

INSTITUTE OF COMPARATIVE LAW  
INSTITUTE OF CRIMINOLOGICAL AND SOCIOLOGICAL RESEARCH  
JUDICIAL ACADEMY

X International Scientific Thematic Conference

# SHAPING JUSTICE: HOW PENAL LAW AND THE JUDICIARY ADDRESS CONTEMPORARY SOCIETAL CHALLENGES

Urednici/Editors:

Marina Matić Bošković

Jelena Kostić

Thematic Conference Proceedings of International Significance



BELGRADE, november 2025



**SHAPING JUSTICE:  
HOW PENAL LAW AND THE JUDICIARY  
ADDRESS CONTEMPORARY  
SOCIETAL CHALLENGES**





INSTITUTE OF COMPARATIVE LAW  
INSTITUTE OF CRIMINOLOGICAL AND SOCIOLOGICAL RESEARCH  
JUDICIAL ACADEMY

**X International Scientific Thematic Conference**

**SHAPING JUSTICE:  
HOW PENAL LAW AND THE JUDICIARY  
ADDRESS CONTEMPORARY  
SOCIETAL CHALLENGES**

**Urednici/Editors:**

Marina Matić Bošković  
Jelena Kostić

Thematic Conference Proceedings of International Significance



**BELGRADE, november 2025**

**X International Scientific Thematic Conference**  
**Shaping justice: How penal law and the judiciary address contemporary societal challenges**

*Publisher:*

Institute of Comparative Law  
Institute of Criminological and Sociological Research

*For the Publisher:*

Prof. dr Jelena Čeranić Perišić  
Dr Ivana Stevanović

*Reviewers:*

Prof. dr Ioana Vasiu (Romania)  
Prof. dr Teresa Russo (Italy)  
Prof. dr Elena Díaz Galán (Spain)

*Scientific Committee:*

Prof. dr Ana Lucia Valvo (Italia)	Prof. dr Sun Wanhui (China)
Doc. dr Ana Đanić Čeko (Croatia)	Prof. dr Piotr Mikuli (Poland)
Prof. dr Anita Rodina (Latvia)	Prof. dr Gordana Gasmi (Serbia)
Prof. dr Ondrej Blažo (Slovakia)	Dr Ana Čović (Serbia)
Prof. dr Sándor Madai (Hungary)	Dr Miloš Stanić (Serbia)
Prof. dr Jurij Pudovočkih (Russia)	Doc. dr Hana Kovacikova (Slovakia)

*Organizing Committee:*

Prof. dr Jelena Čeranić Perišić, Institute of Comparative Law, Belgrade, Serbia;  
dr Ivana Stevanović, Institute of Criminological and Sociological Research, Belgrade, Serbia;  
Srđan Pavličić, Judicial Academy, Belgrade, Serbia; dr Jelena Kostić, Institute of Comparative Law, Belgrade, Serbia; dr Marina Matić Bošković, Institute of Criminological and Sociological Research, Belgrade, Serbia;  
dr Miloš Vasović, Institute of Comparative Law, Belgrade, Serbia

*Official Language:*

English

*Prepress:*

Branimir Trošić

*Printed by:*

*Birograf Comp d.o.o.*

*Copies:*

100

ISBN 978-86-82582-45-8 (IUP)

ISBN 978-86-80756-86-8 (IKSI)

DOI: [https://doi.org/10.56461/ZR\\_25.ShapingJustice](https://doi.org/10.56461/ZR_25.ShapingJustice)

The conference was held on November 28, 2025 in Belgrade

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

# Contents

<b>FOREWORD</b> .....	<b>vii</b>
<b>Milan Škulić</b> <b>IMPLEMENTED AND PLANNED AMENDMENTS</b> <b>TO THE CRIMINAL CODE OF SERBIA</b> .....	<b>1</b>
<b>Leonardo Simões Agapito</b> <b>Matheus de Alencar e Miranda</b> <b>Túlio Felipe Xavier Januário</b> <b>JUDICIAL COMPLICITY IN EXPULSION:</b> <b>THE CASE OF BRASKEM AND THE EROSION</b> <b>OF THE PUBLIC SPHERE IN FLECHAL, MACEIÓ (BRAZIL)</b> .....	<b>33</b>
<b>Ivana P. Bodrožić</b> <b>Nataša Petrović-Tomić</b> <b>CONTEMPORARY CHALLENGES IN SHAPING</b> <b>CRIMINAL LAW PROTECTION OF THE INSURANCE MARKET</b> .....	<b>43</b>
<b>Miomira P. Kostić</b> <b>SHAPING JUSTICE AND HOMELESSNESS</b> .....	<b>55</b>
<b>Olga Sovova</b> <b>DIGITAL MEDIA WORLD IN THE COURTROOM.</b> <b>A CHALLENGE OR AN OBSTACLE FOR THE COURT PROCEEDINGS?</b> .....	<b>71</b>
<b>Manfred Dauster</b> <b>Julia Aileen Kreutz</b> <b>INSULTING POLITICIANS IN GERMANY:</b> <b>BETWEEN FREEDOM OF EXPRESSION AND PROTECTION OF HONOUR</b> ..	<b>79</b>
<b>Ana Krnić Kulušić</b> <b>CASE WEIGHTING IN PROSECUTORIAL OFFICES:</b> <b>DRIVING EFFICIENCY, FAIRNESS, AND PERFORMANCE</b> .....	<b>95</b>
<b>Maja Vitaljić</b> <b>ETHICAL AND PRACTICAL CHALLENGES</b> <b>OF ARTIFICIAL INTELLIGENCE (AI)</b> <b>IN LEGAL PRACTICE AND THE JUDICIARY</b> .....	<b>107</b>
<b>Zoran Pavlović</b> <b>Ištvan Laslo Gal</b> <b>POSITIVE OBLIGATIONS OF THE STATE</b> <b>IN CRIMINAL PROCEEDINGS – DUTY TO PROTECT / DUTY TO PUNISH</b> .	<b>121</b>

<b>Vladimir Šipovac</b> <b>Dejan Logarušić</b> <b>CRIMINAL LAW PROTECTION OF THE TAX SYSTEM: THE CHALLENGES OF DIGITALIZATION .....</b>	<b>133</b>
<b>Svetlana Nenadić</b> <b>A CRITICAL REFLECTION ON THE CONCEPT OF TRUTH IN INTERNATIONAL CRIMINAL JUSTICE.....</b>	<b>149</b>
<b>Ajna Jodanović</b> <b>Almir Beridan</b> <b>ENHANCING EU LEGAL AND POLITICAL COMMITMENT TO THE ICC: STRATEGIES TO SECURE ARRESTS AND COMBAT IMPUNITY .....</b>	<b>169</b>
<b>Nenad Bingulac</b> <b>Dalibor Krstinić</b> <b>PRIVATE PRISONS AS AN ASPECT OF NEOLIBERAL PENOLOGY .....</b>	<b>187</b>
<b>Dmitriy V. Galushko</b> <b>BETWEEN LAW AND POLITICS: THE JUDICIAL EVOLUTION OF CHALLENGING ECONOMIC RESTRICTIONS IN THE PURSUIT OF JUSTICE.....</b>	<b>205</b>
<b>Konstantin V. Kantserov</b> <b>UNIVERSALISM VS. REGIONALISM: THE FRAGMENTATION OF INTERNATIONAL LEGAL COOPERATION IN COMBATING CRIME ACROSS EURASIA.....</b>	<b>219</b>

## FOREWORD

The collection of papers *Shaping Justice: How Penal Law and the Judiciary Address Contemporary Societal Challenges* offers a comprehensive scholarly examination of the evolving role of criminal law and judicial institutions in responding to the complex social, technological, and political transformations of the contemporary world. Prepared by the Institute of Criminological and Sociological Research and the Institute for Comparative Law, in collaboration with the Ministry of Science, Technological Development and Innovation of the Republic of Serbia and the Judicial Academy in Belgrade, this collection represents the outcome of the 10<sup>th</sup> International Scientific Thematic Conference held on November 28, 2025.

Criminal law and the administration of justice increasingly operate within a context marked by accelerated normative change, expanding transnational interdependence, and heightened societal expectations. Penal systems are called upon not only to ensure legal certainty and procedural fairness, but also to respond to structural inequalities, technological disruption, economic transformation, and shifting conceptions of public interest and accountability. In this environment, the boundaries between legal doctrine, institutional practice, and broader socio-political processes become increasingly permeable. This collection of papers engages with these developments by situating penal law and the judiciary within their wider normative, social, and institutional frameworks.

The contributions assembled in this collection address a diverse yet interconnected set of issues central to contemporary criminal justice. Several papers examine legislative reform and doctrinal evolution in criminal law, reflecting on the aims, limits, and unintended consequences of normative intervention. These analyses are complemented by studies that explore the judiciary's engagement with socially sensitive phenomena, such as economic harm, environmental degradation, homelessness, and the regulation of complex markets. Together, they underscore the growing role of criminal law as an instrument through which societies negotiate responsibility, vulnerability, and social order.

A significant thematic strand of the volume concerns the impact of technological change on criminal proceedings and judicial reasoning. The increasing

presence of digital media, data-driven evidence, and artificial intelligence in legal practice raises fundamental questions regarding fairness, transparency, epistemic reliability, and ethical accountability. The contributions addressing these issues critically assess whether and how emerging technologies can be reconciled with established procedural guarantees and the core values of the rule of law.

The collection further engages with enduring constitutional and human rights questions, including the limits of freedom of expression, the protection of dignity and reputation, and the tension between individual rights and collective interests. Institutional perspectives on prosecutorial and judicial functioning, efficiency, and performance offer additional insight into how organizational design and managerial tools influence the realization of justice in practice.

Beyond the domestic sphere, the volume places considerable emphasis on international and transnational dimensions of criminal justice. Several contributions examine foundational issues of international criminal law, including accountability for serious crimes, the conceptualization of truth, and the interplay between duties to punish and duties to protect. Others address the fragmentation and politicization of international legal cooperation, highlighting the challenges posed by geopolitical conflict, economic sanctions, and divergent regional approaches to crime control. These analyses reflect the increasingly complex environment in which national criminal justice systems operate and the necessity of situating domestic developments within broader international legal and political contexts.

Methodologically, the volume is characterized by a plurality of approaches, combining doctrinal analysis, comparative perspectives, critical reflection, and interdisciplinary insight. Contributions from scholars representing different legal traditions and jurisdictions enrich the dialogue and enable a more nuanced understanding of shared challenges and divergent responses. This comparative dimension is particularly valuable in revealing both the contingent and structural features of contemporary criminal justice systems.

By bringing together these diverse perspectives, *Shaping Justice: How Penal Law and the Judiciary Address Contemporary Societal Challenges* seeks to contribute to ongoing scholarly debates on the role of criminal law and the judiciary in contemporary societies. The volume aims to advance critical reflection on how justice is constructed, contested, and implemented in practice, and to provide a foundation for further research, dialogue, and reform-oriented thinking in the field of criminal law and criminal justice.

Belgrade, December 29<sup>th</sup>, 2025

Marina Matic Bošković, PhD  
Jelena Kostić, PhD

## IMPLEMENTED AND PLANNED AMENDMENTS TO THE CRIMINAL CODE OF SERBIA

Milan Škulić\*

*The paper explains and analyzes both the already implemented amendments and supplements to the Criminal Code of Serbia, as well as the planned novelties to the main source of Serbian substantive criminal law. It is particularly emphasized that a large number of previously adopted amendments to the Criminal Code of Serbia have been marked by strong elements of penal populism, reflected in institutes such as multiple recidivism, the elimination of the possibility of mitigating punishment for certain criminal offenses (introduced without clear criteria), the reduction of the scope for imposing suspended sentences, and similar tendencies.*

*Very few changes are planned in the domain of the General Part of the Criminal Code, which is generally positive, especially from the perspective of preserving the overall concept of Serbian criminal law. By far the largest number of planned amendments concerns the Special Part of the Code, and includes the introduction of entirely new criminal offenses, the modification of some previously existing ones, as well as prescribing harsher penalties for a range of criminal offenses—particularly offenses against sexual freedom. This continues the trend seen in earlier reforms of Serbian criminal law, although such changes most often lack valid justification. Many of the planned amendments represent manifestations of penal populism in the sphere of statutory sentencing policy, which is certainly not a positive development.*

*In addition, the author concludes that excessive speed in adopting amendments and supplements to the Criminal Code often results in unnecessary legal and technical errors, while also producing norms of insufficient quality. This may, in certain cases, amount to a violation of the *lex certa* component of the principle of legality—one of the core principles strictly prescribed by the Criminal Code and also one of the most important constitutional principles in Serbia.*

**KEYWORDS:** *Criminal Law, Criminal Code, Amendments, Penal Populism, Draft Law.*

---

\* PhD, Professor at the Faculty of Law, University of Belgrade.  
ORCID: <https://orcid.org/0000-0002-4515-1852>  
E-mail: [skulic@ius.bg.ac.rs](mailto:skulic@ius.bg.ac.rs)

## 1. Introduction

The legal system of Serbia, including its criminal law component, has been in a very "dynamic state" for a long time, which is reflected in large and often radical changes to numerous laws. This also applies to the criminal law of Serbia, both material and procedural, which has been in a constant process of reform for years, even decades, which is characterized by frequent changes both in the sphere of criminal substantive law and in the field of criminal procedural law (Škulić, 2025a, pp. 50–51). There have been numerous amendments to the Criminal Code, and new modifications to this basic source of Serbian substantive criminal law are planned, which will/should result from the current Draft/Proposal of the Law on Amendments to the Criminal Code. Some of those modifications, especially those that can be considered, among other things, manifestations of penal populism, will be analyzed in this text. Although criminal law, both substantively and procedurally, must change over time and adapt to certain social changes/needs, major changes, especially when they are of a radical nature in such an important area of the legal system, are sometimes very problematic, and often not even in the interest of elementary requirements from the domain of the principle of legal certainty.

In the field of criminal law is particularly inadequate too great dynamic of normative changes and when the amendments of the criminal legislation have a radical character and are manifested to conceptual modifications, as is the case with the current Criminal Procedure Code. When it comes to criminal material law, fortunately there were no such big conceptual manifestations on the scene, but some changes and additions, as well as some of the planned amendments to that basic source of Serbian criminal material law, are manifestations of unnecessary and harmful penal populism (Škulić, 2025b, pp. 22–23). Since in a legal state that is characterized by the rule of law, from the point of view of protecting society from crime and for the purpose of realizing the basic function of criminal law, which is the protective function, the enormous importance of criminal law - both substantive and procedural, and since a large number of criminal law norms (such as those concerning the principle of legality in criminal substantive law or those that regulate basic rights in criminal proceedings, when it comes to criminal procedural law), are also based on relevant constitutional rules, it is necessary is to always exercise great caution when reforms in the domain of criminal law are too radical or insufficiently prepared, that is, implemented in an insufficiently high-quality manner (Škulić, 2013, p. 233).

The norms of criminal substantive law can be effectively brought to life only by applying adequate rules of criminal procedural law. Therefore, by the logic of things, criminal procedural law is correlative to criminal substantive law (Škulić, 2024a, p. 28). It is considered in the theory of criminal law that there are three basic aspects of the application of criminal procedural norms: "legal provisions must be formulated in such a way that they appropriately support the substantive criminal law to be implemented; they must simultaneously establish the limits of the right of the criminal justice authorities to encroach on the protected freedoms of individuals; and they must finally create the possibility to re-establish the disturbed legal peace with a legally binding decision" (Roxin, 1998, pp. 1–2). Therefore, everyone should keep in mind that the protective function of

criminal law is its basic and most important function, and "it is the reason for its existence" (Stojanović, 2024, p. 67). Therefore, the basic task of the criminal justice system is the first protective function it performs – the preservation of the elementary values that enable the common life of people in a community (Vuković, 2021, p. 1). Of course, it is extremely important to design an adequate criminal law "zone", in the sense that criminal law protects only those goods and values that deserve it due to their importance, and that the right measure of punishment is also found in the event of damage or endangerment of those goods/values. If this is exaggerated or reasoned in a generally populist and demagogic way, one enters the sphere of penal populism.

When the criminal legislation is under the influence of harmful penal populism, the establishment of such a "violated legal peace" by applying specific criminal law norms to a specific life situation, in the environment of fair criminal procedure, which is one of the characteristics of a legal state that is distinguished by the rule of law, and which belongs to the domain of criminal procedural law, cannot be effectively realized from the point of view of the general not only criminal law, but also the social goal that concerns the effective suppression of crime. As it is generally considered that "constitutional law is the foundation of criminal law" (Schönke & Schröder, 2019, p. 18) which results from the enormous importance of criminal law, both substantive and procedural, for the protection of basic constitutionally guaranteed human rights and freedoms, it is very important to pay attention to the relevant constitutional provisions when analyzing and evaluating both positive law and those planned in accordance with the Draft Law on Amendments to the Criminal Code.

## **2. The main domain and direction of the modifications of the Serbian Criminal Code implemented so far**

The constant process of reform in numerous areas of the Serbian legal system did not, of course, bypass criminal law, which was once completely justified, and for some changes there was no real valid *ratio legis*.

Since its entry into force, the Criminal Code has been amended and supplemented several times, but these changes most often did not concern the general part of that code, which is in principle a good thing, because it did not encroach too much on the basic concept of the Criminal Code, which is generally adequate and basically similar to classical continental-European conceptual solutions in the domain of the general part of criminal law. Therefore, even now the focus of the planned modifications of the Serbian Criminal Code is not on its general part, which can be considered adequate in principle.

## **3. Basic planned amendments to the general part of the Criminal Code of Serbia**

Part of the changes planned in the general part of the Criminal Code is of a terminological nature, and concerns the recent constitutional changes, according to which the Republic Public Prosecutor's Office was renamed the Supreme Public Prosecutor's

Office, the Republic Public Prosecutor is now the Supreme Public Prosecutor, there are no more deputy public prosecutors, but the holders of the public prosecutor's office have the status of public prosecutors, and in each public prosecutor's office there is a chief public prosecutor, etc. Some of these terminological changes harmonized with the valid constitutional provisions are also reflected in some of the planned changes in a special part of the Criminal Code, which concerns certain incriminations in which public prosecutors and holders of public prosecutorial functions are mentioned.

Of particular importance are some changes in the sphere of substantive criminal law that are planned by the Draft Law on Amendments to the Criminal Code:

- 1) specifying that the new purpose of criminal sanctions projected by the criminal legislation (which is explained in more detail in the following text concerning the manifestations of penal populism), namely "achieving fairness and proportionality between the committed act and the severity of the criminal sanction", does not refer to the relationship between the committed act and the severity of the criminal sanction, but to the relationship between the committed act and the severity of the punishment. This is a better normative solution compared to the existing ones, although otherwise this new purpose of criminal sanctioning/punishment, which represents, among other things, a manifestation of penal populism, is in principle not adequate, because only when it comes to punishment, in principle, one can talk about its severity. By the way, it is a mistake here to talk about a "offence" and not a "criminal offence", because only a criminal act/offence is punishable.
- 2) Redefining the characteristics of an attack in relation to which a necessary defense is possible as a legal basis for the exclusion of illegality, by stating that it must be an illegal attack, which is simultaneous "or immediately imminent". In this way, it is proposed to introduce into the legal text what was not otherwise, in judicial practice, as well as in the theory of criminal law, even until now, most often disputed (Škulić, 2017a, p. 47).
- 3) Expanding the exhaustively and restrictively enumerated motives for a crime committed out of hatred, by including disability in addition to the passive subject's belonging to a specific race and religion, national or ethnic affiliation, sex, sexual orientation or gender identity of another person, in such "hateful" motivations. And then the court will appreciate such a circumstance, as well as the other circumstances listed as a motive for the commission of a specific hate crime, as a mandatory aggravating circumstance, unless it is already prescribed as a feature of the criminal offense. Expanding the category of possible passive subjects/victims, so-called hate crime is also a type of victimological orientation of the legislator.
- 4) Redefining the now ill-defined element of the institution of multiple restitution, which concerns the method of determining a new special minimum, when the conditions for the existence of multiple restitution are met, by introducing a new limit of the legal minimum sentence instead of the "range of the prescribed sentence" - "starting from the smallest measure of that sentence". Also, when it comes to multiple restitution, the Draft Law on Amendments and Supplements to the Criminal Code justifiably suggests that it must be about the same or similar criminal acts,

and not only criminal acts committed with intent. In addition, in this part of the Draft Law on Amendments and Supplements to the Criminal Code, it is specified, when it comes to multiple returns/multiple returnees, that a previous conviction means a conviction for a criminal offense that was established by a final judgment of a domestic court, that is, a court of a foreign country."

The replacement of the current somewhat "metaphorical" term computer virus with a more adequate term, which is based more on technical and technological postulates, along with the substitution of the definition of "computer virus" in the existing legal glossary (Article 112, paragraph 20 of the CC) with a more complete, albeit somewhat too complicated, definition of "malicious computer program".

#### **4. Basic planned amendments to the special part of the Criminal Code of Serbia**

As has been the case so far with each of the several amendments to the Criminal Code, the basic planned modifications are in the sphere of a special part of that code. A large part of these planned changes concerns the prescription of heavier penalties for a series of criminal acts, which sometimes, unfortunately, manifests elements of penal populism as well (Škulić & Lukić, 2025, p. 4). Some of the previously existing criminal offenses are being modified to a certain extent, and the introduction of some completely new and hitherto non-existent incriminations is also planned, which, according to the logic of things, represents the most far-reaching planned modification of a special part of the criminal law of Serbia, and thus deserves special attention during the doctrinal analysis.

There are a whole series of new criminal offenses that are planned by the Draft Law on Amendments to the Criminal Code, and on this occasion only some of those new incriminations will be analyzed, whose normative projection deserves special attention, either due to the need to point out the basic characteristics of those new criminal offenses, or to point out certain problems in their normative definition, possible problems in practice, as well as the existence of room for certain improvements. Particularly interesting and significant for doctrinal analysis are some new incriminations planned by the provisions of the Draft Law on Amendments and to the Criminal Code, as well as certain major modifications in the sphere of some previously existing criminal offenses in the Serbian criminal justice system. Special attention will be paid to this in the following text.

#### **5. Some new incriminations foreseen by the Draft Law on Amendments to the Criminal Code of Serbia**

As has been the case so far with each of the several amendments to the Criminal Code, the basic planned modifications are in the sphere of a special part of that code. A large part of these planned changes concerns the prescription of heavier penalties for a series of criminal acts, which sometimes, unfortunately, manifests elements of penal

populism as well. Some of the previously existing criminal offenses are being modified to a certain extent, and the introduction of some completely new and hitherto non-existent incriminations is also planned, which, according to the logic of things, represents the most far-reaching planned modification of a special part of the criminal law of Serbia, and thus deserves special attention during the doctrinal analysis.

There are a whole series of new criminal offenses that are planned by the Draft Law on Amendments to the Criminal Code, and on this occasion only some of those new incriminations will be analyzed, whose normative projection deserves special attention, either due to the need to point out the basic characteristics of those new criminal offenses, or to point out certain problems in their normative definition, possible problems in practice, as well as the existence of room for certain improvements.

### ***5.1. Misuse of a recording, photograph, portrait, audio recording or writing with sexually explicit content***

The criminal offense of misusing a recording, photograph, portrait, audio recording or file with sexually explicit content is the so-called revenge porn. It is a specific criminal offense that essentially represents a crime against honor and reputation, but it has certain similarities with some criminal offenses against sexual freedom. In practice, this type of tort is most often committed by placing certain sexually explicit content on the Internet, that is, by using social networks. Such socially unacceptable behaviors, which in practice extremely hard to victimize the victims of such offenses, but also their families and in general those close to the immediate victims/passive subjects in terms of newly planned incrimination, have experienced a great expansion in recent years, which is based both on the expansion of social networks themselves, and on the very widespread use of certain technical devices, above all, mobile phones, computers, etc., which create photos, audio-video recordings and other materials that are then marketed using the Internet. Although the so-called revenge pornography and, in general, placing in the public content of a sexually explicit character, could to some extent be subsumed under some previously existing incriminations, such as insult, the introduction of a special criminal offense of this type certainly has a justified ratio legis.

The normative construction of the new criminal offense of misusing a recording, photograph, portrait, audio recording or file with sexually explicit content, which would be contained in Article 145a of the Criminal Code, would, in accordance with the Draft Law on Amendments and Supplements to the Criminal Code, consist in the existence of the following forms of this new incrimination: 1) three basic forms, as well as 2) three more serious forms of the new criminal offense, one of which is the most serious form, which manifests itself in three subvariants.

The first basic form of the criminal offense of misusing a recording, photograph, portrait, audio recording or document with sexually explicit content would exist when the perpetrator makes available to a third party a video or other recording, photograph, portrait, audio recording or document with sexually explicit content, without the consent of the person to whom the document refers, i.e. without the consent of the

person shown in the recording, photograph or portrait or whose voice is recorded on the audio recording

The second basic form of the criminal offense of misusing a recording, photograph, portrait, audio recording or writing with sexually explicit content would exist if the first basic form is realized by the perpetrator cumulatively: 1) using a computer system or in another way, creating a new or modifying an existing video or other recording, photograph, portrait, audio recording or writing with sexually explicit content, and then 2) using or making available to a third party such recording, photo, portrait, audio recording or writing as true.

The third basic form of the criminal offense of misusing a video, photo, portrait, audio recording or file with sexually explicit content exists when the perpetrator threatens another to make his video or other video, photo, portrait, audio recording or file with sexually explicit content available to a third party.

The same punishment is prescribed for each of the three basic forms of the criminal offense of misusing a video, photograph, portrait, audio recording or file with sexually explicit content, which is a prison sentence of three months to three years.

The qualifying/aggravating circumstance of the first serious form of the criminal offense of misusing a video, photograph, portrait, audio recording or document with sexually explicit content is contained cumulatively in: 1) the use of a special means and method of execution (use of information and communication technology), and 2) the placement of specific information to a larger number of users of a specific form of information and communication technology. information and communication technologies or in some other way due to which a video or other recording, photograph, portrait, audio recording or document with sexually explicit content became available to a large number of persons and he is threatened with imprisonment from six months to five years.

Another more serious form of the criminal offense of misusing a video, photograph, portrait, audio recording or file with sexually explicit content is qualified by the status of a passive subject, that is, his age. Then when any of the three basic forms of the criminal offense of misusing a video, photograph, portrait, audio recording or file with sexually explicit content is committed against a child (a person who is under 14 years old at the time of execution), then a prison sentence of one to eight years is prescribed for that more serious form.

The third serious form of the criminal offense of misusing a video, photograph, portrait, audio recording or file with sexually explicit content is the most serious form of this criminal offense and it has its three sub-variants, depending on whether the qualifying circumstance exists in relation to one of the three basic forms or it exists in regard to one of the previous two more severe forms. This (most) serious form of the criminal offense of misusing a recording, photograph, portrait, audio recording or file with sexually explicit content is qualified by the status/official capacity of the perpetrator, which means that it is a so-called status delict. If any of the three basic forms and the first two serious forms of the criminal offense of misusing a video, photograph, portrait, audio recording or file with sexually explicit content is committed by an official in the

performance of his duties, he will be punished: 1) for any of the three basic forms by imprisonment from six months to five years, 2) for the first serious form - by imprisonment from one to eight years, and 3) for the second serious form - by criminal imprisonment from two to ten years.

The provisions of the Draft Law on Amendments to the Criminal Code stipulate that Article 145a paragraph 7 of the Criminal Code prescribes the mandatory confiscation of videos or other recordings, photographs, portraits, audio recordings and files, as well as special devices used to commit the criminal offense of abuse of videos, photographs, portraits, audio recordings or files with sexually explicit content, which would otherwise be implied by the application of general criminal law rules.

## 5.2. *Sexual intercourse without consent*

It is believed that "for a long time, the central issue with criminal acts against sexual freedom (for which the term sexual offenses are usually used) has been how to regulate them by law, that is, where to set the boundary between what is permissible and what is criminal" (Stojanović, 2009, p. 442). This problem is obviously very topical in relation to the criminal legislation of Serbia, which has been demonstrating a distinct "dynamism" for a number of recent years, for which there is still no complete justification, although otherwise, in principle, it is not in dispute that criminal legislation, in order to adapt to important social changes, the need to react to new forms of crime associated with them, etc., must be modified from time to time, and sometimes relatively frequently, to a certain extent.

When defining rape in contemporary criminal law, two main approaches are observed: A) the traditional approach to rape, in which rape is usually defined as "the forced sexual intercourse of a woman", i.e. the sexual intercourse of a woman by a man, using force or an appropriately qualified threat, such as a threat of attack on life or body; and B) a relatively new approach, mainly based on "changing cultural attitudes towards sexuality", which is characteristic of the last few decades of the 20<sup>th</sup> century and whose main features are (Škulić, 2017b, pp. 396–397):

1. the use of gender-neutral, i.e. gender-universal terms, both in relation to the perpetrator and in relation to the passive subject, i.e. the victim, which is achieved by legal formulations that refer to the person, and not exclusively to the man or woman in the "exclusive" criminal law statuses of the perpetrator/passive subject;
2. avoiding or "relativizing" the term "promise" or "sexual intercourse/sexual act", instead of which some criminal legislation uses expressions of very broad meaning, and primarily the term "sexual intercourse", which is not limited to "penetration of the penis into the vagina", i.e. another type of penetration of the male genital organ,<sup>1</sup> as well as introducing appropriate alternative prescribed acts of rape, such as forced sexual intercourse or an act equivalent to forced sexual intercourse, as was

---

<sup>1</sup> For example, in many states in the USA, as well as in Canada, when incriminating sexual crimes, not only are "common" terms such as "coercion" or newer expressions such as "sexual intercourse" not used, but all such crimes are treated exclusively as "sexual assaults", which, according to their characteristics (such as whether they were carried out by force or threat, by using some other relevant circumstances that "broke"

- done, for example, in the Criminal Code of Serbia, and is similar, for example, in the Criminal Code of Austria; and
3. in some criminal legislation, the term sexual intercourse is additionally defined by the attribute "illegal", which is also sometimes attributed a very broad meaning, and in this way the concept of illegal sexual intercourse is significantly expanded (Bonnie et al., 1997, pp. 270–271).
  4. not limiting the act of committing rape only to a forced sexual act (whether it is restrictively defined exclusively as fornication or alternatively, so that it also includes other relevant sexual acts, such as "an act that is equated with fornication"), which means that rape exists even when the perpetrator did not use force or a qualified threat, and despite that, fornication, or another sexual act that is equated with fornication, was performed without coercion, but still against the will of the victim, or the passive subject.

This very broad approach to defining rape is largely a consequence of the significantly increased social engagement of women in the second half of the 20<sup>th</sup> century, and in particular the organized efforts of various women's movements, primarily in "Western" countries, and especially in the USA, where it was concluded as early as the 1980s that "the crime of rape is becoming the most discussed crime in that country. (Gilbert, 1980, p. 256). It is undeniable that in this regard, too, the influence of some feminist movements in the USA, and then later throughout the world, was extremely strong and significant. It is believed that in this regard, i.e. in relation to the change in the dominant consciousness in the USA, and then throughout the world in relation to the basic content of rape, the roles of the perpetrator and the victim, but also the essential etiology of this criminal act, a now famous, even legendary book by *Susan Brownmiller - Against our Will, Men, Women and Rape*, was crucial.<sup>2</sup> *Susan Brownmiller* was a socially very engaged American journalist, who was one of the most prominent feminists of the 20<sup>th</sup> century. Her understandings, although she is not a "trained criminologist", today represent mandatory "criminological reading" when it comes to criminological, especially victimological, and to some extent also criminal law views on sexual offenses.

*Susan Brownmiller's* key thesis regarding rape is expressed in her very famous book "Against our Will, Men, Women and Rape". This book was then often summarized in a summary version under the title "No against our Will", and quickly became a kind of feminist manifesto, but finally, as is especially evident in the changes in the definition of rape in many national criminal law systems under the influence of the Istanbul Convention, it also strikingly received its immediate criminal law outcome (Brownmiller, 1994, pp. 16–17). *Susan Brownmiller's* key thesis boils down to the strict position that rape is not primarily a "sexual act", but rather the basic content of rape (phenomenological component), but also the dominant impulse for committing this criminal act

---

the will of the victim, i.e. enabled sexual intercourse against her will, etc.), are divided in the legal provisions themselves according to their severity into sexual assaults of different "degrees" (M. Škuljić, 2022, p. 208).

<sup>2</sup> *Susan Brownmiller's* famous book *Against Our Will: Men, Women, and Rape*, was in 1975 selected by *The New York Public Library* as one of the 100 most important books of the 20<sup>th</sup> century.

(etiological component) - gaining and demonstrating power, primarily "of a man in relation to a woman", and even "keeping women in centuries-old subordination in relation to men" (which is of course an extremely far-reaching and very radical feminist concept), which also reflects the very significant victimological component of rape, but also of other sexual offenses (Brownmiller, 1994, pp. 16–17). Also, it should be borne in mind here that Susan Brownmiller also considers the "homosexual variant of rape", i.e. The rape of a man is also treated as a manifestation of the power of some men over other men (male), so it does not view forced homosexual relations as forced sexual activity, but as a kind of "act of power" or "proof of power" of some men (male perpetrators) over other men (male victims) (Brownmiller, 1994, pp. 16–17).

Since the entry into force of the current Criminal Code (adopted in 2005, implementation began in 2006), the criminal legislation of Serbia has opted for a more modern approach to defining rape, and now, with planned modifications in the form of prescribing a separate criminal offense of non-consensual sexual intercourse, it aims to fully comply with the requirements of the Istanbul Convention. A promise, i.e. sexual intercourse without consent is a new criminal offense against sexual freedom, which is planned to be introduced into the criminal justice system of Serbia by the Draft Law on Amendments to the Criminal Code. Ever since the ratification of the Istanbul Convention, the question of such incrimination has arisen, whether it should be introduced into the Criminal Code of Serbia as a separate criminal offense, or whether it formally represents a variant of rape.

The planning of the introduction of this new sexual crime in the criminal legislation of Serbia has its own interesting history. Namely, back in 2016, in the Draft Law on Amendments and Amendments to the Criminal Code, and later in the Proposal for the Law on Amendments and Amendments to the Criminal Code itself, when a large part of the relevant criminal law norms were harmonized with the requirements of the Istanbul Convention, a completely new form of rape was also prescribed for our practice and, to some extent, criminal law science, which is rape or an act equated with rape against the will of a passive subject, but without applied coercion. In a legal and technical sense, the normative construction of this form of rape was also significantly different from classic rape, because here it is no longer (as in typical rape) about the appropriate "combination" of a promise or an act equivalent to a promise with coercion, which amounts to a forced promise or an act equivalent to it, but in this form of rape it is enough that there is no adequate consent of the passive subject to the sexual intercourse, i.e. promise or an act equivalent to it (Škulić, 2019, p. 23).

This form of rape should have been prescribed in Article 178, paragraph 2 of the Criminal Code, which should have been amended in order to harmonize it with the Istanbul Convention (The Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence - Istanbul Convention), which would have prescribed the criminal offense of rape in a significantly redefined form (Article 10 of the Draft Law), which was abandoned in the meantime.

In addition, in the legal and technical sense, the normative construction of this form of rape is significantly different compared to classic rape, because here it is no

longer (as in typical rape) the appropriate "combination" of rape or an act equivalent to rape with coercion, which amounts to forced rape or an act equivalent to it, but with this form of rape it is sufficient that there is no adequate consent of the passive subject to rape or an act equivalent to it.

