the fact that in *Aksu* (2012) the ECtHR had acknowledged that the use of term 'gypsy' (and for that matter, gypsyism) is a pejorative metaphor for 'miserly and thieving behavior' although quite surprisingly did not consider it a violation of Article 14. This aporetic judicial reasoning does not simply reflect a constitutional crisis, but it actively contributes to one, even fostering discourses on "reasonable antigypsyism",[75] despite international and European obligations to fight against any forms of racism, including antigypsysim. Although one could argue that the Court has been misled by the legal counsels advancing culturalist arguments to win the cases, it nevertheless remains responsible for identifying meaningful interpretative tools both to evaluate cultural relativist claims (that come along with unintended but highly counterproductive effects, as discussed above), and to better understand the structural and institutional discrimination that continues to harm Roma across Europe.

[70] "Gypsyism", in *Wiktionary.com* (Accessed January 31, 2026).

[71] *Aksu v. Turkey*, ECtHR, 2012, para. 28.

[72] ECRI, General Policy Recommendations No. 13 on Combating Antigypsyism and Discrimination against Roma, adopted June 24, 2011, amended December 1, 2020.

[73] Valeriu Nicolae, "Towards a Definition of Antigypsyism" (2006); Rostas Iulius, *Antigypsyism: Causes, Prevalence, Consequences and Possible Responses* (Strasbourg: Council of Europe, 2021).

[74] *Winterstein*, para. 56, referring to *Chapman*.

[75] Van Baar Huub, "Emergence of Reasonable Anti-Gypsism in Europe," in *When Stereotype Meets Prejudice: Antiziganism in European Societies*, edited by Timofey Agarin (Stuttgart: Ibidem Verlag, 2014), 22-44.

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3.2. *Judicial Neutrality and the Duty to Unmask Structural and Indirect Discrimination*

The ECtHR jurisprudence has a prominent role in the European constitutionalism marked by the constitutional or quasi-constitutional place that the ECHR occupies in the constitutional orders of Member State, its recognition as general principle of EU law, as well as due to the access afforded to individuals.[76] The interpretation tools that the Court employs in its judgments and reasoning play a decisive role in fulfilling its function as a constitutional guarantor, upholding everyone's right to free choice through a principled commitment to neutrality[77] and equality of citizens[78] preventing direct, indirect, and structural discrimination where required. However, as noted earlier, the differential non-discrimination approach alone appears unable to maintain neutrality or to meaningfully recognise structural and institutional inequality and racism underlying cultural practices such as the 'gypsy way of life' or 'Roma marriage'.

Marta Cartabia proposed recalibrating the burden of proof and preserving a meaningful margin e appreciation to safeguard the neutrality of the non-discrimination principle,[79] yet neither approach appears capable of exposing the structural nature of vulnerability and institutional discrimination[80] embodied in the recognition of the right to a 'gypsy way of life' or in judicial constructs such as 'Roma marriage'.

Jack Donnelly more convincingly argues that many seemingly cultural claims lack a cultural foundation, requiring courts to remain vigilant of "cynical manipulations of dying, lost, or even mythical cultural past."[81] He further argues that arbitrary culturalist claims are often introduced for external consumption by economically and politically elite representatives who themselves have long abandoned traditional culture and have a high level of self-interest. Most importantly, Donnelly asserts that even well-established cultural practices are subject to limitation when they constitute fundamental deviations from universally agreed human rights standards. The international human rights framework is rooted in the inherent equal dignity of every human being, which suggests that all human rights represent various levels of guarantees against violations or threats of human dignity.[82] As a result, Donnelly argues, a well-established cultural practice that deviates from the recognized human rights standards would be defensible only if it is compatible with the inherent equal dignity of human individuals. That said, being a human rights court, the ECHR should explicitly reaffirm the principle of a commonly shared humanity, which in turn demands "limited cultural variations in enjoyment of human rights".[83]

It is therefore imperative for the ECtHR to acknowledge the limits of the differential antidiscrimination approach and to place human dignity at the center of its evaluative standard, as advocated by Donnelly. Without this shift, the Court risks a submissive reliance on cultural relativist claims, an approach that not only produces inadvertent and mischie-

[76] Dupré Catherine, *The Age of Dignity.*

[77] Cartabia Marta, "The European Court of Human Rights: Judging Nondiscrimination".

[78] Fredman Sandra, *Discrimination Law*.

[79] *Ibid*.

[80] See Khanna Vhandita, "Roma Vulnerability before the ECtHR"; Henrard Kristin and Farkas Lilli, *The Rights of Roma in European Courts*.

[81] Donnelly Jack, "Cultural Relativism and Universal Human Rights," 411.

[82] *Ibid.*, 417.

[83] *Ibid.*, 419.

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vous outcomes, but also perpetuates a constitutional crisis that has already captured Europe's multi-layered constitutionalism. Maintaining the culturalist differential non-discrimination judicial reasoning, the Court risks certifying replacement of belonging with mere tolerance, thereby stripping Roma of 'equal citizenship' and reducing them to 'differential constitutional subjects' or as Hannah Arendt warns, to "human and nothing but human".[84] Unless directly challenged, this constitutional crisis created by a culturalist judicial reasoning risks being reinforced in algorithmic governance and digital constitutional frameworks,[85] embedding patterns of exclusion into the very infrastructure of law and policy, and thereby extending the othering of Roma from judicial reasoning into the AI decision-making systems.

4. *Human Dignity as a Functional Tool in Cultural-Relativist Non-Discrimination*

There seems to be wide consensus that human dignity as a constitutional principle represents a useful interpretation tool thanks to its proportionally-neutral, equalizing, and dialogic nature. Firstly, human dignity's proportionally-neutral character stems from its potentials for both expanding and limiting rights[86] as well as the fact that both parties with conflicting interests could invoke it in the same dispute.[87] The fact that its meaning can only be defined in the concrete sets of circumstances[88] further adds to its proportional neutrality, which is crucial in order to avoid the biased (almost predetermined) cultural relativist tendency that results from a differential non-discrimination argument. Secondly, human dignity has an equalizing function, which rests on the premise that a dignitarian approach is the optimal balance between liberty, equality, and fraternity/solidarity.[89] Such a balance seems to avoid the highly individualist approach resulting from the non-discrimination thesis[90] and instead affording equal protection of the law to human persons not only as autonomous individuals but also as equal members of the human family,[91] reflecting Hannah Arendt's understanding of human dignity as an inalienable right to membership.[92] Lastly, the dialogic nature[93] of the human dignity seems to have emerged from the cross-cultural agreement that it is the foundation of the human rights.[94] In this sense, whereas the non-discrimination often functions as a conversation stopper, human dignity (when understood as protecting various aspects of

[84] Arendt Hannah, *The Origins of Totalitarianism*, originally published 1951 (London: Penguin Classics, 1973), 297.

[85] See De Gregorio Giovanni *et al.* (eds.), *The Oxford Handbook of Digital Constitutionalism* (Oxford: Oxford University Press, 2024).

[86] Carozza Paolo, "Human Dignity in Constitutional Adjudication".

[87] McCrudden Christopher, "Human Dignity and Judicial Interpretation of Human Rights".

[88] Carozza Paolo, "Human Dignity in Constitutional Adjudication".

[89] Fuller Robert W., *All Rise: Somebodies, Nobodies, and the Politics of Dignity* (San Francisco: Berrett-Koehler, 2006).

[90] Fredman Sandra, *Discrimination Law*, 13.

[91] Dupré Catherine, *The Age of Dignity.*

[92] Arendt Hannah, *The Origins of Totalitarianism*.

[93] McCrudden Christopher, "Human Dignity and Judicial Interpretation of Human Rights".

[94] Donnelly Jack, "The Relative Universality of Human Rights," *Human Rights Quarterly*, 29, 2 (2007): 281-306.

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our evolving humanity)[95] creates opportunities for consensus building thus playing a harmonizing role between otherwise conflicting rights.[96] Moreover, thanks to its dialogic nature it enables judicial dialogue among Courts for a contemporary interpretation of constitutional rights taking account of dynamics of humanity and transforming constitutions into living documents, a doctrine acknowledged also by the ECtHR.

Despite these valuable characteristics, critics have questioned its usefulness by emphasizing its vagueness, ambiguity, risk of furthering illiberal and particularistic interests, as well as affording excessive discretionary power to judges to the detriment of democratically elected institutions.[97] On the other hand, supporters argue that criticism on human dignity is not different from that against other constitutional principles such as equality, liberty, non-discrimination and the like with which judges have to deal routinely.[98] Moreover, supporters see these characteristics favorably arguing that those constitute reasons for praising rather than criticizing the use of human dignity in constitutional adjudication. A further dichotomy exists among the supporters between those who favor a limited invocation of human dignity only in relation to core rights in which there is a common understanding on its meaning[99] and those who claim that every rights is rooted in the human dignity and thus it could be invoked beyond the core rights.[100] Admittedly, however, the supporters generally accept that the task of constitutional courts and scholarship is to make dignity a workable interpretation tool while keeping it free of illiberal and particularistic agendas.[101] Having said that, one should take account of the circumstantial and contextual specifics of the cases before construing and applying the multi-nuanced conception of human dignity in the constitutional adjudication of human rights. For these reasons, I propose using human dignity to interpret certain Roma claims under Articles 4, 8 and 10, (addressing forced labour and rehabilitation of workers subjected to degrading working conditions; protection against arbitrary evictions; and safeguarding reputation and personal integrity from degrading hate speech), thereby providing a normative replacement to the culturally grounded differential non-discrimination argument. In doing so, the Court would shift from cultural justification to positive protection, shielding Roma from degrading labour, living condition, and hate speech.

5. *Conclusion*

In conclusion, it would be implausible to say that, since, according to the ECtHR, Roma have a right to 'a travelling/nomadic way of life', ship crewmembers also have a claim for a

[95] Dupré Catherine, *The Age of Dignity*.

[96] McCrudden Christopher, "Human Dignity and Judicial Interpretation of Human Rights".

[97] Rosen Michael, "Dignity: The Case Against," in *Understanding Human Dignity*, edited by Christopher McCrudden (Oxford: The British Academy, 2013), 143-154; McCrudden Christopher, "Dignity and the Challenge to Liberty: Reading András Sajó's Constitutional Sentiments," in *Freedom and Its Enemies: The Tragedy of Liberty*, edited by Renata Uitz (The Hague: Eleven International Publishing, 2015), 127-150.

[98] Carozza Paolo, "Human Dignity in Constitutional Adjudication".

[99] *Ibid.*

[100] Dupré Catherine, *The Age of Dignity.*

[101] Mahlmann Matthias, "The Good Sense of Dignity: Six Antidotes to Dignity Fatigue in Law and Ethics," in *Understanding Human Dignity*, edited by Christopher McCrudden (Oxford: British Academy, 2013), 594-614.

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right to 'a sailing way of life' as both may qualify in the ECtHR language as 'transient population'.

From a Roma intellectual perspective, the recognition of a separate right to a "gypsy way of life"[102] (gypsyism) reinforces rather than challenges structural marginalisation. Indeed, it does not protect Roma culture but certifies unequal citizenship, replacing equal rights with conditional tolerance and sustaining social contempt, thereby making antigypsyism, the structural discrimination against Roma, appear reasonable and acceptable even in the name of fighting it. This represents a particular form of constitutional decay, or, in Professor David's words, "constitutional anaemia"[103] whereby constitutional order formally survives but gradually losses its normative vitality as constitutional adjudication becomes weak, deferential, or ineffective. Importantly, the stereotypically-construed gypsyism remains historically degrading and is neither required nor effective as a strategy for confronting antigypsyism. Just like antisemitism has never corresponded to any coherent self-defined 'Semitic ideology',[104] antigypsyism exists as a longstanding system of prejudice and exclusion directed at Roma and does not respond to, nor is it grounded in, any real or defensible ideology of 'gypsyism'.

In this context, recognizing human dignity's dimension as a proportional yardstick for guaranteeing the minimum standards for a life in dignity – while acknowledging human dignity's other dimension as respect for informed personal autonomy in other contexts – seems mutually beneficial to Roma claims for equal protection of the law as well as to restore constitutional resilience, supporting the ECtHR's stride for being a guardian of constitutional rights. Because human dignity sets a standard for treatment and behaviour, it safeguards equality more effectively than the differential antidiscrimination approach, which can mask human othering behind culturalist arguments. Notably, it can also serve as a stronger benchmark for identifying biased data and algorithmic failures in automated decision-making.

Therefore, safeguarding human dignity as the very essence of the ECHR[105] requires abandoning the judicially introduced right to "a gypsy way of life"[106] in favour of reinforcing the Convention's existing guarantees of freedom from degrading work, degrading living conditions, and degrading hate speech.

[102] *Connors v. the UK*, 2004.

[103] David Joseph E., "Constitutional Crises and the AI".

[104] International Holocaust Remembrance Alliance, "Spelling of 'Antisemitism'," in *Holocaustremembrance.com*, (Accessed 31 January 31, 2026).

[105] *Pretty v. the UK*, ECtHR, 2002, para. 65.

[106] *Connors v. the UK*, ECtHR, 2004.

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POLITICAL THEOLOGY AND CONSTITUTIONALISM: THE NEW KNOTS OF AN UNRESOLVED CONFLICT. PRELIMINARY NOTES

Vincenzo Tondi della Mura

Keywords: Political theology; Democracy; Conflict; Social cohesion; Geopolitical instability

Summary: 1. The Risk that "Democracy [May] Not Necessarily Be The Perfect Solution To Everything". – 2. The Tumultuous Re-emergence of Political Theology. – 3. The "Enemy" and Democracy. – 4. Conflict, The "Art of Remedy" of Politics, and The "Political Nature" of The Constitution.

Remota itaque iustitia
quid sunt regna nisi magna latrocinia?

[Justice being taken away, then,
what are kingdoms but great robberies?]
(Agostino, *De Civitate Dei*, IV, 4)[1]

1. *The Risk that "Democracy [May] Not Necessarily Be The Perfect Solution To Everything"*

Far from having been "definitively disposed of",[2] the category of political theology thrives with renewed vigour on the international stage as a factor of fresh geopolitical instability and a cause of armed conflict. Moreover, unlike what occurred in the past, it now shapes the principal political choices of legal orders that are no longer exclusively autocratic, but also democratic and constitutional; it bursts into their respective decisions without encountering resistance,

[1] The passage from the Bishop of Hippo continues: "Indeed, that was an apt and true reply which was given to Alexander the Great by a pirate who had been seized. For when that king had asked the man what he meant by keeping hostile possession of the sea, he answered with bold pride, 'What do you mean by seizing the whole earth; because I do it with a petty ship, I am called a robber, while you who does it with a great fleet are styled emperor'". As Pope Benedict XVI remarked in the encyclical *Deus Caritas Est*, 2005, 28, a): "Justice is both the aim and the intrinsic criterion of all politics. Politics is more than a mere mechanism for defining the rules of public life: its origin and its goal are found in justice, which by its very nature has to do with ethics".

[2] The reference is to the rejoinder addressed in 1970 by Carl Schmitt, *Teologia politica II. La leggenda della liquidazione di ogni teologia politica*, italian translation edited by Antonio Caracciolo (Milan: Giuffrè, 1992), to the attempt elaborated in 1935 by Erik Peterson, *Il monoteismo come problema politico*, Italian translation edited by Giuseppe Ruggieri (Brescia: Queriniana, 1983), 103-4, note 168, to "demonstrate the theological impossibility of a 'political theology'". In Schmitt's view, Peterson's critique had "in the meantime become a political legend", a legend whose content was the "definitive liquidation of all political theology", to the point

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to the point of disregarding differences in their respective sources of legitimacy; it indiscriminately imposes axiological priorities, thereby shaping their options in equivalent terms.