Thus, according to the new provision (Article 178, paragraph 2 of the CC), which was prescribed by the Draft Law on Amendments and Supplements to the Criminal Code from 2016, a form of rape would be prescribed that would exist when the perpetrator commits rape or an act equivalent to it against another, despite clearly expressed opposition, and on the condition that the characteristics of "classic rape" were not realized, as an act consisting in the coercion of a passive subject to rape or equivalent to it act, using force or threatening to directly attack the life or body of that person or a person close to him, i.e. of the offense prescribed in Article 178, paragraph 1 of the Criminal Code. A prison sentence of six months to five years was foreseen for the new form of rape.

Apart from the formal reason that the provisions of the Istanbul Convention require a significant redefinition of rape or the introduction of a special criminal offense (promising or an act equated to it without the consent of the victim), the basic ratio legis of the new definition of rape, i.e. the introduction of a special form of this criminal offense, in the sphere of some possible practical problems, which seem to us to be quite rare and mostly difficult to imagine, without it sounding even remotely realistic.

Namely, in the explanation of the Draft Law on Amendments from 2016, it is stated that "the existing solution to this criminal offense cannot be applied to all cases in which there was no consent, i.e. when there is no consensual sexual relationship." It is another matter, of course, that in practice it will be very difficult to prove that there was an act of deception or an act equated with it against the clearly expressed will of the passive subject, i.e. that it is not a "consensual relationship" (in that case, one could possibly discuss the existence of (non)distorted, i.e. (non)removable real delusion, but without any relevant coercion.

Without a clear explanation, the foreseen new form of rape was abandoned "at the end" of the adoption of amendments to the Criminal Code of Serbia in 2016, although the fact remains that the provisions of the Istanbul Convention formally require that in our criminal legislation, there should be such provisions, that is, such a "variant" of the criminal offense of rape. We should certainly expect that in some future period, the Criminal Code of Serbia will be "enriched" for such a new incrimination, i.e. a new variant of rape, either in the legal and technical sense as a separate criminal offense (involuntary rape or rape against the will of a passive subject), as is planned by the current Draft Law on Amendments and Supplements to the Criminal Code, either as a special form of the already existing incrimination of rape.

Realistically, one can also start from the statement that it is not entirely simple and undisputed to talk about rape in the narrowest sense of the word, which is, after all, a terminological issue, when it comes to rape/an act equated with rape without the consent of the passive subject, because force implies not only the absence of the consent of the passive subject, but also coercion in the sense of criminal law, in the form of any force or relevant threat. Of course, this does not call into question the justification of

incriminating rape itself/with rape of an equivalent act, regardless of the fact that it is not about forced rape/with rape of an equivalent act.

Admittedly, not here either, that is. when it comes to "classic" rape as a basic criminal offense against sexual freedom in the current Criminal Code of Serbia, the "language" of the legislator is not perfect, because at the root of the word rape is "force", and forced rape/an act equated with rape can be carried out not only by force, but also by another form of coercion, which means a qualified threat. Therefore, in fact, the correct term for "classical rape" would be an otherwise uncommon expression in our country - "forced sexual intercourse or forced sexual intercourse with sexual intercourse", and such a term would in its meaning, i.e., in the terminological sense, really include all forms of forced sexual intercourse/with sexual intercourse with sexual intercourse, which means both promise/sexual intercourse with sexual intercourse carried out by force. Therefore, it would not be illogical if, in the Law on Amendments and Supplements to the Criminal Code, the already existing incrimination of rape was only supplemented, so that rape/an act equated with rape would be the basic form of rape, and then the first more serious form would exist when forced rape/an act equated with rape was realized. For the most part, this is still a legal-technical issue, not an essential one, and the requirement from the Istanbul Convention is fully met by the planned special criminalization of rape without consent. Namely, the convention itself requires that rape/an act equated with rape be punishable, and it is not necessary that they be terminologically defined as rape/variant of rape.

Therefore, according to the provisions of the Draft Law on Amendments to the Criminal Code, a new article 178a is planned in the Criminal Code of Serbia, which would introduce a special crime against sexual freedom into our criminal legislation for the first time, which in some legislations represents a basic variant of rape. It is sexual intercourse without consent. Planned incrimination has a basic form and two more severe forms, one of which is the most severe. The basic form of sexual intercourse without consent exists when the perpetrator commits promise or an act equivalent to it against another without his consent and is threatened with a prison sentence of three to twelve years.

The first serious form of sexual intercourse without consent exists when, as a result of the perpetration of the basic form of this criminal offense, the alternative occurs: 1) the appropriate, optionally foreseen heavier consequence, or 2) if the basic form of sexual intercourse without consent is carried out with the existence of one of the qualifying circumstances. It is about the following alternatively prescribed more serious consequences, due to the occurrence of which there is a more serious form of rape without consent: 1) if as a result of the committed rape/an act equated with rape, serious bodily injury occurred to the person against whom the act was committed or 2) if the committed act resulted in the pregnancy of the passive subject.

Optionally prescribed qualifying circumstances due to which there would be a more serious form of sexual intercourse without consent are: 1) a circumstance concerning the connection of the perpetrators, which means that it is about persons who committed the sexual intercourse as accomplices - if the act was committed by several persons, 2) a circumstance related to a special modus operandi of sexual intercourse

without consent - if the act was carried out in a particularly cruel or particularly humiliating manner, as well as 3) a circumstance related to the age of the passive subject - if the act was committed against a minor. For the first serious form, a prison sentence of five to fifteen years is prescribed. The most serious form of sexual intercourse without consent is qualified by the occurrence of a particularly serious crime, and that is if it is due to the execution of the basic form of this offense and it is alternatively prescribed a prison sentence of at least eight years or a life sentence.

### ***5.3. Planned modifications in the sphere of crimes against the environment***

The problem of environmental crimes, i.e. environmental pollution, is realistically becoming one of the greatest dangers that threaten humanity and civilization in general (Aleksić & Škulić, 2020, p. 357). This problem arose a long time ago, since the first and second industrial revolutions during the 19<sup>th</sup> century, but it experienced its culmination in the second half of the 20<sup>th</sup> century, which then continued in the first decades of the current 21<sup>st</sup> century (Škulić, 2024b, p. 403). Therefore, modern legal states, based on the rule of law, give the right to a healthy environment the rank of a constitutional right, which boils down to an appropriate constitutional guarantee, from which arise, on the one hand, both people's rights to an environment that can be considered healthy and adequate in specific circumstances, as well as the obligations of citizens, and in particular, relevant state authorities, to protect and improve the environment through their activities (Škulić, 2023a, p. 1187). The enormous importance of preserving the environment is significant to such a large extent that the environment is also protected from the most serious forms of injury or endangerment by criminal law. As usual, and when it comes to the protective function of criminal law, which is the basic and most important function and principally the most repressive branch of law in the legal system, criminal law protection with regard to the environment has an *ultima ratio* character.

Environmental pollution, which originates from the activities of powerful industrial corporations, can be classified as a special form of crime committed by members of the most economically powerful stratum of society, which in part of the American criminological literature is designated as crime of businessmen (*Crimes of Business People*) (Galliher, 1989, p. 62). When it comes to the etiological and phenomenological component of environmental crime, in relation to which the appropriate criminal law reaction is manifested, in recent times, systematic criminological research dedicated to this type of crime has also been manifested, which is metaphorically referred to as "green criminology".

Most of the planned amendments to the Criminal Code stem from the basic normative component of EU Directive 2024/1203, which concerns environmental protection through the application of criminal law. This new Environmental Crimes Directive, which entered into force in May 2024, replaces the previous EU Directive from 2008, dedicated to environmental crime. The main objectives of the EU Directive 2024/1203 are to clarify the definitions concerning environmental crime, so that no room is left for too extensive interpretation; appropriate expansion of the list of environmental crimes

and the introduction of some new crimes against the environment; better definition and more adequate gradation of criminal sanctions/punishments for crimes against the environment; improving information in relation to environmental crime, which includes more adequate collection and processing of relevant information, as well as in general - achieving a higher degree of effectiveness when it comes to criminal protection of the environment. All these objectives of the EU Directive 2024/1203 are complementary to the basic principles of criminal law environmental protection in Serbia, which, although not a member state of the EU, as a so-called a candidate for membership in the European Union, must also pay attention to this type of so-called soft source of law of international legal character. By the way, it should certainly be borne in mind that the criminal law protection of the environment in a general sense, but also in the context of appropriate international legal standards, including the requirements formulated in the EU Directive 2024/1203, tends to achieve, first of all, the goals of both special and general prevention, which is particularly important when it comes to environmental crime, through the application of criminal law mechanisms.

Of course, even when it comes to environmental protection, it must be kept in mind that criminal law has an *ultima ratio* character within the general protective function of criminal legislation, which, among other things, means that prevention is of particular importance in environmental protection overall, including in the criminal-law sense. Therefore, environmental criminal-law protection—both in general and in the context of relevant international legal standards, as well as the requirements formulated in EU Directive 2024/1203—seeks to ensure that the application of criminal-law mechanisms primarily achieves the goals of both special and general prevention. General prevention is, as a rule, especially significant when it comes to environmental (ecological) crimes/criminal offenses.

This new Directive on environmental criminal offences, which entered into force in May 2024, replaces the previous EU Directive from 2008 dedicated to ecological crime. The main objectives of EU Directive 2024/1203 are: to clarify definitions related to ecological crime in order to avoid overly extensive interpretation; to appropriately expand the list of environmental criminal offences and introduce certain new offences against the environment; to better define and more adequately grade criminal sanctions/penalties for environmental crimes; to improve reporting and information management in the field of ecological crime, including more effective collection and processing of relevant data; and, in general, to achieve a higher level of effectiveness in the criminal-law protection of the environment. All these objectives of EU Directive 2024/1203 are complementary to the fundamental principles of environmental criminal-law protection in Serbia, which, although not an EU Member State, as a country that is a candidate for membership in the European Union, must also take into account this type of international “soft law” source of legal standards.

There are a large number of modifications that, according to the provisions of the Draft Law on Amendments and Supplements to the Criminal Code, are planned in chapter twenty-four of the Criminal Code, in the group of criminal offenses against the environment. The planned changes and additions concern Art. 260, 262, 265 and

266 of the Criminal Code, and completely new legal provisions are planned, introducing a whole series of completely new incriminations, which is sometimes done in a too casuistic manner. This includes the provisions of the Draft Law on Amendments to the Criminal Code, which plans to add the following new articles to the CC of Serbia: 260a to 260v, 262a, 265a, 266a to 266d and 274a. Some of these incriminations are not completely new, but are reduced to modifying certain previously existing environmental crimes. This primarily includes: Production and placing on the market of harmful substances, Illegal production and placing on the market of mercury and mercury compounds, Unauthorized construction of a facility for which an environmental impact assessment is mandatory, Illegal withdrawal of surface and underground water, Destruction, capture, sale, import and export of protected wild animals and plants, Damage and destruction of habitats of protected species of animals, Unauthorized import into Serbia, processing, disposal and storage of hazardous waste, Unauthorized importation and exportation from Serbia, production, transportation and storage of radioactive material and substance, Importation, cultivation, possession and placing on the market of invasive alien species, Damage to the ozone layer, Unauthorized production, use and trade of fluorinated gas with a greenhouse effect, Unauthorized recycling of ships, as well as the placing on the market of raw materials and products resulting from the destruction and degradation of forests.

It is interesting a new criminal offense of unlawful extraction of surface and groundwater has been planned, especially in the context of problems that sometimes arise in practice in connection with the construction of so-called mini hydroelectric power plants. This criminal offense would exist when a perpetrator, in violation of regulations, extracts surface or groundwater, thereby causing or creating a risk of significant damage to the ecological status or ecological potential of surface waters, or to the quantitative status of groundwater. The criminal offense, whose introduction into the criminal law system is planned by the Draft Law on Amendments and Supplements to the Criminal Code, would be of a *blanket nature*. This is logical in the context of the treatment of surface/groundwater, which has not only major importance as an essential element of the environment, but also in a public health and even geo-strategic sense.

Several planned new criminal offences against the environment deserve special attention, such as the incrimination of the production and placing on the market of harmful substances, as well as a new ecological offence that expands the scope of criminal-law protection relating to wild animals, which are, in themselves, a valuable part of ecosystems and the environment in general.

Under the newly proposed amendments, the planned “ecological” offence of production and placing on the market of harmful substances would exist if the perpetrator, in violation of regulations on environmental protection, preservation and improvement, produces, places on the market, exports, uses, or incorporates a substance — either in its pure form, in mixtures, or in objects, including embedding it into products — thereby creating a danger to human life or health, or a risk of causing substantial damage to the quality of air, soil or water, to ecosystems, or to animal or plant life. Like other environmental criminal offences, this offence would be of a *blanket* (referral-based) nature,

as it requires that the act be committed through the violation of relevant environmental regulations, which are non-criminal in character and often take the form of subordinate or by-law instruments.

A more serious (aggravated) form of the offence of production and placing on the market of harmful substances would exist when qualifying circumstances occur that involve specific grave consequences resulting from the commission of the basic form. This includes cases where the basic offence optionally leads to: (1) substantial damage to the quality of air, water or soil that is irreversible or long-lasting, or (2) the destruction or serious damage to animal or plant life. The most serious form of this criminal offence would exist if the commission of the basic form of production and placing on the market of harmful substances results in the death of one or more persons.

The criminal offence of destruction, killing, capture, possession, sale, import and export of protected wild animals and plants would have two basic forms. The first basic form of destruction, killing, capture, possession, sale, import and export of protected wild animals and plants would exist when the perpetrator, in violation of relevant regulations, undertakes one of the optionally defined acts of commission by: (a) killing, (b) destroying, (c) capturing, (d) possessing, (e) selling, or (f) offering for sale one or more specimens of protected wild animal or plant species.

The second form of the criminal offence of destruction, killing, capture, possession, sale, import and export of protected wild animals and plants would exist when the perpetrator, in violation of regulations, places on the market, imports into Serbia, or transfers abroad one or more specimens of protected wild animal or plant species, or their parts, or objects derived from them. As is the case with most environmental criminal offences, the offence of destruction, killing, capture, possession, sale, import and export of protected wild animals and plants is of a blanket (referral-based) nature. This means that any of the optionally defined acts of commission are carried out by acting contrary to the relevant regulations governing the specific subject matter—i.e., the legally permitted manner of treatment and conduct toward protected wild animals and plants.

#### ***5.4. Approving, denying or mitigating the criminal offense***

According to the provisions of the Draft Law on Amendments to the Criminal Code, a new criminal offense is planned (planned new Article 346a of the Criminal Code) with the characteristics of "delict of opinion", which is the approval, denial or reduction of a criminal offense.

The criminal offense of approving, denying or diminishing a criminal offense would exist when the perpetrator optionally undertakes the following execution actions: 1) publicly approves, 2) denies the existence or 3) significantly reduces the severity of the criminal offense, and cumulatively the following conditions must also be present: 1) it is a criminal offense for which a sentence of life imprisonment can be imposed, 2) the perpetrator undertakes the execution action in a way that can lead to violence, as well as 3) the execution of a criminal offense that approves, denies or diminishes it is determined by a final judgment.

### ***5.5. Illegal carrying of disabled firearms and cold weapons in a public place***

The Draft Law on Amendments to the Criminal Code plans a new Article 347a of the Criminal Code, which would criminalize appropriate socially unacceptable behavior, which is currently treated in practice as an offense against public order and peace. It would be a criminal offense to carry disabled firearms and cold weapons in a public place, which would exist when the perpetrator unlawfully carries in a public place the following optionally enumerated items with the characteristics of real or fake firearms, or cold weapons, such as knives. These include: 1) disabled firearms, 2) old weapons, 3) modern copies of old weapons that do not use a center or rimfire bullet, as well as 4) melee weapons.

### ***5.6. Reckless possession of a firearm***

The criminal offense of negligent possession of a firearm is planned as a new incrimination (planned article 347b of the CC), contained in the Draft Law on Amendments and Supplements to the Criminal Code, whose ratio legis is based on some concrete tragic cases from practice, when there was misuse of a firearm, which was normally owned legally, but was not stored/kept in a sufficiently safe manner. This crime would have two forms: a basic form and a more serious form.

The basic form of negligent possession of a firearm would exist when the perpetrator negligently holds a firearm for which he has the approval of the competent authority and as a result of such possession the weapon comes into the possession of a person who commits a criminal offense with it, i.e. an illegal act designated as a criminal offense by law. The commission of a criminal offense or an offense which is an illegal offense defined as a criminal offense by law, with a firearm that was not held conscientiously, and therefore came into the possession of the person who used it to commit a criminal offense/an offense that is illegal and prescribed by law as a criminal offense, is an objective condition of incrimination/punishability.

A more severe form of negligent possession of a firearm would be qualified by the occurrence of a more serious consequence due to the commission of a criminal act/deed which is illegal and prescribed by law as a criminal offense of a person who came into possession of a weapon that the perpetrator negligently kept, and that is if as a result of the committed criminal act, i.e. an illegal act defined as a criminal offense in the law (objective condition of incrimination), serious bodily injury or death of a person occurred. The basic form would be punishable by imprisonment from six months to five years, and the more severe form by imprisonment from two to twelve years.

### ***5.7. Training a minor to use firearms***

The Draft Law on Amendments to the Criminal Code plans a new Article 347v of the Criminal Code, whose ratio legis, i.e., the reason for such incrimination, is essentially based on the same as the one concerning the planned criminal offense of negligent

possession of a firearm, on some concrete tragic cases from practice, when there was both the misuse of firearms and the misuse of the conducted training of minors for the use of firearms.

The crime of training a minor to use a firearm would have two basic forms. The first basic form would exist when the perpetrator unlawfully instructs or trains a minor to use a firearm. Another basic form would exist when the responsible person of the shooting organization or the shooting range, contrary to the regulations, allows a minor to access the shooting range. Both basic forms of the planned new criminal offense of training a minor to use a firearm are of a blanket character, because the perpetrator must take his action contrary to the regulations, and the other basic form has a status character, i.e. it is a status delict, which implies that the basic form of the criminal offense of training a minor to use a firearm can only be committed by a person who has a certain capacity, namely the responsible person of a shooting organization or shooting range.

## **6. Penal populism as criminological-phenomenological phenomenon and an expression of criminal law policy of the legislator and in the judiciary practice – introduction of explanation of some manifestations of penal populism in Serbia**

Penal populism is a type of populism and has all the main characteristics that every other type of populism ordinary has, as a sort of a political approach that strives to appeal to ordinary people who feel that their concerns are disregarded by already established so called elite social groups. In fact, penal populism is even and obviously a contemporary trend in many countries throughout the world. Populism in general is a range of political stances that emphasize the idea of the common people and often position this group in opposition to a perceived elite group. It is frequently associated with anti-establishment and anti-political sentiment.

Some kind of pre-history to the 'punitive turn' is almost always campaign in the media stimulated by some politicians who exaggerate in explanations of the danger of criminality in the concrete society and state, demanding harsher criminal law reaction and in the thirst, line imposing of tougher penalties in general, but especially for some types of criminality, as the crimes against sexual freedom, domestic violence etc. They do that mostly without any valid criminal policy reason. For these politicians' primary motive for that is usually effort to earn easy some kind of popularity in the public who is usually very punitive oriented, mostly without any valid criminal policy reason.

Essentially, populism is most often based on very strong demagoguery. It is essentially too, the same or very similar when it comes to penal populism. In criminological theory penal populism is explained as "a media driven political process whereby politicians compete with each other to impose tougher prison sentences on offenders based on a perception that crime is out of control" (Pratt, 2006, p. 2). The essence of penal populism is its strong link to societal fears of crime and public demand for harsher criminal law

penalties and other punitive measures, creating even in the society very intensive punitive atmosphere in the society, characterized to with a disproportionate focus of public on retributive measures in the criminal law point of view.

The phenomenon of penal populism as a kind of a process that ignores or minimizes the views of relevant expert, like criminal law professors, criminologists, justice and penal professionals experts, claiming instead to represent the views of "the people" about the constant need for tougher punishment for criminal offending, is explained in the historical point of view, with some typical examples, like the case of United Kingdom in the 1990s years (populist punitiveness) and also the famous United States *war on Drugs* (Newburn, 2007, pp. 14–15).

The term "war on drugs" was popularized by the media after a press conference, given on June 17, 1971, during which President Richard Nixon declared drug abuse "public enemy number one". Nikson stated that in order to fight and defeat this enemy, it was necessary to wage a completely new, all-out and too a worldwide offensive that would be government-wide and also nationwide. In connection to that new act of "Drug Abuse Prevention and Control" was adopted by the Congress. Namely, the war on drugs was a global anti-narcotics campaign led by the United States federal government. The initiative's efforts in the scope of war on drugs included policies intended to discourage the production, distribution, and consumption of psychoactive drugs that the participating governments, through instruments of international law have made illegal. Besides, that campaign included drug prohibition, foreign assistance and even in some cases of military intervention. The goal was to reduce the illegal drug trade in the United States of America. The war on drugs in the USA was in fact not successful and the whole campaign has been widely seen as a large failure (Newburn, 2007, pp. 14–15).

In the United Kingdom in the time of the conservative Government of Margaret Thatcher, penal policy has been marked by what Stuart Hall once described as 'authoritarian populism', characterized by attempts to exploit popular fears and anxieties about crime and insecurity for political ends (Hall, 1988, p. 9). In 1995, Anthony Bottoms wrote of the existence of 'populist punitiveness' in Britain, whereby 'politicians tap into, and skillfully use for their own purposes, what they believe to be the public's generally punitive stance', especially with regard to violent and sexual offences (Bottoms, 1995, p. 17).

The roots of the modern phenomenon of penal populism in Italy may be traced back to the 80s and the 90s or even before and it is characterized that ardly no event of the Italian public life, and especially the so called crime news (*cronaca nera*), goes by without many voices calling for a tougher response by the government and the police, for new crimes to be included in the code or special laws, and for existing sentencing to be made harsher (Pailli & Butelli, 2024, p. 21). Criminological doctrine explained that penal populism in Brazil is obvious, because an exemplary analysis examines 122 new criminal laws passed between 1940 and 2009, showing that 80.3% of them increased the severity of sanctions by creating new offenses or raising penalties and in some cases, the penalty was increased by up to eight times, while the justifications for these bills were based on moral values, appealing to the abstract seriousness of the offense and emotional arguments (Agapito et al., 2024, p. 42). Because of that this kind of data is applied as

proof of penal populism in Brazil in fact without the need for further investigations (Agapito et al., 2024, p. 42).

Of course, there are many other examples of penal populism around the contemporary world, which is most often the result of a failure to recognize that the maximum severity of punishment, by itself and without other adequate measures in the domain of not only criminal substantive law, but also criminal procedural law, which also implies greater success in detecting and evidenced criminal offenses (Škulić, 2024b, p. 13),<sup>3</sup> is not a universal and absolutely effective remedy for combating crime. Finally, this is also important when it comes to the essence of criminalistic thinking in the direction of detecting and proving a criminal offense (Walder et al., 2020, p. 1).

When it comes to the explanation of penal populism, it is very important not to forget two facts: „First, to thinking about crime and crime policy, it is always important to bear in mind the cultural and political context in which things take place”, because “crime is socially constructed politically-influenced and historically variable“. Second, there is no direct link between crime rates and types and levels of punishment (Newburn, 2017, p. 15).

### **6.1. Penal populism in criminal law of Serbia**

The penal policy in Serbia, when we speak about the relevant criminal justice/criminal law norms that have a direct impact on the practice, has been mainly characterized by an outstanding *penal populism*, which is principally not justified. Contrary to this, in recent years, among the academic community in Serbia, but also among the representatives of the competent authorities, there has been a lot of insisting on further development of the system of alternative criminal sanctions.

The phenomenon of moral panic boils down to a marked overemphasis on the danger in society of crime in general or of a certain type of criminal offense, including the systematic incitement of fear of certain types of criminal offenses, the stereotypical intimidation of certain particularly vulnerable potential victims, such as children, by crime, which then leads to the demand to respond to all of this and the atmosphere of fear/panic thus created by tightening penal policy, building the concept of so-called zero tolerance, etc. (Hagan, 2008, p. 450).

Besides, as it was also explained in the previously text, it is increasingly common and even usual for contemporary criminal law to be used for *preventive purposes* (Stojanović, 2011, p. 5), contrary to the principle that only exceptionally and for specific criminal offences, the criminal area/criminal law zone should be expanded to include the preparation of (such/specific) crimes/criminal offences. Thus, one of the novelties of the Serbian Criminal Code incriminated as a special/specific criminal offence - preparation of murder, for which there is essentially no valid and correct *ratio legis*.

---

<sup>3</sup> Namely, the traditional attitude in Criminalistics theory is that, typical unknown perpetrator usually is not in advance afraid essentially, or too much, of the prescribed penalty for the criminal offence, he has committed, but he/she is in the first line afraid of the possibility that he/she will be identified and that his/her criminal offence will be discovered and regularly evidenced in criminal procedure law point of view (Aleksić & Škulić, 2020, p. 10).

Over the last several years, and culminating in recent novelties of the Criminal Code of Serbia of May 2019, normative requirements for a significant and, regrettably, far-reaching and more severe penal/criminal law policy have been constantly created. This is especially reflected in some areas of criminal-justice legislation (Škulić, 2024c, p. 3): 1) Introducing the prohibition of mitigating the penalty for certain types of criminal offences; 2) Introducing the normative institute of multiple recidivism; 3) Significant limitation on possibilities of suspended sentencing; as well as 4) Prescribing a lifetime imprisonment, in combination with introducing a legal prohibition on release on parole for certain categories of offenders sentenced to lifetime imprisonment.

#### 6.1.1. The penal populism in some realized novels of the Criminal Code of Serbia and in the Draft proposal of the Law on amendments to the Criminal Code of Serbia

The last major amendments to the Criminal Code of Serbia from 2019 (prior to the currently planned amendments during 2024) are very important, and they were mainly aimed at a significant tightening of the legal penal policy, which is particularly expressed in a special part of the Criminal Code, especially with regard to certain criminal offenses, such as crimes against sexual freedom. The most striking change of this type in the general part of the Criminal Code refers to the introduction of life imprisonment, in respect of which in fact, it cannot be simply concluded that this type of punishment, as a kind of "capital criminal sanction", is really a form of tightening of penal policy, given that it is essentially very similar to the heaviest punishment that existed until then, which is a prison sentence of thirty to forty years. In this regard, first of all, as a form of a very specific tightening of the lawmaker's penal policy, the legal ban on conditional release stands out more when it comes to the sentence of life imprisonment imposed on those convicted of certain criminal offenses, which otherwise represents a very controversial legal solution, which can be justified criticize with very strong arguments.

In accordance with the article 42 of Criminal Code, within the framework of the general purpose of criminal sanctions,<sup>4</sup> the purpose of punishment is: 1) To prevent an offender from committing criminal offences and deter them from future commission of criminal offences (*special prevention*); 2) To deter others from commission of criminal offences (*general prevention*); 3) To express social condemnation of the criminal offence, enhance moral strength and reinforce the obligation to respect the law, what are all some aspects of *general prevention* and 4) achieving justice and proportionality among the committed offence and the severity of the criminal sanction.

That last (4<sup>th</sup>) purpose of punishment, i.e. the achieving justice and proportionality among the committed offence and the severity of the criminal sanction is obviously without of the prevention system of the criminal law sanctions and it cannot be aspect of either special prevention or general prevention. It was added in criminal law provisions

---

<sup>4</sup> The general purpose of prescription and imposing of criminal sanctions is to suppress acts that violate or endanger the values protected by criminal legislation (Art. 4 of Criminal Code). That general purpose of criminal sanctions formally prescribed in criminal Code is expression of the fundamental basic and function of criminal law and that is its protective function.

in 2019 (amendments), with the obvious idea to promote the tightening the criminal law policy and of course it is too one of the formal manifestations of penal populism in the provisions of the Criminal Code. In this way, retribution was prescribed in the Criminal Code of Serbia, as one of the formally proclaimed goals of punishment.

In addition, it should be borne in mind that the principle of guilt, which is immanent in modern criminal law, among other things, also implies that there must be an appropriate correlation between the degree of guilt and the punishment, and not a strict proportionality between the criminal act itself and the punishment. Therefore, guilt as a subjective element contained in the general concept of a criminal act, in addition to other objective elements (appropriate action of the perpetrator/failure to take the duty to act, illegality and legality), affects, among other things, the punishment in a specific case. The principle of guilt means that the punishments prescribed by the state can only be based on the finding that the perpetrator can be blamed for his act", whereby this principle, on the one hand, implies that "punishment implies the existence of guilt, so that someone who acted without guilt cannot be punished, while on the other hand it means that "punishment must also not exceed the measure of guilt" (Jescheck & Weigend, 1996, p. 23).

Namely, the existence of the elements of a criminal act established by law, as well as illegality, must be combined with the existence of concealment, in order for the perpetrator to be held liable for such an act, which "as it is generally explained", means that the perpetrator can be "blamed" or "objected to" for his act, and "the assumptions for this are that he is capable of bearing guilt, and that there are no circumstances that would constitute "excusing grounds", such as, for example, an irremediable legal error or excusing extreme necessity" (Roxin, 2006, p. 197). In addition, as already explained in the previous text, modern criminal law theory directly connects *guilt and punishment*, therefore not the criminal offence itself and the punishment, but only the subjective element of the criminal offence (*guilt*) and the punishment.

It has already been explained in the previous text that the planned amendments to the Criminal Code intend to apply *proportionality* to the *criminal offense and the punishment*, and not to the proportionality between the criminal offense and the criminal sanction, as prescribed by the provisions of the current Criminal Code. Such an amendment is justified because proportionality can only (which is in accordance with the principle of guilt) concern the relationship between "criminal offense and punishment", and not "criminal offense and criminal sanction", which sometimes does not even imply the guilt of the perpetrator for an act that is unlawful and legally prescribed as a criminal offense, as in the case of security measures imposed on mentally incompetent/insane perpetrators.

Crime prevention, both special and general, has always been the dominant purpose of punishment in our criminal law, which is now supplemented by a previously explained, retributive concept. This does not seem justified and, by all appearances, represents a basically declarative manifestation of penal populism. By the way, everyone should not forget that the famous Beccaria pointed to the preventive effect of punishment in the form of deterring current and potential perpetrators of a criminal offense from engaging in criminality in the future, the basic purpose of punishment. Namely, "Beccaria is generally considered the father of *deterrence theory* for good reason",

because he “was the first scholar to write a work that summarized such extravagant idea in that time regarding the direction of human behavior toward choice, as opposed to fate or destiny“ (Tibbetts & Hemmens, 2010, p. 58).

Finally, it should be borne in mind that when determining punishment, it is crucial in modern criminal law that there is an appropriate proportion between the specific punishment and the type/form of guilt and degree of guilt of the perpetrator. This is, for example, a key requirement contained in the German Criminal Code (§ 46. Abs. 1 *StGB*) (Schönke & Schröder, 2019, p. 763). This represents one of the important aspects of the principle of guilt, immanent in modern criminal law. Otherwise, the eternal question of criminal law is what the essential purpose of punishment is, and this question, which at first glance seems simple, is not at all easy to answer, and in fact the answer to this question lies not only in the sphere of criminal law, but also in the domain of philosophy (Frister, 2020, p. 18). Otherwise, for the provisions relating to the basic rules of sentencing in German criminal law (§ 46. *StGB*), it is emphasized that they represent a concretization of the general rules on sentencing, without delving into the controversy about the meaning and purpose of punishment (Lackner, Kühl, Heger, 2018, p. 362).

Of course, the purpose of criminal sanctions for juveniles, i.e. juvenile offenders, are not the same as the purpose for adult offenders. Within the framework of the general purpose of penal sanctions (Article 4 of the Criminal Code), the purpose of criminal sanctions against juveniles is to influence the development and enhancement of their personal responsibility, education and proper personality development through supervision, protection and assistance as well as by providing general and professional qualifications in order to ensure the juveniles’ re-socialization (Article 10 of the Law on Juvenile Perpetrators of Criminal Offences and Criminal-Justice Protection of Minors).

Since the introduction of life imprisonment, and its variant which includes the prohibition of parole, which is very controversial both in theory and in practical terms, the re-introduction of a variant of multiple recidivism in the criminal legislation of Serbia has attracted far less attention. By the way, this was not done according to the model of the once existing institute of multiple restitution in the criminal legislation of the SFRY (which in the practice of the former Yugoslavia almost did not experience practical application) (Škulić, 2024d, p. 694), but a concept from American criminal law, known under the slang name “the three strikes system”, which is otherwise extremely controversial in the United States itself.<sup>5</sup>

The fact that one part of the recent amendments to the Criminal Code of Serbia is quite weak in the legal and technical sense, and part is also very controversial in the essential aspect, inevitably leads to thinking about the future of our criminal law, which is otherwise part of an attitude, which is almost becoming a trend in contemporary

<sup>5</sup> First experiences with that kind of law had American state California. California’s famous „3-Strikes and You’re Out Law” as one version of *habitual offender laws*, went into effect on March 7, 1994. Its purpose was formally to dramatically increase punishment for persons convicted of a felony and who were convicted of one or more “serious” or “violent” felonies. After California in the USA twenty-eight states have or had some forms of a “three-strikes” law and of course that significantly increased the prison sentences in the judicial practice and too the possibility for a life imprisonment. By the way, origin of the expression “Three strikes and you are out” are from some baseball rules (Scheb & Scheb, 1999, p. 574).

criminal law. Namely, thinking about whether criminal law has a future has been present for some time in the science of criminal law in recent decades, and especially in recent years. For example, the famous German professor of criminal law *Claus Roxin*,<sup>6</sup> who even today, although he died a few months ago, is considered a kind of "icon" of modern criminal law, wrote in particular, about the crisis/future of criminal law (Schünemann, 2007, pp. 945–958).

The concern for the future of criminal law stems primarily from the fact that today, unfortunately, there is an extremely strong influence of the so-called security criminal law, which is most often reflected in legislative practice through often hasty amendments to criminal law, largely aimed at solving the so-called security problems, starting with terrorism and organized crime, and ending with some forms of crime, which are sometimes unnecessarily treated as some particularly great "danger", and which is often an expression of what is defined in criminology as the so-called moral panic (Hagan, 2008, p. 450). Such is the case, for example, with an excessive focus on criminal offences against sexual freedom, especially some forms of those criminal acts/offences, etc (Škulić, 2019, pp. 27–28).

In the last few decades, criminal law has often been significantly influenced by penal populism, both in terms of comparative law and in the tendency towards a constant tightening of legal penal policy, as well as in the significant expansion of the criminal zone, which is especially evident when it comes to forcing the use of criminal law for security purposes, when, for example, criminal law norms tend to incriminate preparatory acts as punishable, etc. This has long been observed in criminal law theory, so for example, in the German doctrine of criminal law it is noted that "under the impression of growing crime, primarily organized crime, as well as violent, sexual and mass crime, since the 1980s there has been a tendency to activate substantive criminal law for the purpose of protecting internal security, which has been significantly strengthened, leading to the very controversial and debatable concept of introducing the possibility of expanding the protective area of criminal law to contribute to the protection of values related to security" (Kühl & Heger, 2018, p. 333).