Nevertheless, precisely the observed fungibility between legal orders of opposing legitimations[3] raises questions about the actual capacity of contemporary constitutional democracies to remain steadfast in their founding rationale; it prompts the question of whether the axiological force of their underlying principles is sufficient to effectively contain the conflictual effects provoked by political theology, so as to absorb and rebalance the opposing centrifugal and disintegrating pressures. It is true, indeed, that these pressures are rooted in motivations and dynamics of a pre-political order necessarily prior to, and exceeding, the historical foundations of individual legal orders. Yet it is equally true that, in the absence of a firm capacity for axiological resistance and response – prior even to any prescriptive one – democratic legitimation itself risks being reduced to a merely formal cover for a legality whose substantive boundaries are essentially indiscriminate; thus, the provocative judgment pronounced by Pope Leo XIV would find confirmation: "if we look at many countries in today's world, democracy is not necessarily the perfect solution to everything".[4]

The issue certainly refers back to the long-standing question provoked by the end of social homogeneity and by the need to resolve the demand for political cohesion through new forms of justification of State authority. It is no coincidence that this problem was not identifiable in preceding systems, which were characterised by different founding presuppositions: the absolute State postulated obedience and only secondarily consent, thus managing to set aside the question under examination; the liberal State, likewise, resolved the problem of heterogeneity at its root by restricting the electorate along census-based lines and narrowing universal suffrage, thereby ensuring, as a matter of fact, the unity of the purposes of the legal order.[5]

It is with the transition to a multi-class society and with the ensuing loss of confidence in the ordinary legislature that the category of legality became incapable of justifying the manifestations of State authority. Legitimacy, in this way, rather than remaining confined beyond the normative boundaries of the legal order, became constitutive of it, rising to become the new justification for public power.[6] Constitutions have been entrusted with the extraordinary

of having oriented the subsequent debate towards "wholesale liquidations" of the entire subject matter, encompassing the writings of the one and "even" of the other (*ibid.*, 3, 8, 11 and 89).

[3] Applebaum Anne, *Autocracy. The Dictators Who Want to Run the World*, italian translation by Tullio Cannillo, *Autocrazie. Chi sono i dittatori che vogliono governare il mondo* (Milan: Mondadori, 2024).

[4] Iacopo Scaramuzzi, Leo XIV, "Nel mondo troppe disparità, guardiamo a Elon Musk. Democrazia non sempre perfetta," in *La Repubblica* (September 14, 2025); Allen Elise Ann, *Papa Leone XIV. La biografia* (Milan: Mondadori, 2026). With regard to which, most recently, Loiodice Aldo, "Interpretazione costituzionalmente adeguata e il legato giuridico per Leone XIV (ausilio all'interpretazione giuridica per i diritti e le libertà costituzionali)," in *Studi in onore di Stelio Mangiameli* (Turin: Giappichelli, 2026).

[5] Lombardi Giorgio Mario, *Contributo allo studio dei doveri costituzionali* (Milan: Giuffrè, 1967), 137 ff.; Lombardi Giorgio Mario, "Legalità e legittimità," in *Novissimo Digesto Italiano* (Turin: Utet, 1963), 577 ff.

[6] Baldassarre Antonio, "Costituzione e teoria dei valori," *Politica del diritto*, (1991): 655; Baldassarre Antonio, "Interpretazione e argomentazione nel diritto costituzionale," *Costituzionalismo.it*, (2007); Luciani Massimo, "Interpretazione conforme a Costituzione," in *Enciclopedia del diritto. Annali*, IX (Milan: Giuffrè, 2016), 392 ff.; Mengoni Luigi, *Ermeneutica e dogmatica giuridica. Saggi* (Milan: Giuffrè, 1996), 122; Passerin d'Entrèves Alessandro, "Legalità e legittimità," in *Studi in onore di Emilio Crosa*, II (Milan: Giuffrè, 1960), 1310 ff.; Zagrebelsky Gustavo, "Introduzione," in *Costituzione e diritto costituzionale*, edited by Rudolf Smend (Milan: Giuffrè, 1988), 2; Zagrebelsky Gustavo, "Storia e Costituzione," in *Il futuro della democrazia*, edited by Gustavo Zagrebelsky, Pier Paolo Portinaro and Jörg Luther (Turin: Einaudi, 1996), 79.

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task of incorporating the specificities of individual State communities, identifying the values to be recognised as the permanent ends of the State. They have been accorded a legal toolkit designed both to consolidate a minimum degree of homogeneity among political forces and social groups, and to promote that cohesion which had by then disappeared from the social fabric. To this end, the said toolkit has been endowed with both a negative and a positive dimension: on the one hand, comprising guarantee institutions of both a formal nature (such as the regulation of the normative production process) and a substantive nature (such as the protection of constitutional freedoms); on the other, concerning principled norms, insofar as they are characterised by compromise formulas expressive of that minimum standard serving as both a point of arrival and a basis for future communal development.

Nevertheless, the linearity and completeness of a constitutional toolkit designed to sustain social cohesion do not diminish the difficulties of achieving its effectiveness. At the outset, indeed, such effectiveness concerns the reasons for 'living together', rests on pre-legal elements, pertains to the pre-political dimension of coexistence, and bears upon the boundary between being and ought, between the factual sphere and the legal order – a tension from which no legal order can do other than maintain, so to speak, an *engaged distance*. This holds true in the light of Arturo Carlo Jemolo's masterly metaphor on the meta-legal nature of the family bond, as "an island that the sea of law should wash against but only wash against".[7] No positive legal order, indeed, is truly capable of guaranteeing its own foundation through the prescriptive and sanctioning instruments at its disposal; none is capable of securing those presuppositions – which can only be of a historical-cultural and political-social order – that enable and legitimise its validity and, therefore, its existence in the form proper to positive legal orders.

The problem is further compounded when one considers how legitimacy is not a static reality – that is, an acquired datum settled once and for all – but rather the result of a constant process that can never come to a halt. As Giovanni Pitruzzella has noted, the legitimation process follows a circular path, moving uninterruptedly from the governed to the governing, since it is the latter – as holders of political power – who adopt behaviours aimed at fostering, within society, those beliefs which they may subsequently invoke as the title to legitimacy of their power. It therefore becomes essential to understand how to maintain consensus around those values that are constitutive of the legal order, and how to actualise them by adapting them to changed historical circumstances.[8]

In this sense, the well-known Böckenförde dilemma is confirmed, according to which "The liberal secularized state lives by prerequisites which it cannot guarantee itself"[9] – prerequisites, one must add, whose exhaustion cannot but entail an axiological recession of the force of constitutional principles in the face of opposing disintegrating tendencies. And this is precisely the problem. So much so that the President of the Russian Federation, Vladimir

[7] Jemolo Arturo Carlo, "La famiglia e il diritto," in *Pagine sparse di diritto e storiografia* (Milan: Giuffrè, 1957), 241.

[8] Pitruzzella Giovanni, "Fiducia e legittimazione dei poteri," in *Enciclopedia del diritto, I tematici, V - Potere e Costituzione,* edited by Marta Cartabia and Marco Ruotolo (Milan: Giuffrè Francis Lefebvre, 2023), 105 ff.

[9] Böckenförde Ernst-Wolfgang, "La nascita dello Stato come processo di secolarizzazione," in *Diritto e secolarizzazione. Dallo Stato moderno all'Europa unita*, edited by Geminello Preterossi, Italian translation by Mario Carpitella (Rome-Bari: Laterza, 2007), 52-3; Baldassarre Antonio, *Weimar: un costituzionalismo in mezzo al guado* (Soveria Mannelli: Rubettino, 2024), 332 ff.

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Putin, drawing precisely from the observation of such exhaustion, has denounced the ensuing weakness of Western democracies and proclaimed their decline.[10]

This is sufficient to account for the tensions and questions provoked by the irruption of political theology into the current historical context in which, as Stelio Mangiameli has shown, Empires and States move within the same international space.[11] Precisely the axiological recession demonstrated by the principles of Western democracies in relation to opposing disintegrating tendencies reveals the epistemological limits of a conception of the Constitution suspended between *constitutional optimism and historical pessimism*: on the one hand, the claims of liberal principles deemed unstoppable in their *magnifiche sorti e progressive* axiological potential – to be understood without limits and freed from any opposing consideration of constitutional balancing and political mediation; on the other, the claims of the sustainability of a sovereignty now undermined by the collapse of its presuppositions on two levels: internally, with regard to a coexistence whose social compact struggles to be reaffirmed; externally, with regard to the geopolitical effects stemming from the end of the Yalta Agreement and the subsequent crisis of market globalization.[12]

It is no coincidence that Peter Thiel, one of the foremost interpreters of Donald Trump's United States Presidency, reflecting on the relationship between security and freedom, has placed upon Constitutions the responsibility for the inability of Western democracies to confront new geopolitical tensions. As one reads in the editor's introductory notes, after *the end* of history its *return* has lifted a curtain of blood: "It has finally been understood, even in the drowsy belly of political Europe, that a norm, a Constitution, a judicial ruling are effective only insofar as they rest on the geometric latitude of a tacitly accepted compact and, above all, on the removal of the great philosophical questions situated beyond the contingent: but when a force irrupts that has no awareness or willingness to respect that compact, the norm, the rule, the Constitution cease to have any utility whatsoever and revert to mere paper". So that "Debate, rights, fine academic words – in the absence of an apparatus capable of presiding over and guaranteeing their survival – are nothing but empty and weary simulacra with which to fiddle on the prow of a drifting ship, on the verge of sinking".[13]

This is why the question of effective social cohesion is bound up with that concerning the very integrity of popular sovereignty. The atomistic dissolution of society and the consequent depoliticisation of citizens do not produce effects only in themselves; they generate the further disintegrating outcome of preventing "ordinary popular sovereignty guaranteed

[10] Putin Vladimir, "L'idea liberale è superata," interview by Lionel Baerber and Henry Foy, in *La Repubblica* (June 29, 2019), 6: "What is happening in the West? The ruling elites have distanced themselves from the people. There is also the so-called liberal idea, which has exhausted its purpose. […] Thus, the liberal idea has become obsolete. It has come into conflict with the interests of the overwhelming majority of the population".

[11] Mangiameli Stelio, "Imperi e Stati e le nuove relazioni internazionali," *Diritto e società*, 2 (2022): 291 ff.

[12] Cintioli Fabio, "Sicurezza nazionale, concorrenza e aiuti di Stato," in *Aipda.it*. (2025); Draghi Mario, "Europe's goal: not looser cooperation, but genuine federation," in *Corriere.it* (February 2, 2026).

[13] Venanzoni Andrea, "Tecnoteologia politica: note su Il momento straussiano," in *The Straussian Moment*, edited by Peter Thiel, Italian translation by Andrea Venanzoni, *Il momento straussiano, 2004-2005* (Macerata: Liberilibri, 2025): 10: "The illusion of the end of violence – pacified by reason, by the secularization of religion and its consequent incorporation into the mechanisms that produce the social pact and the transmission belt of constitutional charters, as well as by the inexhaustible rhetoric of the semantics of rights – has exacted a toll of death and blood upon a West now enfeebled and inert".

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by democratic procedures [from] coping with the tremendous burden that empirical reality unloads upon our societies: lives gone wrong, failed life projects, 'disfigured life contexts'".[14]

2. *The Tumultuous Re-emergence of Political Theology*

In order to better understand the extent of the risks weighing upon contemporary constitutional democracies as a result of the tumultuous re-emergence of the conditioning force of political theology, it is worth briefly outlining its underlying presuppositions. These have remained unchanged over the centuries, notwithstanding the frequent transition of their content from the politicisation of religion to the theologisation of politics.[15]

As regards the politicisation of religion, it suffices to consider the evolution of Augustine's thought, the misreading of which has undoubtedly influenced the subsequent fortunes of this conceptual category. After having upheld religious tolerance and the protection of minorities in continuity with the provisions of the Edict of Constantine of 313,[16] the Bishop of Hippo became briefly convinced of the contrary. Following the grave atrocities committed by a sect of heretics against Christians, he invoked the force of the empire in the service of the salvation of souls. The shift, however, was temporary, to the point of having been regarded not as "a necessary part of the system, but at most a particular moment in a life".[17] In the *De civitate Dei* he depicted two cities, the *civitas Dei* and the *civitas mundi*, confused (*perplexae*) and intermingled (*permixtae*) until the end of the world; such, therefore, as to preclude any forcible mutual predominance, all the more so since one lives within the other without ever being able to replace it. Hence the recognition of the State's task of maintaining order and peace for the benefit of all human beings, pagans and Christians alike. This clarification, however, was not sufficient to defuse the weapon of that Manichaean, theocratic, or caesaropapist conception which shaped the fortunes of the conceptual category, succeeding in conditioning the subsequent history of Christian thought. Only with the Second Vatican Council (1962–1965) did the Church return to the protection of religious freedom for all, in accordance with the tradition of the early centuries, thereby closing the multi-secular parenthesis of the politicisation of theology.[18] The solemn College recognised the personal and collective right to a twofold immunity – from both coercion and restriction – in the practice and dissemination of religious beliefs, embracing the doctrine of human rights, constitutionalism, and the principle of democracy.[19]

As regards the theologisation of politics, reference must be made to the thought of Carl Schmitt, who "introduced into the literature, as far as I know", the concept of political the-

[14] Bosetti Gancarlo, "Idee per una convergenza «postsecolare»," in Jürgen Habermas and Joseph Ratzinger, *Ragione e fede in dialogo*, Italian translation by Giancarlo Bosetti (Venice: Marsilio Bosetti, 2005), 313.

[15] Borghesi Massimo, *Critica della teologia politica. Da Agostino a Peterson: la fine dell'era costantiniana* (Milan: Marietti 1820, 2013); Tondi della Mura Vincenzo, "Il patto costituzionale fra teologia politica e teologia della politica," *Quaderni costituzionali*, 2, 2015): 481 ff.

[16] Eusebio di Cesarea, *Storia ecclesiastica*, II, Italian translation by Giovanni Lo Castro (Milan: Città Nuova, 2001), 242-5.

[17] Cotta Sergio, *La città politica di Sant'Agostino* (Milan: Edizioni di Comunità, 1960), 95.

[18] "*Declaration Dignitatis humanae sulla libertà religiosa 2*," in *I documenti del Concilio Vaticano II* (Milan: Ed. Paoline, 2012), 679.

[19] Böckenförde Ernst-Wolfgang, "La libertà religiosa e il contrasto tra Chiesa e Stato," in *Cristianesimo, libertà, democrazia*, edited by Michele Nicoletti (Brescia: Morcellian, 2007), 67 ff.

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ology.[20] In this case it is politics that, by totalising itself, becomes religion; it is the worldly that becomes theological, to the point of legitimising political decision. The modern State draws upon the theological to legitimise its own accomplished immanence, and "manages to stabilise itself only through the secularisation of theological concepts".[21] The resort to analogy thus serves to "imitate"[22] the ecclesiastical model, with a view to introducing a transcendence other than the ecclesial one, capable of justifying the meta-legal superiority of political decision. Schmitt himself observes that "All significant concepts of the modern theory of the state are secularized theological concepts";[23] that the *Rechtsstaat* corresponds to deism, because the latter, bound by the laws of nature, excludes the miracle – that is, the exception – which, when translated into political terms, corresponds to the direct intervention of the sovereign upon the legal order.[24] Political theology, from this perspective, requires the friend-enemy dialectic; it feeds on eternal conflictuality towards the rival, the "public enemy" who is the *hostis* and not the *inimicus*, whose identification concerns not a personal but a public assessment, falling within the purview of an entire people.[25] And so, as Jacques Maritain explained, it becomes essential for a political community to constitute itself against someone: "It is the principle of *against-the-other*, or of constitutive enmity".[26] Hence the slide of political theology towards the Manichaean position, political antagonism, and the necessity of war as the sole social bond.

It is precisely this second meaning of political theology that has forcefully re-emerged over the last quarter of a century. The backdrop has been that of the *Clash of Civilisations* prophesied by Samuel Huntington in 1996,[27] which came to pass on 11 September 2001 with the attack on the Twin Towers. Against this backdrop, religion, civilisation, and politics fused once again, following the decline of universalist ideologies, the historical failure of the Marxist utopia, and the advent of globalisation and worldwide democracy – foretold in a de-ideologising and areligious vein by Francis Fukuyama in *The End of History.*[28] The emphasis on the totalising tendency of religious identity, as a factor of mobilisation that recognises no distinction between the sacred and the profane, highlighted a politicisation of religion and a resort to the friend-enemy dialectic characteristic of political theology; the result was a political instrumentalisation of religion, construed in functional terms relative to the powers of the world, which consolidated itself exponentially.

[20] Peterson Erik, *Il monoteismo come problema politico*, 103-4.

[21] Galli Carlo, "Il cattolicesimo nel pensiero politico di Carl Schmitt," in *Tradizione e modernità nel pensiero politico di Carl Schmitt*, edited by Roberto Racinaro (Naples: Edizioni Scientifiche Italiane, 1987), 15.

[22] Galli Carlo, "Presentazione," in Carl Schmitt, *Cattolicesimo romano e forma politica* (Milan: Giuffrè, 1986), 17.

[23] Schmitt Carl, "Teologia politica. Quattro capitoli sulla dottrina della sovranità," in *Le categorie del 'politico'*, 61. On which, most recently: Baldassarre Antonio, *Weimar: un costituzionalismo in mezzo al guado* (Soveria Mannelli: Rubettino, 2024), 262 ff., 287 ff., 324; Mangiameli Stelio, "Verità e certezza nell'esperienza costituzionale," *Diritto e società*, 4 (2024): 627 ff.

[24] Silvestri Gaetano, "La parabola della sovranità. Ascesa, declino e trasfigurazione di un concetto," *Rivista di Diritto costituzionale*, (1996): 28.

[25] Schmitt Carl, "Il concetto di 'politico'," in *Le categorie del 'politico'*, 110.

[26] Maritain Jacques, "Il crepuscolo della civiltà," in *Scritti e manifesti politici (1933-1939)*, edited by Giorgio Campanini (Brescia: Morcelliana, 1978): 28.

[27] Huntington Samuel Philips, *Lo scontro delle civiltà e il nuovo ordine mondiale. Il futuro geopolitico del pianeta*, Italian translation by Sergio Minucci (Milan: Garzanti, 2000).

[28] Fukuyama Francis, *La fine della Storia e l'ultimo uomo*, Italian translation by Delfo Ceni (Milan: Rizzoli, 2003).

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In a first phase, this drift manifested itself in the various instances of the Christian-Occidentalist ideology that emerged in the aftermath of the events of 9/11,[29] extending as far as a radical and Manichaean critique of the pontificate of Pope Francis;[30] symmetrically, it surfaced in the "demands for the re-islamisation of the public sphere and the de-secularisation of legal orders, which characterised some of the 'Arab Springs'",[31] also on account of the Muslim Brotherhood's claim "to be the bearer of theological-political values" and to control the various forms of political participation.[32]

In a second and current phase, this drift has consolidated itself on the international chessboard, overriding every procedure and decision of supranational bodies. As Luciano Violante has observed, "The part of the world in which we live must confront four authoritarian regimes, different from one another, but all dangerous for the West and for democracy. These are Trump, Putin, Netanyahu, and Hamas, all of whom claim a theocratic legitimation – explicitly biblical in the case of Trump and Netanyahu, Islamic in the case of Hamas, absolutist in the case of Putin. […] The religious backgrounds confer upon the decisions of Trump, Putin, Netanyahu, and Hamas swiftness, enforceability, unquestionability, and a strong motivational impact, because they are legitimised by those matrices. One must not forget the extraordinary capacity of religious values to galvanise".[33] All of this has come at the expense of the rules of international law and diplomacy, to the point that the ancient instrument of mediation has been displaced by the direct intervention of individual protagonists and by the will to power, which has once again begun to blow across the table of History.[34]

It is evident that such a perspective bears upon the social cohesion of individual legal orders, cascading across the other Western democracies. The claim, advanced by former Trump adviser Steve Bannon, of an identity-based nation "built on the principles of the Judeo-Christian West" and projected "into a spiritual battle against Evil" is such as to push the boundaries of political struggle beyond constitutional dialectic. It is no coincidence that it was accompanied by the reassurance that *christian nationalism* would be incompatible with religious freedom, notwithstanding the contradictory conclusion that "no compromises can be made with this demonic and atheistic secular society".[35]

[29] Fallaci Oriana, *La rabbia e l'orgoglio* (Milan: Rizzoli, 2001); Pera Marcello, "Lettera a Joseph Ratzinger," in *Senza radici. Europa, relativismo, cristianesimo, islam*, edited by Marcello Pera and Joseph Ratzinger (Milan: Mondadori, 2004), 84.

[30] Borghesi Massimo, *Il dissidio cattolico. La reazione a Papa Francesco* (Milan: Jaka book, 2022); Borghesi Massimo, *Francesco. La Chiesa tra ideologia teocon e "ospedale da campo"* (Milan: Jaka book, 2021).

[31] Cantaro Antonio and Losurdo Federico, "Religione e spazio pubblico nel mondo arabo-islamico," *Quaderni costituzionali*, 4 (2013): 996 ff.

[32] Andò Salvatore, "Rivolte arabe, transizione democratica e partiti religiosi," in *Scritti in onore di Aldo Loiodice* (Bari: Cacucci, 2012), 1538.

[33] Violante Luciano, "I pericoli delle teocrazie politiche," in *Corriere della Sera* (September 25, 2025).

[34] Vittadini Giorgio, "La tela della diplomazia. Compromesso e realismo," *Nuova Atlantide*, 16 (2025).

[35] Bannon Steve, "*Il nazionalismo cristiano non è mai stato così forte. Trump, come me, odia i nemici. Musk viene dalla stessa cultura che ha ucciso Kirk*," interview by Viviana Mazza, in *Corriere della Sera* (September 24, 2025). Significant are the observations of: Fabbrini Sergio, "Tragedia teologica, Europa irrilevante," in *Il Sole 24 ore* (September 28, 2025); Giovagnoli Agostino, "*Democrazia e cristianesimo sono dalla parte degli esseri umani*", interview by di Francesca Sabatinelli, in *Vaticannews.va* (September 15, 2025); Magatti Mauro, "Dopo Kirk. E l'Occidente scoprì che tra religione e sfera pubblica il discorso è aperto," in *Avvenire* (September 27, 2025); Zagrebelsky Gustavo, "La libertà di parola è un diritto di tutti. Odio e orrore sono fratelli, dopo c'è solo la Guerra," in *La Stampa* (September 28, 2025).

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Nevertheless, precisely such a perspective confirms how the risks of the 'clash of civilisations' and of civil war are inherent in the civilisational crisis now underway. In 2024 alone, two films set in the United States dramatically captured, with great impact, the decline of Western civilisation and the possible alternative responses: civil war (Alex Garland's Civil War) and utopia (Francis Ford Coppola's Megalopolis). Conflict and utopia as the poles of a new, so to speak dialectical, Manichaeism, in which the opposites – good and evil, life and death – are the poles of the same totality, annihilating every other possibility in the human journey. As Massimo Borghesi critically explained, "without sin there can be no grace, Hegel seems to say; without death there can be no resurrection; without illness there can be no health; without darkness there can be no light; without the diabolical there can be no divine. Without war, moreover, there can be no peace, and there can be no progress. Conflicts are indeed useful to the preservation and maintenance of that political whole which is the State. And most useful of all are modern conflicts, which are fought with firearms: the latter allow one to kill the enemy in an impersonal and indifferent manner, without looking him directly in the eye. The step towards the idea that struggle is the motor of history is indeed a very short one".[36]

In the prevailing new Manichaeism, in short, what is lost is reality as a place of confrontation, construction, and compromise. It is therefore precisely the cultural unavailability of compromise that afflicts the current historical phase, to the detriment of social cohesion. Hence, indeed, the axiological recession demonstrated by one of the most consolidated constitutional democracies – that of the United States – in the face of the conditioning force of political theology.

3. *The "Enemy" and Democracy*

Political theology introduces a disruptive element into the democratic system, one that is destined to distort both the method and the substance of decisions, independently of the institutional safeguards specifically designed to prevent this. The category of the *enemy* is such as to overturn, in and of itself, the presuppositions of social cohesion and the grounds of legitimacy. As Giovanni Pitruzzella has observed, "independently of formal amendments to the Constitution and the institutions, a qualitative transformation is set in motion that undermines the foundations of pluralist democracy".[37]

This is not to say that the categories of enmity, conflict, and the enemy can ever be expunged from the social fabric and the dynamics of politics. As Julien Freund – a pupil of Carl Schmitt who sought to test the viability of the friend-enemy pair in the different context of the pluralist democracies of the post-war period – has shown, the very "idea of a politics without an enemy is quite simply no longer politics".[38] The problem, consequently, is that

[36] Borghesi Massimo, *Il male necessario. L'etica del superuomo nel manicheismo romantico* (Naples: Orthotes, 2024).

[37] Pitruzzella Giovanni, "Il regime politico della Seconda Repubblica: il bipolarismo conflittuale," in *Il bipolarismo conflittuale. Il regime politico della Seconda Repubblica,* edited by Vincenzo Lippolis and Giovanni Pitruzzella (Soveria Mannelli: Rubettino, 2007): 137.

[38] Freund Julien, "L'amico e il nemico: un "presupposto" del Politico," in Julien Freund, *Il terzo, il nemico, il conflitto. Materiali per una categoria del Politico*, edited by Alessandro Campi (Milan: Giuffré, 1995), 100.

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of defusing conflict by weakening and ritualising it through pre-established rules capable of averting radical opposition between irreconcilable fronts, so as to acknowledge the enemy, admit its existence, and negotiate compromise solutions.[39] This involves the transition from the polemic-conflictual state to the agonal-competitive one: the former centred on a dual and inescapable opposition between contenders conceived as *enemies*, driven by hostile intent aimed at mutual annihilation; the latter centred on a rivalry mediated by common rules between contenders conceived as *adversaries*, driven by the intention to overcome the opposing resistance without, however, overriding its physical or moral integrity.[40] This, however, on the condition that no other factors come into play – no longer political, but moral, economic, religious, or ideological ones – liable to alter the connotation of the enemy and transform it into the *absolute and total enemy*: "When the religious motive is predominant – holy war, crusade, war of religion – the enemy is degraded to an infamous, infernal, and impious being: to an incarnation of the devil or of evil. When a racist ideology prevails, the enemy becomes a slave by nature. When a moral or humanitarian ideology holds sway, the enemy becomes an intrinsically guilty being, to such a degree that making him disappear is rendered a service to humanity. The fact is that all these ideologies contain an element that is foreign to politics [...], since from a strictly political standpoint there can be no absolute or total enemy, just as there can be no absolute political friendship or alliance".[41]

This is why political theology operates in a disruptive manner, introducing a conflictual element so foreign to politics that it cannot find any viable space within pluralist democracies, whose system it destabilises and whose constitutional legitimacy it undermines.

On the political level, the transformation of the adversary into an absolute and total enemy is incompatible with the integrity of constitutional legality. It does not merely exacerbate the conditions of conflict elaborated by Freund, but alters their consequences with respect to the survival of the constitutional State. The dual and oppositional character of conflict no longer mediated by the rules of law is, in fact, merely theoretical and explanatory of a politological dynamic, not actual and clarificatory of a legal dynamic. And therein lies the problem. Within the constitutional system, positive legality cannot be disregarded and openly defied in the manner of the Schmittian state of exception, whereby the sovereign's decision served to legitimately "suspend" positive legal norms. In such a system, by contrast, positive rules remain in force and retain their prescriptive force undiminished even in the event of a dual conflict. They are therefore destined to give rise to a second and more decisive conflict: this time no longer between irreconcilable enemies, but between the oppositional force of the contender – intent on pursuing hostility regardless of the mediating and dissuasive role of law – and the military force of the State, of whose legitimate monopoly the prescriptive force of those same rules is the direct expression. And it is in the conflict between these opposites that the very integrity of the constitutional State risks being consumed. Emblematic in this regard are the cases of the two assaults – not merely symbolic – on the seats of Congress of the United States and Brazil: that of 6 January 2021 on the Capitol in Washington, which occurred in the wake of outgoing President Donald Trump's challenges to the outcome of his defeat in the 2020 presidential elections;

[39] Freund Julien, "Il riconoscimento del nemico ed il terzo," in Julien Freund, *Il terzo, il nemico, il conflitto. Materiali per una categoria del Politico*, 206-7.

[40] Freund Julien, "Il conflitto: definizione e significati," in Julien Freund, *Il terzo, il nemico, il conflitto. Materiali per una categoria del Politico*, 169 ff.

[41] Freund Julien, "Il riconoscimento del nemico ed il terzo," 137.

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and that of 8 January 2023 on the National Congress in Brasília, which occurred in response to the defeat of outgoing President Jair Bolsonaro in the 2022 general elections.

On the level of the democratic system, the transformation of the adversary into an absolute and total enemy impinges upon the dialectic between majority and opposition and upon the entire decision-making process. The political *non-recognition* of the contender undermines every presupposition of homogeneity and inhibits every compromise solution, thereby depriving Parliament of the possibility of exercising its negotiating function. Once the decision-making process has thus been diverted towards the absolute imposition of the majority's will, an inevitable consequence follows: the intensified and disproportionately political burden placed upon the corresponding twofold function of oversight – both political, exercised by minorities, and legal, exercised by guarantee bodies.

On the level of constitutional legitimacy, finally, the transformation of the adversary into an absolute and total enemy produces the anachronistic effect of reactivating the limitations of pre-existing forms of State, pushing legitimacy back beyond the frontiers of the legal order and beyond the boundaries of positive legality. Social cohesion is no longer steadily and unstoppably recognised and fostered in the founding values of the Constitution – itself understood as the source of legitimacy of the overall legal order and the legal measure of legality. Rather, it is sought in a cohesive factor extraneous to politics, calibrated against absolute enmity, thereby devaluing the previous social bond and making the justification of public power conditional upon society's shared acceptance of this irreducible conflictuality.

This amounts to an unprecedented upheaval with unforeseeable consequences.

What is troubling is not only the effect of the exponential rise in electoral abstentionism observable across Western democracies. The entire system of representation risks, in such a case, being materially flattened onto the interests of the only voting – and often minority – portion of the population, with the attendant danger that unrepresented interests will remain outside the sphere of legislative protection, deepening popular distrust towards Parliament; a distrust, incidentally, comparable to that which gave rise to the crisis of the single-class liberal State, ultimately overcome with the advent of constitutional democracies through the recovery of the category of legitimacy.