In the context of development so called preventive criminal law and the promotion of the idea that the main purpose of the criminal law is the security of society and prevention of the crime in general way, the criminal-legal reactions becomes more and more focused on the danger of the criminality/crimes, and less and less on the concrete committed criminal offences. In the criminological theory is also noticed that "the populist approach to crime problems suppresses the strategies which essentially deal with the causes of crime (poverty, inequality, unemployment) and gives advantage to the measures and techniques which are relatively simply introduced and applied, and work as a means of calming down the citizens and create the impression decisive actions are taken against crime" (Soković, 2013, pp. 185–232).

Since criminal law represents *the strictest instrument of power at the disposal of state repression*", it follows that *criminal law reaction/repression* should not be manifested/

<sup>6</sup> Duve, T. Ein Gespräch mit Claus Roxin (A conversation with Claus Roxin). Available at: [https://www.researchgate.net/publication/26443246\\_Ein\\_Gesprach\\_mit\\_Claus\\_Roxin](https://www.researchgate.net/publication/26443246_Ein_Gesprach_mit_Claus_Roxin) (1.4.2020.)

used in an excessively broad manner, but rather it is an *ultima ratio*, which means that it represents the most exceptional means or the last means of protecting the *most important social values*. Besides, the constitutional principle of proportionality implies giving priority to other milder means, when possible. Therefore, "the transformation of a part of criminal law into a kind of security law is sometimes not only an expression of penal populism, but is most often contrary to the *ultima ratio* character of criminal law" (Rengier, 2020, p. 9). Essentially, it is the same in Anglo-Saxon criminal law. Namely, in the criminal law theory in the Great Britain, nature and function of the criminal law are explained as connected terms, i.e. the nature and function of the criminal law are inter-related and hard to separate, but that also means that "what is a crime and what should be a crime are actually difficult questions to answer and any answer may change over time"(McAlhone & Huxley-Binns, 2010, p. 2).

The nature of criminal law is connected protective function of that branch of law and zone of criminal law protection depends too of the concrete social atmosphere, social attitudes etc. In the Britain criminal law theory, it is explained with the example of "consensual sex between homosexual adults, what was an offence until the Sexual Offences Act 1967 was passed and was once lawful, for example driving without wearing a seat belt, is now unlawful" (McAlhone & Huxley-Binns, 2010, p. 2). The explanation connected to the first example of so-called decriminalization of the one form of former sexual offence, in the criminal law theory of GB is that the Government undertook a major reform of the sex offences with the passing of the Sexual Offences Act 2003, because "the old law was archaic, incoherent and discriminatory" (Elliot & Quinn, 2012, p. 173). The essence is, therefore, that every modern criminal law, whether European-continental or Anglo-Saxon, represents, on the one hand, the *ultima ratio*, while on the other hand, the function of criminal law is the effective protection of those values that society at a certain time considers so significant that they must be protected by criminal law, as the most repressive branch of legislation. The protection of the most important legal values is also the principle goal of European-continental criminal law, which is specified in a special part of criminal law, when specific incriminations determine which legal goods are protected by criminal law and to what extent. Criminal law has an *ultima razione* character in the protection of important social values, because it represents the strictest "instrument of power" at the disposal of the state apparatus of coercion/power (Rengier, 2020, p. 9).

In accordance with the Article 3. of Serbian Criminal Code, protection of a human being and other fundamental social values constitute the basis and scope for defining of criminal acts, imposing of criminal sanctions and their enforcement to a degree necessary for suppression of these offences. The protection of a human being and other fundamental social values is the normative expression of the basic function of criminal law and that is the protective function. Criminal law theory thus emphasizes that "through its protective function, criminal law serves to realize common values and protect legal peace" (Wessels & Beulke, 2003, p. 2).

It is increasingly common for criminal law in the last decades generally and in many countries from the comparative criminal law perspective, to be in some situations used

for "preventive purposes" (Stojanović, 2011, p. 5). That concept is obviously contrary to the principal concept/idea that only exceptionally and for very specific crimes, the criminal zone should be extended to the preparation of (such/specific/special) criminal offences.<sup>7</sup>

The introduction of elements of the so-called *security law* into criminal law is fundamentally contrary to the basic function of criminal law, which is *protective*, but not preventive, although otherwise, from the very effect of punishment, a preventive effect also arises, in connection with which the classical purpose of punishment, but also of criminal sanctioning in general, is prevention, both special and general. However, such a preventive effect of criminal law is the preventive effect of punishment/criminal sanction which is a legal consequence of a previously/previously committed criminal offense, and it is *not a preventive effect of criminal law to prevent a possible/future criminal offense*. Namely, criminal law "consists of the sum of all provisions that regulate the assumptions or consequences of behavior that is threatened by a punishment or security measure" (Roxin & Greco, 2020, p. 1).

Some reforms of the criminal legislation disregard the *ultima ratio* character of the criminal law, so some delicts, which could rather be misdemeanours, are defined as criminal acts, i.e. criminal offences. Also, criminal law in practice is often "broken" and by the fact that the effect of punishment is significantly overestimated, which is considered not only as a "basic criminal sanction", but even as a "universal medicine" or "hot medicine" for the problem of criminality (as a kind of "angry wound"), and what is referred to in science as the so-called penal populism, accompanied by the creation of a kind of "punitive atmosphere" in society. This so called *punitive social atmosphere* is generally based on the premise that increased severity of penalties, certainly means less crime. This is often accompanied even by a kind of "marketing campaign" in the public in support of the need for a significant tightening of punishment in general or for certain types of criminal acts, which, as a rule, is not based on any previously conducted serious empirical research, or even reliable statistical analyses. Therefore, constantly in many European countries, including in Serbia, every new criminal law reform is accompanied by, among other things, a significant tightening of the legal penal policy. A typical example is the recent introduction of a variant of multiple restitution into the criminal legislation of Serbia (Article 55a of the Criminal Code), which was done to some extent on the model of the concept of "three strikes" from the criminal law of the USA (Škulić, 2023b, p. 157).

#### 6.1.2. Basic manifestations and elements of penal populism in the Criminal Code of Serbia and in some planned novels of the Serbian criminal law

In several areas, it is possible to see and recognize some very clear manifestations of penal populism in the Criminal Code of Serbia. These are, first of all:

- 1) Generally, very significant tightening of the legal penal policy,
- 2) The introduction of an absolute prohibition of the mitigation of punishment for certain criminal offences/some (aggravated) forms of these criminal offences;

---

<sup>7</sup> Thus, the recent amendments to the Criminal Code of Serbia criminalized preparation of murder as a special crime, for which there is essentially no valid and correct *ratio legis*.

- 3) Introduction of the multiple recidivism,
- 4) Legal prohibition on release on parole for certain categories of offenders sentenced to lifetime imprisonment, as well as
- 5) Limitation of the legal option of suspended sentence.

## **7. Conclusion**

Although, as explained in the previous text, significant conceptual modifications of the Serbian substantive criminal legislation are rightly not planned, some of the planned changes can be justifiably criticized. This primarily concerns certain manifestations of penal populism that can be observed in some provisions of the Draft Law on Amendments to the Criminal Code, which amounts to the continuation of a kind of "trend" that started a few years earlier, and was especially expressed in the amendments to the Criminal Code from 2019. Namely, the current Criminal Code of Serbia also contains very striking elements of penal populism, which also dominates a large part of the planned amendments.

Significant manifestations of penal populism were introduced in 2019 by amendments to the Criminal Code into the general part of Serbian criminal law, which primarily concerns the redefined purpose of punishment, the institution of multiple restitution, the absolute prohibition on parole for certain categories of perpetrators/those convicted of certain crimes, and the significant limitation of the possibility of imposing a conditional sentence. Pronounced penal populism was previously manifested in the domain of the general criminal law of Serbia, in the amendments to the Criminal Code from 2009, when without justified reasons and without clear criteria for the selection of relevant criminal offenses, an absolute ban on mitigation of punishment was introduced in relation to a series of enumerated incriminations. Elements of penal populism have also long been present in the special part of the criminal law of Serbia modified by amendments from 2019, which is reflected in the significantly increased punishment for a number of criminal acts, often and even most often without relevant criminal-political reasons.

This penal-populist and highly punitive "direction" of the movement of our criminal law can also be seen in the last planned amendments, which mainly concern the tightening of the legal penal policy, which is in the domain of a special part of the criminal law, but there are also ideas aimed at changing some provisions of the general part of the criminal law of Serbia, which would even drastically tighten the penal policy, as is the case with the planned additional and radical limitation of the possibility of imposing a suspended sentence, which could potentially very soon could, completely contrary to the publicly expressed intentions aimed at strengthening the system of alternative criminal sanctions, lead to the so-called prison overcrowding. Such tendencies realistically contain elements of penal populism and, on the one hand, they obviously create an emphasized "punitive atmosphere" in society, and on the other hand, this atmosphere itself quickly becomes a special generator of new/future manifestations of penal populism in criminal legislation. Such tendencies, but often not even the specific normative solutions resulting from them, are certainly not in accordance with the ruling understandings of criminal law, criminology-penology, or

criminal doctrine, nor, what is more important, is such an approach harmonized with the current situation in the sphere of the state/rate of crime and the social need to react to it in an adequate manner, which is also immanent in a modern legal state, which is characterized by the rule of law.

Modifications of the Criminal Code of Serbia contained in the current Draft Law on Amendments to the Criminal Code are only to a very small extent devoted to the general part of the Criminal Code. This is good in principle, because in this way, it certainly does not encroach on the basic conceptual solutions of the general part of Serbian criminal law. By far the largest part of the planned amendments to the Criminal Code concerns its special part. The planned modifications of the Criminal Code are in terms of certain changes to some elements of previously existing criminal offenses, but they also refer to the introduction of some completely new and hitherto non-existent criminal offenses, such as sexual intercourse without consent, as a specific variant of "rape" that does not include forced sexual intercourse, typical of classic rape as a basic crime against sexual freedom.

A large number of amendments and additions to the Criminal Code of Serbia that are planned are reduced to the prescription of heavier penalties for certain criminal acts, that is, certain (most) serious forms of some criminal acts. This kind of tightening of the legal penal policy is sometimes not fully harmonized - when it comes to the relationship between criminal acts of different types, and it sometimes, unfortunately, also contains features of specific penal populism. Unnecessary elements and normative manifestations of penal populism in the Criminal Code of Serbia, which can also be seen in part of the planned amendments to that Code, are not in accordance with the ruling concepts of criminal law, criminological-penological, or criminal doctrine. Such an approach of the legislator is not realistically aligned with the current situation in the sphere of the crime rate and the need to respond to it in an adequate manner.

Criminal law in a legal state characterized by the rule of law always has a distinctly *ultima ratio* character. This is because it is, in principle, the most repressive branch of law within the legal system, which is intended to effectively protect the most important social values from the most serious forms of violation or threat. In order for criminal law to be sufficiently effective in its application, when it comes to the so-called expansion of the criminal zone, it must have a somewhat exclusive character, which means that it is not always necessary for certain unlawful behaviors of a tortious nature to be defined as criminal offenses, but it is sometimes more appropriate to prescribe them as misdemeanors, and we should not forget that penal law in the broader sense includes, when it comes to the legal system of Serbia, both criminal law and misdemeanor law. It is also not good when the Criminal Code is changed too often, because such excessive "dynamics" of changes in criminal substantive law most often result in major problems in practice, especially from the point of view of the general principle of legal certainty.

Finally, excessive speed in amendments and supplements to the Criminal Code is often associated with making unnecessary legal and technical mistakes in the Criminal Code, and it also leads to insufficiently high-quality norms, which can sometimes be a form of violation of the *lex certa* segment of the principle of legality, as a principle strictly prescribed in the Criminal Code, but also one of the most important constitutional principles.

## Literature

1. Agapito, L. S, Miranda, M. A. & Januário, T. F. X. 2024. Is Penal Populism a Species of Political Populism? Latim American Perspective. In: Matić-Bošković, M & Kostić, J. (eds.), Penal populism and Impact on the work of Institutions. Belgrade: Institute of Criminological and Sociological Research, Judicial Academy, pp. 39–53.
2. Aleksić, Ž. & Škulić, M. 2020. *Kriminalistika*. 13. izmenjeno i dopunjeno izdanje. Beograd: Pravni fakultet Univerziteta u Beogradu.
3. Bonnie, R. J, Coughlin, A. M, Jefries, J. C, Low, S. W. 1997. *Criminal Law*, New York: The Foundation Press.
4. Bottoms, A. E. 1995. The Philosophy and Politics of Punishment and Sentencing. In: Clarkson, C. & Morgan, R. (eds.), *The Politics of Sentencing Reform*. Oxford: Clarendon Press, pp. 17–49.
5. Brownmiller, S. 1994. *Gegen unseren Willen – Wergewaltigung und Männerhererschaft*. Frankfurt am Mein: Fischer Verlag.
6. Duve, T. Ein Gespräch mit Claus Roxin (A conversation with Claus Roxin). Available at: [https://www.researchgate.net/publication/26443246\\_Ein\\_Gesprach\\_mit\\_Claus\\_Roxin](https://www.researchgate.net/publication/26443246_Ein_Gesprach_mit_Claus_Roxin) (1.4.2020.)
7. Elliot, C. & Quinn, F. 2012. *Criminal Law*. 9<sup>th</sup> ed. Edinburgh, Essex: Pearson.
8. Frister, H. 2020. *Strafrecht – Allgemeiner Teil*. 9<sup>th</sup> Auflage. München: C.H.Beck.
9. Galliher, J. F. 1989. *Criminology - Human Rights, Criminal Law and Crime*. Englewood Criffs, New Jersey: Prentice Hall.
10. Gilbert, J. N. 1980. *Criminal Investigation*. Columbus, Toronto, London, Sydney: Charles E. Merrill Publishing Company - A Bell & Howell Company.
11. Hagan, F. E. 2008. *Introduction to Criminology – Theories, Methods and Criminal Behavior*. 6<sup>th</sup> ed. California: Sage Publications.
12. Hall, S. 1988. *The Hard Road to Renewal Thatcherism and the crisis of the left*. Verso, London and New York.
13. Jescheck, H. H. & Weigend, T. 1996. *Lehrbuch des Strafrechts*. Berlin: Duncker & Humblot.
14. Kühl, K. & Heger, M. 2018. *Strafgesetzbuch – Kommentar*. 29. Auflage. München: C. H. Beck.
15. Lackner, K, Kühl, K. & Heger, M. 2018. *Strafgesetzbuch – Kommentar*. 29. neu bearbeitete Auflage. München: C. H. Beck.
16. McAlhone, C. & Huxley-Binns, R. 2010. *Criminal Law – The Fundamentals*. 2<sup>nd</sup> ed. London: Sweet & Maxwell and Thomson Reuters.
17. Newburn, T. 2007. *Criminology*. London: Willan Publishing.
18. Pailli, G. & Butelli, A. 2024. Penal populism in Italy: A few examples from the last 20 years. In: Matić-Bošković, M & Kostić, J. (eds.), *Penal populism and Impact on the work of Institutions*. Belgrade: Institute of Criminological and Sociological Research, Judicial Academy, pp. 21–38.
19. Pratt, J. *Penal Populism*. 2006. London: Routledge.
20. Rengier, R. 2020. *Strafrecht – Allgemeiner Teil*. 12. Auflage. München: C. H. Beck.

21. Roxin C. und Greco L. 2020. Strafrecht – Allgemeiner Teil, Band 1, Grundlagen – Der Aufbau der Verbrechenslehre. 5. Auflage. München: C. H. Beck.
22. Roxin, C. 1998. Strafverfahrensrecht. 25. Auflage. München: Verlag C. H. Beck.
23. Roxin, C. 2006. Strafrecht – Allgemeiner Teil, Band I, Grundlagen – Der Aufbau der Verbrechenslehre. 4. vollständig neu bearbeitete Auflage. München: Verlag C. H. Beck.
24. Scheb, J. M. & Scheb, J. M. 1999. Criminal Law and Procedure. Belmont, Bonn, Boston, Washington: West/Wodsworth – an International Thomson Publishing Company.
25. Schönke, A. & Schröder, H. (part written by Hecker, B.) 2019. Strafgesetzbuch – Kommentar. 30. Auflage. München: C. H. Beck.
26. Schönke, A. & Schröder, H. (Hrsg), (part written by Kinzig J.) 2019. Strafgesetzbuch – Kommentar, 30. Auflage. München: C. H. Beck.
27. Schünemann, B. 2007. Die Zukunft des Strafverfahrens – Abschied vom Rechtsstaat?. Zeitschrift für die gesamte Strafrechtswissenschaft (ZStW), 119(4), pp. 945–958.
28. Škulić, M. 2013. Dominantne karakteristike velikih krivičnoprocenih sistema i njihov uticaj na reformu srpskog krivičnog postupka. Crimen, 2/2023, pp. 176–234.
29. Škulić, M. (a) 2017. Anglosaksonska doktrina „odbrane zamka“ u krivičnom pravu SAD i njene moguće refleksije na nužnu odbranu u srpskom krivičnom zakonodavstvu. Kaznena reakcija u Srbiji, edicija Crimen. VII deo. Beograd: Pravni fakultet Univerziteta Beogradu, pp. 3–77.
30. Škulić, M. (b) 2017. Krivično delo silovanja u krivičnom pravu Srbije – aktuelne izmene, neka sporna pitanja i moguće buduće modifikacije. Crimen. Revija za krivično pravo i kriminologiju, 2-3/2017, pp. 393–441.
31. Škulić, M. 2019. Krivična dela protiv polne slobode. Beograd: Službeni glasnik.
32. Škulić, M. 2022. Osnovi krivičnog prava Sjedinjenih Američkih Država. 2. izmenjeno i dopunjeno izdanje. Beograd: Pravni fakultet Univerziteta u Beogradu.
33. Škulić, M. (a) 2023. Ustavna pravna zaštita životne sredine. Glasnik Advokatske komore Vojvodine, 95(4), pp. 1187–1249.
34. Škulić, M. (b) 2023. Krivično pravo Sjedinjenih Američkih Država. Beograd: Službeni glasnik.
35. Škulić, M. (a) 2024. Krivično procesno pravo. 14. izmenjeno i dopunjeno izdanje. Beograd: Pravni fakultet Univerziteta u Beogradu.
36. Škulić, M. (b) 2024. Kriminalistika, 2. izmenjeno i dopunjeno izdanje. Beograd: Pravni fakultet Univerziteta u Beogradu.
37. Škulić, M. (c) 2024. The manifestations of penal populism in some amendments/provisions of the Criminal Code of Serbia. In: Matić-Bošković, M. & Kostić, J. (eds.), Penal populism and Impact on the work of Institutions. Belgrade: Institute of Criminological and Sociological Research and Judicial Academy, pp. 1–20.
38. Škulić, M. (d) 2024. *Krivično materijalno pravo socijalističke Jugoslavije*. Socijalističko pravo u Jugoslaviji 1945 – 1990. Drugi tom. Beograd: Pravni fakultet Univerziteta u Beogradu.

39. Škulić, M. (a) (2025) Reforma krivičnog prava Srbije – hibridni krivični postupak i elementi penalnog populizma. In: Škulić, M, Miljuš, I. & Škundrić, A. (eds.), *Izazovi međunarodnog krivičnog prava*. Palić, pp. 49–102.
40. Škulić, M. (b) 2025. Skorašnje novele i planirane reforme Krivičnog zakonika Srbije. *KoPra – kontinentalno pravo – časopis za održiv i skladan razvoj prava*
41. Škulić, M. & Lukić, N. 2025. The explanation of the main characteristics of penal populism and examples of penal populism in some criminal law provisions and planned amendments of the Criminal Code of Serbia. *Crimen*, 16(1), pp. 3–40.
42. Soković, S. 2013. Penal populism: causes, characteristics and consequences, in: Bejatović, S. (ed.), *Penal policy: law and practice*. Belgrade, pp. 185–232.
43. Stojanović, Z. 2009. *Krivično pravo*. Podgorica: CID.
44. Stojanović, Z. 2011. Preventivna funkcija krivičnog prava. *Crimen*, 2(1), pp. 3–25.
45. Stojanović, Z. 2024. *Krivično pravo – opšti deo*. 29. izdanje. Novi Sad: Pravni fakultet u Novom Sadu.
46. Tibbetts, S.G & Hemmens, C. 2010. *Criminological Theory – A Text/Reader*. California: Sage.
47. Vuković, I. 2021. *Krivično pravo – opšti deo*. Beograd: Pravni fakultet u Beogradu.
48. Walder, H, Hansjakob, T, Gundlach, T. E. & Straub, P. 2020. *Kriminalistisches Denken*. Heidelberg: Kriminalistik.
49. Wessels, J. & Beulke, W. 2003. *Strafrecht – Allgemeiner Teil – Die Straftat und Ihr Aufbau*. 33. neu bearbeitete Auflage. Heidelberg: C. F. Müller.



# JUDICIAL COMPLICITY IN EXPULSION: THE CASE OF BRASKEM AND THE EROSION OF THE PUBLIC SPHERE IN FLECHAL, MACEIÓ (BRAZIL)

Leonardo Simões Agapito\*  
Matheus de Alencar e Miranda\*\*  
Túlio Felipe Xavier Januário\*\*\*

*The collapse of Salt Mine 18 in Maceió, Brazil, involving the company Braskem, represents the largest ongoing socio-environmental disaster in any urban area worldwide. Initially affecting five neighborhoods, this disaster has displaced lots of families, closed businesses, destroyed historical and cultural heritage, and erased local identities along time. It has also caused numerous social and public health issues, alongside extensive environmental damage. Although the Federal Police have issued a report on the incident, the Public Prosecutor's Office has not yet filed any criminal charges. This study examines the reparation process in the Flechal region, which has suffered from water contamination and disruptions to public services. In this case, although a Provisional Collective Agreement has been established, merely ceasing extractive activities has not been enough to prevent the population from suffering from ongoing and increasingly severe harm. In the absence of criminal accountability, the reparation process has increasingly served the interests of the company, blurring the boundaries between public authorities and corporate actors in designing new public service strategies. As a result, the integrity of the public sphere is undermined while private profits continue to rise. In the criminal sphere, significant uncertainties remain regarding the role and scope of legal action in response to the situation, raising doubts about its effectiveness. On one hand, initiating criminal proceedings without a complete assessment of the damage is controversial; on the other, the absence of criminal accountability may legitimize unlawful conduct and deny victims formal recognition. Thus, the criminal justice system faces a dual challenge: (a) reliance on other forums to assess damage and mitigate risks—affecting the evaluation of criminal conduct; and (b) the necessity of establishing liability without a definitive assessment of the outcomes. Based on a bibliographic review and deductive methodology, this research argues that Fisse's theory of reactive fault and Braithwaite's responsive regulation may acquire renewed*

---

\* Professor, São Paulo State University (Brazil).

E-mail: [leonardo.agapito@unesp.br](mailto:leonardo.agapito@unesp.br)

\*\* PhD in Criminal Law, State University of Rio de Janeiro (Brazil).

E-mail: [matheus.alencarm@gmail.com](mailto:matheus.alencarm@gmail.com)

\*\*\* PhD Fellow, Fundação para a Ciência e a Tecnologia (FCT), University of Coimbra (Portugal).

E-mail: [tuliofxj@gmail.com](mailto:tuliofxj@gmail.com)

significance. These frameworks not only shift the analysis of *mens rea* for corporate actors but also prioritize victims' reparative needs. Under such models, public admission of guilt by companies becomes a prerequisite for subsequent stages, including the identification of control failures, omissions, licensing fraud, and collusion with state agents. From this recognition, reparations and damage containment mechanisms may be legitimately structured, enhancing transparency, reducing misinformation, and preventing the marginalization of victims.

**KEYWORDS:** *Braskem; Flexais; urban development; reparation.*

## 1. INTRODUCTION

The incident in Maceió, Alagoas, represents the largest ongoing socio-environmental disaster in any urban area worldwide. This disaster initially impacted five neighborhoods—Pinheiro, Bebedouro, Mutange, Bom Parto, and part of Farol—leading to the displacement of families, the bankruptcy of businesses, the destruction of historical and cultural heritage, the erasure of local identities, and numerous other social and public health problems, in addition to the environmental damage itself. In this sense, Braskem's responsibility in its aggressive mining operations was demonstrated both by technical reports and by the findings of the Parliamentary Inquiry Commission held in the Federal Senate (Carvalho, 2024).

This article does not seek to detail the full extent of the community impact or the various forms of harm, as these have already been comprehensively addressed in the CPI report and other scholarly works (especially Levino, Fontana, 2023). Given that the Federal Police have already presented a report on the case, but no criminal charges have been filed by the Public Prosecutor's Office by the time of this writing, this study focuses on analyzing the ongoing reparation process in the Flexais region.

Located on the shores of the Mundaú Lagoon, the Flexais area has also experienced land subsidence, water contamination, and interruptions in public services. However, its population was not relocated, as the region was not classified as a risk area like the others. According to a statement from the Geological Service of Brazil, the National Secretariat for Protection and Civil Defense, and the Special Deputy Secretariat for Civil Defense (SGB, DCN, & DCM, 2025), no soil subsidence risk was identified that would justify any sort of intervention.

Nevertheless, the same statement recognizes the occurrence of a process of "socioeconomic isolation" in the region (SGB et al., 2025, 5–6), which would have motivated the adoption of "actions aimed at meeting the needs of the population," especially regarding infrastructure. According to the website *Economic Integration and Development Project of the Flexais* (*Projeto Integração econômica e desenvolvimento dos Flexais*, n.d.), created as one obligation of the Conduct Adjustment Agreement (TAC – *Termo de Ajustamento de Conduta*) signed between the company Braskem, the Federal Public Prosecutor's Office, the State Public Prosecutor's Office of Alagoas, the Federal Public Defender's Office, and the Municipality of Maceió (ratified on October 10, 2022), the project would include 23 socioeconomic measures.

The TAC, signed in the context of Public Civil Action No. 0806577-74.2019.4.05.8000, before the Fifth Federal Court (TRF 5), serves as a precautionary measure intended to halt the damage caused by the company. Simply put, the collapse of the rock salt mining cavities and the soil subsidence caused environmental damage of such magnitude that merely stopping the soil exploitation is not enough for the population to cease suffering permanent and increasingly severe harm. On the contrary, even if the ground ceases to sink, the damage will persist and intensify, considering the interruption of economic activities, limited access to transportation, and consequently, to education, healthcare, and many other social rights.

Legally, if the damage is still ongoing, the assessment of civil reparations and administrative sanctions can be estimated and set provisionally. However, as new dimensions and developments emerge, all economic and administrative compensations must be revised accordingly. Yet in criminal matters, a new layer of uncertainty arises: could a criminal liability process even begin if it is still not able (maybe not even possible) to fully assess the extent of the harm?

For victims, affected individuals, and civil society, the absence of criminal legal measures to establish guilt and assign penal responsibility may be perceived as legitimizing criminal conduct and denying victims formal recognition. Conversely, in the absence of convictions of those responsible, reports of resentment toward compensated victims by other residents are not uncommon, leading to a reversal of judgment that blames the victims themselves, and the emergence of false narratives about undue payments and frauds in the reparation system.

Thus, the criminal justice system faces a dual challenge: (a) reliance on other forums to assess damage and mitigate risks—affecting the evaluation of criminal conduct; and (b) the necessity of establishing liability (“guilty” or “innocent”) without a definitive assessment of the outcomes.

Considering these challenges, the proposals of *reactive fault* (Fisse, 1983, 1991) and *responsive regulation* (Braithwaite, 2002) gain renewed relevance. Beyond proposing a shift in parameters for verifying *mens rea* (the volitional element) of legal entities, these theories place victims and their reparation needs at the forefront of criminal intervention. Under the doctrine of these frameworks, public admission of guilt by corporations is encouraged and serves as a prerequisite for subsequent phases of a due process. Although this issue may generate theoretical controversy, Braithwaite’s studies show that the adoption of consensual guilt models (*reintegrative shaming*) positively impacts recidivism prevention, especially when compared to the traditional guilt-imposition models (Braithwaite, Braithwaite, Ahmed, 2005).

Using the present case as a reference to apply the framework, the agreements between public authorities and Braskem should be grounded in a single premise: Braskem’s public admission of its failures in the rock salt extraction process. This acceptance of responsibility should be specific, indicating the control techniques that were not implemented, the reports that were neglected or omitted, the frauds that may have occurred in environmental licensing, and the formal or informal agreements with the State and its agents that enabled such ambitious mining activity. Only based on this

admission of guilt can appropriate reparations and damage containment mechanisms finally proceed. In this sense, the process will not forgo the victims' right to the truth, although truth might be achieved through more collaborative ways – outside the traditional adversarial system.

Providing detailed information, public admission of guilt, and transparency in the reparation process would help reduce misinformation, negative narratives about victims, and cynicism regarding reparations. How can one assess whether reparations are large or small without data on the severity of the criminal and administrative offenses committed? Although the effects of Braskem's ambitious mining operations are felt throughout the Maceió region, the company's actual profits are not easily discernible, leading to distorted perceptions of its actions.

As Harvey (2012, p. 81) highlights, it was in the context of major urban transformations of the 1960s that Lefebvre observed the city had become the central arena of political struggles and capitalist survival. It is in the process of urban expansion over the past decades that Harvey observes urban quality of life being transformed into a commodity, whether through the privatization of common goods or the creation of new habits. However, the current situation in the Flexais area of Maceió transcends the mere appropriation of space by private interests and market forces. The development of public infrastructure through reparation agreements is not simply a physical acquisition of space, but rather the creation of *symbolic capital* (using Bourdieu's concept, 2013), whereby a major corporation provides what the State has failed to deliver for decades.

If such mechanisms are not enough to erase the memory of the mine collapses and the earth tremors, they suffice for the construction of many other narratives controlled by those who shape the urban (social) space. Sassen (2016) demonstrates that processes of expulsion are deliberate rather than naïve or accidental. They represent a new phase of capitalism, with new instruments promoting primitive accumulation. In the case of Maceió, where the creation of symbolic capital is evident, further discussion is needed, as significant gains for various actors—including political ones—remain to be assessed.

In this context, could the Law (especially criminal law) prevent this intentional process of accumulation? The hypothesis proposed in this article is that it could not, because it failed at its most crucial stage—the prevention of soil subsidence and the beginning of the expulsion process. Particularly in the case of the Flexais, even though one might consider mechanisms for fostering environmental citizenship, broad disclosure of criminal proceedings, and transparency in compensations, the creation of symbolic capital is solidified through reparation instruments established without any admission of guilt.

For this reason, this article aims to demonstrate the relationship between legal guilt (*shaming*) and the process of accumulation and construction of symbolic capital. Thus, it not only critiques the current model of environmental protection and the State's failures in regulating major economic activities, but also examines how the justice system—through its actions and omissions—contributes to the construction of social meaning. Rather than the generic claim that corporations and States act in concert in ongoing processes of dispossession, it seeks to indicate precisely how the judiciary has done so—and what other paths it could take.

## 2. METHODOLOGY

This study is positioned within the field of critical environmental criminology, analyzing the impacts of corporate criminal conduct and the responses provided by the State. Within this field, the research object for this article is the ongoing reparation process in the Flexais area, in Maceió. Adopting a critical perspective rooted in historical materialism, this case study utilizes documentary analysis (including data published by the company on its official website, the CPI da Braskem report, Public Civil Action No. 0806577-74.2019.4.05.8000, and environmental reports issued by public authorities) as well as a literature review, with particular emphasis on Harvey's (2012) work.

## 3. THE FLEXAIS PROJECT AND THE PRIVATIZATION

The reparation agreement of the Flexais area was signed between the company Braskem, the Municipality of Maceió, the Federal Prosecution Service (Ministério Público Federal), the State Prosecution Service of Alagoas, and the Federal Public Defender's Office in October 2022. The Agreement (MPF, 2022) established 23 actions to be executed by Braskem in partnership with public authorities. Their goals are to overcome socioeconomic isolation and to support the neighborhood recovery. The actions are divided into five axes: (a) economy and labor; (b) education, sports, leisure, and environment; (c) health and social assistance; (d) management, community services, and security; (e) [urban] mobility. In an information bulletin published by the Federal Prosecution Service (MPF, [n.d.]), it was stated that all proposals will depend on the dialogue with the community, including the models to be followed regarding the proposed facilities. However, the signed Agreement stipulates that “[t]he Flexal community, civil society organizations, and related institutions” would merely be consulted to provide “contributions and suggestions” (MPF, 2022, p. 4 – Clause Two, paragraph two).

According to the electronic portal *Projeto Flexais* (Projeto, [n.d.]), sixteen actions had been implemented by May 2025, presented in seven items: (a) maintenance and security; (b) free complementary bus route; (c) school transportation; (d) vocational training courses (10 of 14 already completed); (e) general maintenance of the lighting network; (f) construction of a daycare-school; (g) construction of a basic health unit. There are actions ongoing, and others planned, ready to be done. Among the ongoing actions is “road requalification” (replacement of asphalt with ecological pavement and creation of bike lanes). Meanwhile, planned actions include the renovation of Nossa Senhora da Conceição Square and the construction of a shopping center, a space for an open-air market, and a support pier for fishermen.

In the education area, the “Aprendi no Flexal” (“Learned in Flexal”) program was developed. According to the website, two courses are currently underway, namely the technical course in Nursing (with twenty vacancies) and the technical course in Information Technology (with twenty vacancies). There is no information about where the classes are held (Projeto, [n.d.]). Among the completed courses, the following were

offered: (I) mentoring for entrepreneurs and (II) a gel nail course, both concluded in November 2024, and (III) a community communication workshop (held in September 2023 at the “Espaço Flexal”). Also listed (*ibid.*) as offered/completed are courses for (III) ceramic coating applicator, (IV) basic cooking, (V) elderly caregiver, (VI) building plumber installer, (VII) basic English for tourism services, (VIII) electrical installer, (IX) manicurist and pedicurist, (X) bricklayer, and (XI) motorcycle mechanic — all conducted at existing SENAI (National Service of Industrial Learning) and SENAC (National Service of Commerce Learning) training centers outside the Flexais area.

The agreement also stipulates two indemnity payments. The first, made in November 2022, was paid to the Municipality of Maceió in the amount of 64 million reais. The second payment, directed to Flexais families, addresses economic and social isolation and commenced in January 2023 (Projeto, [n.d.]). According to the website, registration of families and local businesses by property—conducted by Civil Defense and completed on January 26, 2023—began in November 2022, with the goal of guiding compensation measures. However, a separate, multifunctional registration—carried out by Braskem in collaboration with municipal public agents—was initiated by field teams in December 2022 and is described as “continuous action.”

In the timeline presented by the company, the activity of “teams” is repeatedly mentioned, starting on November 7, 2022, with initiatives to raise “population awareness”, and continuing with surveys to identify which types of courses residents would like to see offered. Identified by their blue vests, these teams remain active in the region to this day (May 2025), providing information on infrastructure and project progress. Their presence is also made visible through vehicles “delivered” by the company to the municipality to carry out patrols, a program referred to as “Solidarity Surveillance” (Projeto, [n.d.]).