More troubling still is the *perfect storm* that is taking shape. The resort to the category of radical enmity – both within and outside the State – as a social bond substituting the founding values of the Constitution can only lead to the outcome whereby intolerance towards positive legality is matched by an equal intolerance towards constitutional legitimacy.

4. *Conflict, The "Art of Remedy" of Politics, and The "Political Nature" of The Constitution*

From the features outlined above, it appears futile to place any confidence in the possibility of achieving social composition and pacification through the search for a perfect political-constitutional system capable of silencing every conflict.

Returning to the observations of Julien Freund, conflict constitutes a "normal social phenomenon", much like the transgression of rules; indeed, it "may even be necessary," insofar as it can reactivate recourse to "negotiation" and unlock prior "fractures". Within conflict there "resides an invitation to freedom", one denied by the anxiety of positive *hyper*-regulation: "Ultimately, in a society not everything can be regulated. Freedom consists precisely in this imperfection". In this sense, even the Constitution ought once again to be regarded

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as "a political instrument [whose] purpose does not consist in its own juridical perfection".[42]

From this follows a distrust of the so-called "government of judges", which "tends to subordinate the entire life of individuals to laws or rules and to seek in judicial procedure the solution to rivalries or even political divergences, for example by granting priority to the constitutional court – composed of jurists not politically accountable – over the responsibility of governing authorities". Such distrust, incidentally, had already been doubly emphasized by Carl Schmitt with regard both to the process of neutralizing conflict through technical rules[43] and to a judicialized form of politics in which rationality prevails over will and political authority.[44] All this, of course, calls into question not "the work, generally very prudent, of supreme courts", but rather "the abusive tendency that would subordinate every political decision to judicial review".[45]

It is noteworthy that the forceful re-emergence of political theology in Western democracies has occurred precisely at the moment of the greatest exposure of such a form of conflict neutralization.

Recent developments concerning the democratic legitimacy of the European Union and of Italy are emblematic in this respect.

As regards the Union, for a very long time it has been reductively conceived as a community of law, if not as a juridical machine that lives through norms, interpretations, and judgments. As Giovanni Pitruzzella has observed, "every problem it has had to confront has been framed, addressed, and resolved as if it were a legal problem. Through the interpretation and reconstruction of treaty law and secondary law, a solution would be found to every issue and to the underlying conflicts. Highly significant conflicts […] have been addressed as if they consisted solely in interpreting provisions of primary and secondary law, without the need to make a political choice among conflicting interests. The selection and reconciliation of such interests were presented as if they were the necessary consequence of applying technical rules".[46] Yet a juridical machine of this kind follows its own internal logic, and since its decisions appear as legally necessary, it inevitably lacks the flexibility required to correct them.[47]

As regards Italy, the long season of "endless" transition[48] following the collapse of the "First Republic" and the advent of globalization has produced a dual destabilizing effect. On the one hand, the most complex political decisions have been diverted to judicial bodies (the "government of judges"), as they lie outside the democratic-representative circuit; this has entailed a methodological shift from parliamentary mediation to judicial and constitutional balancing. On the other hand, the formulation of the resulting solutions has been influenced by the intense "traffic"[49] or "commerce"[50] of interpretative models and judicial decisions

[42] Freund Julien, "Il conflitto: definizione e significati," 176-78.

[43] Schmitt Carl, "L'epoca delle neutralizzazioni e delle spoliticizzazioni," in *Le categorie del 'politico'*, 176 ff.

[44] Schmitt Carl, *Dottrina della Costituzione*, Italian translation by Antonio Caracciolo (Milan: Giuffrè Schmitt, 1984), 182.

[45] Freund Julien, "Il riconoscimento del nemico ed il terzo," 200.

[46] Pitruzzella Giovanni, "Identità europea, identità costituzionali nazionali e il problema della "disconnessione democratica," in *Ripartire dall'Europa. Ripensare l'Unione*, edited by Daniela Bianchini (Rome: Edizioni Studium, 2024), 55.

[47] Pitruzzella Giovanni, "Il problema della democrazia europea," *Associazionedeicostituzionalisti.it*, (2025).

[48] Elia Leopoldo, "Dinamica "esclusione/integrazione" e forma di governo," *Giurisprudenza costituzionale*, (1999): 1487.

[49] Carozza Paolo, "Il traffico dei diritti umani nell'età post-moderna," in *Il traffico dei diritti insaziabili*, edited by Luca Antonini (Soveria Mannelli: Rubettino, 2007), 81 ff.

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within the global judicial network, leading to a decontextualization of the principles and rights involved, detached from their original legal systems and cultural frameworks.[51] Thus, the deferral of politics to jurisprudential determinations – often receptive of foreign and supranational interpretative options – has tended to result in the *neutralization* of the former and the *politicization* of the latter.[52]

It is therefore unsurprising that Luciano Violante has sounded the alarm following the re-emergence of political theology on the international stage: "Democracy is losing its driving force. It has lost its value-based foundation and has been reduced to proceduralism. We have remained silent because democracy has become pure procedure, technicality. It is therefore necessary to counter political theologies by forcefully reclaiming the values of equality and respect for fundamental rights".[53]

However, while acknowledging the essential nature of this warning, one must also ask whether the proposed solution is sufficiently adequate. In a secularized context, alienated by the absence of values, by social disillusionment, and by the erosion of popular participation, burdened by a permanent economic crisis, dominated by economically powerful private actors capable of deploying highly sophisticated technologies for pervasive and capillary surveillance through networks and traversed by national and international tensions, the insistence on values alone, however fundamental, risks postponing, if not diverting, urgent political responsibilities. As Stelio Mangiameli has added, it is not even sufficient to invoke a simple revival of the principles of the "rule of law" and the constitutionalisation of international processes.[54]

At the same time, it is necessary to place confidence in the *political nature* of the Constitution and in the human capital required to sustain it. These are the conditions – paraphrasing Ronald Dworkin – for *taking seriously* the reasons of conflict, embracing its challenges and provocations, which are always expressive of the tensions inherent in every historical phase. Before the rationality of legal choices, there must prevail the realism of a politics capable of confronting conflict in the name – this time indeed – of the values that characterize constitutional legitimacy. Such a politics must necessarily remain open to the category of possibility[55] and, therefore, be grounded in realism, compromise, and negotiation, being structured – following the lesson of Niccolò Machiavelli – as an "art of remedy".[56]

According to the author of *The Prince*, the eminent function of politics was to provide remedies, repair breaches, and find provisional and always precarious equilibria; it consisted in the concrete capacity to identify and implement remedies for evils and ruins arising from the uncertainty and precariousness of human affairs. Given that society is marked by the use of force and instrumental reason, the dimension of conflict is ineliminable and cannot be

[50] Allard Julie and Garapon Antoine, *La mondializzazione dei giudici. Nuova rivoluzione del diritto*, Italian translation by Carla Maggiori (Macerata: Liberilibri, 2006), 4 ff.

[51] Markesinis Basil and Fedtke Jörg, *Giudici e diritto straniero. La pratica del diritto comparato*, Italian translation by A. Taruffo (Bologna: Il Mulino, 2009), 90.

[52] Tondi della Mura Vincenzo, "I rischi della competizione regolativa e valoriale fra i diversi poteri dello Stato (riflessioni a margine del «caso Englaro»)," *Associazionedeicostituzionalisti.it*, (2009).

[53] Violante Luciano, "I pericoli delle teocrazie politiche".

[54] Mangiameli Stelio, "Verità e certezza nell'esperienza costituzionale," 658.

[55] Giussani Luigi, *Il senso religioso* (Milan: Jaka book, 1986), 72.

[56] Ferroni Giulio, *Machiavelli, o dell'incertezza. La politica come arte del rimedio* (Rome: Donzelli Editore, 2003).

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abstractly expelled by means of an artificial structure capable of neutralizing and excluding disintegrative forces, as envisaged by Thomas Hobbes. Unlike the English philosopher, the Florentine Secretary maintained that the social body cannot be separated from the soul that unifies and governs it but constitutes a unified whole whose health derives from the relationship among its different parts.

Accordingly, the role of politics is to govern the conflictual tension that naturally arises from the various interests at stake, since without tension there can be no politics; and, as Roberto Esposito has observed, "the number of politics – when life is at stake – is not One, but Two".[57] In a famous passage of the *Discourses*, it is written that "Nature created men in such a way that they can desire everything, yet cannot attain everything; thus, since desire always exceeds the power of acquisition, there results dissatisfaction with what one possesses and little satisfaction from it".[58] From this state of nature – according to Machiavelli – derive both error in human judgment and the insecurity of every interpretation of reality. Hence the "anthropology of remedy" and the realism of a politics aimed at anticipating the moves of *fortuna*, seeking to avoid the worst and always preserving a hope of salvation; a realism, so to speak, practical in nature, as it is embedded in everyday practice and commensurate with its demands.

In sum, it is necessary to reconnect *the art of remedy* in politics with the *political nature* of the Constitution, abandoning the mirage of juridical perfection and embracing a "critical" conception of democracy: a democracy "that does not presume to possess truth and justice, yet does not consider their pursuit meaningless"; in short, a democracy of "possibility"[59] and of "dialogue".[60]

In the flourishing period of post-war democracies, scholarship was devoted – with great clarity – to investigating the correlations and mutual influences between forms of government and political systems, such as to produce equivalent functioning in constitutionally opposed models, such as the presidential and parliamentary systems.[61] Today, rather, it would be necessary to inquire into the reasons why models grounded in opposite forms of legitimacy – namely autocratic and democratic ones – appear, in light of political theology, to display a tendentially and dramatically similar functioning. It would be necessary to understand why, as provocatively suggested by Leo XIV, "democracy is not necessarily the perfect solution to everything".[62]

[57] Esposito Roberto, *Pensiero vivente. Origine e attualità della filosofia italiana* (Turin: Einaudi, 2010), 47 ff., 55.

[58] Machiavelli Niccolò, "Discorsi sopra la prima Deca di Tito Livio," I, in Niccolò Machiavelli, *Tutte le opere*, edited by Mario Martelli (Florence: Sansoni, 1971), 119.

[59] Zagrebelsky Gustavo, *Il «crucifige» e la democrazia* (Turin: Einaudi, 1995), 6.

[60] Barbera Augusto, "La laicità come metodo," in *Il Cortile dei Gentili. Credenti e non credenti di fronte al mondo di oggi*, edited by Laurent Mazas (Rome: Donzelli, 2011), 110.

[61] Amato Giuliano, "Forme di Stato e forme di governo," in *Manuale di Diritto pubblico*, I, *Diritto pubblico generale*, edited by Giuliano Amato and Augusto Barbera (Bologna: Il Mulino, 1997), 30-31.

[62] Leo XIV, "Nel mondo troppe disparità, guardiamo a Elon Musk. Democrazia non sempre perfetta".

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JUDGING IN TIMES OF EMERGENCIES: THE ROLE OF THE ITALIAN CONSTITUTIONAL COURT IN MANAGING LEGALITY, LEGITIMACY, AND FUNCTIONAL CRISES

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Keywords: Constitutional Resilience; Judicialized Emergency Governance; Legislative Inertia; Institutional Overexposure; Crisis Constitutionalism.

Summary: 1. Introduction: Constitutional Courts between Stabilization and Crises. – 2. Constitutional Crises as a Structural Category of Constitutionalism. – 3. Ideal Types of Crisis and the Stabilizing Role of the Italian Constitutional Court. – 4. Crises of Legality and the Defense of Constitutional Supremacy. – 5. Crises of Legitimacy and Judicial Authority. – 6. Functional Crises and Constitutional Adaptation. – 7. Constitutional Courts and the Risk of Institutional Overexposure.

1. *Introduction: Constitutional Courts between Stabilization and Crises*

In recent decades, constitutional crisis has re-emerged as a central category in legal scholarship. Mounting institutional tensions across democratic systems – ranging from democratic backsliding to recurring confrontations between political authorities and the courts – have renewed interest in the ways constitutional orders respond to periods of systemic stress.[1]

Traditionally, constitutional crises were associated with *coups d'état*, revolutionary ruptures, or the suspension of constitutional legality. On that view, crisis denoted an exceptional breakdown of the legal order.[2] However, contemporary developments suggest that this conventional understanding is increasingly inadequate. In many democratic systems, constitutional crises no longer take the form of dramatic institutional collapse. They unfold more gradually, through incremental transformations that remain formally embedded within

[1] A growing body of scholarship has documented these transformations, *ex multis*, see Pech Laurent and Scheppele Kim Lane, "Illiberalism within: Rule of law backsliding in the EU," *Cambridge Yearbook of European Legal Studies*, 1 (2017): 3-47; Tushnet Mark, *Taking the Constitution Away from the Courts* (Princeton: Princeton University Press, 1999); and also Loughlin Martin, "The contemporary crisis of constitutional democracy," *Oxford Journal of Legal Studies*, 2 (2019): 435-54.

[2] More broadly, classical constitutional theory tended to conceptualize crises as moments of rupture, in which the ordinary functioning of constitutional norms is suspended or replaced, rather than as processes unfolding within the constitutional framework itself. *Cf.* for example Schmitt Carl, *Le categorie del politico (1922)*, it. trans. Gianfranco Miglio and Pierangelo Schiera (Bologna: Il Mulino, 2013); Kelsen Hans, *La dottrina pura del diritto (1934)*, it. trans. Mario Losano (Torino: Einaudi, 2021); Romano Santi, *L'ordinamento giuridico (1918)* (Macerata: Quodlibet, 2018).

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the legal order itself. The routinization of emergency powers, the erosion of parliamentary centrality, and the growing politicization of judicial institutions often develop without any explicit breach of constitutional rules.[3]

Comparative scholarship has captured this transformation through concepts such as 'abusive constitutionalism', 'constitutional hardball', and 'executive aggrandizement'. In contemporary democracies, constitutional crises are more likely to emerge through the gradual concentration of political power than through overt institutional rupture.[4] Within this environment, the courts have acquired an increasingly prominent role in the management of political conflict. Modern constitutional systems rely more and more on judicial institutions to stabilize tensions that ordinary political processes prove unable to resolve.[5] Yet this development carries an inherent paradox: the more courts are called upon to preserve constitutional stability, the more their own legitimacy becomes vulnerable to contestation.[6]

Constitutional courts therefore occupy an inherently ambivalent position within democratic systems. They serve as "guardians" of constitutional legality, but they also operate as institutional actors, whose interventions may reshape the relationship between judicial authority and democratic representation. This article argues that the Italian Constitutional Court (ICC) has evolved well beyond the traditional role of a negative legislator. It has progressively come to function as a structural compensator for the shortcomings of representative institutions. In contemporary systems, courts are often drawn into disputes not because constitutional rules have plainly been violated, but because elected institutions are unable – or unwilling – to address persistent conflicts, legislative deadlock, and recurring emergencies.[7]

The *Corte costituzionale* now performs a stabilizing function that extends well beyond the classic boundaries of judicial review. However, this very success generates a further tension. While constitutional adjudication succeeds in preserving institutional continuity and

[3] See *passim* Levitsky Steven and Ziblatt Daniel, *How Democracies Die* (New York: Crown Publishing, 2018); Balkin Jack, "Constitutional Crisis and Constitutional Rot," *Maryland Law Review*, 1 (2017): 147-60; Landau David, "Populist Constitutions," *University of Chicago Law Review*, 2 (2018): 521-43.