Based on the 2022 registration, two forms of compensation were offered. For families who lived in the Flexais area and were identified as such by the Municipal Civil Defense (Projeto, [n.d.]), a single payment of R\$25,000.00 was offered, with an additional R\$5,000.00 available for those who could prove they conducted an economic activity in their residence. Those who carried out economic activities in the region and were identified by the Civil Defense studies (Projeto, [n.d.]) could choose between receiving a single payment (R\$25,000.00 – less than 5,000 US dollars) or submitting a claim for lost profits directly to Braskem, demonstrating the “socioeconomic isolation” through accounting documentation.<sup>1</sup>

According to the “Projeto Flexais Information Bulletin” (MPF, [n.d.]), the Federal Prosecution Service instructed that, in order to receive compensation, individuals must “have a lawyer or public defender, and Braskem will pay the legal fees.” The MPF also presented the process of compensation requests - which, in practice, takes place through an extrajudicial agreement. Thus, the entire logic is inverted. Braskem, supported by the municipal government (through the Civil Defense’s enlistment of residents and business owners), becomes the party to whom individuals must *apply* for aid (which it should be

---

<sup>1</sup> All the information presented in this paragraph is available on the web site of the project (Projeto, n.d.).

providing), and the company then decides (within the 30-day period it granted itself in the Agreement) whether applicants meet the requirements, after which it offers the family or business owner its settlement proposal to be signed within 30 calendar days (as also defined in the 2022 Agreement). Braskem became its own judicial court.

The incidents in Mariana (Fundão Dam, 2015) and Brumadinho (Dam 1 of the Córrego do Feijão Mine, 2019), involving the mining companies Samarco, Vale, and BHP, resulted in various reparation agreements with the State of Minas Gerais due to the environmental, economic, and social damages caused. The most recent of these agreements—the Judicial Agreement for Full and Final Reparation Related to the Fundão Dam Collapse—was signed on October 25, 2024, between the federal government (and its agencies), the state governments of Minas Gerais and Espírito Santo (and their respective environmental agencies), the National Bank for Economic and Social Development (BNDES), Samarco S.A., Vale S.A., and BHP Billiton Brasil Ltda., as well as the Renova Foundation. This agreement stipulates payments totaling 170 billion reais, distributed across various categories, including 29 billion reais to the federal government for financing social projects, 25 billion to the government of Minas Gerais for social development projects, 14 billion to the government of Espírito Santo, and 1.26 billion to “justice institutions” (Samarco, 2024).

The reparation agreements, presented as measures to ensure efficiency by removing compensation from judicial oversight, end up functioning as bureaucratic instruments that dissolve the traditional roles of perpetrator and victim. Instead, they create a dynamic between “managers” and “claimants,” which strips the payments of their symbolic significance. On the contrary, the court-approved settlements are accompanied by studies submitted outside the traditional adversarial process and close cases without any admission of guilt. This strategy reduces transparency and weakens social control over decision-making.

However, this data from the incidents in Minas Gerais is also relevant for comparison, as it demonstrates the mining companies’ ability to capture governments and development programs. The impacts caused by ambitious extraction and inadequate risk management occurred in economically vulnerable regions, allowing the newly presented social and environmental projects to serve as evidence in narratives suggesting that the population’s living conditions have improved—forgetting the traumas, the human losses, and the erased histories. The dispossession extends not only to territories and their resources but also to the very instruments of the State, such as hospitals, schools, and social assistance centers, which are now rebuilt, financed, and managed by the mining companies themselves.

In this merging of corporate and public powers, both sides profit from the destruction of areas and personal projects, gaining free rein to implement their own models of city, public services, and economy. In the case of the Flexais, this is reflected in the nature of the training programs, the urbanization plan, and the very disarticulation of the neighborhood. In contrast to the consensus among public and private institutions, there is no consensus among the local population, whose interests are diverse and contradictory—whether regarding relocation or revitalization.

Thus, the post-neoliberal discourse does not operate by delegitimizing the public sphere but rather by pursuing new forms of integration—through new institutional arrangements, outsourcing, public-private partnerships, and management agreements. At a time when privatizations are being questioned in terms of their efficiency, common goods (such as water or a balanced environment) do not need to be privatized if access to them is mediated by standards set by corporations.

#### 4. CONCLUSION

This article presents an initial analysis of the Flexais case, in which the process of displacement did not occur—as in other affected regions—through soil subsidence, but rather through a much slower model of “revitalization” carried out by the integration between public institutions (the State) and the company. From these preliminary reflections, it was observed that the procedures reveal intentionality and that the traditional procedural roles (defendant, victim, judge) have been reshaped through extra-judicial agreements formalized in terms lacking social representation. Thus, the article shows that the concern in post-disaster transition processes does not lie in the amount of compensation or in the activities effectively interrupted, but rather in the construction of economic and social development narratives - narratives that are, in fact, conceived from an agenda that is scarcely, if at all, democratic.

Therefore, minimum procedural standards must be upheld, including the admission of guilt, symbolic reparation measures, effective listening to victims (giving voice to silenced populations), preparation of detailed and easily accessible reports on the accidents and the actions that caused them, the integration of the community around a recovery model, the ongoing review of safety standards based on past incidents, and the widespread dissemination of cases as a form of environmental education. In this regard, although restorative justice concepts (as presented in Braithwaite, 2002) are important, it is the transitional justice models—those grounded in truth and public commitments of non-repetition—that can prevent the mere appropriation of public functions and social programs.

#### References

1. Bourdieu, P. 2013. *Capitalismo simbólico e classes sociais*. *Novos Estudos*, 96, pp. 105–115. <https://doi.org/10.1590/S0101-33002013000200008>
2. Braithwaite, J. 2002. *Restorative justice and responsive regulation*. Oxford: Oxford University Press.
3. Braithwaite, J., Braithwaite, V. & Ahmed, E. 2006. *Reintegrative shaming*. In: Henry, S. & Lanier, M. M. (eds.), *Essential criminology reader*. Oxfordshire: Routledge.
4. Fisse, B. 1983. *Reconstructing corporate criminal law: Deterrence, retribution, fault and sanctions*. *Southern California Law Review*, 56, pp. 1140–1246.

5. Fisse, B. 1991. *The attribution of criminal liability to corporations: A statutory model*. Sydney Law Review, 13(3), pp. 277–297.
6. Harvey, D. 2005. *O novo imperialismo*. 2<sup>nd</sup> ed. São Paulo: Loyola.
7. Harvey, D. 2012. *O direito à cidade*. Lutas Sociais, 29, pp. 73–89. <https://doi.org/10.23925/lis.v0i29.18497>
8. Levino, N. de A. & Fontana, M. E. 2023. *A cidade engolida: Uma discussão inicial do afundamento dos bairros em Maceió-AL pela extração do sal-gema*. São Carlos: Pedro & João.
9. Sassen, S. 2016. *Expulsões: Brutalidade e complexidade na economia global: Brutalidade e complexidade na economia global*. Rio de Janeiro: Paz e Terra.

### **Internet Sources**

1. Carvalho, R. 2024. *CPI da Braskem: Relatório final*. Brasília: Senado Federal. Available at: <https://legis.senado.leg.br/atividade/comissoes/comissao/2642/mna/relatorios> (5.6.2025)
2. Ministério Público Federal. (n.d.). *Informativo Projeto Flexal. Caso Pinheiro/Braskem*. Available at: <https://www.mpf.mp.br/grandes-casos/caso-pinheiro/flexal> (5.6.2025)
3. Ministério Público Federal. 2022. *Íntegra do Termo de Acordo para Implementação de Medidas Socioeconômicas Destinadas à Requalificação da Área do Flexal. Caso Pinheiro/Braskem*. Available at: <https://www.mpf.mp.br/grandes-casos/caso-pinheiro/flexal> (5.6.2025)
4. Projeto Integração Urbana e Desenvolvimento dos Flexais. (n.d.). *Projeto Flexais*. Available at: <https://projetoflexais.com.br> (5.6.2025)
5. Samarco. 2024. *Acordo judicial para reparação integral e definitiva relativa ao rompimento da barragem de Fundão*. Available at: <https://www.samarco.com/wp-content/uploads/2024/10/Repactuacao-TTAC-Mariana.pdf> (5.6.2025)
6. Serviço Geológico do Brasil, Secretaria Nacional de Proteção e Defesa Civil & Secretaria Adjunta Especial de Defesa Civil. 2025. *Nota técnica conjunta n. 01/2025*. Available at: <https://maceio.al.gov.br/uploads/documentos/SEI-MIDR-5687709-Oficio.pdf> (5.6.2025)



# CONTEMPORARY CHALLENGES IN SHAPING CRIMINAL LAW PROTECTION OF THE INSURANCE MARKET

Ivana P. Bodrožić\*  
Nataša Petrović-Tomić\*\*

*The current time context is dominantly marked by changes and development. In public discourse, it is often emphasized that change is the only constant. In the spirit of that statement, criminal law itself, as the most exclusive instrument of the state's reaction to crime, is in constant development - status semper reformandus. Changed social circumstances determine the dynamics and character of changes in the criminal legal framework. It should certainly be a rational and relatively consistent system of legal documents, but by no means sluggish and inadequate. Continuity of changes in criminal law provisions is present in all European criminal legislation, including the Serbian one. Changes as such are not always marked as necessary and adequate, but numerous are precisely of this type and are most prominent in the area of criminal offenses from the mala prohibita category. One of the segments that the criminal law protects is the legal and undisturbed performance of economic activity, the aspects of which are developing in several directions. The paper will analyze the peculiarities of the criminal protection of legal flows of insurance, its possibilities and scope, both in the provisions of the Criminal Code (CC) and in the provisions of secondary criminal legislation - in this case the Insurance Law (IL). This analysis refers both to the nomotechnical peculiarities of the criminal offense of insurance fraud in the CC, as well as to some fundamental problematic questions of determining the mutual conditionality of criminal law norms with the conditions of modern economic crime, the question of how criminality vice versa shapes insurance products. All classic research methods in legal sciences will be used in the work, primarily the dogmatic-legal and normative method.*

*In conclusion, it is emphasized that criminal law provides protection to the legal functioning of insurance as an activity within the framework of the financial sector and as such directly protects economic activity, especially in relation to the group protection facility that the criminal offense of insurance fraud has within the framework of the Special Part of the CC. Criminal law norms are included in the framework of the lex specialis -the*

---

\* Associate Professor, University of Criminal Investigation and Police Studies in Belgrade.  
ORCID <https://orcid.org/0000-0001-5010-7832>  
E-mail: [ivana.bodrozic@kpu.edu.rs](mailto:ivana.bodrozic@kpu.edu.rs)

\*\* Full Professor, Faculty of Law, University of Belgrade.  
E-mail: [nataly@ius.bg.ac.rs](mailto:nataly@ius.bg.ac.rs)

*Insurance Law, which shows that this regulation in the field of criminal law protection is within the framework of secondary legislation, but as confirmed in the paper, it is legitimate and without unnecessary overlapping of incriminations.*

**KEYWORDS:** *Insurance market, criminal law protection of the insurance market, continuous changes in criminal law, contemporary social challenges.*

## 1. INTRODUCTION

The current time context is dominantly marked by changes and development. In public discourse, it is often emphasized that change is the only constant. In the spirit of that statement, criminal law itself, as the most exclusive instrument of the state's reaction to crime, is in constant development-*status semper reformandus*. Changed social circumstances determine the dynamics and character of changes in the criminal legal framework. It should certainly be a rational and relatively consistent system of legal documents, but by no means sluggish and inadequate.

Continuity of changes in criminal law provisions is present in all European criminal legislation, including the Serbian one. Changes as such are not always marked as necessary and adequate, but numerous are precisely of this type and are most prominent in the area of criminal offenses from the *mala prohibita* category. The future trends of EU substantive criminal law should exercise caution when continuing to exercise its competences to approximate the substantive criminal law of its Member States and attention should be paid to *inter alia* the principles of *ultima ratio*, proportionality and subsidiarity (Buisman, 2022). The same applies to the provisions of the national criminal legislation. Although the criminal acts that protect the economy must certainly have a dynamic character, too frequent changes of the criminal norms do not meet the democratic standards of a rational and relatively solid criminal law (Bodrožić, 2020, p. 396).

One of the segments that the criminal law protects is the legal and undisturbed performance of economic activity, the aspects of which are developing in several directions.

This article analyzes the peculiarities of the criminal law protection of legal flows of insurance, its possibilities and scope, both in the provisions of the Criminal Code (CC) and in the provisions of secondary criminal legislation - in this case the Insurance Law (IL). This analysis refers both to the nomotechnical peculiarities of the criminal offense of insurance fraud in the CC, as well as to some fundamental problematic questions of determining the mutual conditionality of criminal law norms with the conditions of modern economic crime, the question of how criminality *vice versa* shapes insurance products. It is emphasized that criminal law provides protection to the legal functioning of insurance as an activity within the framework of the financial sector and as such directly protects economic activity, especially in relation to the group protection object that the criminal offense of insurance fraud has within the framework of the Special Part of the CC.

Criminal law norms are included in the framework of the *lex specialis* of the IL, which shows that this regulation in the field of criminal law protection is within the

framework of secondary legislation, but as confirmed in the paper, it is legitimate and without unnecessary overlapping of incriminations.

The insurance market is the sector of the economy where financial protection against various risks is bought and sold. It involves participants like policyholders (buyers), insurers (sellers), and reinsurers, and is a vital component of the global financial services industry, providing stability and risk management for individuals and businesses.

What are possibilities for adapting the insurance market to an uncertain and turbulent macroeconomic environment? Declining economic activity, rising inflation, and increasing interest rates are new challenges that insurance companies must now navigate as critical players in the market. Despite the challenges, the insurance market has demonstrated resilience, as evidenced by the growth in insurance premiums. Macroeconomic challenges have adversely affected the performance of insurance companies. If the insurance market fails to adapt to the dynamically unstable macroeconomic environment, the consequences for insurers' solvency could be severe. Furthermore, the unfavorable geopolitical situation and economic crisis are compounded by the growing frequency of natural disasters due to climate change, causing immense material damage and loss of life. This raises the question: can insurance companies take on these severe risks without jeopardizing their own survival (Kočović et al., 2024)?

Heading into 2026, there is little doubt insurers are entering an era of considerable uncertainty—from economic and geopolitical volatility to the increasing frequency and severity of catastrophic events.

It seems clear to most stakeholders that business as usual for insurers may not suffice going forward. A new reality is unfolding, and carriers may need to rethink how they operate, engage, and grow to be ready to take it on (2026 Global Insurance Outlook).

The emphasis on technology modernization has shifted to executing real Artificial Intelligence (AI) use cases at scale, strengthening data foundations, and aligning architecture and security to support these ambitions (Tošić, 2025, pp. 86-87). However, embedding digital tools and capabilities effectively requires insurers to enable their workforce to thrive in increasingly digital, data-rich environments.

The accelerated pace and breadth of complexity and uncertainty don't appear to be a passing phase. Insurers that understand this and act decisively to reconsider their current business models, products, tools, and stakeholder interactions could be well positioned in the market.

At this very point we ask the main scientific question within this research: what are the main connections between very different branches of law—insurance law and criminal law, and consequently what are the possibilities and scopes of a contemporary criminal law protection of the insurance market and what should or could be done to enhance the strands and opportunities for better protection of the insurance industry by the means of substantive criminal law.

Criminal law protects the insurance market by penalizing and deterring fraud and other financial crimes that harm policyholders and insurers, and by establishing rules for market integrity, risk management, and anti-money laundering (Petrović-Tomić, 2024, pp. 8-9). This protection is crucial because criminal activity like insurance fraud

can lead to higher premiums for everyone and can be linked to organized crime. Insurance companies also use their own sophisticated methods, including technology and legal processes, to combat crime.

Major streams in criminal law protection of the insurance market can be divided in the following way:

- **Deterrence and punishment:** Criminal law acts as a deterrent by imposing penalties, including imprisonment, for insurance fraud and other financial crimes. This protects the market by making criminal activity less attractive.
- **Combating organized crime:** Criminal law is used to fight serious organized crime that may use the insurance market as a funding source or target.
- **Market integrity:** Criminal law, in conjunction with other regulations, helps ensure the integrity of the market by preventing illegal activities such as money laundering and bribery. It requires insurance companies to implement rigorous due diligence procedures, especially for high-risk customers.
- **Protecting policyholders and beneficiaries:** By deterring fraud and ensuring market stability, criminal law indirectly protects policyholders and beneficiaries from the negative consequences of insurer failure or financial crime.

On the other hand the insurance industry cooperates with criminal law by:

- **Fraud prevention:** Insurers use technology and data analytics to detect fraud and cooperate with law enforcement agencies to combat it.
- **Internal controls:** Companies implement sophisticated financial crime controls and risk management systems to comply with regulations and stay ahead of evolving threats, such as cyberattacks.
- **Legal defense:** Insurers offer legal protection services to policyholders, providing access to legal advice and representation in criminal proceedings.
- **Adherence to regulations:** Insurers must follow rules regarding anti-money laundering and combating the financing of terrorism (Baker&Shortland, 2023).

## **2. CRIMINAL LAW PROTECTION OF LEGAL FLOWS OF INSURANCE — PROVISIONS OF THE CRIMINAL CODE (CC)**

In contemporary society, the economic development of a country and the conduct of economic activities have acquired such significance that the state increasingly intervenes in economy to establish and maintain normal relations among economic entities in a manner aligned with national economic interests and the needs of its citizens. Under such circumstances, various new forms of criminal behavior emerge, which, as a social phenomenon, always adapt rapidly to the prevailing societal conditions.

As economic life is always dynamic and subject to change, economic crime likewise evolves quickly in terms of its forms and structure. Accordingly, the criminal law response to this type of crime is gaining increasing importance, resulting in a growing number of legal, and specifically criminal, regulations in this area (Đorđević&Bodrožić, 2024, p.177).

There are significant difficulties in defining the concept of an economic criminal offense. In the proper sense, it refers to socially harmful behavioral patterns whose punishment primarily serves to protect the economic system and its functioning. The primary purpose of criminalizing this category of offenses is to prevent the erosion of trust in the economic system. Among other things, regarding the economic model deemed desirable for protection under criminal law, the dominant view is that it is the market economy model (Stojanović, 2022, pp.176–177).

Given that the share of economically motivated crime in the Republic of Serbia is relatively high, by aggregating crimes against property and against the economy accounts for 48.6% of all criminal offenses that are economically motivated. Although varied in their legal nature, these offenses share a underlying economic motives and are, thus, registered as such in the annual reports of the Statistical Office of the Republic of Serbia (Radović, 2021, pp.55-57). This data serves as material legitimacy for the existence of offenses against the economy and is one of the legislative motives behind their incrimination. As insurance law has emerged as one of the fastest-growing branches of the economy, its development is paralleled by the emergence of a significant area in which new forms of criminal behavior arise, which have the potential to be addressed as criminal offenses.

In the positive criminal legislation of the Republic of Serbia, the Criminal Code (CC) is considered the principal legal act that defines the vast majority of behaviors deemed criminal offenses. Nevertheless, following the codification of criminal legislation in 2006, certain special provisions, commonly referred to as subsidiary criminal legislation, have remained in force due to specific legislative and technical reasons. These contain individual criminal provisions and distinct criminal offenses.

In the field of insurance, the only criminal offense that directly protects insurance activities is the offense of insurance fraud, as prescribed in Article 223a of the CC. This offense is classified among crimes that collectively aim to protect the economy. This is justified, due to the fact that the Serbian criminal law environment is characterized by a dynamic phase of legislative interventionism and this chapter on criminal offenses was among those that underwent significant and thorough changes in 2016, within the framework of no fewer than eight amendments to the CC enacted since 2006 up to the present. At that time, the offenses in this chapter were substantially improved both structurally and substantively; they were systematized by similarity, and as many as seven new incriminations were introduced, an evident example of criminal law expansionism, which, as a criminal-political trend, must be labeled as negative. Additionally, terminological corrections and normative reconfigurations were made, and three offenses were decriminalized (Delić, 2023, pp. 242–243; Bodrožić, 2020).

In addition to this criminal offense, numerous other incriminations may be used to protect the rights and interests of participants in the insurance market such as Fraud in the conduct of business activity (Article 223 of the CC); Embezzlement in the conduct of business activity (Article 224 of the CC); Abuse of trust in the conduct of business activity (Article 224a of the CC); Damage to creditors (Article 233 of the CC), among many others. However, insurance fraud is yet regarded as the *classical lex specialis* provision in this area (Petrović-Tomić, Bodrožić, 2025, pp. 428-431).

Alongside this offense, the Insurance Law (IL), under *Chapter XV* (Penal Provisions), Section 1 (Criminal Offenses), sets three specific criminal offenses related to insurance: unauthorized performance of insurance activities (Art. 256 IL), issuing false opinions and reports (Art. 257 IL), and issuing false assessments (Art. 258 IL).

The criminal offense of insurance fraud was introduced into the Criminal Code in 2009. In its original version, it was classified under *Chapter XXI Criminal Offenses Against Property*, as Article 208a, and represented a specific form of the general offense of fraud. Thus, insurance fraud represented a specific legal norm, standing in a *lex specialis derogat legi generali* relationship to the general offense of fraud under Article 208. The act of insurance fraud in this original 2009 version involved inducing another person, in connection with insurance, to act to the detriment of their own or another's property, either by commission or omission. The law, in that version of the offense, specified typical forms of conduct such as falsely presenting facts, concealing facts, submitting false documentation, or otherwise misleading or maintaining a state of deception. The elements of crime, as a subjective characteristic, included the intent to unlawfully obtain material gain for oneself or another. The aforementioned activities had to be undertaken in relation to insurance, without specifying the type of insurance involved. The offense included two aggravated forms, involving more severe consequences, and one basic form (Lazarević, 2011, p.704).

As a special type of fraud related to the insurance industry, the elements of crime of insurance fraud corresponded to, or overlapped with, those of the general offense of fraud, as a classic property crime. Insurance fraud, in its original version from Article 208a of the 2009 Criminal Code, read as follows:(1) Whoever, with the intent to obtain unlawful material gain for themselves or another, misleads someone, by misrepresenting or concealing facts, providing false opinions or reports, submitting false assessments, presenting false documentation, or by otherwise deceiving or maintaining a state of deception, in connection with insurance, and thereby induces that person to act or refrain from acting to the detriment of their own or another's property, shall be punished with a prison sentence of six months to five years and a fine. (2) Whoever commits the act referred to in paragraph 1 of this Article solely with the intent to cause harm to another, shall be punished with a prison sentence of up to six months and a fine. (3) If the offense referred to in paragraphs 1 and 2 of this Article results in material gain or damage exceeding 450,000 dinars, the offender shall be punished with a prison sentence of one to eight years and a fine. (4) If the offense referred to in paragraphs 1 and 2 of this Article results in material gain or damage exceeding 1,500,000 dinars, the offender shall be punished with a prison sentence of two to ten years and a fine (Simonović, 2010, p. 414).

However, the 2016 amendments to the Criminal Code, through which the legislator significantly intervened in the area of criminal offenses against the economy, had a notable impact on the incrimination of insurance fraud. The offense was reclassified, moving from the chapter on criminal offenses against property to the chapter on criminal offenses against the economy. This is considered desirable, as the protected legal interest under the new criminal offense, though it retained the same name but modified legal elements, is now insurance as an economic activity.

The reasons justifying this major legislative intervention include, first, the primary protected object, namely, what the analyzed criminal offense seeks to protect in the first place. Secondly, they relate to the necessity of effectively safeguarding against so-called insurance fraud in a manner consistent with the approaches adopted by most comparative criminal law systems. Through the amendments and supplements, the criminal offense of insurance fraud was more precisely defined, as the offense of insurance fraud (Article 208a of the CC) had previously been practically encompassed entirely by the existing offense of fraud. Insurance fraud constitutes a form of so-called policyholder fraud, which significantly differs from the general offense of fraud. For this reason, it is introduced as a separate criminal offense in many criminal law systems, in line with comparative legal practice. This justifies its introduction as a distinct offense, since, unlike the general offense of fraud, the criminal domain in insurance fraud is defined more broadly, and there is no requirement for inducing or maintaining a misconception on the part of the passive subject.

As the Republic of Serbia is a candidate for European Union (EU) membership, it is undergoing comprehensive legal reforms, including efforts to harmonize criminal law provisions as well. The criminal offense of insurance fraud, as regulated since 2016, remains in effect under the 2024 version of the CC, in Article 223a:

- (1) Whoever, with the intent to collect the agreed sum from an insurance company, destroys, damages, or conceals the insured item and then reports the loss, shall be punished by imprisonment from three months to three years.
- (2) The same punishment as in paragraph 1 shall apply to anyone who, with the intent to collect the agreed sum from an insurance company for bodily harm, injury, or health impairment, causes such harm, injury, or impairment to themselves and then submits a claim to the insurance company.
- (3) If the acts referred to in paragraphs 1 and 2 result in financial gain or cause damage exceeding four hundred and fifty thousand dinars, the perpetrator shall be punished by imprisonment from one to eight years.
- (4) If the acts referred to in paragraphs 1 and 2 result in financial gain or cause damage exceeding one million five hundred thousand dinars, the perpetrator shall be punished by imprisonment from two to ten years.

The criminal offense has a basic form and two aggravated forms. The conduct constituting the basic form is defined alternatively and may consist either of the destruction, damage, or concealment of the insured item or of the reporting of a loss, which itself comprises two acts – causing harm, injury, or health impairment to oneself and submitting a claim to the insurance company.

The object of the act may be either the insured item or the perpetrator. The offense is committed with intent, and the perpetrator may be any person. The aggravated and the most severe forms are linked to obtaining financial gain or causing damage exceeding certain monetary thresholds (Petrović-Tomić, Bodrožić, 2025, pp. 428-431).

### **3. CRIMINAL LAW PROTECTION OF LEGAL FLOWS OF INSURANCE — PROVISIONS OF SECONDARY CRIMINAL LEGISLATION**

Secondary criminal legislation in Serbia refers to regulations that supplement and support the CC, including laws that define new criminal offenses (e.g. in the field of economy, high-tech crime), determine specific sanctions, or regulate procedural aspects (criminal procedure) and the execution of sentences, thereby protecting various social goods in addition to those covered by the Code itself.

In addition to the CC, which represents a codified system of legal norms covering the entire area of criminal law, secondary, auxiliary or supplementary criminal law is also applied in many countries. It is a set of laws from other areas of legal life, which, based on the principles and within the framework of the CC, determine the concept and characteristics of one or more criminal acts, namely acts that violate and violate the norms of those special laws.<sup>1</sup>

Article 1 of the IL regulates the performance of insurance activities in the Republic of Serbia the conditions for the establishment and operation of insurance companies and reinsurance companies, the performance of insurance and reinsurance mediation activities, the performance of insurance representation activities, the supervision of the performance of insurance activities, the protection of the rights of policyholders, policyholders, insurance beneficiaries and third party injured parties, as well as the performance of insurance activities in the Republic of persons from the member states of the European Union and foreign countries.

Within Title XV of the IL which bears the name criminal provisions, in Section 1, there are definitions of three criminal offenses related to insurance activity. Those are criminal acts: Unauthorized performance of insurance activities from Article 256, Giving false opinions and reports, from Article 257 and Providing a false assessment referred to in Article 258. Criminal offence of Unauthorized conduct of insurance activities implies that a responsible person within an insurance company, reinsurance company, insurance brokerage company, insurance agency, or among insurance agents, who engages in insurance activities without obtaining authorization from the National Bank of Serbia, shall be punished for a criminal offense with a prison sentence ranging from three to six years. A responsible person of a legal entity who, in the capacity of a service provider, enters into insurance contracts, or contracts that, by their legal nature, constitute insurance contracts, with other persons, shall be punished for a criminal offense with a prison sentence ranging from three to six years. Criminal offence Providing false opinions and reports means that an authorized actuary or auditor who, contrary to the provisions of this law, prepares a false opinion or report shall be punished for a criminal offense with a prison sentence of one to three years.

---

<sup>1</sup> Criminal provisions found in these special laws, which are not criminal laws as a whole, but laws that regulate different areas, together with the provisions of the special part of the CC, form the whole of the special part of the criminal law of the Republic of Serbia. The number of criminal offenses in secondary criminal legislation in the Republic of Serbia is relatively small. The main reason for their non-introduction into the CC is their close connection with the substance of the special laws in which they are contained, but also the fact that the said substance is subject to frequent changes (Đorđević, Bodrožić, 2024.p. 2).

Criminal offence Providing a false assessment is defined as A responsible person within an insurance company, reinsurance company, insurance brokerage company, insurance agency, or among insurance agents, who prepares false assessments or statements when determining and evaluating risks and damages, shall be punished for a criminal offense with a fine or a prison sentence of up to three years.

This structuring of the criminal offense of insurance fraud, in relation to the offenses specified in Articles 256, 257 and 258 of the IL, could potentially pose challenges in delineation. However, the statutory descriptions of these offenses differ sufficiently regarding the definition of the act of the crime of insurance fraud, so that they do not conflict with each other, and there is justification for their parallel existence in these two legal provisions (Stojanović, 2020, pp.748-749). Although the aforementioned acts from the IL are considered criminal acts from the secondary criminal legislation and they are not within the formal system of the CC, in one, broader theoretical sense, they can be classified as crimes against the economy (Đorđević, Bodrožić, 2024, p.8).

#### 4. CONCLUSION

Insurance is among the economic activities marked by strong development potential. It may also be viewed as a kind of civilizational phenomenon, having evolved in direct proportion to humanity's growing need for protection and security. This phenomenon has not escaped criminal law. The range of human behaviors deemed criminal and codified in the Special Part of a country's criminal law is known as the dynamics of incrimination. Though criminal law's primary function is protective, the evolution of crime and associated fear, especially the security paranoia of modern times, has led to the assignment of a security function to criminal law. This is a function alien to its original purpose and drives criminal law into a full-blown crisis of legitimacy. Changes in life conditions and parallel developments in crime have led to increased demand for both insurance and more extensive criminal law protection. In the context of insurance law and the insurance market, this reflects a positive development trend of a business activity aligned with the traditional stages of economic cycles. However, in criminal law, the tendency toward preventively oriented criminalization and the use of criminal law in the early phases of criminal progression must be viewed as negative criminal policy tendencies, ones that lead criminal law into a crisis of legitimacy and reduced applicability.

Criminal law provides protection to the legal functioning of insurance as an activity within the framework of the financial sector and as such directly protects economic activity, especially in relation to the group protection facility that the criminal offense of insurance fraud has within the framework of the Special Part of the CC.

Criminal law norms are included in the framework of the *lex specialis* of the Insurance Law, which shows that this regulation in the field of criminal law protection is within the framework of secondary legislation, but as confirmed in the paper, it is legitimate and without unnecessary overlapping of incriminations.

In general, the major key conclusions about the contemporary challenges in criminal law protection of the insurance market can be that- financial crime includes fraud, bribery, money laundering, and other illegal activities that target or occur within the insurance industry.

The main and the strongest possibility of the state reaction can be seen only through harmonized rules: In regions like the EU, harmonized regulations ensure a uniform level of protection for policyholders and create a stable market environment.

Criminal law in those specific type of the protection of the legal flows of the insurance also need to respect the *ultima ratio* principle. This Latin term means "the last resort," emphasizing that criminal law should be used to protect the insurance market only when other legal and regulatory measures are insufficient. This allows for the use of criminal law only when it is both useful and necessary. When other mechanisms exist that can provide such protection in a satisfactory manner, or when criminal law, if applied, risks becoming a threat to the very legal interests it is intended to protect, particularly if it ultimately destabilizes the legal system entrusted with that protection, then prosecution and punishment must take a step back and be adapted and limited according to the specific circumstances of each case (Maculan, Gill, 2020, p.157).

## References

- Baker, T., Shortland, A. 2023. How Crime Shapes Insurance and Insurance Shapes Crime. *Journal of Legal Analysis*, 15 (1), pp.183–200.
- Bodrožić, I. 2020. Kontinuirani krivičnopravni ekspanzionizam - na raskršću politike i prava. *Srpska politička misao*, 2, pp. 381-396.
- Buismann, S. S. 2022. The Future of EU Substantive Criminal Law. *European Journal of Crime, Criminal Law and Criminal Justice*, 30 (2), pp. 161–187.
- Delić, N. 2023. *Krivično pravo – Posebni deo*. Belgrade: Faculty of Law, University of Belgrade.
- Đorđević, Đ., Bodrožić, I. 2024. *Krivično pravo – Posebni deo*. Belgrade: University of Criminal Investigation and Police Studies.
- Kočović et al. 2024. *Transformation of the insurance market-responses to new challenges*. Belgrade: University of Belgrade, Faculty of Economics and Business Publishing Centre.
- Lazarević, Lj. 2011. *Komentar Krivičnog zakonika*, Second Revised and Expanded Edition. Belgrade: Faculty of Law, Union University.
- Maculan, E., Gil Gil A. 2020. The Rationale and Purposes of Criminal Law and Punishment in Transitional Contexts. *Oxford Journal of Legal Studies*, 40 (1), pp. 132–157.
- Petrović Tomić, N. 2019. *Pravo osiguranja – Sistem, Knjiga prva*. Belgrade: *Official Gazette*.
- Petrović Tomić, N. 2024. Supplementary Health Insurance as a Contribution to Development of a Sustainable Healthcare System in The Republic of Serbia. *Tokovi osiguranja*, 1/2024, pp.7-39.

- Petrović Tomić, N., Bodrožić, I. 2025. General issues of the reversible relationship between criminal and insurance law. *Tokovi osiguranja*, 41( 3), pp. 397-437.
- Radović Stojanović, J. 2021. *Kriminal i ekonomija Srbije*. Belgrade: University of Criminal Investigation and Police Studies.
- Simonović, D. 2010. *Krivična dela u srpskoj legislativi*. Belgrade: Official Gazette.
- Stojanović, Z. 2019. *Krivično pravo – Opšti deo*. Belgrade: Pravna knjiga.
- Stojanović, Z. 2020. *Komentar Krivičnog zakonika*, Tenth revised edition. Belgrade: Official Gazette.
- Stojanović, Z. 2022. *Krivično pravo – Posebni deo*. Novi Sad: The University of Novi Sad, Faculty of Law.
- Tošić, I. 2025. Insurance companies business in a digital environment-what does Dora bring?. *Tokovi osiguranja*, 1/2025, pp. 69-86.

### ***Legal Sources***

- Criminal Code of the Republic of Serbia (*Official Gazette of RS*, Nos. 85/2005, 88/2005, 107/2005, 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016, 35/2019 and 94/2024).
- Insurance Law of the Republic of Serbia (*Official Gazette of RS*, Nos 139/2014 and 44/2021).

### ***Internet Sources***

- 2026 Global Insurance Outlook. Available at: <https://www.deloitte.com/us/en/insights/industry/financial-services/financial-services-industry-outlooks/insurance-industry-outlook.html> (12.12.2025)



## SHAPING JUSTICE AND HOMELESSNESS\*

Miomira P. Kostić\*\*

*The author divided the work into several thematic units. First of all, in the introductory part of the work, she pointed out the importance of human work, as the process of producing material and spiritual goods, in the sense of purposeful activity of man to create useful values. Idleness, as a special type of behavior, of younger and older people, is connected, in the etiological sense, with different criminological phenomena, that is, different forms of delinquent activities. On the other hand, showing disinterest in maintaining or improving one's existence, due to a special psychological state or deviation in the personality structure, determines that one's social status will be permanently unfavorable, and the person will be clearly seen, in a professional sense, as someone who possesses traits of social maladjustment, i.e. as living in a state of vagrancy or homelessness, for example. Then the historical context of vagrancy/homelessness/vagabondage is explained, as well as their conceptual definition. An important approach to these phenomena was emphasizing the legal regulation of European continental law, as well as the legal regulation of domestic law.*

**KEYWORDS:** Homelessness, Vagrancy, Vagabondage, Justice.

---

\* The paper is the result of research on the scientific project: „Responsibility in the legal and social context” funded by the Faculty of Law, University of Niš, in the period 2021–2025. *Acknowledgement:* This paper is a result of theoretical observation, According to the 2030 Agenda for Sustainable Development (A/RES/71/313) this paper is connected to the Sustainable Development Goal No 1 and 11 call for ending extreme poverty including homelessness, everywhere and ensuring access for all to adequate, safe and affordable housing..