[4] *Cf.* Bermeo Nancy, "On democratic backsliding," *Journal of Democracy*, 1 (2016): 5-19; Tushnet Mark, *Weak courts, strong rights: Judicial review and social welfare rights in Comparative Constitutional Law* (Princeton: Princeton University Press, 2008), 52 ff.; Choudhry Sujit, "Will democracy die in darkness? Calling autocracy by its name," in *Constitutional Democracies in Crisis?*, edited by Mark Graber *et al*. (Oxford: Oxford University Press, 2018), 571-84.

[5] See *passim* Hirschl Ran, *Towards Juristocracy. The Origins and Consequences of the New Constitutionalism* (Cambridge: Harvard University Press, 2004); Stone Sweet Alec, *Governing with Judges. Constitutional Politics in Europe* (Oxford: Oxford University Press, 2000); Ackerman Bruce, "The emergency Constitution," *Yale Law Journal*, 5 (2004): 1029-91.

[6] Ackerman Bruce, *Before the Next Attack: Preserving Civil Liberties in an Age of Terrorism* (New Haven: Yale University Press, 2006); Bickel Alexander, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (New Haven: Yale University Press, 1962); Kumm Mattias, "The cosmopolitan turn in constitutionalism: On the relationship between constitutionalism in and beyond the State," in *Ruling the World?: Constitutionalism, International Law, and Global Governance*, edited by Jeffrey Dunoff L. and Joel P. Trachtman (Cambridge: Cambridge University Press, 2009), 258-325.

[7] See Rosenfeld Michel, *The Identity of the Constitutional Subject* (London: Routledge, 2010); Walker Neil, *Intimations of Global Law* (Cambridge: Cambridge University Press, 2015); De Búrca Gráinne, "The EU, the European Court of Justice and the International legal order after Kadi," *Harvard International Law Journal*, 1 (2010): 1-49.

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defusing unresolved disputes, political systems risk becoming dependent on courts as substitutes for ordinary and democratic decision-making.[8]

The Italian experience offers a particularly revealing case study in this regard. Unlike legal systems that have undergone explicit processes of 'democratic backsliding' or 'constitutional capture', Italy represents a case of institutional resilience under persistent pressure. The Italian legal order is especially instructive because it combines a set of conditions that are rarely found together within the same constitutional order.

First, the Italian political system has long been marked by fragmented political party competition, governmental instability, and recurring difficulties in producing durable parliamentary majorities.[9] Second, the executive branch has progressively expanded its influence through confidence votes, decree-laws, and broad legislative delegations.[10] Third, the legal order has repeatedly faced acute systemic pressures, without ever experiencing a complete breakdown of constitutional legality.[11] Nevertheless, the resilience of the system has often depended on the capacity of the Constitutional Court to compensate for the weaknesses of representative institutions and to manage conflicts that political actors proved unable to manage.

From this perspective, the ICC has not operated in the shadow of authoritarian rupture. Rather, it has acted within a system marked by chronic instability, legislative inertia, executive expansion, and recurring emergencies. The *Corte costituzionale* has operated in an environment increasingly conducive to subsidiary interventions, stepping in where representative institutions proved reluctant to act. At times, however, this growing role has also raised concerns about the gradual blurring of the separation of powers.

2. *Constitutional Crises as a Structural Category of Constitutionalism*

Every constitutional order, however stable it may appear, contains within itself the possibility of crisis. Constitutional crises should therefore be understood as structural phenomena

[8] *Cf.* in Italian constitutional scholarship, Cartabia Marta, *Custodi della democrazia. La Costituzione, le corti e i confini del politico* (Milan: EGEA, 2026); Zagrebelsky Gustavo, *Il diritto mite. Legge, diritti, giustizia* (Turin: Einaudi, 1992); Silvestri Gaetano, *La Corte costituzionale nella svolta di fine secolo*, Id., *Le garanzie della Repubblica* (Turin: Giappichelli, 2009), 127-59.

[9] On fragmentation, governmental instability, and the weakness of parliamentary majorities within the Italian political system, see Newell James L., *The Politics of Italy. Governance in a Normal Country* (Cambridge: Cambridge University Press, 2012); Smith Denis Mack, *Modern Italy. A Political History* (New Haven: Yale University Press, 1997); Cotta Maurizio and Verzichelli Luca, *Political Institutions in Italy* (Oxford: Oxford University Press, 2007).

[10] See Lupo Nicola, "Emendamenti, maxi-emendamenti e questione di fiducia nelle legislature del maggioritario," in *Le regole del diritto parlamentare nella dialettica tra maggioranza e opposizione*, edited by Gianfrancesco Eduardo and Lupo Nicola (Rome: Luiss University Press, 2007), 41-110; Sorrentino Federico, "Spunti sul controllo della Corte costituzionale sui decreti-legge e sulle leggi di conversione", *Aspetti e tendenze del diritto costituzionale: scritti in onore di Costantino Mortati*, (Milan: Giuffrè, 1977), 737-775; Clementi Francesco, "Tra leggi elettorali e riforme istituzionali: trent'anni di una transizione ancora aperta," *Rivista di Politica*, 4 (2018): 33-41.

[11] On the absence of full constitutional breakdown despite recurring systemic pressures, *cf.* Elia Leopoldo, *Costituzione, partiti, istituzioni* (Bologna: Il Mulino, 2009); Cassese Sabino, *Dentro la Corte. Diario di un giudice costituzionale* (Bologna: Il Mulino, 2015); Zagrebelsky Gustavo, *Questa Repubblica. Cittadinanza e Costituzione* (Milan: Mondadori, 2009).

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that reveal the tensions inherent in modern governance. Moments of crisis expose the limits of legal arrangements but they also illuminate their capacity for adaptation.[12]

Modern systems operate through a complex interaction among constitutional norms, political institutions, and social expectations. When that interaction becomes destabilized – because of polarization, fragmentation, institutional paralysis, or extraordinary pressures – the Constitution may begin to lose its ability to perform its essential coordinating function.[13]

Democratic orders are designed to absorb conflict and to correct themselves over time: individual violations of legality do not necessarily amount to a constitutional crisis so long as the order retains the institutional resources needed to restore equilibrium.[14] A constitutional crisis arises only when those ordinary mechanisms of stabilization begin to weaken. At that point, the problem no longer concerns the legality of a particular measure. It concerns the broader capacity of the constitutional framework to organize, channel, and contain conflicts.[15]

Constitutional courts play a decisive, yet deeply ambivalent, role in these dynamics. On the one hand, they may operate as stabilizing institutions, preserving continuity when the ordinary political process comes under strain. On the other hand, the expansion of judicial authority exposes courts to new forms of politicization and legitimacy contestation. They are institutions of legal control, but they are also arenas in which political conflicts are reformulated through constitutional language.[16]

This ambivalence is not accidental. Constitutional adjudication is precisely designed to convert political disagreement into juridical controversy. By subjecting political decisions to judicial scrutiny, constitutional courts transform disputes that would otherwise unfold within the political sphere into legal questions governed by constitutional principles, procedural con-

[12] Contributions emphasizing the dynamic and conflictual nature of constitutional order, see *passim* Loughlin Martin, *Foundations of Public Law* (Oxford: Oxford University Press, 2010); Walker Neil, *Intimations of Global Law*, note 7; Christodoulidis Emilios A., *Law and Reflexive Politics* (London: Kluwer Academic Publishers, 1998).

[13] See Lindseth Peter, *Power and Legitimacy: Reconciling Europe and the Nation-State* (Oxford: Oxford University Press, 2010); MacCormick Neil, *Questioning Sovereignty: Law, State, and Nation in the European Commonwealth* (Oxford: Oxford University Press, 1999); and Sunstein Cass R., *Designing Democracy: What Constitutions Do* (Oxford: Oxford University Press, 2001).

[14] *Cf.* Fuller Lon, *The Morality of Law* (New Haven: Yale University Press, 1964); Elster Jon, *Ulysses Unbound: Studies in Rationality, Precommitment, and Constraints* (Cambridge: Cambridge University Press, 2000); Holmes Stephen, *Passions and Constraint: On the Theory of Liberal Democracy* (Chicago: University of Chicago Press, 1995).

[15] See *ex multis* Ioannidis Michael and von Bogdandy Armin, "Systemic deficiency in the rule of law: What it is,what has been done, what can be done," *Common Market Law Review*, 1 (2014): 61-94; Luhmann Niklas, *Procedimenti giuridici e legittimazione sociale (1969)*, it. trans. Alberto Febbrajo (Milano: Giuffrè, 1995); Teubner Gunther, *Constitutional Fragments: Societal Constitutionalism and Globalization* (Oxford: Oxford University Press, 2012). See also Walker Neil, "Beyond boundary disputes and basic grids: Mapping the global disorder of normative orders," *International Journal of Constitutional Law*, 3-4 (2008): 373-96.

[16] See Fallon Richard, *Law and Legitimacy in the Supreme Court* (Cambridge: Harvard University Press, 2018); Dahl Robert A., "Decision-making in a democracy: The Supreme Court as a national policy-maker," *Journal of Public Law*, 6 (1957): 279-295, Barak Aharon, *The Judge in a Democracy* (Princeton: Princeton University Press, 2006). For Italian constitutional scholarship, *cf.* Zagrebelsky Gustavo, *La legge e la sua giustizia* (Bologna: Il Mulino, 2008); Cheli Enzo, *Il giudice delle leggi. La Corte costituzionale nella dinamica dei poteri* (Bologna: Il Mulino, 1999).

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straints, and techniques of balancing. In doing so, courts contribute to stabilizing the constitutional order, by ensuring that conflict remains contained within a framework of legality.[17]

Nonetheless, this stabilizing role carries unavoidable institutional risks. When constitutional judges intervene more frequently in politically salient matters, their decisions inevitably acquire broader political significance. Judicial reasoning becomes a site at which competing visions of democracy, rights, and institutional authority are articulated and contested.[18] This tension recalls the classic debate between Kelsen and Schmitt over the identity of the so-called 'guardian of the Constitution'. Although developed in the interwar period, that theoretical debate continues to shape contemporary discussions of constitutional adjudication.[19]

Modern constitutional systems have largely embraced the Kelsenian model, by assigning courts the authority to review legislation and to enforce the constitutional boundaries of political and social action. At the same time, Schmitt's concerns have never entirely disappeared: the expansion of judicial authority in contemporary democracies has revived longstanding questions about the proper limits of constitutional interpretation and the extent to which courts may legitimately shape outcomes that are, in substance, political.[20]

Contemporary constitutionalism therefore continues to operate within the conceptual space defined by the tension between juridification and politicization, becoming especially visible during periods of constitutional stress.[21] In times of crisis, constitutional courts are required to intervene more assertively in order to preserve institutional continuity. Yet such interventions may also intensify debates over the proper role of judicial institutions within democratic governance.[22]

[17] *Cf.* Habermas Jürgen, *Fatti e norme. Contributi a una teoria discorsiva del diritto e della democrazia (1996)*, it. trans. Ceppa Leonardo, (Rome-Bari: Laterza, 2013). See also Hirschl Ran, *Towards Juristocracy*, note 4; and Grimm Dieter, *The Constitution of European Democracy* (Oxford: Oxford University Press, 2017)

[18] See *ex plurimis* Sunstein Cass R., *One Case at a Time: Judicial Minimalism on the Supreme Court* (Cambridge: Harvard University Press, 1999); Rosenberg Gerald N., *The Hollow Hope: Can Courts Bring About Social Change?* (Chicago: University of Chicago Press, 1991); Friedman Barry, *The Will of the People: How Public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution* (New York: Farrar, Straus and Giroux, 2009). In Italian constitutional scholarship, see also Zagrebelsky Gustavo, *Principi e voti. La Corte costituzionale e la politica* (Torino: Einaudi, 2005); Zanon Nicolò, "Corte costituzionale, evoluzione della 'coscienza sociale', interpretazione della costituzione e diritti fondamentali: Questioni e interrogativi a partire da un caso paradigmatico," *Rivista AIC*, 4 (2017): 1-16.

[19] On the classical debate concerning the 'guardian of the Constitution', see Schmitt Carl, *Der Hüter der Verfassung* (Tübingen: 1931); Kelsen Hans, "Wer soll der Hüter der Verfassung sein?", *Die Justiz*, 6 (1931): 576-628. For discussion, see also Grimm Dieter, "Types of Constitutions", in *The Oxford Handbook of Comparative Constitutional Law* edited by Rosenfeld Michel and András Sajó (Oxford: Oxford University Press, 2012), 98-132.

[20] See Ginsburg Tim, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (Cambridge: Cambridge University Press, 2003); Issacharoff Samuel, *Fragile Democracies: Contested Power in the Era of Constitutional Courts* (Cambridge: Cambridge University Press, 2015). On the persistence of tensions between legal adjudication and political decision-making, see, for example, Waldron Jeremy, "The core of the case against judicial review," *Yale Law Journal*, 5 (2006): 1346-1406.

[21] On judicial decisions perceived as substituting political deliberation, see Waldron Jeremy, *Law and Disagreement* (Oxford: Oxford University Press, 1999); Ely John, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge: Harvard University Press, 1980); Bellamy Richard, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge: Cambridge University Press, 2007).

[22] *Cf.* Commaille Jacques, *L'esprit sociologique des lois* (Paris: PUF, 1994); Vauchez Antoine, *Brokering Europe: Euro-Lawyers and the Making of a Transnational Polity* (Cambridge: Cambridge University Press, 2015); Poiares Maduro Miguel, *We the Court: The European Court of Justice and the European Economic Constitution* (Oxford: Hart Publishing, 1998).

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3. *Ideal Types of Crisis and the Stabilizing Role of the Italian Constitutional Court*

The Italian constitutional experience offers a particularly revealing perspective on the role of constitutional courts in managing systemic tensions. Unlike legal orders that have experienced forms of 'constitutional capture' or 'democratic backsliding', Italy has remained formally committed to the liberal-democratic framework established by the 1948 Constitution. At the same time, the political system has long been characterized by governmental instability, fragmented party competition, legislative inertia, executive expansion, and recurring emergencies.[23]

Within this context, the ICC has gradually assumed a role that extends far beyond the traditional model of judicial review. Over time, the Court has come to function as an institution of continuity, intervening to preserve constitutional equilibrium under conditions of persistent systemic stress.[24]

Two long-term features of Italian constitutional adjudication are especially important in explaining this development. The first is the early affirmation of the supremacy of the Constitution over ordinary legislation.[25] In Decision no. 1 of 1956, the Court made clear that ordinary legislation could not prevail over constitutional norms and that the rigidity of the Constitution constituted the fundamental precondition for the legality of public power.[26] The second is the development of the doctrine of 'supreme principles'. In Decision no. 1146 of 1988, the Court identified a set of constitutional principles so fundamental that they could not be overturned even through formal constitutional amendment. This line of case law reinforced the idea that certain substantive elements of the constitutional order remain unavailable even to parliamentary majorities.[27]

Together, these doctrinal foundations strengthened the Italian Constitutional Court's role as a guardian of constitutional continuity. Over time, the ICC has acted not merely as an interpreter of constitutional provisions, but as an institution capable of absorbing systemic tensions, restoring normative coherence, and compensating for the failures of representative politics.[28]

From this perspective, three ideal types of constitutional crisis may be distinguished. Crises of legality arise when constitutional rules formally remain in force, yet their substantive function is progressively weakened by practices that distort the constitutional distribution of powers. These crises often emerge through the abuse of decree-laws, the overuse

[23] On the Italian constitutional experience as a case of resilience under persistent systemic strain, *cf.* Silvestri Gaetano, *Le garanzie della Repubblica* (Torino: 2009); Cassese Sabino, *La nuova costituzione economica* (Rome-Bari: Laterza, 2012); Elia Leopoldo, *Costituzione, partiti, istituzioni*, note 11.