\*\* LLD, Full Professor, Law School University of Niš, Republic of Serbia.  
ORCID <https://orcid.org/0000-0002-1802-7733>  
E-mail: [kosticm@prafak.ni.ac.rs](mailto:kosticm@prafak.ni.ac.rs)

## 1. INTRODUCTORY CONSIDERATIONS

Homelessness, vagrancy, begging and idleness are not phenomena related only to modern times. On the contrary, they have a long history, so looking at the historical context is necessary in order to observe certain common characteristics of their manifestation through different periods of time, and prehistory, anthropological and sociological approaches in explaining their appearance, find their interpretations in the distant past, since the ancient and medieval period. The conceptual definition and forms of manifestation of these forms of deviant behavior are also important factors in the transparency of observation and their social foundation in the modern countries of the world, including in our country. The causes of these phenomena are often hidden and, at first glance, are most often defined as endogenously based, thus obscuring their social significance and context.

World Homeless Day is October 10, so this paper aims to mark that day. conduct activities with the aim of sensitizing the public and pointing out the increasingly complex difficulties of homelessness. According to United Nations estimates, there are more than 1.6 billion people in the world living in inadequate housing conditions, with around 15 million forcibly evicted each year. The number of homeless people in the world is almost impossible to estimate, because each country has a different definition of homelessness. Data from the European Union indicate that there are 2.7 million of them in the territory of its member states, and in the United States of America, according to estimates, about two million (Bešić, 2022).

Vagrancy, begging and idleness (Konstantinović Vilić, Nikolić Ristanović & Kostić, 2012, p. 396) are often associated with the manifestation of numerous forms of delinquent activities.<sup>1</sup> At the same time, this way of life affects vagrants, beggars and idlers to be exposed to various forms of criminal victimization. In recent years, the world has seen an increase in the share of crimes, even the most serious crimes, committed against the homeless. Murders of homeless people by minors are often referred to as "teenage sport" in the mass media (CNN, 2007).

Wandering and begging is directly related to not doing work and to the absence of work habits. Man's work represents one of the most important aspects of the economic, cultural, political and personal prosperity of an individual and is woven into the general development and progress of a social community. Work realizes the process of production of material and spiritual goods, in the sense of purposeful activity of man to create use values. Man's existence and satisfaction of all other needs for his realization and development as a generic being depend on work (Konstantinović Vilić & Kostić, 2006, p. 160). On the other hand, indulging in idleness, as a special type of behavior, of younger and older people, is connected, in an etiological sense, with different criminological phenomena, that is, different forms of delinquent activities. Thus, in the basic criminological literature, the absence of work habits, and therefore the manifestation of idleness,

---

<sup>1</sup> Certainly, idleness is a broader concept than vagrancy and "consists in not accepting any obligations related to work or social engagement" (Konstantinović Vilić, Nikolić Ristanović & Kostić, 2009, pp. 406-407).

is often associated with the occurrence of juvenile delinquency, for example. Criminologists agree in their view that numerous factors, of a subjective and objective nature, influence the occurrence of inactivity. The objective ones are related to the reduction of employment opportunities, due to economic crises or restructuring of the economy and economic branches, as a result of which the individual is not able to oppose it or directly influence the change in such a situation in society. On the other hand, showing disinterest in maintaining or improving one's existence, due to a special psychological state or deviation in the personality structure, determines that one's social status will be permanently unfavorable, and the person will be clearly seen, in a professional sense, as someone who possesses traits of social maladjustment (Perović, 1998, p. 338), i.e. as living in a state of vagrancy or homelessness.

Numerous works, from individual discussions, through monographic publications (Beier & Ocobock, 2008) about homeless people and homeless families in developed countries, such as the USA, for example, as well as in the countries of the European Union, point to the necessity of raising awareness about these phenomena here as well, especially if all exogenous factors of their origin are properly and impartially observed, such as: poverty (Kostić, 2008), wars, job loss, economic crises. Hence, this work is an effort in victimological observation of the observed phenomena and a contribution to the further engagement of the criminological and criminal-political approach in the prevention of occurrence, but also in the protection of persons who are vagrants/homeless, beggars or vagabonds.

## **2. HISTORICAL CONTEXT OF VAGRANCY/VAGRANCY/HOMELESSNESS/VAGRANCY**

According to the understanding presented by A. Vexliard, vagrancy appeared in the old century, when it was severely punished, due to the danger of "traveling gangs", which were constantly increasing, and therefore vagrants were persecuted (Perović, 1998, p. 338). In Hammurabi's code, which contains only fragmentary provisions of criminal law, in paragraph 143, it is prescribed that if a woman "is not a good housewife, but a vagabond, if she wastes the house, neglects her husband, she will be thrown into the water" (Jasić, 1968, p. 37). Vagrancy, in the prescribed context of the law, is more a form of a woman's disobedience and idleness, which would result in poor household management, than just a structural determination of punishment for vagrancy.

In the sociological literature, again, explanations of vagrancy and vagabondage are most often related to the "history of poverty". During the Middle Ages, there are not many written documents about poverty and the poor. Some progress was made after the "Black Death" of 1348-1349. year, when the population of England was reduced by a third. At the beginning of the new century, that is, from 1459 and during the 16<sup>th</sup> century, there was an increase in the number of the population, and therefore finding a job became difficult. During the reign of the Tudor dynasty, in England, thousands of unemployed persons wandered the country. Crippled beggars also appeared, as well as

those who acted as if they were mentally ill or crippled, in order to beg more successfully. Tudor rule tolerated crippled beggars. However, she did not tolerate physically healthy people wandering around, doing nothing. Such "insolent vagabonds" were considered a threat to law and order (Lambert, 2024). In Europe, during the 14<sup>th</sup> century, more precisely in 1383, vagrancy became sanctioned by law, so government officials in Britain could capture vagabonds and force them to support themselves, and if they could not, they were sent to prisons. Vagabonds could be punished by being chained to yokes for three days and three nights. As early as 1530, flogging for vagabonds was added to that punishment. The assumption of the medieval as well as the modern lord was that vagabonds were, in fact, thieves. During 1547, a law was passed in Britain that related to vagrancy and prescribed some drastic retributive provisions, such as: slavery for two years and branding with the letter V (vagrant, English vagrant), as a punishment for the first offense, because the death penalty was already foreseen for the second. In 1573, an even harsher law was passed. For the first offense the vagabond would be flogged and his right ear burned with a red-hot iron (unless he got some work in the meantime), while for the second offense he would be hanged (again unless he got some work in the meantime), and for the third he would be hanged unconditionally. However, in 1597, the death penalty for vagrancy was abolished (Lambert, 2024)

Until the end of the 16<sup>th</sup> century, in England, the state tried to provide housing for vagabonds instead of punishing them, by encouraging the establishment of "bridewell" institutions (Konstantinović Vilić & Kostić, 2011, p. 129), for the residence of vagabonds and, at the same time, their training to perform some occupation. During the 18<sup>th</sup> and 19<sup>th</sup> centuries, poorhouses were opened, according to which the state had an extremely restrictive policy, in terms of allocating funds for their survival. Also, among the convicts, who were transported to the American colonies in the 18<sup>th</sup> century, there was a large number of vagabonds.

In the USA, in 1872, the first mission to care for the homeless was opened, all in accordance with the growing movement of social care towards vulnerable categories of the population. In the smaller cities of the USA, a special category of hobos gathers, who live next to the tracks and travel to different destinations by train.

In the first years of the 20<sup>th</sup> century, in most European countries and in larger cities, dilapidated urban areas where the poor, vagabonds, and alcoholics live (English: skid roads). It is sociologists, doyens of sociological literature, who express such views, according to which conventional forms of crime, delinquency, mental illness, suicide, prostitution, homelessness, increased child mortality, as well as other phenomena that indicate social pathology, such as increased mortality and infectious diseases, in general, occur differently, but in urban and suburban areas (Clinard, 1968, p. 108).

Already in the thirties of the 20<sup>th</sup> century, the "Great Depression" in the USA caused epidemic proportions of poverty, hunger and vagrancy. At that time, it was recorded that over 2,000,000 homeless people roamed the entire US. During the 1960s, that is, some thirty years later, there were changes in the understanding of the social needs of the homeless in England. The number of people living a "cruel life" on the streets has increased dramatically. It was then that the Rough Sleeper Initiative association was

founded, which still exists today, and made the social conditions of the homeless much better (Homelessness and rough sleeping, 2025).

Towards the end of the 20<sup>th</sup> century, "modern homelessness" appeared, as a consequence of economic changes and a decrease in the possibility of achieving "decent housing" for the poorer categories of the population. Then, during the seventies of the 20<sup>th</sup> century, the process of deinstitutionalization of mentally ill persons from state psychiatric institutions in the USA began, so the influx of homeless people to large urban agglomerations, such as New York, for example, became enormous (Home in Place, 2025).

Just then, homelessness came to the attention of the American public, that is, in the late seventies and early eighties of the 20<sup>th</sup> century, when the first step was taken in the USA in the statistical recording of persons living on the street, "with a way of life clearly delimited by the rails of big cities." From the mid-1970s until the early 1990s, visible homelessness became a common sight, even in countries with well-developed social safety nets, such as Canada, for example. By engaging the mass media, the population of North America has since begun to face the scenes of homeless people in Africa and Asia, but also from their own areas, but still this phenomenon is not perceived as homelessness in their own country, that is, as homelessness "at home" (The History of Homelessness in the United States, 2018).

In that period of time, there was also the emergence of some new "currents", in the manifestation of vagrancy as a way of life. Namely, in the mid-eighties of the 20<sup>th</sup> century, there was a sudden increase in the number of homeless families. This directly affected the growing number of impoverished and runaway children, teenagers and young adults, who now form a subgroup of the homeless population.

At the beginning of the 21<sup>st</sup> century, more precisely in 2002, research showed that children and entire families are, in fact, the largest growing segment of the homeless in the US, which placed completely new demands on the state and the non-governmental sector to suppress the phenomenon, or rather, to ensure decent living conditions and to protect these persons from any form of victimization (The History of Homelessness in the United States, 2018).

Hence, "street children" are considered as a special criminological/victimological phenomenon, the name used for children living on the streets of big cities. They are persons essentially deprived of family care and protection. Most street children are between the ages of 5 and 17, who live in abandoned buildings, cardboard boxes, parks and directly on the street. In the victimological approach, it is especially emphasized that there are no precise criteria for classifying these persons into groups, but the peculiarity of the continuity of such a life, which separates two groups: those who spend some time on the street and sleep in houses with unreliable adults, and those who really live on the street, without any supervision or care from the elders. Street children are exposed to various forms of abuse, neglect and exploitation, even murder by "clean-up squads", hired by local powerful or the police. (Consortium for Street Children, 2025).

### 3. CONCEPTUAL DEFINITION OF HOMELESSNESS/VAGRANCY/VAGABONDAGE

Conceptual definition of homelessness, vagrancy, vagabondage, as a form of deviant behavior, can be in the legal and sociological sense. The legal definition is based on the legal regulations on vagrants and beggars, and the sociological one, which is covered by the term vagrancy, refers to the social characteristics of these phenomena.

Wandering is, in short, a way of life without a place of residence. Vagrants are constantly wandering and changing their place of residence, but some are permanently settled, so it is clear that the essential characteristic of vagrancy is not only wandering, but a way of life. Therefore, some criminologists rightly conclude that vagrants are "isolated from social life, are on its margins, do not participate in regular social activities, live 'from today to tomorrow', are unable to integrate into the social community. They belong to separate social groups without responsibility, without socially recognized status and protection, are in a state of self-isolation in the political, economic, cultural and social sense and do not accept moral and legal norms" (Konstantinović Vilić, Nikolić Ristanović & Kostić, 2012, pp. 395-396).

A clear conceptual definition of the homeless is of key importance for the creation of a social policy towards them. As the most visible indicator of poverty, homelessness, when it appears, confronts the rest of the population of modern countries with the fact that there are no conditions or sufficient capacity of the state to offer/provide every citizen the most basic conditions for a healthy and productive life (Glasser & Bridgman, 1999).

A widely accepted conceptualization of homelessness was developed by Peter Rossi (1987). This author made a distinction between the literary description of the homeless (persons who clearly do not have access to conventional housing and who would be considered homeless by any possible definition of the term) and the description that refers to the transient or marginally housed (persons who rarely or very occasionally gravitate toward more or less conventional housing or housing). This distinction should be applied in studies of the 'visible homeless' (those found in homeless shelters, living on the streets, encampments, in abandoned buildings and in places such as subway stations) and those with irregular housing (those who are 'crowded' in one place, occasionally with others, usually with the poor or whole families or those who live in low-cost apartments for which they pay a daily or weekly rent). Depending on how broadly the 'homeless network' is understood, it has a huge impact on the scope and characteristics of people who can be covered by the term homelessness.<sup>2</sup>

---

<sup>2</sup> People who are homeless themselves give completely different views of their social status. Thus, in a study conducted by Watson and Austerberry in 1986, it was noted that in a sample of 60 homeless women from Great Britain, who were interviewed by these authors, there was a greater number of different answers to the questions: "Do you consider yourself homeless" and "What does the word homeless mean to you?" It was established that 30% of the surveyed women did not consider their current accommodation to be their home at the same time. However, they did not see themselves as homeless either. On the contrary, 32% of the respondents, who perceived their previous accommodation as their own home, also saw themselves as homeless. The meaning of the words "home" and "homeless" had a different meaning for each of them: "You have to face the whole thing. I'm looking closely at the Sally Army Hostel (homeless shelter)

However, homeless people or vagrants are those persons or social categories of persons whose life does not take place in their own home, i.e. in their place of residence or stay, because they cannot provide it for themselves, for any reason, lack of money for rent, for example, or, on the other hand, they are prevented from obtaining regular, safe and adequate housing or they lack at least "permanent, regular and adequate accommodation". The legal determination of the status of vagrants and/or vagrancy as a phenomenon varies from country to country, even between different entities or institutions in the same country or region.

Homelessness also includes the status of those persons whose night residence takes place in a shelter for the homeless, i.e. in an institution that provides temporary residence for persons who wish to be institutionally cared for in some way or, on the other hand, cared for in some private or public place, which was not originally intended to be used as a regular night accommodation for people. In the USA, for example, the Ministry of Housing and Urban Development deals with homeless issues, which defines the category of "chronic homeless" as "a single person, in a single state of disability, who has been homeless continuously for one year or more or has had at least four episodes of homelessness in the past three years" (U.S. Department of Housing and Urban Development HUD, 2025).

However, the literature often mentions a question, the resolution of which is important in determining the term homeless, and it refers to the situation when "there is no access to conventional accommodation", and yet this person is not considered homeless. This happens in cases where people move from one place to another, as a way of life that is in accordance with the cultural understanding of the group. Like herdsmen, for example, who move after herds and do not have a permanent place of residence. It is even more difficult to answer this question in relation to refugees and immigrants. Being a refugee can also increase one's vulnerability to various forms of homelessness (Glasser & Bridgman, 1999).

On the European continent, homelessness is also one of the main social issues, which requires a clear and unambiguous politically coordinated response. The most significant, unified activity in solving the social and legal status of the homeless is carried out by the organization FEANTSA (European Federation of National Organizations Working with the Homelessness), which developed a typology of homelessness and lack of housing, called ETHOS (European Typology of Homelessness and housing exclusion). The ETHOS typology is based on the conceptual understanding of the existence of three domains that constitute the word "home", and that the absence of each of them, in fact, indicates homelessness. If someone has his/her own "home", it can be permanently understood as: achieving adequate housing (that is, space), whereby the person and his/

and I'm thinking, I'm going to move in there. What's the difference between me and someone there? It's just an attitude that makes me different from some alcoh. It's not worth thinking about." Next response: "Homeless is a small, old man walking around with a bag over his shoes. So I don't think of myself as homeless... But the only reason I'm not homeless is because the people I live with are too middle-class to just throw me out on the street..." Third response: "Homeless? In a way, I am. I mean, I'm in a hostel - I don't have a place to call home. You have to leave anyway." that place when you turn 60 - so I'm homeless in the sense that it's not time for my retirement yet." (Glasser & Bridgman, 1999).

her family have the right of ownership (physical domain); enabling one to preserve privacy and enjoy certain relationships with others (social domain) and having a legal right to maintain it (legal domain).

The absence of any of these three definitions leads to the establishment of four concepts of homelessness, which are described as: lack of a roof over one's head, homelessness, unsafe housing and inadequate housing. ETHOS then classifies the homeless, according to how they live or what their "home" situation is. These conceptual categories include thirteen types of homeless, in order to guide and implement different political procedures, such as: mapping the issue of homelessness, development, monitoring and evaluation policy, according to each of them. Those categories of persons are those who live: hard (on the street, public spaces, for example); in emergency accommodation (reception centers or reception stations); in homeless shelters; in shelters for women (due to domestic violence); in refugee camps; under the pressure of judicial dispossession; under threat of violence; temporary/unusual lifestyle; in unsuitable home conditions; surrounded by a large number of other persons, released from penal institutions; in unsafe conditions or receive long-term social assistance (ETHOS - European Typology of Homelessness and housing exclusion, 2025).

#### **4. LEGAL REGULATION OF EUROPEAN CONTINENTAL LAW (EUROPEAN UNION, COUNCIL OF EUROPE, INDIVIDUAL COUNTRIES)**

Since the European Parliament adopted the Resolution on Social Aspects of Housing in May 1997, the European Housing Forum was established as a forum for exchange of views and discussion between networks involved in housing issues, based in Brussels. The goals of this organization are reflected in: exchanging information between its members, identifying topics that require discussion, and promoting the importance of the housing sector at all levels. FEANTSA is a member of this Forum (Draft Charter of Fundamental Rights of the European Union, 2000).

In Paris from 18-19. in September 2000, the 12<sup>th</sup> informal meeting of ministers for housing issues in the member states of the European Union was held, with the theme of "accessibility to housing", and also with the idea of considering the possibility of enacting and adopting a special convention on the right to housing.

Recognizing and recording the right to housing in various international documents, i.e. at the level of the UN, as well as within the European Union and the Council of Europe, are procedures of particular importance for the claim that homelessness is something that is not only a social issue, including a victimological approach, but, above all, a question of adequate legislature in the countries of Europe.

List of documents (Draft Charter of Fundamental Rights of the European Union, 2000) which include, among other things, the right to adequate housing, must begin by citing the most important acts adopted at the level of the United Nations and the International Labor Organization, which prescribe the following: Universal declaration on human rights from 1948 (Universal declaration on human rights, 1948), that "every

person has the right to a standard of living that is sufficient to ensure his health and well-being, as well as the health and well-being of family members, especially in terms of: nutrition, clothing, housing, medical care, as well as in terms of obtaining necessary social services" (A. 25.1.); Agreement on economic, social and cultural rights from 1966 (Agreement on economic, social and cultural rights, 1966), that "the signatory states to this agreement recognize the right of every person to a standard of living sufficient for himself and his family, including sufficient food, clothing, as well as satisfactory housing, as well as continuous improvement in living conditions" (A. 11); Declaration on progress and development in the social domain from 1969 (Declaration on progress and development in the social domain, 1969), that one of the main objects of policy development is to "make sure that everyone, especially people with low incomes and large families, have satisfactory housing conditions and accompanying common services". (Council of Europe: „Housing Rights: The Duty to Ensure Housing for All“, 2008).

Then, certain target groups are protected, each individually, by an explicit request for adequate housing, through certain documents, adopted at the level of the UN, that is, by the International Labor Organization (ILO or ILO): workers (ILO, 1962), refugees (ILO, 1961), children (UN, 1959, 1989), women (UN, 1979), elderly workers (ILO, 1980), immigrant workers (ILO, 1990), minorities (UN, 1991, indigenous population (UN, 1993).

The second Housing Conference (United Nations Conference on Human Settlements HABITAT II, 1996) was held from 3 to 14. June 1996 (along with the accession of the European Union to the Istanbul Declaration) and its action plan included "the government's obligations to help the population realize the right to housing and to protect and improve neighborhoods."

At the European level, the right to housing is covered by a series of important documents adopted by the Council of Europe. Among them, it is certainly the most significant to mention the European Convention on Human Rights, adopted on November 5, 1950, intended to protect civil and political rights and five accompanying protocols. The Convention does not mention the right to housing, but Article 8 stipulates that all people have the right to respect for their private and family life, their home and their correspondence, as well as the right to found a family (Article 12).

The Council of Europe also adopted the European Social Charter, (European Social Charter, 1961) October 1961 and revised in May 1996, intended to protect social and economic rights. The European Committee for Social Rights has confirmed that the European Social Charter is a document complementary to the European Convention on Human Rights and that the rights guaranteed by the Charter are not self-limiting, but complementary to the rights from the Convention. Nevertheless, practice has confirmed that the indivisibility of all listed rights is more a theory than a reality, because political and civil rights can hardly be achieved by persons who are deprived of basic economic and social rights. The revised European Social Charter from 1996 contains a specific right to protection against poverty and social exclusion. The document also includes protection against modern forms of violence - such as sexual harassment, as well as modern forms of exclusion - such as homelessness. In Article 31 it is written: "With the

intention of ensuring a satisfactory practice in exercising the right to housing, the contracting parties agree to take measures with the intention of: helping to provide housing in an adequate way, to prevent and reduce the status of homelessness, with a view to its gradual elimination, to make the price of housing acceptable to people who do not have the necessary income".<sup>3</sup>

The Permanent conference of local and regional authorities of Europe (Permanent conference of local and regional authorities of Europe, 1993), which has been held since 1993, promotes the recommendation, with the aim of integrating the right to housing, within existing legal instruments, especially in accordance with the European Convention on Human Rights.

The right to housing is also regulated at the level of the European Union. Namely, the Treaty of the European Union, from 1992, in Article 136 refers to the fundamental social rights established by the European Social Charter from 1961 (the revised Social Charter includes the right to housing).

The European Parliament, which consists of citizens' representatives - MPs, who are elected in general, direct elections every five years, is an elected body that represents the citizens of the European Union and participates in the legislative process (*Briefing No 39*). This EU institution also passed a series of important acts related to the exercise of the right to housing and the elimination of homelessness. The Resolution on housing for the homeless (June 1987) was adopted in June 1987, according to which "the right to housing should be guaranteed by the legislature of the member states and recognized by the member states as a fundamental right." Then, in May 1996, the Resolution of the European Parliament on the Second United Nations Habitat Conference on Housing from May 1996 was adopted (European Parliament resolution on the United Nations Habitat II conference, May 1996), according to which it is necessary to "immediately call on the European Union to incorporate the right to housing in all treaties and charters that regulate the activities and goals of the European Union." In May 1997, the European Parliament resolution on the social aspects of housing was adopted (the adoption of which was followed by the establishment of the European Forum on Housing) (European Parliament resolution on the social aspects of housing May, 1997), in which "the European Union is invited to include the right to housing in its treaties". The Bertel Haarder report from March 2000, which was adopted by the Commission on the freedom and rights of citizens of the European Parliament (European Parliament, Commission on the freedom and rights of citizens, Bertel Haarder report, March 2000), should be mentioned as significant. This report demands that all economic and social rights, ranging from social protection to adequate housing conditions and from medical care to adequate education, should be incorporated into the future Charter of Fundamental Rights of the European Union.

The Committee of the Regions announced an initiative for the homeless in 1999 (Committee of the Regions: announcement of initiative for the homeless 1999/C 293/07), in which it is emphasized that if "housing is considered one of the first conditions to

---

<sup>3</sup> Also, see: *The European Pillar of Social Rights Action Plan*. Available at: <https://op.europa.eu/webpub/empl/european-pillar-of-social-rights/en> (10.10.2025)

enable a person to participate in the process of social and professional realization, the Committee of the Regions calls on the European courts to promote the pursuit of the right to housing".

The European Commission Communication (European Commission Communication: Building a Europe of "inclusion", March 2000) in its aspiration towards an "inclusive Europe", believes that "the loss of an apartment is one of the most serious indicators of poverty and social exclusion", and therefore it is necessary "... to improve general measures of social inclusion, thanks to the legal framework, which defines exclusion in terms of access to basic rights in the field of: employment, housing, medical care, education, culture, family and child protection".

The right to housing, in certain member states of the European Union, is first regulated by constitutional provisions, as in the law of: Belgium, Spain, Greece, Portugal, Finland, the Netherlands, Sweden, then by constitutional acts of certain areas in Germany (Bremen, Berlin, Brandenburg, Bavaria, Hamburg), finally, by special laws on housing or laws regulating the fight against poverty (France, Denmark, United Kingdom, Italy, Ireland, Germany).

## **5. LEGAL REGULATION OF DOMESTIC LAW (NORMS ON HOMELESSNESS, VAGRANCY)**

The Constitution of the Republic of Serbia (2006) does not prescribe a special right to housing. In the Second Part of the Constitution, entitled: "Human and Minority Rights and Freedoms", in Article 69, the right to social protection is prescribed, so that citizens and families who need social assistance in order to overcome social and life difficulties and create conditions for meeting basic life needs, have the right to social protection, the provision of which is based on the principles of social justice, humanism and respect for human dignity.

The Law on Confirmation of the Revised European Social Charter adopted in Strasbourg prescribes the right to housing in Article 31 (Zakon o potvrđivanju Revidirane evropske socijalne povelje, 2009). In order to ensure the effective realization of the right to housing, the contracting parties undertake to take measures aimed at: improving access to housing of an appropriate standard; preventing or reducing the occurrence of homelessness, in order to gradually eliminate it; to make the prices of residential accommodation accessible to those who do not have sufficient means.

It is particularly important to apply the provisions for the realization of the rights of users in different levels of social need (Pravilnik o organizaciji, normativima i standardima rada centra za socijalni rad, 2008). The National Youth Strategy (Nacionalna strategija za mlade, 2008) states that, according to police data, the number of children and young people living or working on the streets in the Republic of Serbia is around 400, of which around 200 are in Belgrade. However, it can be safely assumed that this number is incomparably higher. These young people are generally deprived of any organized help and support and are at high risk of becoming victims of human trafficking. As particularly

sensitive, marginalized and socially vulnerable groups of young people, except those who are: without parental care, placed in educational institutions, the poor, those who are not included in the school system, members of national minorities, religious communities, young people in need of special support, refugees and displaced persons, The Strategy for the Development of Youth Health in the Republic of Serbia (Strategija razvoja zdravlja mladih, 2006) also mentions the homeless. Another document entitled Strategy for Youth in the Republic of Serbia for the period from 2023 to 2030 was adopted (Strategija za mlade u Republici Srbiji za period od 2023. do 2030. godine, 2023).

Mentioning child homelessness, as an example of abuse of children's rights, is clearly highlighted in the Rulebook on the curriculum of the civics education course for the eighth grade of primary school (Pravilnik o nastavnom planu i programu predmeta građansko vaspitanje za osmi razred osnovne škole, 2008). The strategy for improving the position of Roma in the Republic of Serbia lists a whole series of recommendations regarding the housing conditions of Roma returnees, in the period after readmission (No. 5.4.2). Accommodation should be organized for homeless returnees (Strategija za unapređivanje položaja Roma u Republici Srbiji, 2009).

## 6. CONCLUSION

The modern form of homelessness began as a consequence of the economic upheavals in modern societies of the 20<sup>th</sup> and 21<sup>st</sup> century, aided by the reduced availability of adequate housing for poorer people.

Today, it is almost impossible to state a conclusion about the homeless/vagrants/vagrants that would end, reduce or at least alleviate their status position and influence the reduction of their victimhood. On the contrary, there is a new frequency of categories of people who were previously less frequently and sporadically characterized as homeless (children) or completely new forms among those who are otherwise less exposed to entering the category of homeless (the extremely impoverished middle class of the population).

The strategy of social inclusion in the European Union was adopted by the European Council in Lisbon in 2000. This clearly provided the conditions for reaching a general agreement at the level of the European Union countries to stimulate the achievement of a coordinated national development policy in this area. The specific objectives adopted in the Strategy include the promotion of housing affordability and the prevention of homelessness. The strategy of social inclusion in the European Union has been merged, meanwhile, with two separate strategies on pensions and health care, into one single strategy on social protection and social inclusion.

In March 2006, the European Council adopted a new framework for the social protection process and for the social inclusion process. In that revised framework, three new goals of general social inclusion were adopted, including: "ensuring access to all goods, rights and services necessary for participation in social life, preventing and paying attention to exclusion and fighting against all forms of discrimination that lead to

exclusion". This document, on our country's path towards the European Union, is a sufficient incentive, but also an obligation, towards the adoption of new legal solutions that would explicitly protect the right to adequate housing of every resident here (Edgar, Meert, 2006:7; Busch-Geertsema, et al., 2010).

### **References**

1. Clinard, M. 1968. *Sociology of Deviant Behavior*, New York, Holt, Rinehart and Winston.
2. Jasić, S. 1968. *Zakoni starog i srednjeg vijeka*, Beograd.
3. Konstantinović-Vilić, S., Kostić, M. 2006. *Penologija*, Niš, SVEN.
4. Konstantinović-Vilić, S., Kostić, M. 2011. *Penologija*, Niš, Centar za publikacije Pravnog fakulteta.
5. Konstantinović-Vilić, S., Nikolić-Ristanović, V., Kostić, M. 2009. *Kriminologija*, Niš: Pelikan Print.
6. Konstantinović-Vilić, S., Nikolić-Ristanović, V., Kostić, M. 2012. *Kriminologija*, Niš, Centar za publikacije Pravnog fakulteta.
7. Kostić, M. 2008. *Zadovoljavanje potreba u uslovima siromaštva*. Beograd: *Socijalna misao* 60 (4), 119–132.
8. Perović, K. 1998. *Kriminologija*, Univerzitet Crne Gore – Podgorica, Nikšić.

### **Internet Sources**

1. *A History of Vagrancy and Homelessness in Global Perspective*, (ed. by A.L. Beier, P. Ocobock) (2008). Ohio University Press, Swallow Press. Retrieved from Available at: <https://library.oapen.org/bitstream/handle/20.500.12657/25337/1004762.pdf;jsessionid=E72C0E5D9FA91EAD6418E7EBBB70FAE8?sequence=1> (13.9.2025)
2. Bešić, V. (2022). Svjetski dan beskućnika: U svijetu više od 1,6 milijardi ljudi živi u neadekvatnim stambenim uslovima. AA. Available at: <https://www.aa.com.tr/ba/svijet/svjetski-dan-besku%C4%87nika-u-svijetu-vi%C5%A1e-od-1-6-milijardi-ljudi-%C5%BEivi-u-neadekvatnim-stambenim-uslovima/2707269> (19.9.2025)
3. Bill Edgar and Henk Meert, *Fifth Review of Statistics on Homelessness in Europe*, November 2006, FEANTSA. Available at: <https://www.feantsaresearch.org/download/5-2006449618011929240409.pdf> (19. 9. 2025)
4. Briefing No 39, *The social aspects of enlargement of the European Union, II. The Positions of the Institutions of the European Union, 1. The European Parliament* Available at: [http://www.europarl.europa.eu/enlargement/briefings/39a2\\_en.htm](http://www.europarl.europa.eu/enlargement/briefings/39a2_en.htm). (19.9.2025)
5. Busch-Geertsema, V., Edgar, W., O'Sullivan, E., and Pleave, N. (2010). *Homelessness and Homeless Policies in Europe: Lessons from Research*. European Consensus Conference on Homelessness 9-10 December 2010, Brussels. Available at:

- [https://www.feantsa.org/download/fea\\_020-10\\_en\\_final8900978964616628637.pdf](https://www.feantsa.org/download/fea_020-10_en_final8900978964616628637.pdf) (19.9.2025)
6. CNN (2007). Teen 'sport killings' of homeless on the rise. Available at: <https://edition.cnn.com/2007/US/02/19/homeless.attacks/index.html> (19.9.2025)
  7. Council of Europe: European Convention on Human Rights and its 5 Protocols, Available at: <http://www.hri.org/docs/ECHR50.html>. (13.9.2025)
  8. Council of Europe: European Social Charter Available at: <https://www.coe.int/en/web/european-social-charter/european-social-charter-and-european-union-law> (13.9.2025)
  9. Council of Europe: Housing Rights: The Duty to Ensure Housing for All, Available at: <https://www.refworld.org/reference/themreport/coechr/2008/en/83712> (13.9.2025)
  10. Draft Charter of Fundamental Rights of the European Union, Brussels, 19 April 2000, Charte 4242/00, Contrib 115, Available at: [www.europarl.europa.eu/charter/civil/pdf/con115\\_en.pdf](http://www.europarl.europa.eu/charter/civil/pdf/con115_en.pdf). (22.9.2025)
  11. ETHOS - European Typology of Homelessness and housing exclusion Available at: <https://www.feantsa.org/en/toolkit/2005/04/01/ethos-typology-on-homelessness-and-housing-exclusion> (22.9.2025)
  12. Home in Place (2025). Available at: <https://homeinplace.org/modern-homelessness/> (22.9.2025)
  13. Homelessness and rough sleeping (2025). Available at: <https://www.gov.uk/housing-local-and-community/homelessness-rough-sleeping> (12.9.2025)
  14. Irene Glasser, Rae Bridgman (1999). Braving the Streets: The Anthropology of Homelessness. New York – Oxford: Berghahn Books. Available at: [https://books.google.rs/books?id=F0QmzjKMQcC&printsec=frontcover&hl=sr&source=gbs\\_ge\\_summary\\_r&cad=0#v=onepage&q&f=false](https://books.google.rs/books?id=F0QmzjKMQcC&printsec=frontcover&hl=sr&source=gbs_ge_summary_r&cad=0#v=onepage&q&f=false) (22.9.2025)
  15. Lambert, T. (2024). Poverty in the Middle Ages. Available at: <https://localhistories.org/a-brief-history-of-poverty/> (13.9.2025)
  16. Street children are some of the most vulnerable children on the planet (2025). Consortium for Street Children. Available at: <https://www.streetchildren.org/about-street-children/> (22.9.2025)
  17. The European Pillar of Social Rights Action Plan. Available at: <https://op.europa.eu/webpub/empl/european-pillar-of-social-rights/en/> (13.9.2025)
  18. The History of Homelessness in the United States. (2018). National Library of Medicine. Available at: <https://www.ncbi.nlm.nih.gov/books/NBK519584/> (22.9.2025)
  19. U.S. Department of Housing and Urban Development (HUD). Available at: <https://www.usa.gov/agencies/u-s-department-of-housing-and-urban-development> (22.9.2025)
  20. Ugovor o Europskoj uniji (UEU) / Ugovor iz Maastricht. Available at: <https://www.europarl.europa.eu/about-parliament/hr/in-the-past/the-parliament-and-the-treaties/maastricht-treaty> (22.9.2025)
  21. United Nations Conference on Human Settlements HABITAT II), 3 to 14. June 1996, Available at: <https://docs.un.org/en/A/CONF.165/14> (19.9.2025)

### **Legal Sources**

1. *Ustav Republike Srbije*, „Sl. glasnik RS“ br. 98/2006.
2. *Zakon o potvrđivanju Revidirane evropske socijalne povelje usvojene u Strazburu 3. maja 1996.*, „Sl. glasnik RS – Međunarodni ugovori“, br. 42/2009.
3. *Pravilnik o organizaciji, normativima i standardima rada centra za socijalni rad*, „Sl. glasnik RS“, br. 59/2008, 37/2010, 39/2011 - dr. pravilnik, 1/2012 - dr. pravilnik, 51/2019, 12/2020, 83/2022 i 10/2025.
4. *Nacionalna strategija za mlade*, „Sl. glasnik RS“ br. 55/2008.
5. *Strategija za mlade u Republici Srbiji za period od 2023. do 2030. godine*, „Sl. glasnik RS“, br. 9/2023
6. *Strategiji razvoja zdravlja mladih*, „Sl. glasnik RS“ br. 104/2006.
7. *Strategija za unapređivanje položaja Roma u Republici Srbiji*, „Sl. glasnik RS“ br. 27/2009.
8. *Pravilnik o nastavnom planu i programu predmeta građansko vaspitanje za osmi razred osnovne škole*, „Sl. glasnik RS“ br. 6/2008.



## DIGITAL MEDIA WORLD IN THE COURTROOM. A CHALLENGE OR AN OBSTACLE FOR THE COURT PROCEEDINGS?

Olga Sovova\*

*The paper examines new challenges to justice and court openness. Court proceedings, with some legal exceptions, are generally accessible to the public. However, only a small number of people attend the courtroom. Mass media inform them about the most critical cases, thereby enabling transparency in the justice system. New technologies support an immediate reaction to matters of public interest. The paper dissects the role of new mass media in the courtroom, with a focus on their coverage of high-profile cases. The judge must comply with the presence of journalists and their need to attract an audience. Medial pressure, opinion formation before hearing and evaluating the evidence, could influence the fairness of a trial and the presumption of innocence. Based on case law, after interviewing legal practitioners, academics, and journalists, the author explores the backstage of the courts and newsrooms and seeks to answer the headline question. The author struggles to reconfirm and redefine the role of the media as watchdogs of democracy and the plurality of opinions.*

**KEYWORDS:** mass media, Digital world, Social platforms, Artificial intelligence, Fair trial, Freedom of expression, European Court of Human Rights

---

\*\* Associate Professor, Police Academy of the Czech Republic in Prague, Lhotecka 559/7, Prague 4, CZ.  
ORCID <https://orcid.org/0000-0001-9651-0686>  
E-mail: [sovova@polac.cz](mailto:sovova@polac.cz)

## 1. INTRODUCTION

*Freedom of the press. According to the will in this age of confusion, you are not allowed to write about everything. Freedom to write everything, only if you say nothing is permitted. (Czech poet Celakovsky, according to Kober, J. et al., 2021, p.7)*

Public media form one of the main pillars for disseminating information. In the rapidly changing media market, the unprecedented dynamics of social change, as well as the intense competition among various public and private media and social networks, often lead to the infringement of ethical principles and legal regulations. According to the latest data, over 5.07 billion people, who form about 63% of the world's population, use social media platforms for communication and gathering information. (Altay, et al., 2025)

The courtroom and high-profile cases provide an excellent source for attracting the audience. High reader attractiveness or viewership of broadcasts or social networks then brings financial benefits in the form of increased interest from commercial advertisers. The interest in objective reporting or even the protection of the parties involved often disappears when providing information. Nevertheless, the court is, after all, the guardian of a fair trial. Other professionals, especially attorneys and public prosecutors, should also support the court in its task.

However, the procedural parties often leverage the media to facilitate an agreement or achieve a more favourable outcome in the proceedings. Media attention or recognition can also lead to a better position in the highly competitive legal market. The popular media term 'elite judge, lawyer, or police officer' often behind the scenes can dishonour the daily work of others and demotivate them.

Based on legal books, case law, and the author's and legal professionals' practical experience, the author examines and discusses the role of new mass media in the courtroom. A brief survey reveals the professional perception of the media's role in court proceedings. The author ponders whether the time to redefine the role of mass media as the watchdogs of democracy has already come, acknowledging the significant influence of the public's perception on this redefinition.

## 2. DIGITAL WORLD AND MASS MEDIA IN THE COURTROOM

*Journalism has been around since people recognised a need to share information about themselves with others. Journalism is intrinsically tied to democracy. It plays a key role in shaping our identities as citizens, making possible the conversations and deliberations between and among citizens and their representatives. (Wahl – Jorgensen, Hanitzsch, 2009, p. 3).*

The concept of “openness in court proceedings” and the right to receive information on matters of public concern, including the course of justice, deserve to be examined with particular reference to the relevant articles of the European Convention on Human Rights.<sup>1</sup>

<sup>1</sup> Decision of the European Court of Human Rights. 2015. *Delfi AS v. Estonia*, Application No. 64569/09. Available at: [https://hudoc.echr.coe.int/fre#{%22itemid%22:\[%22001-155105%22\]}](https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-155105%22]}) (5.6.2025).

Under Article 6.1 of the European Convention on Human Rights (ECHR), the member states must guarantee that “*everyone is entitled to a fair and public hearing*” and that “*the judgment is pronounced publicly*”.

Article 10.2 of the ECHR expressly provides that the exercise of freedom of expression can be limited to protect the reputation or rights of others, or to maintain the authority and impartiality of the judiciary.

The European Court of Human Rights, in many of its decisions, reiterated that *freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and each individual's self-fulfilment. Subject to paragraph 2 of Article 10, it applies not only to “information” or “ideas” that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of pluralism, tolerance and broad-mindedness, without which there is no “democratic society”.* (*Bergens Tidende v. Norway, Application No.26132/95*)

However, the journalists must inform accurately and reliably. That is also why Article 10.2 of the ECHR expressly provides that the exercise of freedom of expression can be limited to protect the reputation or rights of others, or to maintain the authority and impartiality of the judiciary. The above-mentioned decision, *Bergens Tidende v. Norway*, summarised and laid down the limits of the freedom of expression concerning traditional mass media.

Over the last two decades, a new phenomenon of social media virality has challenged the role of the nation's courts and the judiciary, as well as all legal professions. Expressive language and distrust of official public media, especially during the COVID-19 period (2020–2022) blurred the boundaries between reality and the virtual world. The public's shift to the digital world of social media has also impacted the judiciary.

News from high-profile cases reported immediately online, and investigative work has attracted a new audience. Such a type of internet user posts comments under information or on their own web profiles. This may lead to influencing the court, interference in the criminal justice system, violation of the presumption of innocence or the use of the media as a mean of pressure to achieve a more favourable verdict. Some attorneys or invited media experts, using both social networks and traditional mass media, also attempt to enhance the media image of their clients. In recent years, the field of PR litigation has also evolved, albeit with an insufficient practical and theoretical foundation in Central European legal culture.

Individual judges, who are clearly not left untouched by the digital world, must, even under the most intense pressure, maintain their duty to guard a fair trial, thereby upholding the integrity of the judicial process.

Since 2015, the European Court of Human Rights has, in its case law, recognised that the internet is a crucial medium for exercising freedom of expression, including the reporting of court proceedings and judicial information. However, the Court maintains the crucial line that online reporting must also be balanced against other interests, such as the right to a fair trial (Article 6 ECHR), the right to privacy (Article 8 ECHR), and the authority and impartiality of the judiciary.

The decision in *Delfi AS v. Estonia* (2015), Application No. 64569/09, set a precedent for intermediary liability in Europe, particularly for large commercial platforms. In its subsequent judgments, the European Court of Human Rights reiterated that the public's right to receive information about judicial proceedings, especially when it concerns matters of public interest, is a fundamental right. However, this conception does not exclude restrictions where reporting could prejudice the fairness of a trial or the rights of individuals. (see *Magyar Helsinki Bizottság v. Hungary*, 2016, Application No.18030/11).

Czech legal doctrine has long been committed to the public nature of judicial proceedings, especially in criminal matters. As early as 1922, the explanatory report to the amendment to the Criminal Proceedings Act stated as follows: *Finally, the administration of justice in front of the public provides everyone with the opportunity to convince themselves with public eyes that the most important interests of their citizens are being decided with the rule of law and fairness.* (Herceg, 2013).

Thus, the Act on Courts and Judges, No.6/2002 Coll., equips judges with the necessary legal tools to guarantee the fair and smooth conduct of proceedings, particularly in relation to media participation. The judge's role is pivotal, as they must grant prior approval for direct courtroom transmissions and video recordings, and audio recordings must be reported to the judge. The judge has the authority to prohibit recordings if they disrupt the proceedings or violate the principles of protecting personality and the presumption of innocence in criminal proceedings. The public may be excluded from all proceedings in cases provided for by law. The verdict is always pronounced publicly. Czech law is therefore more restrained when it comes to active media participation in the courtroom.

The Czech Constitutional Court in the Decision No. IV. ÚS 2257/18,<sup>2</sup> delivered in June 2020, decided on the nature of internet content and pages of a publishing house. The house published both a printed daily and its extended internet version. A statement appeared on the website that defamed the complainant. He pointed out that the press law and the right to clarify journalistic assertions should also apply to the Internet medium.

The Constitution Court ruled that the regulation of the rights and obligations of publishers (or broadcasters) does not reflect the specific nature of internet news. The creation of "*internet content*" represents a specific area of human activity. Internet content, and by extension internet news, is a unique form of expression that can be created by almost anyone. This fact fundamentally blurs the distinction between 'institutional' actors and private individuals. The aspect of time is also significant – in the case of printed media, it is possible to pinpoint when an intervention occurred. However, with online newspapers, the aspect of periodicity is absent, and there may be continuous changes in the content of the communication. This underscores the dynamic and evolving nature of internet content creation.

That is why the Constitutional Court dismissed the claim in the part of the considered application of the Press Act, No. 46/2000 Coll. While the Czech legal system does not directly regulate reporting on the Internet, the Constitutional Court has established

---

<sup>2</sup> Decision No. IV. ÚS 2257/18. Available at: <https://www.usoud.cz> (5.6.2025).

that general legal provisions, which protect fundamental rights and freedoms, should be applied. The Internet, as a global computer network without central control, differs from traditional media in terms of media law, particularly in areas such as registration, rules, publication, and dissemination. However, when it comes to protecting fundamental rights, there is no difference. This judgment serves as the basis for determining the responsibility for information in the Czech Republic, both in official media and on the Internet in general. It also defines the boundaries of freedom of expression when mass media are present in the courtroom.

Czech courts inform the public through their spokespeople, websites, and social media channels, which the Ministry of Justice manages. However, there are no uniform rules or recommendations for the admission of the public and media representatives. There are also no instructions on the court websites on how to proceed in the courtroom. This information is posted at the entrance to the individual courtrooms. The specific procedure is thus left to the judge, as stated above. In the author's opinion, this can sometimes be an obstacle to cooperation with the public and the media. In practice, it has happened in the past that during a high-profile case hearing, the mass media took up the whole courtroom, and the relatives of the victims were not allowed inside and could not support them.

Despite the above-mentioned practical issues, the case law and legal books strongly support balanced and objective reporting by both traditional and new mass media. Courts and journalists have sufficient guidance on how to proceed in a digital environment to ensure a fair trial is not compromised.

### **3. SURVEY AND DISCUSSION**

The author conducted a brief survey focused on communication between courts, journalists, parties to proceedings, and the public. Ten persons – judges, a former state prosecutor, attorneys-at-law, academicians and journalists participated. Nine of them combine their primary job with academia. The aim was to find out whether informants prefer in-person or digital communication and whether they still consider the media as watchdogs of democracy. One of the questions examined whether informants know the term Litigation PR and whether they have ever helped improve the media image of one of the procedural parties.

Informants do not avoid direct communication with courts or the public. One judge prefers the services of the court press department. All participants are familiar with PR Litigation and have had experience with it during their practice. An independent journalist and an attorney assisted clients in enhancing their media image during court litigation.

Two main questions focusing on digital media highlighted that all participants appreciate the possibility of receiving quick and topical information. However, all of them identified inaccuracy, brevity, and tendency as the principal risks of digital media in the courtroom. The author assumes that this is why all informants are concerned about the role of mass media in the digital world. All ten participants hesitate to fully affirm that

mass media are entirely the watchdogs of democracy. Informants agreed partly with some of the allegations mentioned above.

It is thus evident that new digital media have changed the perspective on the role of mass media in the contemporary legal environment. Moreover, the Central European legal system must contend with the fact that the protection of parties' rights often appears overly formalistic and cannot always effectively respond to the aggressive dissemination of information.

#### 4. CONCLUSION

*Never before have we witnessed technologies with such transformative potential, promising to reshape our world in ways that are both awe-inspiring and daunting. (Suleyman, Bhaskar, 2023, p. 2).*

Despite some disillusionment about new technologies, the media in the courtroom do not form an obstacle. However, the need for objective and balanced reporting, with respect for the rights of all parties, is more crucial than ever. This fact is especially relevant in the face of the ever-expanding potential of artificial intelligence, which anybody can easily use to skew narratives. It is a challenge that all stakeholders in the legal system must prepare to meet.

Generative artificial intelligence can create realistic photos, videos, and audio recordings in seconds, making the manipulation of information easier than ever. The need for verifying content manipulation has become more crucial than ever. The impending wave of technological possibilities with AI could significantly influence not only court proceedings but also the global human destiny in ways that we are only beginning to comprehend. Generative AI tools could underpin information literacy and critical thinking. All these form an excellent challenge for the legal profession, mass media, and educators in their respective fields. (Matthews, Bartley, 2025).

Regardless of whether contemporary digital challenges affect civil, penal, or administrative court procedures, the fair trial and an objective reporting about it could not be endangered.

Anyone who feels offended by a statement or piece of information on social networks should first contact the originator of the message. Only then should the intervention of the judicial power be sought. However, it's important to understand that internet law, as a soft law, has only limited possibilities for protecting individuals. It is often challenging to determine the actual originator of the message or the owner of the social media account. Even if it is known, it may be located outside the jurisdiction to which the injured party can turn. This awareness of the limitations of internet law is crucial for lawyers, who must not only follow judicial case law but also contribute to the legal and public debate beyond the proportionality test, i.e., the limits of interference in the right to information within the framework of the public interest. The media play a significant role in this and thus become allies of a fair judicial process.

**Statement on originality:** The paper is an original work of authorship. The author partly used MS Copilot for searching sources. The author has verified the existence of all sources and properly cited them.

## References

- Altay, S., Hoes, E., Wojcieszak, M. 2025. Following news on social media boosts knowledge, belief accuracy and trust. *Nature Human Behaviour*, 9, pp. 1833–1842. <https://doi.org/10.1038/s41562-025-02205-6>.
- Decision of the European Court of Human Rights. 2000. *Bergens Tidende v. Norway*, Application No. 26132/95. Available at: [https://hudoc.echr.coe.int/fre#{%22itemid%22:\[%22001-58797%22\]}](https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-58797%22]}) (5.6.2025).
- Decision of the European Court of Human Rights. 2016. *Magyar Helsinki Bizottság v. Hungary*, Application No. 18030/11. Available at: [https://hudoc.echr.coe.int/fre#{%22itemid%22:\[%22001-167828%22\]}](https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-167828%22]}) (5.6.2025).
- European Convention on Human Rights. Available at: [https://www.echr.coe.int/documents/d/echr/convention\\_ENG](https://www.echr.coe.int/documents/d/echr/convention_ENG) (5.6.2025).
- Herceg, J. 2013. Přístup médií na jednání soudu a právo na spravedlivý process. *Bulletin advokacie*, No. 3, pp. 26–31. Available at: [https://advokatnidenik.cz/wp-content/uploads/BA\\_03\\_2013\\_web.pdf](https://advokatnidenik.cz/wp-content/uploads/BA_03_2013_web.pdf) (5.6.2025).
- Kober, J. (eds). 2021. *Svoboda projevu? Současné otázky nad jejím omezováním*. Brno: Doplněk.
- Matthews, A. S., Bartley, B. 2025. Pay attention to the chatbot behind the curtain when AI ‘is no place like home’: A framework and toolkit for integrating critical thinking and information literacy in educational and professional settings. *Advances in Online Education: A Peer-Reviewed Journal*, 3(3), pp. 247–273. <https://doi.org/10.69554/FMAI7138>.
- Suleyman, M., Bhaskar, M. 2023. *The Coming Wave. AI, Power and Our Future*. Penguin Random House, UK.
- Wahl-Jorgensen, K., Hanitzsch, T. (eds). 2009. *The Handbook of Journalism Studies*. Routledge, London, UK.

## Internet Sources

- Czech Acts. Available at: <https://www.zakonyprolidi.cz> (5.6.2025).
- Decision No. IV. ÚS 2257/18. Available at: <https://www.usoud.cz> (5.6.2025).
- Decision of the European Court of Human Rights. 2015. *Delfi AS v. Estonia*, Application No. 64569/09. Available at: [https://hudoc.echr.coe.int/fre#{%22itemid%22:\[%22001-155105%22\]}](https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-155105%22]}) (5.6.2025).



## INSULTING POLITICIANS IN GERMANY: BETWEEN FREEDOM OF EXPRESSION AND PROTECTION OF HONOUR

Manfred Dauster\*  
Julia Aileen Kreutz\*\*

*The culture of political debate in Germany has become noticeably more heated in recent years. Disputes over how to deal with the coronavirus pandemic, the war in Ukraine and the economic situation in Germany are becoming increasingly confrontational – not only within the political system, but also among the general population. In the process, political debate is often conducted in disregard of basic standards of democratic discourse. Politicians are increasingly becoming the targets of verbal abuse, which is disseminated on a massive scale, particularly on social media, in the form of defamatory images and text. In response to this development, the legislature amended the provision of § 188 of the German Criminal Code (StGB) in 2021 and extended the scope of protection to politicians at the local level and to the dissemination of insults, rather than just the dissemination of false factual claims, as was previously the case. The provision now makes all insulting statements against persons who are involved in the political life of the people a criminal offence if they are suited to making that person's public activities substantially more difficult. The aim is to combine the protection of the personal honour of political actors with the protection of democratic processes against intimidation and delegitimation. This article explores whether § 188 of StGB succeeds in fulfilling this dual protective mandate without disproportionately restricting the constitutionally guaranteed freedom of expression under Article 5(1) of the German Basic Law. In addition to the historical development and dogmatic classification of the provision, current case studies and constitutional lines of conflict are also analysed.*

**KEYWORDS:** *Freedom of Expression , Political Discourse , Defamation , Insult , Defensive Democracy , Hate Crime , German Criminal Code*

---

\* Former presiding judge at the Bavarian Supreme Court in Munich, member of the Institute for Economic Criminal Law, International and European Criminal Law at Saarland University in Saarbrücken, Germany.

E-mail: [saarlouis10@hotmail.com](mailto:saarlouis10@hotmail.com); [saarlouis10@outlook.de](mailto:saarlouis10@outlook.de)

\*\* Research assistant at the Chair of German and European Criminal Law and Criminal Procedure Law including Economic Criminal Law, held by Prof Dr Marco Mansdörfer, at Saarland University, Saarbrücken, Germany.

E-mail: [j.a.kreutz@t-online.de](mailto:j.a.kreutz@t-online.de)

## 1. INTRODUCTION

The world seems to be undergoing a period of profound change. Almost nothing is the same as it was yesterday. Parliamentary democracy, of which those who survived the Second World War or were born after 1945 were (and still are) so proud, no longer seems uncontested. This also applies to the principle of the rule of law and the independence of courts and judges that is inextricably linked to it. Populists – and not only them – look back to times when ‘everything was better’. On the (right-wing) political fringe of European societies, parties and groups have emerged that openly question democracy, the rule of law and the independence of judges, or undermine the institutions based on these principles in a ‘march through the institutions’ in order to pervert the content of these principles to their own ends. We became familiar with such phenomena in Europe in the early years of the 20<sup>th</sup> century, and in Germany, the year 1933 marked a clear turning point when Reich President *von Hindenburg* appointed *Adolf Hitler* as Reich Chancellor at the end of January 1933. This marked the beginning of the ‘National Socialist revolution,’ which, within a few months, from the top down, as *Adolf Hitler* had announced, eliminated the parliamentary democracy in Germany that he and his accomplices despised, leaving not even a facade of the rule of law and the independence of judges. This is also the mindset of many extremists, and it is not surprising that their protagonists are outspoken nationalists with pronounced anti-Semitism and xenophobia. In any case, European societies have experienced migration in the last 20 years that has stretched them to the limit. With regard to immigrants, ideas are being spread in terms of seeing the solution of that undesired ‘foreign infiltration’ of European societies in the ‘deportation’ of those immigrants. This is difficult to reconcile with national and international human rights, if at all. Europeans also had to deal with these xenophobic developments in the early years of the 20<sup>th</sup> century; they are not new, but are currently being revived. It is no exaggeration to say that European societies seem to be eroding, and every crack, no matter how small, is being filled with right-wing and historically distorted ideas. The election results of recent years in many European countries have resulted in parliamentary compositions that have strained and continue to strain their ability to function.

Global technological developments play a significant role in this domestic development. The times without the internet and social media platforms, which are now part of history, required controversial debates of all kinds to be conducted openly, so that it was clear to both opponents and observers who was involved in the debates (anonymous letters and leaflets or similar did exist, but they can be disregarded). However, the internet and the social media platforms allow opponents to hide behind anonymous, self-created identities. Victims of attacks therefore no longer know who is attacking them. Those who hide have something to hide. It is obvious that this can lead to statements that are unobjective and violate the rights of others. Attempts to make online providers take greater responsibility for this have not been successful so far. In this context, it is worth asking whether greater responsibility on the part of providers would turn the legal situation on its head. Providers are not, after all, the internet police. No one would seriously consider holding postal and telecommunications service providers responsible for the

content of anonymously sent letters or anonymous telephone calls. Technological advances have undoubtedly made an unprecedented contribution to the threats facing societies and the democracies that sustain them.

The technological developments mentioned above have undoubtedly led to a situation where information is now available worldwide and can be accessed thanks to corresponding services to an extent that was unimaginable in the pre-internet era. Even in those days, 'trash' was disseminated. However, its dissemination at that time involved considerable effort, sometimes financial. This effort is no longer necessary in the age of the internet. This is tempting for extremists. Before the introduction of civil liberties, censorship organised by state authorities attempted, mostly unsuccessfully, to suppress (politically or religiously) unpopular opinions. In the age of the internet, official censorship has not disappeared; it just works differently. States that are interested in controlling opinions simply shut down the internet or ban unpopular providers. This is just as little conducive to democracy as the state censorship practised in the past (and in some cases, still practised today).

'Trash' has always found its way into circulation, and it becomes 'trash' when it is shared on the internet, but it is not always recognised as such. There is hardly any questioning of the content found there. Exchange on social media is often reduced to mere slogans and is miles away from substantive discourses. Slogans simplify reality and no longer reflect the diversity of opinions. Extremist and other conspiracy theories thrive on such simplifications. The more individuals are satisfied with simplified pseudo-truths, the more dangerous these simplifications become for democracy, which reflects the social complexity of our circumstances and therefore, today as in classical antiquity, serves as a forum for a wide variety of views. Absurdities become pseudo-truths simply because they are clicked on often enough. Critical or even scientifically based debates give way to simplifications because the actors are not interested in democratic discourse.

The domestic phenomena described above, which are interwoven with international developments, do not exist in isolation in European societies. They have an international context, which could only be outlined above.

The perspective of the American administration under President *Donald Trump* can only be touched upon here. However, it must not be overlooked when discussing international contexts. Shortly after taking office, US Vice President *James David Vance* appeared at the annual international security conference in Munich in February 2025. The audience had expected *Vance* to comment on the Ukraine conflict and was bitterly disappointed. Instead, *Vance* gave a speech on the dangers to democracy in European countries, which he saw less in the threats posed by Russia. Rather, with Germany and the Alternative for Germany (AfD) party in particular in mind, he said that the restrictions on freedom of expression he had observed were the real risk.

In May 2025, the German domestic intelligence service (Bundesamt für Verfassungsschutz, BND) classified the right-wing political party Alternative für Deutschland (AfD) in its entirety as a confirmed right-wing extremist organisation. This internal German development prompted US Secretary of State *Marco Rubio* to immediately comment that Germany

was developing into a tyranny. When the leading nation of the West takes such a position in ignorance of Germany's past, it is worrying because no one can say with certainty whether this view has cast doubt on American solidarity with its allies within NATO.

We will return to these statements later. The international context that must be considered is the Russian Federation's attack on its Ukrainian neighbour, which has now been going on for over three years.

President *Vladimir Putin's* 'expedition' to remove what he considers a fascist, but in reality, is a democratically elected regime in Ukraine, planned in just a few days, may, on the one hand, have led to strengthen solidarity among NATO members and to two new member states, Sweden and Finland. However, the invasion of Ukraine has also made European countries aware of their vulnerability. This has a domestic and social dimension, which is marked by the conflict between protagonists who are pro-Russia and those who support Ukraine. This domestic conflict contains explosive elements that could spill over onto the international stage. Solidarity with Ukraine, for its part, has many facets. On the one hand, there are the embargo measures designed to weaken the Russian Federation's economic power in its conflict with Ukraine. These are controversial domestically, and at the international level, even within the European Union, the countries supporting Ukraine are not always in agreement. This is especially true when it comes to the question of military support for the invaded country.

Equally worrying are developments in Syria in the Middle East following the fall and flight of President *Assad*. Syria is still far from stability because the country is also characterised by a conflict of international interests ranging from Iran to the Russian Federation, also including Israel and Turkey. Depending on one's 'taste,' this conflict has domestic political implications in the countries of the European Union.

The situation in the Western Balkans is the final example of international interference with democratic and constitutional principles. Serbia is marked by domestic unrest and insists on its view of Kosovo\* and its independence. Bosnia and Herzegovina has been in a state of instability since the peace agreement of December 1995, with fluctuations in intensity at best. Nationalism is certainly a defining feature of identity in Bosnia and Herzegovina and its population groups. It is important which constitutionally recognised ethnic group an individual belongs to. Some politicians seek support for their views in the Kremlin in Moscow, while others lean more towards European institutions in Brussels. The security situation appears fragile, especially as the European Union has not developed a firm and unified position and the US seems to be redefining its approach to the Western Balkans. The countries of the Western Balkans, including Croatia, have problems with right-wing extremist and nationalist views. These local views find favour with extremists within the European Union. Mutual support and, in some cases, assistance may result.

Like all other conflicts around the world, the conflicts in Ukraine, Syria and the Western Balkans create a climate that is extremely hostile to human rights and difficult to address under international law. These conflicts are a breeding ground for crimes that

---

<sup>1</sup> This designation is without prejudice to positions on status, and is in line with UNSCR 1244/1999.

have been comprehensively codified in the Rome Statute of the International Criminal Court. There is a growing view worldwide that international law does not have to be strictly adhered to because it lacks enforcement mechanisms. Agreements concluded in times of political 'fair weather' are no longer worth the paper they are written on in times of war and crisis. It has always been naive to believe that codification alone would lead to changes in behaviour. Internationally guaranteed human rights have not made the world a better place. The Rome Statute does not prevent the crimes it describes from being committed. What is astonishing is the contempt for the law demonstrated by the fact that internationally outlawed crimes continue to be committed in full view of the world public, despite their clear prohibition and the threat of sometimes draconian penalties. This has been demonstrated following the Russian attack on Ukraine. Extremists enamoured with autocracy are managing to deny, or at least downplay, the crimes committed on Ukrainian territory and against the people there. Thischutzpah is also astonishing in view of the clear evidence that has come to light so far. The International Criminal Court in The Hague was welcomed with euphoria by supporters of international criminal law. By 2025, disillusionment has set in. It is not possible here to explore whether and to what extent the ICC itself is responsible for this disillusionment. However, in a world where human rights are precarious, the ICC shares the fate of other institutions that protect human rights. Unscrupulous holders of power behave like common murderers who, when committing their crimes, do not ask themselves whether they face life imprisonment for their actions. However, international institutions, including the ICC, have a responsibility to ensure that human rights violations are no longer forgotten but are established in court. They are essential for the eternal memory of humanity. This began with the International Military Tribunal against the major Nazi war criminals in Nuremberg and continues to this day – much to the annoyance of neo-Nazis who have forgotten history.

If the national and international developments described above set the framework within which European societies and their systems are exposed to the threat of erosion, this raises the complex question of what an individual state can do to counter these threats. Two things should be noted here: First, each country must find a response that is appropriate to its national circumstances. Second, the complexity of national causes and effects requires limitations in the presentation desired here.

In Germany, it is almost a state dogma that historical events that led to the establishment of the Nazi dictatorship must not and cannot be repeated. Equally mantra-like is the description of Germany, created in 1949 and reunified in 1990, as a 'defensive democracy,' which is supposed to represent a departure from the Weimar Republic of 1919, which surrendered itself in 1933 in the so-called National Socialist revolution.

It is not possible within the scope of this article to describe in detail the individual elements that make up this defensive capability of German democracy. This article can be taken at face value when it states that Germany has a defensive arsenal at its disposal to defend its constitutional democracy, but also the political will to use this arsenal. Criminal repression plays a role in this arsenal.

It is part of the spectrum of defensive capabilities, but only one part. The old and newly introduced criminal provisions for the defence of democracy and the rule of law

cannot be presented here in their entirety. Such a presentation would go beyond the scope of this article. The article therefore deals with a criminal provision that exemplifies the (constitutional) tension in which criminal law can find itself: This is § 188 of the German Criminal Code (StGB), which in a special way criminalises insults, defamation and slander directed against persons in political life and which came into force in its new version on 1 July 2021. The provision reads as follows:

Paragraph 1: If an insult (§ 185) is committed against a person involved in the political life of the people, either publicly, at a meeting or by disseminating content (§ 11 paragraph 3), for reasons related to the position of the insulted person in public life, and if the act is likely to significantly impede their public activities, the penalty shall be imprisonment for up to three years or a fine. The political life of the people extends to the municipal level.

Paragraph 2: Under the same conditions, malicious gossip (§ 186) shall be punished with imprisonment for three months to five years and defamation (§ 187) with imprisonment for six months to five years.

Thus, anyone who publicly insults a person involved in the political life of the people, at a meeting or by disseminating content, for reasons related to the position of the insulted person in public life, is punishable if the act is likely to significantly impede the public activities of the insulted person. Politicians at the local level are expressly included among those involved in the political life of the people. The offender may be punished with imprisonment of up to three years or a fine. If, under the same conditions, instead of an insult, malicious gossip or defamation are committed against that person, the penalty under § 188(2) of StGB is even imprisonment of six months to five years. The following section examines why this provision exists and what it can achieve.

## 2. A LOOK BACK

The deliberate defamation of politically active persons through disparaging statements, smear campaigns and disinformation, often spread via social media, can, once a certain threshold is crossed, no longer be understood as part of legitimate criticism, but as an attack on the democratic formation of opinion within the political debate. In view of the social developments explained above, it is not surprising that advocates of § 188 of StGB can point to a whole series of true facts that have occurred in recent years to the detriment of politicians.

In 2019, Green Party politician *Renate Künast* was subjected to a so-called ‘shitstorm’ on social media after statements she made in a parliamentary debate in 1986 surfaced, in which she appeared to advocate for the partial decriminalisation of paedophile acts against children.<sup>1</sup> As a result, *Künast* was called a ‘piece of shit,’ ‘hazardous waste,’

---

<sup>1</sup> <https://www.welt.de/politik/deutschland/article141406874/Gruenen-Politikerin-Kuenast-geraet-in-Erklaerungsnot.html>, accessed on 11 May 2025.

and ‘old perverted pig,’ among other things. The politician wanted to take action against such and similar statements and requested that the user data of the users concerned be released so that they could be identified. The details of this legal dispute will not be discussed here. In any case, the prerequisite for the de-anonymisation of online users was that the user to be unmasked had committed a criminal offence. The criminal offence of insult under § 185 of StGB was considered here.

In German criminal law, insulting means expressing contempt or disdain for a person. When assessing whether an insult has occurred, the court must always take into account the constitutionally guaranteed fundamental right to freedom of expression (Article 5(1) of the German Basic Law [Grundgesetz, GG]), which in turn may be restricted by criminal law (Article 5(2) of GG). When reaching a decision in individual cases, the protection of the honour of the person concerned as part of the fundamental right to general personal rights under Article 1(1) of GG in conjunction with Article 2(1) of GG must therefore be weighed against the freedom of expression of the person making the statement.

An opinion is characterised by its subjectivity, which is characterised by an element of statement, opinion and belief in the context of an intellectual debate. Even polemical and dishonourable value judgements are therefore protected by freedom of expression as long as a factual reference can still be identified. Conversely, a balancing of interests with freedom of expression is not necessary in exceptional cases which are clearly and purely insulting in nature, namely in the case of so-called ‘abusive criticism’, where the sole aim of what is said is to denigrate a person without any sufficient factual reference – such as legitimate criticism – being recognisable, and in the case of so-called ‘formal insults’, i.e. particularly nasty swear words that serve only to disparage the honour of the person concerned.<sup>2</sup> In all other cases, it is necessary to weigh up the fundamental right to freedom of expression of the person making the statement against the fundamental right to general personal rights of the person concerned. If the balance is wrong or if the necessary balance is not struck, the convicted person’s freedom of expression would be violated.

At the end of 2019, the Berlin Regional Court (LG) decided to classify the comments made against *Renate Künast* as permissible expressions of opinion and not to comply with the politician’s request for information.<sup>3</sup> The judges argued that the statements in question were still relevant to the matter at hand and should therefore be classified as permissible expressions of opinion rather than formal insults or defamatory criticism. The court argued that an objective connection could still be established because *Renate Künast* herself had provoked the negative reactions through her parliamentary statements. Furthermore, it reasoned that politicians are particularly exposed to public criticism and must therefore tolerate it to a greater extent. This was also in line with the previous case law of the Federal Constitutional Court (BVerfG), according to which insulting statements made about particularly prominent public figures such as politicians are not normally punishable as long as they contribute to the formation of

---

<sup>2</sup> An overview of criminal law considerations is provided by *Reinbacher*, ZIS 2022, 802 (805 f.).

<sup>3</sup> LG Berlin, decision of 9 November 2019, 27 AR 17/19 = MMR 2019, 754 (756).

public opinion.<sup>4</sup> The ECtHR in Strasbourg also takes a similar view. Politicians, by virtue of their office, expose themselves much more to the public and thus to criticism and must therefore also be more tolerant of insults.<sup>5</sup> Special protection of politicians' honour would contradict this principle and therefore also Article 10 of the European Convention on Human Rights (ECHR), which guarantees freedom of expression.<sup>6</sup>

Following considerable criticism from the public and legal experts, the Berlin Court of Appeal (Kammergericht [KG]) partially revised the Regional Court's opinion and classified some of the statements as abusive criticism or formal insults due to their 'massively defamatory content'.<sup>7</sup> The Federal Constitutional Court (BVerfG) subsequently dealt with the *Künast* case on several occasions and revised its previously liberal approach to defamatory statements against politicians, arguing that they are no less worthy of protection than the average citizen, but must enjoy criminal law protection so that they do not withdraw from politics, which in turn would damage democracy.<sup>8</sup>

### 3. THE AMENDEMENT OF § 188 OF StGB

The debate surrounding the *Renate Künast* case quickly spread to the previously neglected offence under § 188 of the old version of the StGB. The criminal provision, which had been in force since 1951<sup>9</sup> (as § 187a of the old version of StGB) and had remained largely unchanged until then, protected persons 'who are involved in the political life of the people' from malicious gossip and defamation if the act was committed in a manner likely to disturb public peace. The attentive reader will notice that an insult was not mentioned here. This is no coincidence, because in fact, malicious gossip (§ 186 of StGB) and defamation (§ 187 of StGB) are to be distinguished from insult (§ 185 of StGB) in German criminal law. Malicious gossip and defamation concern the expression of untrue facts. Statements of fact are characterised by the objective relationship between the statement and reality and are subject to objective clarification and thus to proof.<sup>10</sup> Malicious gossip occurs when someone asserts or disseminates a fact about another person that is likely to make them contemptible or disparage them in the public eye, unless this fact is demonstrably true (§ 186 of StGB). The deliberate assertion or dissemination of untrue facts about another person constitutes defamation if the facts are likely to make

---

<sup>4</sup> Federal Constitutional Court, judgment of 15 January 1958 – 1 BvR 400/51 = BVerfGE 7, 198 (212); Federal Constitutional Court, decision of 8 February 2017 – 1 BvR 2943/17 = NJW 2017, 1460 (1461); BVerfG, decision of 19 December 2021 – 1 BvR 1073/20 = NJW 2020, 680 (683).