[24] Amato Giuliano, *Le istituzioni della democrazia* (Bologna: Il Mulino, 2015), Rodotà Stefano, *Il diritto di avere diritti* (Rome-Bari: Laterza, 2012); Zanon Nicolò, "I rapporti tra la Corte costituzionale e il legislatore alla luce di alcune recenti tendenze giurisprudenziali," *Federalismi.it*, 3 (2021): 86-98.

[25] See, Mortati Costantino, *La costituzione in senso materiale (1940)* (Milan: Giuffrè, 1998); Esposito Carlo, *La Costituzione italiana. Saggi* (Padova: CEDAM, 1954); Modugno Franco, "Ricorso al potere costituente o alla revisione costituzionale?," *Giurisprudenza italiana*, 1 (1998): 620-24.

[26] ICC, 1/1956, conclusions on points of law, section 3.

[27] ICC, 1146/1988.

[28] See Baldassarre Antonio, *Diritti della persona e valori costituzionali* (Torino: Giappichelli, 1997); Barile Paolo, *Diritti dell'uomo e libertà fondamentali* (Bologna: Il Mulino, 1984); Paladin Livio, *Le fonti del diritto italiano* (Bologna: Il Mulino, 1996) and Luciani Massimo, *Ogni cosa al suo posto* (Milan: Giuffrè, 2023). See also ICC, 406/1989; ICC, 356/1996; ICC, 162/2014; ICC, 269/2017; ICC, 170/2023.

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of legislative delegation, emergency lawmaking, or attempts to shield political actors from ordinary forms of legal accountability.[29]

Crises of legitimacy arise when constitutional institutions begin to lose their capacity to command broad political and social acceptance. In such cases, the issue is not the validity of constitutional rules as such, but the authority of the institutions responsible for interpreting and enforcing them. Constitutional courts may then become objects of political contestation rather than neutral arbiters of constitutional conflict.[30]

Functional crises emerge when extraordinary events – economic collapse, environmental disaster, public health emergencies, security threats – place exceptional pressure on the constitutional order. Under such conditions, the central problem is how to preserve constitutional guarantees while still allowing public institutions to respond effectively to urgent collective dangers.[31]

Although analytically distinct, these forms of crisis are often interconnected. Crises of legality may trigger legitimacy tensions; legitimacy crises may weaken the ability of institutions to respond effectively to emergencies; functional crises may encourage the expansion of executive discretion and the compression of ordinary democratic procedures. One of the Court's central functions has increasingly been to mediate among these overlapping dimensions of systemic instability.

In all these situations, the ordinary mechanisms of constitutional government often prove inadequate. Political actors resort to exceptional measures that alter the balance between rights and necessity, legality, and expediency. Legislative deliberation is compressed, executive authority expands, and individual freedoms may be restricted in the name of urgent public interests. It is precisely under these conditions that the Italian Court has assumed a broader stabilizing role, seeking to preserve institutional continuity while adapting constitutional principles to changing forms of structural stress.[32]

[29] See Daly Tom, "Democratic Decay: Conceptualising an Emerging Research Field," *Hague Journal on the Rule of Law*, 2 (2019): 9-36; Raz Joseph, *The Authority of Law: Essays on Law and Morality* (Oxford: Oxford University Press, 1979); Dyzenhaus David, *The Constitution of Law: Legality in a Time of Emergency* (Cambridge: Cambridge University Press, 2023); Gross Oren and Ni Aolain Fionnuala, *Law in Times of Crisis: Emergency Powers in Theory and Practice* (Cambridge: Cambridge University Press, 2006); and Dixon Rosalind and Landau David, "Transnational constitutionalism and a limited doctrine of unconstitutional constitutional amendment," *International Journal of Constitutional Law*, 3 (2015): 606-38.

[30] See *ex multis* Helfer Laurence and Alter Karen, "Legitimacy and Lawmaking: A Tale of Three International Courts," *Theoretical Inquiries in Law*, 2 (2013): 479-506; Weber Max, *Economia e Società (1922)*, it trans. Palma Massimo (Rome: Donzelli, 2022); Weingast Barry, "The political foundations of democracy and the rule of law," *The American Political Science Review*, 2 (1997): 245-63; Brennan Geoffrey and Buchanan James, *The Reason of Rules: Constitutional Political Economy* (Cambridge: Cambridge University Press, 1985); Versteeg Mila and Ginsburg Tom, "Why Do Countries Adopt Constitutional Review?," *Journal of Law, Economics, and Organization*, 3 (2014): 587-622.

[31] See Offe Claus, *Contradictions of the Welfare State* (Cambridge: MIT Press, 1984); Bobbitt Philip, *Terror and Consent: The Wars for the Twenty-First Century* (New York: Alfred A. Knopf, 2008); Graber Mark, *Constitutional Dysfunction on Trial* (Chicago: Oxford University Press, 2013) and Ackerman Bruce, *Before the Next Attack*, note 6.

[32] On the growing tendency of emergencies to distort the ordinary logic of constitutional governance, see, for example, Agamben Giorgio, *Stato di eccezione* (Torino: Bollati Boringhieri, 2003); Ferejohn John and Pasquino Pasquale, "The Law of the Exception: A Typology of Emergency Powers," *International Journal of Constitutional Law*, 2 (2004): 210-239. See also Dyzenhaus David, *The Constitution of Law*, note 29.

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4. *Crises of Legality and the Defense of Constitutional Supremacy*

Unlike Poland or Hungary, Italy has never experienced explicit forms of 'constitutional capture', capable of systematically undermining judicial independence from within. This does not mean, however, that the Italian constitutional order has been free from legality crises. Significant tensions emerged during the 'Berlusconi era', and have resurfaced more recently under various forms of 'executive populism', aimed at weakening the normative guarantees that protect judicial autonomy and constitutional accountability.[33]

a) Immunities and the Insulation of Political Power

Crises of legality often emerge when political office is used not purely as an instrument of governance, but as a means of seeking insulation from ordinary legal responsibility. Constitutional provisions formally remain in force, yet their stabilizing function is progressively weakened or selectively distorted in order to shield high-ranking office holders from judicial scrutiny.[34]

Faced with political narratives asserting the unqualified supremacy of popular sovereignty over constitutional limits and European obligations, the Italian Constitutional Court has repeatedly reaffirmed the centrality of the supreme principles of the constitutional order. Above all, it has insisted on the primacy of fundamental rights, judicial accountability, and respect for international and European commitments.[35]

The Court opposed these efforts on several occasions. In judgment no. 24 of 2004, it invalidated the so-called 'lodo Schifani', holding that the temporary suspension of criminal proceedings for a broad category of institutional office holders violated both the principle of equality and the right to judicial protection.[36] The same logic informed decision no. 262 of 2009, which struck down the subsequent 'lodo Alfano'.[37]

These decisions reaffirmed a broader constitutional principle: democratic legitimacy cannot replace legal accountability. Public authority, even when supported by broad electoral consent, remains subject to constitutional limits and judicial review.[38] Limited forms of immunity may be justified where necessary to protect the independence of constitutional functions, but they cannot be extended so far as to create privileged zones of impunity within the political system.[39]

[33] On 'constitutional capture' and the systematic erosion of judicial independence, see *ex multis* Sadurski Wojciech, *Poland's Constitutional Breakdown* (Oxford: Oxford University Press, 2019) and Sajó András and Uitz Renáta, *The Constitution of Freedom: An Introduction to Legal Constitutionalism* (Oxford: Oxford University Press, 2017). On the Italian case, see Pinelli Cesare, "The populist challenge to constitutional democracy," *European Constitutional Law Review*, 1 (2011).

[34] Proponents of such measures justified them on the grounds of institutional functionality arguing that the effective exercise of high governmental responsibilities required protection from judicial interference. *Cf.* Law no. 140 of June 20, 2003, "*Disposizioni per l'attuazione dell'articolo 68 della Costituzione nonché in materia di processi penali nei confronti delle alte cariche dello Stato*," and Law no. 124 of July 23, 2008, "*Disposizioni in materia di sospensione del processo penale nei confronti delle alte cariche dello Stato*".

[35] *Cf.* Manetti Michela, "Costituzione, partecipazione democratica, populismo," *Rivista AIC*, 3 (2018): 375-401.

[36] ICC, 24/2004, conclusions on points of law, sections 4 and 6.

[37] ICC, 262/2009, conclusions on points of law, section 7.

[38] See Luciani Massimo, "Questioni generali della forma di governo italiana," *Rivista AIC*, 1 (2024): 1-25; Mezzanotte Carlo, *Il giudizio sulle leggi. Le ideologie del Costituente* (Milan: 1979); Silvestri Gaetano, *Lo Stato senza principe. La sovranità dei valori nelle democrazie pluraliste* (Turin: Giappichelli, 2005).

[39] Ferrajoli Luigi, *Poteri selvaggi. La crisi della democrazia italiana* (Rome-Bari: Laterza, 2011); Luciani

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b) Emergency Lawmaking and the Abuse of Decree-Laws

Similarly, crises of legality arise when emergency lawmaking becomes a routine substitute for ordinary legislative mediation. Legal instruments originally designed to address extraordinary and temporary situations may gradually become ordinary techniques of governance, allowing the executive to bypass parliamentary deliberation and compress the legislative process.

The Italian Court responded to the abuse of decree-laws by transforming the constitutional requirements of extraordinariness, necessity, and urgency into substantive standards of review. In judgment no. 29 of 1995, the ICC held that recourse to decree-laws must be justified by genuine and properly documented emergency circumstances. In judgment no. 360 of 1996, the Court further ruled that the systematic reiteration of expired decree-laws, absent «*new and autonomous circumstances of necessity and urgency*» was unconstitutional.[40]

This line of reasoning was consolidated in decision no. 171 of 2007, where the Constitutional Court clarified that the manifest absence of the required conditions may lead to the invalidation not only of the decree-law itself, but also of the subsequent conversion statute.[41] Later decisions extended this scrutiny to the material homogeneity of decree-laws and to amendments introduced during the conversion process, thereby preventing emergency sources of law from becoming omnibus legislative instruments.[42]

c) Legislative Delegation and Democratic Responsibility

A further legality crisis arises when delegated legislation begins to displace parliamentary control over fundamental policy choices. Legislative delegation was originally conceived as a pragmatic instrument that would allow the Chambers to rely on governmental expertise in technically complex fields. Yet when enabling statutes become excessively broad or vague, the distinction between delegated legislation and ordinary legislative authority begins to blur.[43]

The Constitutional Court has consistently intervened to prevent such distortions. Its case law treats the limits imposed by Article 76 of the Constitution not as merely formal requirements, but as substantive guarantees designed to preserve the constitutional distribution of normative power.[44] In particular, the ICC has consistently emphasized that the Government re-

Massimo, "Costituzionalismo irenico e costituzionalismo polemico," *Giurisprudenza costituzionale*, 4 (2006): 1643-68; Palombella Gianluigi, "The rule of law as an institutional ideal," in *The Rule of Law and Democracy. Internal and External Issues*, edited by Morlino Leonardo and Palombella Gianluigi (Leiden: Brill, 2010), 3-37.

[40] ICC, 29/1995; and ICC, 360/1996, conclusions on points of law, sections 5 and 6.

[41] ICC, 171/2007, conclusions on points of law, section 5. See also ICC, 128/2008.

[42] ICC, 22/2012, conclusions on points of law, section 4.1; ICC, 32/2014, conclusions on points of law, sections 4 and 5. *Cf.* ICC, 247/2019. Among the scholars see Lupo Nicola, "L'omogeneità del decreto-legge (e delle leggi di conversione): un nodo difficile, ma ineludibile per limitare le patologie della produzione normativa," in *Scritti in memoria di Alessandra Concaro,* edited by Giuseppe D'Elia *et al*. (Milan: 2012), 419-58; Celotto Alfonso, *L'abuso del decreto-legge* (Padova: CEDAM, 1997); Luciani Massimo, "Questioni generali della forma di governo italiana," note 38.

[43] *Cf.* Pizzorusso Alessandro, "Problemi metodologici in tema di studio delle fonti del diritto," in *Scritti in memoria di Livio Paladin* (Naples: Jovene, 2004), 1687-1719. According to the author the risk is not merely procedural: when delegation is formulated in excessively broad or indeterminate terms, the Government may effectively acquire wide discretion in shaping substantive legislative policy.

[44] See Di Cosimo Giovanni, "Tutto ha un limite (la Corte e il Governo legislatore)," in *I mutamenti della forma di governo tra modificazioni tacite e progetti di riforma*, edited by Siclari Massimo (Rome: Aracne, 2008), 89-102; Dal Canto Francesco, "La qualità della normazione e i suoi custodi," in *La tecnica normativa tra legislatore e giudici*, edited by Massimo Cavino and Conte Lucilla (Naples: Edizioni Scientifiche Italiane, 2014),

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mains strictly bound by the principles and criteria established in the enabling statute and cannot introduce regulatory solutions that depart substantially from the legislative mandate. Judgments no. 98 of 1965, no. 426 of 1995, no. 80 of 2012, and no. 5 of 2014 all reflect this approach.[45]

The constitutional significance of Article 76 extends beyond the formal protection of parliamentary competence. It safeguards Parliament's democratic responsibility for the fundamental policy choices underlying the legislative framework. Delegation is constitutionally permissible only insofar as the Chambers retain control over the essential normative orientation of the delegated discipline.[46]

5. *Crises of Legitimacy and Judicial Authority*

A second, subtler, form of constitutional crisis concerns legitimacy. Legitimacy crises arise when constitutional adjudication, while remaining formally valid, progressively loses its ability to command broad social acceptance. Under these conditions, the courts continue to operate within the legal framework, yet their decisions increasingly become objects of political contestation.[47]

Such tensions may originate both inside and outside the constitutional system. Internally, they often stem from a growing disconnect between the formal and the material Constitution. Courts may interpret constitutional principles in ways that appear increasingly detached from prevailing political expectations, institutional practices, or social conventions. When this occurs, judicial authority may come to be perceived as insufficiently responsive to democratic preferences.[48]

Externally, legitimacy crises may emerge from the gradual relocation of political authority beyond the traditional sphere of representative decision-making. In contemporary systems of governance, important policy choices are increasingly shaped by supranational institutions, markets, technocratic bodies, and international obligations. Constitutional courts are then called upon to mediate between domestic principles and external constraints, often becoming focal points of contestation over decisions that are only partially within the control of national democratic institutions.[49]

53-102; Carnevale Paolo, "La legge di delega come strumento per la semplificazione normativa e la qualità della normazione: il caso del meccanismo del c.d. 'taglia-leggi'," *Federalismi.it*, 12 (2009): 1-28.

[45] ICC, 98/1965; ICC, 426/1995, conclusions on points of law, section 6; ICC, 80/2012, conclusions on points of law, section 4.1; ICC, 5/2014, conclusions on points of law, section 3.1.

[46] ICC, 3/1957, conclusions on points of law, section 2; ICC, 60/1957; ICC, 293/2010, conclusions on points of law, section 8.4; ICC, 250/2016, conclusions on points of law, section 5; and ICC, 10/2023, conclusions on points of law, section 7

[47] Fallon Richard, *Law and Legitimacy*; Tyler Tom, *Why People Obey*; Cheli Enzo, *Il giudice delle leggi*, note 16.