<sup>5</sup> ECtHR, judgment of 14 March 2016, No. 26118/10 (*Eon v. France*), No. 59.

<sup>6</sup> ECtHR, judgment of 14 March 2016, No. 26118/10 (*Eon v. France*), No. 59.

<sup>7</sup> KG Berlin, decision of 11 March 2020 – 10 W 13/20 = MMR 2020, 867 (868).

<sup>8</sup> BVerfG, decision of 19 May 2020 – 1 BvR 2459/19 = NJW 2020, 2629; BVerfG, decision of 19 May 2020 – 1 BvR 1094/19 = NJW 2020, 2631; BVerfG, decision of 19 May 2020 – 1 BvR 362/18 = NJW 2020, 2636; BVerfG, decision of 19 December 2021 – 1 BvR 1073/20 = NJW 2020, 680 (684).

<sup>9</sup> Criminal Law Amendment Act of 30 August 1951 (Federal Law Gazette I p. 739).

<sup>10</sup> Federal Constitutional Court, decision of 13 April 1994 – 1 BvR 23/94 = BVerfGE 90, 241.

the person concerned contemptible or disparage them in the public eye (§ 187 of StGB). An insult, on the other hand, is the expression of disparaging opinions outside the scope of freedom of expression which are not facts. Insulting politicians was not covered under § 188 of StGB (old version) and instead fell under the ‘normal’ offence of insult under § 185 of StGB, which is why the provision of § 188 of StGB (old version) did not apply in the *Künast* case. In the case of malicious gossip or defamation against a politician, § 188 of StGB (old version) constituted a qualifying element that would have been accompanied by an increased penalty.

In response to the *Künast* case and the murder of state politician *Walter Lübcke* by a right-wing extremist, also in 2019, a draft law<sup>11</sup> was introduced in December 2019 to strengthen criminal law protection against ‘hate crimes’ in general and for politicians in particular. In fact, the draft was preceded by further public reports that local elected officials in particular, but also members of parliaments, had been repeatedly insulted over long periods of time in the manner reflected in the explanatory memorandum to the bill and had even been stalked (along with their family members), with the result that isolated victims resigned from their offices (district administrators, mayors, members of local and parliamentary representative bodies) or announced their intention to do so. The draft law thus had a real background in which it sought justification:

"This behaviour not only attacks the general personal rights of those affected, but also political discourse in a democratic and pluralistic social order and calls it into question. Public figures and representatives active in the community are, for example, subjected to defamatory statements or death threats after making political statements, or calls are made for violence against them. These disrespectful and derogatory statements, which are often visible to a wide audience over a long period of time, lower the threshold for further statements of the same kind. In this brutalised environment, certain opinions are already no longer being expressed for fear of such reactions. This can even lead to people withdrawing completely from public political discourse. This jeopardises the free exchange of opinions on the internet and ultimately freedom of expression. Being able to express one's own opinion freely, openly and without influence, and to exchange views on it, is an essential cornerstone of a democratic, pluralistic society, which the state must defend with the means at its disposal."<sup>12</sup>

Among the offences covered by the draft was § 188 of StGB. Its amendment was intended to explicitly include local politicians in the scope of criminal law protection. Until then, it had been controversial in legal literature whether § 188 of StGB in its old version could only protect ‘high-ranking’ politicians because only they were involved in the political life of the ‘entire’ population. However, *Walter Lübcke* was hardly known outside his home state Hesse and yet had become a target. This was another reason why there were calls for local politicians to be explicitly included in the group of persons protected.<sup>13</sup>

---

<sup>11</sup> Draft bill of the Federal Ministry of Justice on a law to combat right-wing extremism and hate crime, [https://www.bmj.de/SharedDocs/Downloads/DE/Gesetzgebung/RefE/RefE\\_BekaempfungHatespeech.pdf?\\_\\_blob=publicationFile&v=4](https://www.bmj.de/SharedDocs/Downloads/DE/Gesetzgebung/RefE/RefE_BekaempfungHatespeech.pdf?__blob=publicationFile&v=4), accessed on 11 May 2025.

<sup>12</sup> BT-Drs. 19/17741, p. 1.

<sup>13</sup> BT-Drs. 19/17741, p. 4.

With the Act to Combat Right-Wing Extremism and Hate Crime, the amended § 188 of StGB came into force in 2021.<sup>14</sup> Surprisingly and largely without major debate, a significant change to the wording was made at the last minute: the inclusion of insult in the definition of § 188 of StGB, which now stands on an equal footing with malicious gossip and defamation.

From a dogmatic point of view, the new § 188 of StGB continues to constitute a qualification of the general offences against honour under §§ 185 et seq. of StGB. The increased penalty for politicians, in contrast to ‘normal victims’, is justified by the fact that the act must be capable of ‘significantly influencing the public activities of the victim’. Accordingly, the offence does not protect politicians as individuals or even the office as such, but also protects free political discourse, which must be protected from brutalisation and intimidation. § 188 of StGB thus combines two central protected interests: on the one hand, the personal honour of politically active persons is to be preserved; on the other hand, the provision aims to protect democratic processes that may be endangered by targeted defamation and intimidation of political actors. The offence therefore also serves to protect the political and democratic community.<sup>15</sup>

In terms of location, the act must have been committed in public, at a meeting or through the dissemination of content. In the case of dissemination on the internet, the criterion of ‘publicity’ is regularly fulfilled. With regard to the protected group of persons, § 188 of StGB offers protection to all persons who ‘are involved in the political life of the people’ and are thus actively involved in the political decision-making process. In the opinion of the Federal Constitutional Court, this broad definition complies with the principle of specificity.<sup>16</sup> The wording that persons must be ‘in’ political life excludes persons who are only ‘on the fringes’ of political life but are highly visible in public, such as actors, musicians, journalists, athletes or high-ranking church dignitaries, from the scope of application.<sup>17</sup> Whether this is sensible or whether the inclusion of other persons who are highly visible in public would be justified is a matter of debate. In any case, it is correct that not only office holders are covered by the provision, but also persons who are merely candidates for public political office. According to the current legal situation, officials who work purely within a political party and do not hold public office are not covered by the protected group of persons under § 188 of StGB, but only by the general offences.<sup>18</sup> In objective terms ‘, the statement must have been made deliberately and not just by chance against a person of public life and must also relate specifically to their public position, not to private matters.

A suitable act is the expression of an insult, malicious gossip or defamation against a person in political life. With regard to these terms, reference can be made to the above. In the case of insulting statements that serve the public debate and the democratic

---

<sup>14</sup> BGBl. I 2021, 441.

<sup>15</sup> *Rühs*, ZIS 2022, 51 (56).

<sup>16</sup> BVerfG, decision of 30 November 1955 – 1 BvL 120/53 = NJW 1956, 99.

<sup>17</sup> *Rühs*, ZIS 2022, 51 (55 ff.).

<sup>18</sup> *Rühs*, ZIS 2022, 51 (62).

formation of opinion, a particularly liberal standard must also be applied within the framework of § 188 of StGB.<sup>19</sup>

The most difficult element of the offence to prove in practice is the 'suitability to significantly impede the public activities of the person'. This criterion serves to exclude purely private disadvantages to the injured party and merely minor political disadvantages and requires an effect at the overall political meta-level. This restriction is to be welcomed in principle because it establishes an unambiguous link to the collective legal interest protected by the norm.

With regard to the procedural requirements, unlike other offences of defamation, § 188 of StGB is not an absolute offence but a relative offence subject to complaint. This means that prosecution generally requires a complaint to be filed by the injured party (§ 194(1) of StGB). However, if there is a special public interest, the public prosecutor's office may take action on its own initiative even without a complaint from the injured party. In practice, this means that the public prosecutor's office does not have to wait for a criminal complaint to be filed in cases affecting the public interest. Nevertheless, the injured party will continue to file a complaint in most cases, as the public prosecutor's office cannot monitor the internet comprehensively. The law also provides for a further exception: even if the prosecuting authority considers it necessary to take action *ex officio*, the offence cannot be prosecuted if the injured party objects to prosecution (§ 194 (1) sentence 4 of StGB).

#### 4. ASSESSMENT OF THE NEW § 188 OF StGB

Has the new version of § 188 of StGB proven successful so far? In Bavaria, a total of 3,625 people were convicted of insulting behaviour under § 185 et seq. of StGB by 2023.<sup>20</sup> However, § 188 StGB is not reported on separately in the statistics. The general conviction figures for offences of expression under §§ 185 et seq. of StGB, which can be extrapolated to the population of Germany as a whole (population as of 30 September 2024: 83,550,000 inhabitants) based on the population of Bavaria as of 31 December 2023 (13,176,426 inhabitants), do not provide any information on this. The overview of 'hate crime' published by the Federal Ministry of the Interior and Home Affairs on 21 May 2024 only shows that the number of cases is still rising, even though the tightening of criminal law designed to combat it has been in force since July 2021. Incidentally, the available figures leave open the question of whether the tightening of the law (combined with improved criminal investigation methods) has led to a change in the awareness of law enforcement agencies, which could also be a plausible explanation for the observed increase in the number of hate crime cases. Based on media reports, there has certainly

---

<sup>19</sup> BVerfG, judgment of 15 January 1958 – 1 BvR 400/51 = BVerfGE 7, 198 (212); BVerfG, decision of 22 June 1982 – 1 BvR 1376/79 = BVerfGE 61, 1 (11); BVerfG, decision of 10 October 1995 – 1 BvR 1476, 1980/91 and 102, 221/92 = BVerfGE 93, 266 (294 f.).

<sup>20</sup> *Bavarian State Office for Statistics, Convicted and sentenced persons in Bavaria 2023. Results of criminal prosecution statistics*, p. 23.

been a heightened awareness of hate crime in the public consciousness, which may have led to a change in behaviour when it comes to reporting crimes. This has not yet been clarified either. However, the political climate has become more tense, particularly in the debate with right-wing extremists in the years since the stricter § 188 of StGB came into force. This may explain why the number of cases recorded by the Federal Ministry of the Interior continues to rise.

However, the last four years already offer a multitude of high-profile examples in which § 188 of StGB has been discussed or applied as a response instrument. The vast majority of cases concern insults: in 2023, FDP politician *Marie-Agnes Strack-Zimmermann* was described in online comments as a ‘warmonger’ or ‘devilish, ugly woman’ and reported these comments en masse and with great publicity; in 2024, former Federal Minister of Economics *Robert Habeck* (Alliance 90/The Greens) was called a ‘moron’ and ‘complete idiot’ on social media, among other things, and also reported these cases, one of which even led to a (controversial) house search of a suspect. The politicians and parties mentioned are just examples, because such comments are by no means limited to party lines but are widespread across the entire political landscape – and the trend is rising.

The concerted wave of complaints initiated by politicians such as *Strack-Zimmermann* and *Habeck* has now become a political issue in its own right. Communications agencies, specifically commissioned by these two politicians for these cases alone, have filed thousands of criminal complaints in the last two years for insulting, malicious gossip and defamatory content – often with reference to § 188 of StGB.<sup>21</sup> The aim of this action is not only to deter potential perpetrators from making such statements and to prompt the law enforcement authorities to take action. The complaints are regularly accompanied by civil claims for damages. These monetary claims have led to widespread rejection among the population of the criminal offence known colloquially as ‘lèse-majesté’ in § 188 of StGB. The procedure is not illegal: the victim of a criminal offence is generally entitled to claim damages from the perpetrator.<sup>22</sup> However, the impression that civil enforcement of claims for damages is being used to intimidate political opponents and that politicians are personally enriching themselves through their ‘special criminal law’ is not conducive to the political climate. In addition, the proceedings are not usually conducted by the politicians themselves, but by companies and organisations set up specifically for this purpose, which are financed in part by the compensation payments won.<sup>23</sup> If these organisations take it upon themselves to scour the internet for offensive content and file criminal complaints on behalf of the politician concerned, the purpose of the criminal provision is hardly fulfilled – after all, the persons concerned have not even seen the offensive statements themselves and can hardly claim to have been insulted, intimidated or defamed.

---

<sup>21</sup> <https://www.tagesschau.de/inland/innenpolitik/habeck-anzeigen-hassnachrichten-100.html>, accessed on 11 May 2025; <https://www.spiegel.de/politik/deutschland/marie-agnes-strack-zimmermann-stellt-monatlich-250-anzeigen-wegen-drohungen-und-hetze-a-cd890890-4ab3-46f1-8643-8f039c2f5620>, abgerufen am 11.05.2025.

<sup>22</sup> Doubts about the legality of mass warnings are expressed by *Drygala*, NJW 2025, 278 (283 f.).

<sup>23</sup> *Drygala*, NJW 2025, 278 (279 f.).

The courts have already handed down several judgments applying the amended § 188 StGB. One of the most prominent decisions is that of the Bavarian Supreme Court (BayObLG) of 6 March 2025.<sup>24</sup> The court had to decide in the final appeal instance whether the verbal description of former Federal Chancellor *Olaf Scholz* (SPD) as a ‘public enemy’ at a demonstration fulfilled the elements of the offence. The decisive question was whether the statement was likely to ‘significantly impede’ the public work of the Chancellor. It has already been indicated above that this characteristic is the crucial question within the offence. The spectrum of opinions within case law is correspondingly broad. The Higher Regional Court of Zweibrücken considered that a Facebook account with only 417 followers and thus a comparatively small reach constituted a significant hindrance if it posted an insult.<sup>25</sup> The BayObLG did not agree with this broad interpretation and did not recognise either the number of approximately 100 fellow demonstrators of the defendant or the specific statement ‘public enemy’ as capable of significantly impeding the work of the Federal Chancellor. The court emphasised that particular attention must be paid to the reach and impact of the statement. In the case of insults, it is in any case much more difficult to imagine that the public activities of the person concerned could be impaired than in the case of statements of fact.<sup>26</sup> Anyone who insults a politician may entertain their audience for a short time, but does not encourage them to think about it at length or to repeat the insult. In response to the ruling, Lower Saxony’s ([Niedersachsen], one of the 16 States of the Federal Republic of Germany) Minister of Justice, Kathrin Wahlmann (also SPD), called for the criterion of ‘suitability to cause significant impairment’ to be dispensed with entirely<sup>27</sup>, thereby significantly lowering the threshold for criminal liability.

The expression of political convictions will always be associated with the price of possibly being criticised for those political convictions. The state must not intervene to affirm one opinion over another. This principle applies in particular to criminal law, which should only be used as a last resort. However, the aim of § 188 of StGB is not only to protect personal honour, but also to safeguard democratic discourse from targeted intimidation that could jeopardise political participation. The increase in the severity of the punishment is therefore not merely a result of the distinction between ‘ordinary citizens’ and politicians but is justified by the fact that the act is committed, firstly, for reasons related to the position of the person concerned in public life and, secondly, must be likely to impede the public activities of the person insulted. In the opinion of the Federal Constitutional Court, there is therefore no violation of the constitutional principle of equal treatment.<sup>28</sup>

---

<sup>24</sup> BayObLG, judgment of 6 March 2025 – Ref. 206 StRR 433/24.

<sup>25</sup> OLG Zweibrücken, judgment of 30 September 2024 – Ref. 1 ORs 1 SRs 8/24.

<sup>26</sup> BayObLG, judgment of 6 March 2025 – Ref. 206 StRR 433/24.

<sup>27</sup> <https://www.welt.de/politik/deutschland/plus254670238/SPD-Idee-Jetzt-kommt-der-Vorstoss-Politikerbeleidigung-umfassender-zu-ahnden.html>, accessed on 11 May 2025.

<sup>28</sup> BVerfG, decision of 30 November 1955 – 1 BvL 120/53 = NJW 1956, 99. This decision cannot eliminate the unequal differentiation because the court did not consider this perspective and was not required to do so. The decision dates from 30 November 1955. The view of the importance of the functions performed by civil society actors has changed since 1955.

However, this is only convincing insofar as it concerns the dissemination of false facts in the context of malicious gossip or defamation. The reason for punishment is then the abstract danger that other persons will be convinced of an untrue fact that is likely to disrupt political discourse. This covers the classic case of the dissemination of so-called ‘fake news’: populist and fear-mongering statements such as ‘X will take away your private assets’, ‘Y is controlled by an underground organisation’ or ‘Z eats puppies’ do not serve the democratic formation of opinion. They mislead citizens about actual political content and serve no purpose other than to prevent objective discourse and ultimately to radicalise all those who believe these statements. In the future, false factual claims will play a much greater role. The dissemination of ‘AI videos’ that already appear deceptively real today will be an extremely dangerous weapon in the future. According to the principle ‘what you see with your own eyes is true’, even the most audacious claims can be backed up with irrefutable photographic, audio and video evidence.

Since 2021, § 188 of StGB has covered not only false factual claims but also mere insults. In the opinion of the legislator, these are also likely to significantly impede the public activities of persons in political life.<sup>29</sup> This article opposes this view. Insults express subjective contempt, which, due to their subjective component, are significantly less likely to spread to other persons than is the case with untrue facts. The dissemination of an objectively appearing but untrue statement that was deliberately put into circulation in order to discredit a politician generates an exponentially higher chance of dissemination than a comment that insults a politician (even in the most vile manner) with just one word. In retrospect, hardly anyone will remember this insult, and it will rarely be shared or forwarded by other people. It is difficult to imagine how such an insult could make it more difficult for a politician to perform his duties. In contrast, the deliberate dissemination of untruths can shake not only individual politicians or parties, but also the overall trust in state institutions if the news creates the impression that the entire political system is riddled with corrupt and dishonourable traitors.<sup>30</sup> In order for the offence to fulfil its actual purpose, the criterion of ‘suitability to significantly impair the political activities of the person concerned’ must therefore not be dispensed with under any circumstances: otherwise, § 188 of StGB would only be considered special criminal law for politicians.

## 5. CONCLUSION

Many citizens – not only those who participate in the brutalised opinion-making on the internet – find § 188 of StGB a thorn in their side. In connection with the wave of claims for civil damages by well-known politicians, it is subject to the criticism, which is not unjustified, that it is being misused to censor unpopular voices. In 1994, the Hungarian Constitutional Court declared a similar criminal provision on ‘insulting

---

<sup>29</sup> BT-Drs. 19/20163, p. 43.

<sup>30</sup> *Rühs*, ZIS 2022, 51 (57).

politicians' to be unconstitutional.<sup>31</sup> Nevertheless, it cannot be denied that public discourse is increasingly characterised by confrontation, provocation and, not infrequently, violence. Against this background, an in-depth examination of § 188 of StGB appears necessary not only from the perspective of criminal law and constitutional doctrine, but also from the perspective of democratic theory.

The argument that the political climate has 'always been' harsh cannot be dismissed out of hand. However, the decisive difference between political discourse today and in the past lies in the channels of communication through which it is conducted. The internet in particular offers individuals unprecedented speed and reach for disseminating statements. A comment read hundreds of thousands of times on social media is simply not comparable in its external impact to a demonstrator carrying an offensive sign in front of twenty other people. In this respect, the purpose pursued by § 188 of StGB is at least understandable. US Vice President *James David Vance* may have had this type of criminal repression in mind when he delivered his philippika on the threat to European democracies at the Munich International Security Conference in February 2025. For the American understanding of freedom of expression, the criminal punishment of offences of expression, as described in §§ 185 to 187 of StGB, is an absurdity. In Germany, the offended or defamed person cannot be referred exclusively to civil law to defend their personal honour, which is also possible in the United States. To date, they also enjoy criminal law protection.<sup>32</sup>

§ 188 of StGB itself is not worded in such a way that the provision could have become a powerful weapon in the fight against hate crime. Only marginal concerns have been raised that the provision creates special rights to protect persons who are involved in the political life of the people. Other civil society officials whose work is non-political but equally important to society do not enjoy the special criminal law protection of § 188 of StGB but must instead be content with the protection offered by §§ 185-187 of StGB. If § 188 of StGB is concerned with protecting the functions performed by incumbent politicians, rather than protecting their personal honour, as is the case in the case law of the criminal courts<sup>33</sup>, the disadvantageous treatment of other persons who work for the common good and are therefore more important in a pluralistic democracy does not appear to be objectively justified. A violation of the general principle of equality under Article 3(1) of GG is still evident.<sup>34</sup> It is therefore necessary that § 188 of StGB retains its overall democratic meaning at all costs. Demands to further lower the threshold for criminal liability are completely misguided, because otherwise the norm would completely lose its connection to the collective legal interest it supports.

The inclusion of insults into § 188 of StGB is inappropriate and – as long as the requirement of suitability to impair public activity is not deleted – is unlikely ever to lead

---

<sup>31</sup> Hungarian Constitutional Court Decision 36/1994 (VI. 24.) Tenor Point 1; further information *Szomora*, ZIS 2011, 29 (34).

<sup>32</sup> This article does not seek to answer the question of whether the punishment of insults by means of imprisonment and fines is outdated and in need of reform.

<sup>33</sup> See *Fischer*, StGB, § 188 no. 2.

<sup>34</sup> BVerfG, decision of 30 November 1955 – 1 BvL 120/53 = NJW 1956, 99.

to convictions. It is simply inconceivable how an insult, however vile, could significantly impair a politician's political activities. Instead, insults against politicians should continue to be measured exclusively against the general standard of § 185 of StGB. This also applies in view of the fact that the conviction and penalty order rate for 'prominent' victims is significantly higher than for private individuals, whose proceedings for simple insult would normally be discontinued due to insignificance.<sup>35</sup> Here, the courts should endeavour to avoid the accusation of 'special political criminal law' at the procedural level as well.

### List of References

1. Drygala, T. (2025) „Schwachkopf! – Die Massenverfahren wegen Politikerbeleidigung im Internet, in: *Neue Juristische Wochenschrift*, 278-284.
2. Fischer, T. (2025) *Strafgesetzbuch mit Nebengesetzen*, Auflage, München.
3. Reinbacher, T. (2022) „Das wird man doch wohl noch sagen dürfen!“ Politische Meinungsäußerungen im Internet als strafbare Beleidigung, in: *Zeitschrift für Internationale Strafrechtswissenschaft*, 802-810.
4. Rühls, C. (2022) “Gegen Personen des politischen Lebens gerichtete Beleidigung, üble Nachrede und Verleumdung: Welches Rechtsgut wird durch § 188 StGB geschützt?”, in: *Zeitschrift für Internationale Strafrechtswissenschaft*, 51-67.
5. Szomora, Z. (2011) “Schranken und Schrankenlosigkeit der Meinungsfreiheit in Ungarn. Grundrechtsbeeinflusste Widersprüche im ungarischen Strafrecht”, in: *Zeitschrift für Internationale Strafrechtswissenschaft*, 29-43.

---

<sup>35</sup> On the approach taken by the specialised courts in cases of insulting politicians in comparison to the approach taken in cases of 'normal insult', see Drygala, NJW 2025, 278 (279).

## CASE WEIGHTING IN PROSECUTORIAL OFFICES: DRIVING EFFICIENCY, FAIRNESS, AND PERFORMANCE

Ana Krnić Kulušić\*

*Case weighting systems (CWS) have traditionally been applied in courts to assess workload and allocate resources, but over the past decade, their adoption in prosecutorial systems has increased significantly. This paper examines the principles, methodologies, and experiences of CWS implementation across European prosecutorial services, drawing on Council of Europe European Commission for the Efficiency of Justice reports, national studies, and international literature. It highlights the variety of approaches, ranging from Time-study methods to Delphi or Delphi-like Time-estimate methods, and discusses their advantages, limitations, and practical implications. Key factors for successful implementation include strong institutional leadership, high-quality data collection, appropriate information technology tools, and stakeholder engagement. The paper also explores alternative systems used in states without formal CWS, illustrating how workload assessment can be tailored to national contexts. Lessons learned from both European and international examples offer guidance for jurisdictions considering the adoption of CWS or similar mechanisms, emphasizing adaptability, transparency, and sustainability.*

**KEYWORDS:** *Case weighting systems (CWS), Prosecutorial workload, Judicial efficiency, Resource allocation, Workload assessment.*

---

\* Mag. iur., univ. spec. elect. comm. Justice Reform Expert.  
E-mail: [ana@krunich.com](mailto:ana@krunich.com)

## 1. INTRODUCTION

There are many terms used when discussing case weighting, such as case weighting analysis, case weighting study, case weighting systems and case weighting formula. The World Bank (WB) labeled case weighting analysis as “a technique developed in the United States in the 1970s to help courts estimate their personnel needs, readjust staff distribution, and support requests for more human resources.”<sup>1</sup> The term case weighting analysis is frequently used interchangeably with case weighting study, although the WB prefers the term analysis to more accurately describe the examination of data on court activity.

The Council of Europe European Commission for the Efficiency of Justice (CEPEJ) defines a case weighting system as “a scoring system to assess the degree of complexity of case types based on the understanding that one case type may differ from another case type in the amount of judicial time required for processing”.<sup>2</sup>

Although case weighting studies emerged as a response to performance gaps in courts caused by insufficient staffing, unevenly distributed caseloads, inefficient work unit structures, and human resources that did not match the actual volume of judicial demand, the applicability of the method has widened over the years. More recently, it has also been applied to address additional concerns, such as wide disparities in individual productivity, judges’ tendency to resolve simpler cases before more complex ones, and the ways in which both behaviors contribute to growing backlogs.

The key innovation of case weighting lies in recognizing that different case types require varying levels of time and effort from judges and administrative personnel. Therefore, relying solely on counts of inputs or outputs cannot accurately reflect true workload. By determining the amount of effort associated with each category of cases and translating this into average case weights, reasonable caseload expectations can be set more accurately and staff distributed where most needed. Case weighting systems (CWSs) are now employed for broader administrative goals than the initial intention, including reallocating staff or case assignments, establishing productivity benchmarks, and designing or downsizing organizational units.

As the approach has developed, a range of case weighting techniques have developed such as whether to collect real-time data through time logs or rely on estimations, whether to measure the time for entire cases or for particular procedural events, how to record time, how long data collection should last, whether participation should be universal or selective, how participants should be chosen, whether expert panels should supplement time logs, and how broadly or narrowly to group case and event types. An additional element are also the information technology (IT) tools developed over time, providing new horizons in development of CWSs.

---

<sup>1</sup> The World Bank. 2017. Case weighting analyses as a tool to promote judicial efficiency: Lessons, substitutes and guidance. December. Available at: <https://documents.worldbank.org/pt/publication/documents-reports/documentdetail/529071513145311747> (5.6.2025).

<sup>2</sup> Council of Europe, European Commission for the Efficiency of Justice (CEPEJ). 2020. Case weighting in judicial systems (CEPEJ Studies No. 28). Available at: <https://rm.coe.int/study-28-case-weighting-report-en/16809ede97> (5.6.2025).

Largely influenced by its successful implementation within court systems, judiciaries across Europe and the global stage have taken individual initiatives to pioneer the incorporation of case weighting into their prosecutorial systems. In 2023, CEPEJ has decided to examine the topic in more detail in a report that examines different approaches to conducting case weighting analyses. The findings of the respective report will be discussed in greater detail in this paper. Nonetheless, the broadness of CWS application does not stop at courts and prosecution services; it is also applicable to professions like police investigators, and other legal professionals.

## **2. THEORY OF CASE WEIGHTING IN PROSECUTION SERVICES – IMPLEMENTATION METHODS**

According to CEPEJ Report on Case Weighting in Public Prosecution Services, “not all prosecution cases are equal in terms of complexity, which means that different types of cases require varying amounts of time and attention from public prosecution services/offices (PPS or PPO). The exact composition of a caseload, and the relative percentages of different types of cases, can significantly affect prosecutors’ workload.”<sup>3</sup>

Although over time, and depending on national contexts, many implementation methods have been developed, two main types of methods are usually used – CEPEJ named them the Time-estimate method and the Time-study method.

The Time-study method involves tracking prosecutors’ activities over a specific data collection period, providing a direct measure of the time spent on various predefined prosecutorial tasks. These tasks may include not only case-related work but also administrative duties, meetings, training, and other work-related activities. The precise quantification of time is then used to calculate case weights. While this method offers high accuracy, it also has drawbacks, including significant costs and considerable time demands, particularly for the prosecutors involved.

The Time-estimate methods (Delphi and Delphi-like) are structured approaches that rely on a panel of experts who, by consensus, estimate the time required for different case types. These methods are based on the assumption that a structured group of experienced experts is more likely to provide objective and reliable estimates of the time needed to resolve a case than individual experts or an unstructured group would be.

Nonetheless, this method is less accurate than the Time-study method, as it depends on human perception and the quality of the process and question design. However, it is less costly and considerably faster to implement. Another advantage is that it can be more reassuring for prosecutors regarding their professional independence.

Other methods include, *inter alia*, data-driven analysis and prosecutors’ surveys. Data-driven analysis relies on historical information from CMS or case databases, examining “case events” such as number of participants, submissions, hearings, witnesses,

---

<sup>3</sup> Council of Europe, European Commission for the Efficiency of Justice (CEPEJ). 2019. Glossary of terms and abbreviations used in the CEPEJ reports. Available at: <https://rm.coe.int/cepej-2019-5final-glossaire-en-version-10-decembre-as/1680993c4c> (5.6.2025).

pages, and exhibits. Points can be assigned to different events to evaluate and forecast prosecutors' workload. Prosecutors' surveys, similar to a Delphi method, gather time estimates from prosecutors for each step in case procedures. These averages are then used to identify workload trends within a prosecutorial office or system.

The final decision regarding the approach to be adopted must be tailored to the national context and the specific goals to be achieved. However, decision-makers need to be familiar with the available options, along with their respective advantages and disadvantages.

### **3. PROSECUTORIAL CASE WEIGHTING SYSTEMS ACROSS EUROPE**

In its Report on Case Weighting in Public Prosecution Services, CEPEJ has found eight prosecutorial systems within Europe which employ a CWS: Austria, Belgium, Bulgaria, Denmark, Germany, Lithuania, the Netherlands, Sweden. Another three non-European countries the United States of America, Canada and Australia have also been examined. This section focuses exclusively on the European states, with the remaining three states discussed later in the paper.

These systems have proven to be highly versatile in their application of case weighting, offering a wide range of possibilities and valuable lessons learned. Each of the examined systems is adapted to its national context, reflecting local needs and priorities, yet they all share common features in methodology and underlying principles.

#### ***3.1. Development and Implementation Paths***

Most of the states examined by CEPEJ had previous experience with legacy systems, which were abandoned as either obsolete or inadequate. Moreover, the states reported that the previous systems were replaced due to their lack of practicability (Germany, Lithuania, Sweden), lack of precision (Bulgaria, Lithuania), and lack of flexibility (Austria, Denmark, Germany, Sweden).

Another common feature of the examined systems is the involvement of high-level leading institutions that provide strategic direction, financial support, regulatory authority, essential expertise, and efficient decision-making processes. In short, strong sponsorship contributes to the success of CWSs. This sponsorship can come from the Ministry of Justice (Austria, Germany, the Netherlands) or from other specialized institutions, such as the Public Prosecutorial Board in Belgium, the Director of Public Prosecutions in Denmark, the General Prosecutor's Office in Lithuania, the Prosecution Authority in Sweden, and the Supreme Judicial Council in Bulgaria<sup>4</sup>.

External expertise has proven to be both useful and applicable throughout the process, particularly in data collection and IT support. In Austria, the process was guided by a consulting company; in Germany, the CWS was designed by a consulting firm; and in Denmark, the databases and IT systems were developed and maintained by outsourced companies.

---

<sup>4</sup> Jointly for courts and prosecution.

The CWS examined in these states were found to serve a variety of purposes. In some cases, they were used solely for personnel and budgetary planning (Austria, Germany, the Netherlands). In others, they supported prosecution service management at different levels: (i) the unit level (Belgium, Bulgaria, Denmark, Lithuania, Sweden), for allocating prosecutors, staff, and budget, as well as assessing unit productivity; and (ii) the individual level (Bulgaria, Lithuania), for evaluating individual productivity, supporting performance appraisals, career development, and disciplinary accountability.

In terms of data collection, five states employed a Time-study methodology (Austria, Belgium, Denmark, Germany, Sweden). Denmark collects data continuously, while Sweden does so twice a year for two weeks. Most states rely on online tools and use representative samples, and all make extensive use of case management systems to extract data. Three states opted for Time-estimate methods (Delphi-like) (Bulgaria, Lithuania, the Netherlands).

In Lithuania, ten expert prosecutors spent 18 months reviewing resolved cases, examining 50 cases per article of the Criminal Code. In Bulgaria, a special working group developed coefficients (basic and additional) for an extensive list of prosecutorial actions and decisions. In the Netherlands, case complexity was graded on a scale from one to five.

States take very different approaches to assessing prosecutors' working time. Some collect precise data (Denmark, Sweden, Lithuania), while others rely on averages and estimates. For example, in Denmark, it is calculated that 4.9 hours per day are spent on case-related work. In Austria, a prosecutor's workload is estimated at 1,720 hours per year, in Germany 1,646 hours per year, and in Bulgaria 5 hours per day over 250 working days per year. In Belgium, online calendars are used as a source of information. External expertise is also employed in this part of the process in several states, including Austria, Belgium, and Germany.

The classification of cases forms the basis for CWS calculations and can be organized in various ways: by offences provided by law, by phases of the procedure, by both offences and phases of the procedure, by case complexity. Examples from different states below illustrate these approaches.

In Sweden, the classification system used for all types of statistics is based on hundreds of codes combining legal and criminological aspects. Examples include murder, manslaughter, gross assault, other assault and violence, unlawful threat, molestation, other crimes against personal freedom and integrity, and rape.

In Austria, the system recognizes 13 case types to which weights are assigned. Classification is based on the type of activity rather than the offence. Examples include preliminary proceedings against juveniles and young adults, preliminary proceedings against adults, main proceedings – single judge, and main proceedings – jury.

In Lithuania, classification for the investigation phase is based on the type of offence, with 66 criminal offence types used for case weighting purposes. These are further categorized according to procedural specifics, such as whether the prosecutor leads or conducts the pre-trial investigation and whether the case decision is a suspension, discontinuance, or referral to court.

In the Netherlands, five case weight categories (from 1 to 5) have been established according to case complexity, reflecting how time-consuming cases are. Multiple criteria, including the type of offence, are considered in this categorization.