[48] See Loughlin Martin, *Political Jurisprudence* (Oxford: Oxford University Press, 2017); Rosanvallon Pierre, *Counter-Democracy: Politics in an Age of Distrust* (Cambridge: Cambridge University Press, 2008); Dyzenhaus David, *The Long Arc of Legality: Hobbes, Kelsen, Hart* (Cambridge: Cambridge University Press, 2022) and Mortati Costantino, *La costituzione in senso materiale*, note 25.

[49] On the relocation of political and normative authority beyond the traditional sphere of democratic decision-making, see *ex plurimis* Cassese Sabino, *Oltre lo Stato*, (Rome-Bari: Laterza, 2006); Slaughter Anne-Marie, *A New World Order* (Princeton: Princeton University Press, 2004); Sassen Saskia, *Territory, Authority, Rights: From Medieval to Global Assemblages* (Princeton: Princeton University Press, 2006).

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These crises are therefore best understood as meta-constitutional phenomena. They do not concern the validity of rules themselves, but rather the broader transformation of the institutional environment within which constitutional adjudication operates. Such tensions are fueled both by the social salience of judicial decisions – particularly in areas such as end-of-life regulation, migration, reproductive rights, family law, and privacy – and by the increasing visibility of courts in an era marked by declining trust in representative institutions.[50]

a) Judicial Substitution and Institutional Displacement

Within the Italian order, legitimacy tensions have become increasingly visible as a result of legislative inertia. Parliament has often proved unwilling to regulate politically contentious issues involving fundamental rights, leaving the Constitutional Court to intervene in order to address unresolved conflicts.[51] The ICC has therefore systematically entered fields such as assisted suicide, prison law, migration, reproductive rights, family law, and the relationship between transparency and personal data protection. In these areas, constitutional adjudication has become one of the few institutional arenas capable of producing authoritative decisions.[52]

This development creates a deeper institutional tension. As the Court intervenes more frequently to compensate for the failures of representative institutions, judicial review becomes increasingly vulnerable to the charge of political intrusion. It no longer appears simply as a mechanism for correcting unconstitutional legislation. Instead, the ICC begins to function as a substitute for political decision-making itself.[53] The central issue, hence, is not simply judicial activism. Constitutional courts do not intervene only because they disagree with legislative choices but, more often, they intervene because representative institutions fail to make those choices in the first place.[54]

[50] *Cf.* Azzariti Gaetano, *Critica della democrazia identitaria*, (Rome-Bari: Laterza, 2005); Stone Sweet Alec, "Constitutional Courts and Parliamentary Democracy," *West European Politics*, 1 (2002): 77-100, and Waldron Jeremy, *The core of the case against judicial review*, note 20

[51] On the growing reliance on constitutional courts to resolve politically divisive questions, see Gardbaum Steven, *The New Commonwealth Model of Constitutionalism* (Cambridge: Cambridge University Press, 2013); Devins Neal and Fisher Louis, *The Democratic Constitution* (Oxford: Oxford University Press, 2004); Stone Sweet Alec, *Governing with Judges*, note 4. For Italian legal scholarship, Mezzanotte Carlo, *Corte costituzionale e legittimazione politica* (Rome: Tipografia Veneziana, 1984); Gallo Franco, *Il futuro non è un vicolo cieco. Democrazia, economia, Costituzione* (Palermo: Sellerio, 2019); Zagrebelsky Gustavo, *Principi e voti*, note 18.

[52] See *ex multis* Loiodice Aldo, "La Corte costituzionale tra tecnica giuridica e contatti con la politica," in *Corte costituzionale e processi di decisione politica. Atti del seminario di Otranto-Lecce, svoltosi il 4-5 giugno 2004*, edited by Vincenzo Tondi Della Mura *et al*., (Turin: Giappichelli, 2005), 3-16; Morrone Andrea, "Suprematismo giudiziario. Spunti su sconfinamenti e legittimazione della Corte costituzionale," *Quaderni costituzionali*, 2 (2019): 251-90; Basile Roberto, "Le decisioni di manifesta inammissibilità e infondatezza per rispetto della discrezionalità del legislatore," in *La ridefinizione della forma di governo attraverso la giurisprudenza costituzionale*, edited by Antonio Ruggeri (Napoli: Edizioni Scientifiche Italiane, 2006), 437-78.

[53] *Cf.* for example Zanon Nicolò, "La Corte, il legislatore ordinario e quello di revisione, ovvero del diritto all'ʻultima parola' al cospetto delle decisioni d'incostituzionalità," *Giurisprudenza costituzionale*, 5 (1998): 3169-83; Ruotolo Marco, "Corte, giustizia e politica," in *Corte costituzionale e processi di decisione politica. Atti del seminario di Otranto-Lecce, svoltosi il 4-5 giugno 2004*, edited by Vincenzo Tondi Della Mura *et al.* (Turin: Giappichelli, 2005), 319-42; and Massa Pinto Ilenia, "La discrezionalità politica del legislatore tra tutela costituzionale del contenuto essenziale e tutela ordinaria caso per caso dei diritti nella più recente giurisprudenza costituzionale," *Giurisprudenza costituzionale*, 2 (1998): 1309-23.

[54] See for example Morrone Andrea, "Suprematismo giudiziario II. Sul pangiuridicismo costituzionale e sul lato politico della Costituzione," *Federalismi.it*, 12 (2021): 170-212; and Elia Leopoldo, "La Corte nel

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Three forms of judicial intervention may be distinguished. The first is judicial correction. Here, the courts only invalidate unconstitutional measures while leaving the underlying political choices to Parliament. The second is judicial compensation. In such cases, the courts intervene in order to fill temporary gaps created by legislative inertia, while still preserving room for future political action. The third is judicial substitution. This occurs when constitutional judgment becomes the ordinary mechanism through which divisive policy questions are resolved. At that point, courts cease to function merely as corrective institutions and become structurally integrated into the political process.[55] This form of intervention does not itself constitute a legitimacy crisis. It becomes a source of such a crisis when the Court's compensatory role ceases to appear exceptional and begins to be perceived as a normal substitute for representative decision-making.

Judicial substitution also alters the incentives of the political system itself. The strategic avoidance of politically costly decisions, legislative inertia, and executive reliance on emergency governance may all be reinforced by the expectation that constitutional adjudication will ultimately provide a solution. A legal system becomes fragile when Parliament no longer legislates on controversial issues, when courts are repeatedly required to construct detailed normative frameworks that would ordinarily belong to the political sphere, and when institutional dialogue becomes effectively unilateral.[56]

b) Self-Legitimating Strategies

Faced with these tensions, the Italian Constitutional Court has gradually developed a series of self-legitimating strategies designed to preserve its authority, while maintaining a cooperative relationship with the political branches.

The first strategy is a form of selective deference toward Parliament. In politically sensitive areas, the Court has often attempted to preserve the primacy of legislative decision-making before intervening directly. This approach is especially visible in order no. 207 of 2018 and judgment no. 242 of 2019 on assisted suicide. The Court initially postponed its ruling in order to give Parliament time to legislate. Only after legislative inaction did it intervene, partially decriminalizing the relevant offence under limited conditions.[57] A similar pattern appears in the case law on life imprisonment without parole (ergastolo ostativo). In judgment no. 253 of 2019, order no. 97 of 2021, and judgment no. 20 of 2022, the ICC declared aspects of the statutory regime incompatible with constitutional principles while simultaneously delaying the effects of its decisions in order to encourage legislative reform.[58]

quadro dei poteri costituzionali," in *Corte costituzionale e sviluppo della forma di governo in Italia*, edited by Barile Paolo *et al.*, (Bologna: Il Mulino, 1988), 515-527; Bartole Sergio, *Interpretazioni e trasformazioni della Costituzione repubblicana* (Bologna: Il Mulino, 2004).

[55] See Ruggeri Antonio, "Gli 'effetti politici' delle sentenze della Corte costituzionale emesse in occasione dei giudizi sulle leggi," *Consulta online*, 1 (2014): 1-23; Zagrebelsky Gustavo, "La Corte costituzionale e il legislatore," in *Corte costituzionale e sviluppo della forma di governo in Italia*, edited by Paolo Barile *et al.* (Bologna: Il Mulino, 1988), 103-158; Morrone Andrea, "Corte costituzionale: fattore condizionante o elemento strutturale?," *Rivista AIC*, 3 (2024): 186-273.

[56] Hirschl Ran, "The judicialization of mega-politics and the rise of political courts," *Annual Review of Political Science*, 1 (2008): 93-118; Shapiro Martin, *Courts: A Comparative and Political Analysis* (Chicago: University of Chicago Press, 1981); Whittington Keith, *Political Foundations of Judicial Supremacy* (Princeton: Princeton University Press, 2007); and Bickel Alexander, *The Least Dangerous Branch*, note 6.

[57] ICC, order no. 207/2018, and ICC, 242/2019.

[58] ICC, 253/2019; ICC, order no. 97/2021; ICC, 20/2022, and ICC, 227/2022.

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A second strategy is persuasive reasoning. The Court increasingly devotes attention not only to the outcome of its decisions, but also to the broader methodological principles that justify constitutional adjudication. This tendency can be seen in decision no. 10 of 2015 on the temporal effects of constitutional rulings, judgment no. 269 of 2017 on the relationship between constitutional review and EU law, and decision no. 20 of 2019 on the balance between transparency and personal data protection.[59] Persuasive reasoning becomes a source of legitimacy not because it eliminates conflict, but because it frames judicial intervention as publicly justifiable rather than simply institutionally binding.[60]

A third strategy concerns institutional communication. The Court has progressively expanded the visibility of its activities through public hearings, educational initiatives, official press releases, a more accessible use of its website, annual reports, and conferences.[61] Such initiatives reflect a growing awareness that the legitimacy of constitutional adjudication depends not only on the formal authority of judicial decisions, but also on their capacity to be understood and accepted by the broader political community.[62]

Institutional communication thus complements judicial reasoning by expanding the range of audiences to whom constitutional review must now explain itself. These strategies do not eliminate legitimacy tensions, rather they manage them by transforming authority into a function of justification and dialogue. As President Marta Cartabia observed in 2020, the authority of the Constitutional Court depends not only on the force of its decisions, but also on its capacity to be understood and accepted within the wider political community.[63]

Ultimately, legitimacy tensions in Italy appear less as episodic anomalies than as structural features of contemporary constitutionalism. The more representative institutions fail to perform their integrative function, the more the ICC is called upon to stabilize the system through adjudication. Yet this very success generates a further paradox. Judicial authority is strengthened by the Court's ability to manage unresolved conflicts, but it is also exposed to new forms of contestation, precisely because it becomes increasingly central to the functioning of the political system. The question hence is not whether the Italian Court should intervene at all. In many cases, intervention is unavoidable. What remains at stake is whether constitutional judgment can continue to stabilize democratic order without gradually becoming a structural substitute for representative politics.[64]

[59] ICC, 10/2015, conclusions on points of law, sections 7 and 8; ICC, 269/2017, conclusions on points of law, sections 5.1-5.3; ICC, 20/2019, conclusions on points of law, sections 3-5.

[60] On the idea that the authority of constitutional courts depends on the persuasive quality and public accessibility of their reasoning, *cf.* Sperti Angioletta, "Corte costituzionale e opinione pubblica," *Diritto e Società*, 4 (2019): 735-90; Pasquino Pasquale, "Constitutional adjudication and democracy. Comparative perspectives: USA, France, Italy," *Ratio Juris*, 1 (1998), 38-50; Kumm Mattias, "The idea of Socratic contestation and the right to justification: The point of rights-based proportionality review," *Law and Ethics of Human Rights*, 2 (2010): 141-75.

[61] Viganò Francesco, "La Corte costituzionale e la sua comunicazione," *Quaderni costituzionali*, 1 (2023): 45-72; Tega Diletta, *La Corte nel contesto* (Bologna: Il Mulino, 2020); Azzariti Gaetano, "La Corte costituzionale nella società," *Costituzionalismo.it*, 1 (2024): 1-7.

[62] See Conti Gian Luca, "La Corte costituzionale si apre (non solo) alla società civile," *Osservatorio sulle fonti*, 1 (2020), 1-37; Romboli Roberto, "Corte costituzionale e opinione pubblica. Genesi, forme, finalità," *Quaderni costituzionali*, 1 (2023): 45-72; Olivito Elisa, "Invito a Corte, con cautela. Il processo costituzionale si apre alla società civile," *Rivista italiana per le scienze giuridiche*, 2 (2020): 485-98.

[63] Cartabia Marta, *Relazione sull'attività della Corte costituzionale nel 2019*, in *Cortecostituzionale.it* (April 28, 2020).

[64] On the structural tension between constitutional adjudication and democratic representation, see Cap-

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6. *Functional Crises and Constitutional Adaptation*

Functional crises arise when extraordinary circumstances place the legal order under severe strain, testing the ability of institutions to respond effectively without abandoning the constitutional framework itself. Unlike crises of legality or legitimacy, functional crises do not primarily concern the validity of constitutional rules or the authority of constitutional institutions. Their central question is operational: whether constitutional systems can preserve institutional equilibrium under conditions of acute stress.[65]

Economic collapse, environmental disaster, public health emergencies, and major security threats all generate situations in which ordinary procedures may appear too slow or inadequate to address urgent collective dangers. Constitutional systems are therefore confronted with a recurring dilemma: how to reconcile the need for rapid governmental action with the protection of fundamental rights, democratic accountability, and the separation of powers.[66]

The ICC has had to confront these tensions across several fields. Although the substantive contexts vary, its case law reveals a common analytical structure. The Italian Court has not suspended constitutional guarantees during emergencies. Instead, it has sought to adapt constitutional principles in order to preserve their effectiveness under changing circumstances.[67]

Across different forms of functional crisis, three doctrinal pillars recur: proportionality, which ensures that emergency measures do not impose excessive restrictions on rights; temporality, which prevents exceptional measures from becoming permanent instruments of governance; and minimum core protection, which preserves the essential content of fundamental rights, even under emergency conditions.[68]

pelletti Mauro, *Giudici legislatori?* (Milan: Giuffrè, 1984); Baldassare Antonio, "Costituzione e teoria dei valori," *Politica del diritto*, 2 (1991): 639-64; Mezzanotte Carlo, *Corte costituzionale e legittimazione politica*, note 51. See also Silvestri Gaetano, *Dal potere ai princìpi. Libertà ed eguaglianza nel costituzionalismo contemporaneo* (Rome-Bari: Laterza, 2009).

65 Scheppele Kim, "Small emergencies," *Georgia Law Review*, 4 (2006): 835-62; Ramraj Victor, *Emergencies and the Limits of Legality* (Cambridge: Cambridge University Press, 2008); Rosenfeld Michel, "Judicial balancing in times of stress: Comparing the American, British, and Israeli approaches to the war on terror," *Cardozo Law Review*, 5 (2006): 2079-2101.

66 Sunstein Cass, *Laws of Fear: Beyond the Precautionary Principle* (Cambridge: Cambridge University Press, 2005); Barak Aharon, *Human Dignity: The Constitutional Value and the Constitutional Right* (Cambridge: Cambridge University Press, 2015); Holmes Stephen, "In case of emergency: Misunderstanding tradeoffs in the war on terror," *California Law Review*, 2 (2009): 301-355; Vermeule Adrian, *The Constitution of Risk* (Cambridge: 2014); and Ackerman Bruce, *The emergency Constitution*, note 5.

67 See Luciani Massimo, "Il sistema delle fonti del diritto alla prova dell'emergenza," *Rivista AIC*, 2 (2020): 1-33; Morrone Andrea, *Il custode della ragionevolezza* (Milan: Giuffrè, 2001); Cartabia Marta, "I principi di ragionevolezza e proporzionalità nella giurisprudenza costituzionale italiana. Relazione alla Conferenza trilaterale delle Corti costituzionali italiana, portoghese e spagnola, Rome, Palazzo della Consulta," in *Cortecostituzionale.it* (October 24-26, 2013).

68 *Cf. ex multis* Serges Giuliano, "L'emergenza: fattore esogeno di condizionamento della produzione normativa in tempo di crisi?," in *Modello costituzionale e trasformazione del sistema delle fonti nelle crisi economica e pandemica. Emergenza e persistenza*, edited by Cardone Andrea (Naples: Edizioni Scientifiche Italiane, 2023), 225-70; Baldini Vincenzo, "L'emergenza sanitaria: tra stato di eccezione, trasformazione della Costituzione e garanzie del pluralismo democratico", *Dirittifondamentali.it*, 1 (2023): 390-415; and Zagrebelsky Gustavo, *Il diritto mite*, note 8.

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a) Economic Crisis and Social Rights

The financial crisis that followed the global downturn of 2008 generated significant tensions between fiscal sustainability and the constitutional protection of social rights. Faced with mounting pressure on public finances, the legislature adopted austerity measures affecting pensions, public sector salaries, and welfare programmes.

The Italian Constitutional Court acknowledged that exceptional fiscal circumstances may justify temporary limitations on welfare provisions and it recognized that financial emergencies may require extraordinary budgetary interventions. At the same time, however, the Court insisted that such measures must remain temporary, exceptional, and proportionate. In judgment no. 223 of 2012, the Corte costituzionale held that emergency measures affecting public-sector remuneration could be justified only if they remained limited in duration and proportionate to the exceptional situations that had prompted them.[69]

In decision no. 264 of 2012, the ICC warned against the indefinite repetition of temporary fiscal measures, emphasizing that the constant renewal of emergency interventions risks transforming exceptional austerity policies into ordinary techniques of governance, and it emphasized that proportionality requires careful consideration of the impact of fiscal policies on vested rights and legitimate expectations.[70]

Later decisions refined the constitutional limits of austerity policies. Decision no. 310 of 2013 stressed that proportionality requires careful consideration of the impact of fiscal measures on vested rights and legitimate expectations. Decision no. 70 of 2015 further clarified that financial constraints cannot operate as an absolute criterion of economic policy. Budgetary discipline must instead be balanced against the constitutional protection of social rights. The Court made this point explicit when it stated that «it is the guarantee of inviolable rights that determines the allocation of resources, and not the other way around».[71]

Subsequent decisions extended the same logic to the protection of the so-called ‘essential levels of assistance’ (livelli essenziali delle prestazioni), emphasizing that public spending cuts remain constitutionally acceptable only if minimum standards of protection are preserved.[72]

b) Environmental and Industrial Crises

A second category of functional crisis concerns conflicts among public health, environmental protection, and economic activity.[73] These tensions emerged with particular intensity in the litigation surrounding the steel plant in Taranto, commonly known as the ‘Ilva case’, which has generated one of the most important lines of constitutional jurisprudence in recent years.[74]

[69] ICC, 223/2012, conclusions on points of law, section 11.

[70] ICC, 264/2012, conclusions on points of law, section 5.3. See also ICC, 275/2016.

[71] ICC, 310/2013; ICC, 70/2015, conclusions on points of law, section 10.

[72] ICC, 5/2018; ICC, 40/2019; ICC, 63/2020; and ICC, 168/2022. Carosi Aldo, “La Corte costituzionale tra autonomie territoriali, coordinamento finanziario e garanzia dei diritti,” *Rivista AIC*, 4 (2017): 1-33; Morrone Andrea, “Crisi economica e diritti. Appunti per lo stato costituzionale in Europa,” *Quaderni costituzionali*, 1 (2014): 79-108; Ruggeri Antonio, “Crisi economica, dialogo tra le Corti e salvaguardia dei diritti fondamentali (con specifico riguardo alla materia pensionistica),” *Dirittifondamentali.it*, 1 (2017): 1-25.

[73] Teubner Gunther, *Constitutional Fragments*, note 15; Choudhry Sujit, “Resisting democratic backsliding: An essay on Weimar, self-enforcing Constitutions, and the Frankfurt School,” *Global Constitutionalism*, 1 (2018): 54–81; and Tushnet Mark, *Constitutional hardball.*

[74] ICC, 85/2013, conclusions on points of law, sections 8-10.

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In judgment no. 85 of 2013, the Italian Court rejected the idea that one constitutional value could automatically prevail over all others. Instead, it held that health, environmental protection, and employment must be balanced within a framework capable of preserving the essential core of each interest.[75]

This approach was further refined in judgment no. 58 of 2018. There, the Corte costituzionale invalidated a legislative provision that effectively shielded certain forms of industrial conduct from criminal liability, reaffirming that economic continuity cannot justify the suspension of fundamental guarantees protecting health and environmental integrity.[76]

At the same time, however, the Court avoided framing the issue in terms of an absolute hierarchy among constitutional values. Rather than forcing the immediate closure of the industrial facility, it reiterated the need for legislative and administrative solutions, capable of reconciling environmental remediation with economic continuity.[77]

Functional crises do not necessarily require the suspension of constitutional guarantees. They require adaptive forms of balancing capable of structuring conflicts among competing constitutional values without eliminating them altogether.

c) Pandemic Crisis and Fundamental Freedoms

The Covid-19 pandemic posed even sharper challenges, combining rapid executive action, scientific uncertainty, and pervasive restrictions on fundamental freedoms. Unlike economic crises, which primarily affect distributive policies, the pandemic required immediate limitations on rights such as freedom of movement, freedom of assembly, religious liberty, economic initiative, and the right to work.

Faced with this unprecedented situation, the Italian Constitutional Court adopted a balanced and relatively deferential approach. It acknowledged the exceptional nature of the emergency, but rejected the idea that the Constitution could be suspended in the name of public necessity. In decision no. 37 of 2021, the ICC reaffirmed that the Constitution continues to govern public action even under emergency conditions. Public-health urgency does not create a constitutional vacuum. Rather, it requires a reconfiguration of constitutional priorities within the existing legal framework.[78]

The Court further emphasized that restrictions on fundamental freedoms may be justified only when they are supported by scientific evidence, limited, and subject to continuous review. The protection of public health is both a constitutional right and a duty of solidarity, but it cannot justify indefinite or unreviewable restrictions on individual liberty.[79]

Three factors proved decisive: justification, duration, and reviewability. Emergency measures were constitutionally acceptable only insofar as they remained linked to the persistence of the health risk and open to constant reassessment.[80] The emergency – in the Court's words – does not constitute a constitutional 'no man's land', but rather a domain in which the Constitution continues to operate thereby excluding any general suspension of rights.[81]

[75] See especially, ICC, 85/2013; and ICC, 121/2022, conclusions on points of law, section 5.

[76] ICC, 58/2018, conclusions on points of law, sections 7 and 8.

[77] ICC, 10/2016; ICC, 71/2023; ICC, 105/2024.

[78] ICC, 37/2021, conclusions on points of law, sections 7-9. See also ICC, 54/2022.

[79] ICC, 15/2023, conclusions on points of law, sections 8 and 9.

[80] ICC, 198/2021; ICC, 127/2022; ICC, 185/2022.

[81] ICC, 14/2023, conclusions on points of law, sections 7 and 8. *Cf.* ICC, 171/2022.

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Compared with the jurisprudence of other constitutional courts, the Italian approach appears relatively deferential. Unlike the German Federal Constitutional Court, which subjected specific restrictions to more intensive rights-based scrutiny, or the Spanish *Tribunal Constitutional*, which questioned the constitutional basis of certain emergency measures, the Italian Court largely adopted a procedural approach. The ICC did not impose rigid substantive limits. Instead, it concentrated on the existence of adequate parliamentary and judicial oversight, the quality of justification, and the proportionality of restrictions.[82]

This comparative difference is significant because it confirms a broader feature of the Italian model of constitutional resilience. The Court does not generally respond to emergencies through categorical assertions of rights absolutism. Instead, it seeks to preserve constitutional continuity by subjecting emergency governance to principles of proportionality, temporality, scientific justification, and reviewability.

Across these different contexts, the Italian experience reveals a common logic. The Court does not suspend the Constitution in times of crisis. It adapts constitutional principles in order to preserve their effectiveness under exceptional conditions. Constitutional resilience, therefore, depends not on the absence of conflict, but on the capacity of legal institutions to transform systemic tensions into legally structured processes of balancing and adjustment.[83]

7. *Constitutional Courts and the Risk of Institutional Overexposure*

The expanding role of constitutional courts in the management of crises inevitably raises a broader question about the limits of judicial intervention within democratic systems. As courts become more deeply involved in politically salient disputes – particularly those concerning fundamental rights, social policy, emergency governance, and the separation of powers – their decisions inevitably acquire wider political significance.[84]

Judicial intervention may strengthen constitutional guarantees, but it also exposes the courts to legitimacy tensions whenever judicial reasoning is perceived as displacing choices that would ordinarily belong to democratically accountable institutions. The issue, then, is not confined to the traditional counter-majoritarian difficulty. Constitutional courts do not simply invalidate legislation enacted by elected representatives. Increasingly, they participate in redefining the boundaries of political discretion itself.[85]

[82] King Jeff and Ferraz Octávio (eds.), *Comparing Covid Laws: A Critical Global Survey* (Oxford: Oxford University Press, 2026).

[83] See, for example, Romboli Roberto, "L'incidenza della pandemia da Coronavirus nel sistema costituzionale italiano," *Revista Brasileira de Estudos Politicos*, 1 (2021): 517-596; Viceconte Nicola, "Ragioni logiche, prima che giuridiche. La gestione della pandemia da SARS-CoV-2 alla prova della Corte costituzionale," *Italian Papers on Federalism*, 1 (2023): 73-105; Algostino Alessandra, "Costituzionalismo e distopia nella pandemia di Covid-19 tra fonti dell'emergenza e (s)bilanciamento dei diritti," *Costituzionalismo.it*, 1 (2021): 1-81; Piergigli Valeria, "Corti costituzionali e diritti ovvero l'onda lunga della risposta istituzionale all'emergenza sanitaria. Quali prospettive per il post-pandemia?," *DPCE online*, 1 (2023): 693-729.

[84] See Friedman Barry, *The Will of the People: How Public Opinion Has Influenced the Supreme Court*, note 18; Whittington Keith, *Political Foundations of Judicial Supremacy*, note 56; and Dixon Rosalind, "Weak-Form Judicial Review and the Right to Equality," *Supreme Court Law Review*, 1 (2009): 31-62.

[85] Grimm Dieter, *The Constitution of European Democracy*, note 17; Pildes Richard, "The constitution-

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For this reason, the central question is no longer whether courts have become excessively visible or politically exposed. In many contemporary democracies, constitutional judges have become structurally indispensable institutions. They are repeatedly called upon to resolve conflicts that political actors either cannot or will not address through ordinary democratic processes.

This dynamic may be understood through the distinction already introduced between judicial correction, judicial compensation, and judicial substitution. Judicial correction occurs when courts merely invalidate unconstitutional measures, while leaving the substantive political choices to representative institutions. Judicial compensation occurs when courts intervene in order to address temporary failures of the political process, while still preserving room for subsequent legislative action. Judicial substitution, by contrast, occurs when constitutional adjudication becomes the default institutional channel through which unresolved political conflicts are managed. Under these conditions, courts no longer compensate for the deficiencies of representative institutions; they begin to replace them functionally.[86]

Such judicial substitution alters the incentives of the political system itself. Executive reliance on emergency governance, legislative inertia, and the strategic avoidance of politically costly decisions may all be reinforced by the expectation that constitutional adjudication will eventually provide a solution. Judicial intervention then ceases to be exceptional, and instead becomes part of the ordinary operation of the political system.

Several indicators suggest when judicial stabilization begins to turn into institutional displacement. The first is persistent legislative inertia in areas involving politically controversial issues, especially where Parliament persistently avoids legislating because it expects the Court to intervene. The second is the growing tendency of courts to construct detailed normative frameworks that go beyond the correction of constitutional defects and begin to resemble primary political decision-making. The third is the transformation of institutional dialogue into a largely unilateral process. Constitutional negotiation presupposes reciprocal interaction between representative institutions and courts. When Parliament systematically fails to respond, judicial dialogue becomes difficult to distinguish from judicial replacement.[87]

This is the deeper paradox of constitutional resilience. The Italian Constitutional Court has often preserved institutional continuity precisely because it has been willing to intervene where political institutions were unable or unwilling to act. Nevertheless, the same centrality that strengthens the capacity for self-correction of the constitutional order may gradually weaken the autonomy of the political process.[88]

The ICC therefore offers a particularly revealing example of the ways in which con-

alization of democratic politics," *Harvard Law Review*, 1 (2004): 29-154; Tushnet Mark, "The Possibility of Illiberal Constitutionalism?," *Florida Law Review*, 6 (2017): 1366-84; and Shapiro Mark, *Courts*, note 56.

[86] Groppi Tania, "La Corte e 'la gente': uno sguardo 'dal basso' all'accesso incidentale alla giustizia costituzionale," *Rivista AIC*, 2 (2019): 408-77. See also Mezzanotte Carlo, *Il giudizio sulle leggi*; Baldassare Antonio, *Costituzione e teoria dei valori*, note 64; Gallo Franco, *Il futuro non è un vicolo cieco*, note 51.

[87] On the tendency of courts to elaborate increasingly detailed normative frameworks, see Roach Kent, "Dialogic judicial review and its critics," *Supreme Court Law Review*, 1 (2004): 49-104; Brewer-Carías Allan, *Constitutional Courts as Positive Legislators* (Cambridge: Cambridge University Press, 2011); Schauer Frederick, "Judicial supremacy and the modest Constitution," *California Law Review*, 4 (2004): 1045-67.

[88] Among Italian scholars Bin Roberto, *Diritti e argomenti. Il bilanciamento degli interessi nella giurisprudenza costituzionale* (Milan: Giuffrè, 1992); Luciani Massimo, *Ogni cosa al suo posto*, note 28; Zanon Nicolò, "Corte costituzionale, evoluzione della 'coscienza sociale'," note 18; Morrone Andrea, *Suprematismo giudiziario*, note 52.

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stitutional courts may function as institutions of crisis management within contemporary democracies. Across crises of legality, legitimacy, and functionality, the Italian Court has increasingly acted as an institution of continuity, transforming unresolved political conflicts into legally structured processes of adjudication, balancing, and institutional adjustment.[89]

For this reason, constitutional resilience cannot be measured simply by the capacity of courts to solve every crisis. It must also be assessed by asking whether judicial stabilization preserves, rather than replaces, the autonomy of democratic politics.

The success of judicial review becomes constitutionally sustainable only so long as it remains a mechanism of correction and compensation, rather than a permanent substitute for representative government.[90]

[89] On the risk that constitutional courts may become structurally integrated into the political process as a consequence of their effectiveness, see Barak Aharon, *The Judge in a Democracy*, note 16; Cappelletti Mauro, *Giudici legislatori?*, note 64; Stone Sweet Alec, *Constitutional Courts and Parliamentary Democracy*, note 50.

[90] On the idea that the boundary between adjudication and governance is continuously renegotiated through institutional practice, Choudhry Sujit, "The Lochner era and comparative constitutionalism," *International Journal of Constitutional Law*, 2 (2004): 1-55; Tushnet Mark, *Weak courts, strong rights*, note 4; and Waldron Jeremy, *Law and Disagreement*, note 21.

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