Case weights can be determined using different methods, depending on the approach chosen by each state. Under the Time-study method, the case weight is based on the average time spent on a case. In Denmark, for example, a conviction for murder and arson requires 37.5 hours, while an indictment with trial for the same offences takes 11.25 hours, and other decisions related to these offences take 1.34 hours. In Sweden, average times are converted into relative values and indices. One case type, “Use of illegal drugs/possession for personal use”, serves as a reference with an index weight of 1.00. Since the average time for this case type is 1.15 hours, the weight index for each case type is calculated by dividing the average time by 1.15. For instance, rape has an average time of 7.16 hours, giving it a weight index of 6.23, while fraud has an average time of 2.53 hours, resulting in a weight index of 2.20.

The Time-estimate method, on the other hand, assigns case weights based on expert estimation. In Bulgaria, the first step involves calculating the case weight by summing the coefficients of each predefined action or decision, with one coefficient equal to 150 minutes. A second, optional step adjusts weights for cases of exceptional severity or complexity, considering factors such as a large volume of materials or multiple offenders. In Lithuania, case weights for fraud depend on the procedural outcome: if the prosecutor supervises an investigation that is terminated, the standard weight is 11 hours; if it is suspended, the weight is 20 hours; and if it is referred to court, the weight is 50 hours. For each additional suspect, 14 hours are added to the standard weight.

These approaches illustrate how case weights can be derived either from precise measurements of time spent or from professional estimations based on case complexity and procedural specifics, reflecting the diverse methodologies applied across different prosecutorial systems.

#### **4. PROSECUTORIAL CASE WEIGHTING SYSTEMS BEYOND EUROPE – AUSTRALIA, CANADA, AND THE UNITED STATES OF AMERICA**

In Australia, the system is used by the Commonwealth Directorate of Public Prosecutions, which formed a working group of prosecutors to draft a “National Legal Direction” using a Delphi method. Cases are graded from 1 (least complex) to 4 (most complex), with consideration of factors such as the volume and nature of evidence and the number of victims. Senior management assigns weights to cases, guiding whether they are handled by junior or senior prosecutors, or by a team for the most complex cases, and informing budgetary requests. Complexity can be adjusted during the prosecution if circumstances change. While generally satisfied, the Commonwealth Directorate is exploring minor upgrades, including more granular grading (e.g., 1.2, 1.4).

In Canada, the Federal Public Prosecution Service uses its CWS to determine staffing needs, support funding requests, allocate prosecutors and staff, and assign cases.

Cases are divided into low, moderate, high, and mega complexity, with the latter two categories assigned only in consultation with a manager. Weights were determined by a working group based on data collected from the case management system.

The United States of America, the cradle of case weighting, is a federation with various systems implemented across its federal states. In 2002, the American Prosecutors Research Institute conducted a study (American Prosecutors Research Institute (APRI), 2002) to determine how many cases a prosecutor can reasonably handle and to explore the feasibility of establishing national caseload and workload standards. The study concluded that universal workload standards were impractical due to differences in criminal codes, court structures, and crime profiles across states. However, it recommended a preferred model in which staff record prosecutors' time by case type, disposition type, and procedural stage (pre-charge, pre-trial, trial). Disposition type was particularly important, as most cases are resolved before trial. Resource needs are then calculated by case type, considering the frequency of different disposition types and available time, excluding vacations, leave, and non-case-related work.

## **5. BARRIERS TO INTRODUCING CWS AND ALTERNATIVE METHODS FOR EVALUATING CASE WORKLOAD**

In its Report, CEPEJ surveyed 46 Council of Europe member states to gather data on case weighting in prosecutorial services across Europe. Although only eight respondents reported having a system that fully fits CEPEJ's initial definition of a CWS, many others provided information on the obstacles preventing implementation and described other similar systems in place.<sup>5</sup>

As reported by surveyed states, several most common barriers hinder the successful introduction of CWSs. Insufficient awareness of the system and its potential benefits limits buy-in from key stakeholders. Data collection often imposes an excessive burden, both in terms of time and resources, which can discourage participation. Concerns about the improper use of collected data, along with deficiencies in the data collection process or gaps in the available data, can further undermine confidence in the system. Additionally, skepticism among prosecutors regarding the effectiveness of CWS may reduce engagement and impede its implementation, highlighting the importance of addressing both technical and organizational challenges when introducing the system.

Even a potential constitutional barrier has been noted. In Luxembourg, for example, any increase in the number of prosecutors is contingent upon the adoption of a law, which could limit the flexibility and responsiveness of a CWS.

---

<sup>5</sup> These are Bosnia and Herzegovina, Croatia, Czech Republic, Finland, France, Greece, Hungary, Ireland, Latvia, Lithuania, Luxemburg, Malta, Republic of Moldova, North Macedonia, Poland, Romania, Türkiye and Ukraine.

### 5.1. Alternative Methods

Nonetheless, despite the reported obstacles, 17 responding states (all except North Macedonia) without a CWS described similar or alternative systems that serve comparable purposes. The three most common purposes identified were allocating prosecutors across different prosecutorial offices, determining the number of prosecutors required, and assessing overall staffing needs, including the specialization requirements of prosecutors.

If summarized, the alternative systems may be aggregated to three categories;

- Managerial assessment by superiors: Workload is evaluated by hierarchical managers to assign cases fairly, identify needs, and allocate resources. Examples include the Czech Republic, Ireland, Malta, Latvia, Türkiye, and Ukraine.
- Use of statistical data: Decision-makers rely on statistical information to determine the number of prosecutors required. Examples include Poland, Luxembourg, and Greece.
- Alternative case weighting or CMS methods: Some states have developed methods resembling case weighting but not fully fitting the CWS definition, often using crime type or CMS-based assignments to allocate cases and assess workload. Examples include Finland and Bosnia and Herzegovina.

An interesting example of a case-weighting-like system is Croatia's Framework Criteria<sup>6</sup>, a hybrid point-based system designed primarily to determine the number of prosecutors, while also serving as an additional tool for evaluating prosecutors' workload and performance. The main distinction from a traditional CWS is that this evaluation is conducted post festum, whereas a CWS assigns weights to cases as they enter the prosecution system.

## 6. COLLABORATIVE CASE WEIGHTING IN NORWAY

Norway demonstrated an example of case weighting delineated by the law enforcement process, rather than the institution or profession. Instead of dividing the actors in the criminal investigation – the police, the investigators and the prosecutors, Norway decided to conduct a capacity assessment in the field of criminal investigation under the sponsorship of the project "Efterforskningsløftet" in 2018 as a joint effort of the Office of the Director of Public Prosecutions and the Norwegian Police Directorate.

However, this Norwegian example was not included in the detailed CEPEJ examination, as it relates predominantly to police activities.

The Norwegian methodology for capacity planning is built around three core questions that together provide a comprehensive picture of the resources and workload within the criminal justice system. First, it assesses how many resources are available for

---

<sup>6</sup> Available at: [https://mpudt.gov.hr/UserDocsImages/dokumenti/Okvirna%20mjerila/Okvirna%20mjerila%20za%20rad%20sudaca\\_2021..pdf](https://mpudt.gov.hr/UserDocsImages/dokumenti/Okvirna%20mjerila/Okvirna%20mjerila%20za%20rad%20sudaca_2021..pdf). (10.7.2025)

criminal case management within the police, expressed in full-time equivalents (FTEs). Second, it examines the total number of criminal cases resolved by the police in a given year. Third, it measures how much time is spent on different activities and case types throughout criminal proceedings. By integrating these three elements, Norway is able to determine workload distribution, identify capacity gaps, and plan resource allocation more effectively.

A computer model capable of projecting how changes in case numbers, crime types, or task performance influence police resource requirements was created on the basis of the collected information, which was also used to assess current resource utilisation.

Interestingly, significant variation is observed across different case categories. For example, cases concerning murder and attempted murder take approximately 445 times longer to complete than those classified as “Other.” At the same time, the largest share of police resources is allocated to cases falling under the “Other” category.

Although not widely adopted, this approach to interagency cooperation can offer valuable insights for prosecution systems. Given the prosecutors’ integral role within the broader law enforcement framework and their close collaboration with the police, adopting similar cooperative practices could enhance coordination, improve resource allocation, and support more effective case management across the criminal justice system.

## **7. KEY GUIDING PRINCIPLES**

In conclusion, CEPEJ’s report presented a set of guiding principles based on its analysis. These principles outline the fundamental considerations that were evident from the examination of prosecutorial case-weighting systems across Europe.

Each state followed its own learning curve in developing CWSs, mostly working independently and without drawing extensively from the experiences of other countries. For states new to case weighting, simpler approaches were generally preferred over more complex designs, as this allows for a more manageable and effective implementation process.

Strong leadership has proven to be a cornerstone of successful CWS development. Leading institutions play a critical role in defining the vision and strategy, fostering a culture of excellence, accountability, and innovation, and ensuring timely and informed decision-making. They are responsible for consulting relevant stakeholders, promoting the system, and safeguarding its long-term viability.

Long-term planning is essential because CWS is not a tool for quick wins; no judicial system can expect immediate results. Similarly, it is important to clearly define the objectives targeted by the introduction of a CWS. Starting with simpler systems and gradually progressing to more complex designs allows for steady adaptation and capacity-building.

The quality and efficiency of data collection are fundamental to the design and development of CWS. Accurate, reliable data underpin the assignment of case weights and ensure that the system reflects actual workload. In recent decades, member states have

increasingly incorporated relevant and efficient IT tools to support these processes, taking advantage of technological improvements to enhance data management and system functionality.

Equally important are dissemination, transparency, and communication. Broad acceptance of the system depends on stakeholders' understanding of its purpose and methodology. Finally, sustainability is key to fostering trust and long-term engagement among all participants, ensuring that the system remains effective and credible over time.

## 8. CONCLUSION

The importance of measuring workloads and managing performance in judiciaries, to ensure cases are handled fairly, efficiently, and on time, while making the best use of limited resources, is unquestionable. While case weighting systems have traditionally been more common in courts, their adoption within prosecutorial systems has grown significantly over the past decade. Prosecutorial offices stand to benefit from these systems, as they provide a structured and objective way to assess workload, allocate resources, and support effective management.

Navigating the available options and techniques remains a task for each national jurisdiction, as one size does not fit all. Nevertheless, the experiences and lessons learned from other systems provide valuable guidance that countries can consider when implementing a CWS or selecting an alternative approach to assess prosecutorial workload.

The key guiding principles for implementing case weighting systems highlight the importance of tailoring the system to the national context, ensuring strong institutional leadership, and maintaining high-quality and efficient data collection. Incorporating relevant IT tools, promoting transparency and stakeholder engagement, and planning for long-term sustainability are equally essential.

The Norwegian example illustrates that successful workload systems do not necessarily need to focus solely on the prosecution; they can also integrate other professionals, such as investigators and police officers, to enhance overall efficiency.

Lastly, one of the most important lessons from experience is that simplicity beats complexity, especially in prosecutorial systems adopting case weighting for the first time. Implementing a large-scale, highly complex CWS from the outset is more likely to encounter challenges, whereas starting with a simpler system and gradually expanding it over time tends to be more successful.

## References

1. American Prosecutors Research Institute (APRI). 2002. *How many cases should a prosecutor handle? Results of the National Workload Assessment Project*. Alexandria, VA. Available at: [https://biblioteca.cejamericas.org/bitstream/handle/2015/2111/How\\_Many\\_Cases.pdf?sequence=1&isAllowed=y](https://biblioteca.cejamericas.org/bitstream/handle/2015/2111/How_Many_Cases.pdf?sequence=1&isAllowed=y) (5.6.2025).
2. Council of Europe, European Commission for the Efficiency of Justice (CEPEJ). 2019. *Glossary of terms and abbreviations used in the CEPEJ reports*. Available at: <https://rm.coe.int/cepej-2019-5final-glossaire-en-version-10-decembre-as/1680993c4c> (5.6.2025).
3. Council of Europe, European Commission for the Efficiency of Justice (CEPEJ). 2020. *Case weighting in judicial systems* (CEPEJ Studies No. 28). Available at: <https://rm.coe.int/study-28-case-weighting-report-en/16809ede97> (5.6.2025).
4. European Commission for the Efficiency of Justice (CEPEJ). 2023. *Report on case-weighting in public prosecution services*. Available at: <https://rm.coe.int/report-on-case-weighting-in-public-prosecution-services-en/1680b2ca1f> (5.6.2025).
5. Kleiman, M., Lee, C. G., Ostrom, B. J., & Schauffler, R. Y. 2017. Case weighting as a common yardstick: A comparative review of current uses and future directions. *Oñati Socio-Legal Series*, 7(4), pp. 640–660. Available at: <http://ssrn.com/abstract=3047725> (5.6.2025).
6. Ministarstvo pravosuđa i uprave Republike Hrvatske. 2021. *Okvirna mjerila za rad sudaca*. Available at: [https://mpudt.gov.hr/UserDocsImages/dokumenti/Okvirna%20mjerila/Okvirna%20mjerila%20za%20rad%20sudaca\\_2021..pdf](https://mpudt.gov.hr/UserDocsImages/dokumenti/Okvirna%20mjerila/Okvirna%20mjerila%20za%20rad%20sudaca_2021..pdf) (5.6.2025).
7. Making the most use out of a weighted caseload model: The varied uses of weighted caseload studies, models and data. n.d. Copenhagen Business School Research. Available at: <https://research.cbs.dk/en/publications/benefit-of-doubt-approach-to-case-weighting-improving-and-simplif> (5.6.2025).
8. The World Bank. 2017. *Case weighting analyses as a tool to promote judicial efficiency: Lessons, substitutes and guidance*. December. Available at: <https://documents.worldbank.org/pt/publication/documents-reports/documentdetail/529071513145311747> (5.6.2025).
9. World Bank. n.d. Case weighting: A tool to improve the performance of the courts. Available at: <https://blogs.worldbank.org/europeandcentralasia/case-weighting-tool-improve-performance-courts> (5.6.2025).



# ETHICAL AND PRACTICAL CHALLENGES OF ARTIFICIAL INTELLIGENCE (AI) IN LEGAL PRACTICE AND THE JUDICIARY

Maja Vitaljić\*

*The deployment of artificial intelligence in legal practice and judicial systems raises a range of ethical and practical challenges that go beyond questions of technical performance. These challenges affect the core values of the legal profession and the judiciary, including confidentiality, professional independence, accountability, procedural fairness, and public trust in the administration of justice. While AI systems are often presented as neutral technological tools designed to enhance efficiency, their integration into legal decision-making processes has a significant influence on professional responsibilities and institutional safeguards. This paper addresses certain risks associated with the use of AI in legal practice and the judiciary, with particular attention to their normative implications. Further, it also analyses the deployment of such systems in Europe based on the provisions of the legally binding AI Act (Regulation (EU) 2024/1689), and the Council of Europe Framework AI Convention (Council of Europe Framework Convention on Artificial Intelligence and Human Rights, Democracy and the Rule of Law, no. 225, 2024) while taking account of OECD AI Principles.\*\**

**KEYWORDS:** AI Act, digitalisation, judiciary, AI Framework Convention, AI risks

---

\* PhD candidate, Law Faculty, University of Zagreb/Ministry of Justice, Public Administration, and Digital Transformation, Republic of Croatia.  
E-mail: [vitaljic.maja@gmail.com](mailto:vitaljic.maja@gmail.com)

\*\* OECD/LEGAL/0449, 22. 5. 2019 and 3. 5. 2024, available at: <https://legalinstruments.oecd.org/en/instruments/oecd-legal-0449> (10.10.2025)

## **1. RISK ON USING AI IN THE LEGAL SPHERE**

This chapter examines the main legal and institutional risks associated with the use of artificial intelligence in the legal sphere, with particular attention to legal practice and judicial contexts. The aim is to identify how AI systems may affect core principles of the legal system, including confidentiality, professional responsibility, equality before the law, transparency and accountability. This part focuses on concrete risk areas that arise when AI tools are used to support or influence legal analysis, procedural acts or decision-making.

The chapter is structured around five interrelated risk categories: risks to confidentiality and data protection; challenges relating to accuracy and reliability, including the phenomenon of AI “hallucinations”; risks of bias and discrimination; concerns surrounding transparency, explainability, and the right to challenge AI-assisted outcomes; and finally, questions of liability and the allocation of responsibility. Together, these sections highlight key legal challenges created by the use of AI in the legal sphere and prepare the basis for assessing the capacity of current legal frameworks to address them.

## **2. CONFIDENTIALITY, PROFESSIONAL SECRECY, AND DATA PROTECTION**

One of the most sensitive issues related to the use of AI in the legal contexts relates to the protection of confidentiality.<sup>1</sup> Legal professional privilege and confidentiality in judicial proceedings significantly influence the client-lawyer relationship and, hence, are a crucial element of the right to a fair trial and the proper functioning of the legal system. The use of AI systems, especially generative AI tools, may jeopardise these guarantees if appropriate safeguards are not in place. In legal practice, the input of case-related facts or personal data into generative AI systems may result in unauthorised disclosure or secondary use of information, especially where user inputs are retained or used for further model training (Goraya, Makhani, Nigam, 2025; Odubela, 2025). Similar risks arise in the judiciary when AI tools are used for document analysis, case management or the anonymisation of judicial decisions, all of which may involve personal and sensitive data.

In that regard, in the European Union obligations under data protection legislation apply, including the principles of lawfulness, purpose limitation and data minimisation, as well as the requirement to conduct data protection impact assessments for high-risk processing activities (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/

---

<sup>1</sup> See CCBE, 2019, Charter of Core Principles of the European Legal Profession, point b, and Code of Conduct of European Lawyers, point 2.3. Available at: [https://www.ccbe.eu/fileadmin/speciality\\_distribution/public/documents/DEONTOLOGY/DEON\\_CoC/EN\\_DEON\\_CoC.pdf](https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/DEONTOLOGY/DEON_CoC/EN_DEON_CoC.pdf) (15.10.2025) Confidentiality is both in the interest of justice and the client.

EC (General Data Protection Regulation - GDPR), OJ L 119, 4.5.2016, p. 1 and arts. 5, 6, 35). One of the more difficult issues refers to the notion of personal data and pseudonymisation. The CJEU adopted an approach rejecting the view that pseudonymised data are always personal data when transferred by the controller to a third party.<sup>2</sup> In that regard, in November this year, as a part of Digital Omnibus package, the Commission proposed amendments to GDPR / Proposal for a Regulation of the European Parliament and of the Council amending Regulations (EU) 2016/679, (EU) 2018/1724, (EU) 2018/1725, (EU) 2023/2854 and Directives 2002/58/EC, (EU) 2022/2555 and (EU) 2022/2557 as regards the simplification of the digital legislative framework, and repealing Regulations (EU) 2018/1807, (EU) 2019/1150, (EU) 2022/868, and Directive (EU) 2019/1024 (Digital Omnibus) [2025] COM(2025) 837 final), which *inter alia*, include a change in the definition of personal data aligning it with jurisprudence of CJEU. A second issue relates to the notion of legitimate interest and use of personal data for training of AI models, and the deletion of such data/models when used illegally.<sup>3</sup> However, confidentiality concerns extend beyond data protection compliance. They refer to wider professional and institutional responsibilities to maintain trust in lawyer–client relationships and in the administration of justice. These requirements cannot be regulated only by technical safeguards.<sup>4</sup>

### 3. ACCURACY, RELIABILITY, AND THE PROBLEM OF “HALLUCINATIONS”

Another challenge concerns the limited reliability of generative AI systems, particularly their tendency to generate false or fabricated information, commonly referred to as “hallucinations,” meaning that a false statement is given, or it is falsely claimed that a source supports a statement (Magesh, Surani, Dahl, Suzgun, Manning, 2025, p. 6). Research has shown that this can be up to 50% of AI generated content for hallucinations and even up to 60 % for incomplete answers.<sup>5</sup> Even new solutions like RAG (retrieval-augmented generation), a system combining large language models (LLMs) and specific data, did not solve the issue fully.<sup>6</sup> In legal practice, where arguments must be

---

<sup>2</sup> CJEU, Case C-413/23 P, *European Data Protection Supervisor v Single Resolution Board*, ECLI:EU:C:2025:645.

<sup>3</sup> See EDPB, Opinion 28/2024 on certain data protection aspects related to the processing of personal data in the context of AI models, 2024. See also CJEU, Case C-251/21, *Meta Platforms Inc and Others v Bundeskartellamt* [2023] ECLI:EU:C:2023:537.

<sup>4</sup> CCBE. 2022. *Guide on the Use of AI-Based Tools by Lawyers and Law Firms*. Available at: [https://www.ccbe.eu/fileadmin/speciality\\_distribution/public/documents/IT\\_LAW/ITL\\_Reports\\_studies/EN\\_ITL\\_20220331\\_Guide-AI4L.pdf](https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/IT_LAW/ITL_Reports_studies/EN_ITL_20220331_Guide-AI4L.pdf) (10.10.2025) A very strict approach was taken by the State Bar of California, the home of Silicon Valley, specifically stating that “[a] lawyer must not input any confidential information of the client into any generative AI solution that lacks adequate confidentiality and security protections.” See Practical Guidance for the Use of Generative AI in the Practice of Law, 2024.

<sup>5</sup> *Ibid*, p. 2.

<sup>6</sup> *Ibid*, pp. 4-5. The authors explain the limits based on the question what to retrieve, non-textual elements of retrieval, and the number of documents retrieves and their filtering.

based on verifiable legal sources and accurate presentation of facts, these kinds of errors can have serious professional and procedural consequences.<sup>7</sup> The use of AI tools for drafting pleadings, contracts or legal opinions may result in references to non-existent case law or incorrect legal interpretations, thus undermining the lawyer's duty of professional conduct and care.<sup>8</sup>

However, certain guidelines can provide a safe guide for legal professions, namely acknowledging limitations of generative AI, adhering to existing AI rules, considering the use of generative AI by others, complementing legal expertise, maintaining attorney-client privilege, ensuring data protection, external and internal transparency and addressing possible impact on intellectual property.<sup>9</sup> In the judicial/legal context, although AI is generally used as an assistant tool only, risks emerge where AI-generated summaries, analyses, or recommendations are relied upon without sufficient critical scrutiny, potentially leading to a decline in the quality of judicial/legal reasoning, as AI reasoning might differ from human reasoning. This specifically applies to the logic of unsupervised and reinforced learning based on clustering and possible unforeseen methods of reaching the goal.<sup>10</sup> This challenge requires a clear normative distinction between legitimate AI-assisted decision-making and over-reliance on automated outputs, as well as the recognition of human verification as an integral component of professional responsibility.<sup>11</sup>

---

<sup>7</sup> Ambrogi, R. 2025. AI Hallucinations Strike Again: Two More Cases Where Lawyers Face Judicial Wrath for Fake Citations. *LawNext*, 14 May 2025, pp. available at: <https://www.lawnext.com/2025/05/ai-hallucinations-strike-again-two-more-cases-where-lawyers-face-judicial-wrath-for-fake-citations.html>. (10.10.2025)

<sup>8</sup> European Bars Federation (FBE). 2024. *European Lawyers in the Era of ChatGPT – Guidelines 2.0 on how lawyers should take advantage of the opportunities offered by large language models and generative AI*. Available at: <https://www.fbe.org/wp-content/uploads/2024/10/European-lawyers-in-the-era-of-ChatGPT-Guidelines-2.0-on-how-lawyers-should-take-advantage-of-the-opportunities-offered-by-large-language-models-and-generative-AI.pdf> (10.10.2025). See Guideline 4, Complement Legal Expertise.

<sup>9</sup> *Ibid.*

<sup>10</sup> European Commission for the Efficiency of Justice (CEPEJ), 2018, European Ethical Charter on the Use of Artificial Intelligence in Judicial Systems and their environment, <https://rm.coe.int/ethical-charter-en-for-publication-4-december-2018/16808f699c> (10.10.2025). Introducing the following five principles: respect for fundamental rights; non-discrimination; quality and security; transparency, impartiality and fairness; and user control. See also Appendix II (p. 65) regarding on uses of AI in the European judicial system whereby the following uses are to be encouraged, namely case-law enhancement, access to law and development of strategic tools (e.g., performance indicators). Contrary to this, precaution is advised for drawing up scales in civil disputes (e.g., on damages), dispute resolution and predictive policing.

<sup>11</sup> See Recital 61 of the AI Act stating that “[t]he use of AI tools can support the decision-making power of judges or judicial independence but should not replace it: the final decision-making must remain a human-driven activity. The classification of AI systems as high-risk should not, however, extend to AI systems intended for purely ancillary administrative activities that do not affect the actual administration of justice in individual cases, such as anonymisation or pseudonymisation of judicial decisions, documents or data, communication between personnel, administrative tasks.”

#### 4. BIAS AND DISCRIMINATION

AI systems trained on historical data may replicate or increase existing social and institutional biases. In legal contexts, where decisions directly affect individual rights and obligations, such effects are particularly problematic. In legal services, bias may manifest in predictive analytics tools, risk assessment applications, or outcome forecasting systems, potentially influencing the quality of legal advice provided to different categories of clients. In the judiciary, the use of AI for evaluating or predictive purposes (especially in criminal proceedings) may result in indirect discrimination or unequal treatment.<sup>12</sup> These risks raise serious concerns regarding compliance with the principles of equality before the law and non-discrimination. Another difficulty lies in the practical challenge of identifying and contesting algorithmic bias, taking into account the opacity of many AI systems and the limited ability of users to scrutinise used AI models and datasets, as human in the loop as such is not enough to guarantee algorithmic accountability (Yeung, 2018, pp. 505- 523). It is often very difficult to prove discriminatory intent, as AI discrimination is often subtle and difficult to detect (Wachter, Mittelstadt, Russell, 2021). Therefore, the main challenge will be the question of indirect discrimination and the standard of proof. EU anti-discrimination law is based on a burden-shifting model in which a claimant must first show facts that suggest discrimination, after which the burden of proof shifts to the respondent. The Court of Justice of the EU applies this approach flexibly and does not rely on fixed evidentiary thresholds, which is appropriate for specific nature of discrimination cases. However, this flexibility is difficult to apply with automated fairness mechanisms, which typically depend on predefined technical standards and fixed thresholds (Wachter, Mittelstadt, Russell, 2021).<sup>13</sup>

#### 5. TRANSPARENCY, EXPLAINABILITY, AND THE RIGHT TO CHALLENGE

Transparency and explainability represent essential preconditions for the legitimate use of AI in legal decision-making cases. In situations where an AI system has a real or potential influence on legal decisions or procedural acts, it must be possible to understand its role and assess its impact.<sup>14</sup> In the judicial context, this requirement

---

<sup>12</sup> European Commission for the Efficiency of Justice (CEPEJ), 2018, European Ethical Charter on the Use of Artificial Intelligence in Judicial Systems and their environment, <https://rm.coe.int/ethical-charter-en-for-publication-4-december-2018/16808f699c> (10.10.2025). Principle 2 on non-discrimination.

<sup>13</sup> *Ibid.* In comparison, in the US the issue is dealt under the term disparate impact. See 2025. *Developments in the Law - Discrimination: Resetting Antidiscrimination Law in the Age of AI*, Chapter One, Vol. 138 Issue 6, *Harvard Law Review* 1562. Available at: <https://harvardlawreview.org/print/vol-138/resetting-antidiscrimination-law-in-the-age-of-ai/> (10.10.2025)

<sup>14</sup> See also Art. 6 ECHR regarding the reasoning of judicial decision for both civil and criminal cases. Such a right is implied from the Convention and confirmed by ECtHR case-law. See Council of Europe. 2025. *Guide on Article 6, Right to a fair trial (civil limb)*. Available at: <https://rm.coe.int/1680700aaf> (10.10.2025) pp. 116-117; and Council of Europe. 2025. *Guide on Article 6, Right to a fair trial (criminal limb)*. Available

is closely linked to the right of parties to receive a reasoned decision and to effectively challenge it. Even where AI tools are formally described for assistance, the boundary between support and influence may become blurred, especially when AI outputs have impact on judicial reasoning or filter legally relevant information.<sup>15</sup> In legal practice, the opacity of AI tools may also influence lawyers' ability to explain to clients how advice or litigation strategies have been developed, thus possibly undermining the principle of informed representation for the client/defendant.<sup>16</sup>

An interesting comparison between the EU and US regarding the protection of fair process and the possibility to challenge can be made. In the EU a significant part of AI regulation is focused on *ex ante* control (before the placing on the market). In that regard, the AI Act (Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828) is primarily a market safety instrument, while providing also for legal remedies.<sup>17</sup> In the US, on the other side, at federal level there is no such legislation (different in the individual federal states, especially California).<sup>18</sup> At federal level, the main focus is on *ex post* legal remedies in the form of procedural due process (14<sup>th</sup> Amendment to the U.S. Constitution). In that regard, for example, the Wisconsin Supreme Court in *State v. Loomis*,<sup>19</sup> dealt with question of due process (fair proceedings) and discrimination based on gender and race regarding the use of the Compas (Correctional Offender Management Profiling for Alternative Sanctions) system. It was designed as a risk-assessment and case-management tool for probation and parole, and not as part of sentencing. The Wisconsin Supreme Court accepted this use as permissible but limited, under the following conditions, namely: use as supplementary information only, not determinative of the sentence, cannot be used to decide sentence length or severity, and must be accompanied by explicit warnings about methodological limits (e.g., awareness of the trade secrecy of the algorithm, possible gender and race discrimination,

---

at: <https://rm.coe.int/1680304c4e> (10.10.2025), pp. 41-44. See also Art. 14 Council of Europe AI Framework Convention regarding remedies and referring, inter alia, to sufficient information to contest the decision.

<sup>15</sup> This was highlighted by the CJEU regarding Art. 22 GDPR, whereby the Court considered something as automated decision-making „where a third party, to which that probability value is transmitted, draws strongly on that probability value. See CJEU, Case C-634/21, *Schufa*, ECLI:EU:C:2023:957.

<sup>16</sup> See also CCBE, 2025, Guide on the Use of Generative AI by Lawyers, available at: [https://www.ccbe.eu/fileadmin/speciality\\_distribution/public/documents/IT\\_LAW/ITL\\_Guides\\_recommendations/EN\\_ITL\\_20251002\\_CCBE-guide-on-the-use-of-the-use-of-generative-AI-for-lawyers.pdf](https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/IT_LAW/ITL_Guides_recommendations/EN_ITL_20251002_CCBE-guide-on-the-use-of-the-use-of-generative-AI-for-lawyers.pdf) (10.10.2025)

<sup>17</sup> Arts. 85 and 86 of AI Act regarding the right to lodge a complaint with a market surveillance authority, and the right to a clear and meaningful explanation for most of the high-risk systems from Annex III of the AI Act (legal effects or similarly significantly affects and adverse impact on health, safety or fundamental rights).

<sup>18</sup> For example: Bhatia, A., Desai, A., Jiang, K. & Moheyuddin, H. 2025. AI and Privacy: A Guide to California's Recently Passed Legislation. *California Lawyers Association*, available at: <https://calawyers.org/privacy-law/ai-and-privacy-a-guide-to-californias-recently-passed-legislation/>. (10.10.2025)

<sup>19</sup> *State v. Loomis*, 881 N.W.2d 749 (Wis. 2016).

group-based statistics, use of national sample and not of the particular group, the foreseen use when developed).<sup>20</sup> Such warnings may serve as a guide also for the use of predictive AI tools in general, including in the EU.

## 6. LIABILITY AND ALLOCATION OF RESPONSIBILITY

The integration of AI into legal practice raises complex questions regarding liability for errors or harm caused by the use of such systems. It is necessary to distinguish between the responsibilities of AI providers, professional users, and even the judiciary in certain cases. There is a general issue of such liability, as legal systems did mostly not yet create specific rule on defective AI systems, neither in civil neither in criminal law. There is certain exception for certain types of AI, for example self-driving cars. However, in the EU Member States showed reluctance for even a minimum of harmonisation and the Commission, despite opposition in the European Parliament, revoked the proposed AI Liability Directive (COM(2022)0496). The mentioned proposal would have at a very limited level harmonise certain aspects of non-contractual liability, namely disclosure of evidence (COM(2022)0496, art. 3) and two rebuttable presumptions.<sup>21</sup> Criticism came from two sides. On one hand, critics argued that the legal act should be a regulation to effectively prevent fragmentation, as well as cover fundamental rights violations. On the other hand, business stakeholders claimed that the directive might hinder AI innovation by increasing legal risks, particularly for SMEs. The proposal was based on the initial text of the proposed AI Act. Hence, neither terminology nor concepts (categories of AI) corresponded anymore to the finally adopted AI Act.

More progress was made in the field of product liability where specific rules were adopted, including for software. In that regard, Directive 85/374/EEC (Council Directive 85/374/EEC, p. 29)<sup>22</sup> was replaced by a new Directive (EU) 2024/2853 (Directive (EU) 2024/2853 of the European Parliament and of the Council of 23 October 2024 on liability for defective products and repealing Council Directive 85/374/EEC, OJ L, 2024/2853) updating the rules for modern technology. The new Directive, inter alia, clarified the term “product” by including software and interaction between services and products.<sup>22</sup> It further introduced liability rules throughout the supply chain, (Directive (EU) 2024/2853, art. 8) evidentiary rules by reversing the burden of proof in certain cases due to complexity of technological products, (Directive (EU) 2024/2853, Art. 9(1) to (3)) and rebuttable presumptions on defectiveness and causal link (Directive (EU) 2024/2853, Art. 10(2) and (3)).

Further, in legal practice, main professional standards indicate that the use of AI tools does not limit the lawyer’s responsibility towards the client. Ideas for legal personality

---

<sup>20</sup> *Ibid*,

<sup>21</sup> Such presumptions referred to non-compliance in the case of non-disclosure (Art. 3(5) and the causal link (Art. 4).

<sup>22</sup> Rec. 6 and Art. 4, point 1, of Directive (EU) 2024/2853, excluding non-commercial free and open-source software and pure information.

of AI, as proposed for example by the European Parliament, were not considered as viable for the moment (Hildebrandt, 2020, pp. 246 – 249). Hence, AI remains a tool rather than a separate holder of legal responsibility (Susskind, 2023). In the judicial context, however, liability issues are increased by the public authority exercised by courts and the constitutional implications of judicial error. The absence of clear liability frameworks may lead to legal uncertainty and undermine trust in AI-assisted legal processes, particularly where responsibility becomes divided among multiple actors. The current fragmented European landscape on liability represents a serious legal lacuna in that regard. In view of the current European Commission's regulatory simplification initiatives (omnibus legislation) it is not expected that this gap will be closed soon at EU level.

Based on all mentioned above, the use of AI systems raises broader concerns regarding the long-term impact on the autonomy of lawyers and judges. While AI is often promoted as a means of enhancing efficiency, there is a risk that legal reasoning may gradually adapt to the logic and limitations of technological tools. In the legal profession, this may result in the weakening and decline of individual professional judgment. In the judiciary, the uncritical use of AI-generated recommendations may limit judicial discretion, potentially affecting judicial independence over time.

## **7. THE INTRODUCTION AND USE OF AI TOOLS IN THE LEGAL SPHERE BASED ON THE CURRENT LEGAL FRAMEWORK**

This part of the article examines how artificial intelligence is being introduced and used in the legal sphere by reference to the current international and European legal framework. Its purpose is to clarify which AI uses in legal and judicial contexts are legally permitted, restricted, or prohibited, and under what conditions such systems may be developed or deployed.

The analysis focuses primarily on the EU Artificial Intelligence Act (AI Act) as the most comprehensive and binding regulatory framework governing AI systems, including those used in the administration of justice. In addition, the chapter considers the Council of Europe Convention on Artificial Intelligence as complementary international instrument that shape common principles and safeguards in this field.

By examining these instruments together, this section aims to show how existing law addresses the risks posed by AI in legal decision-making, distinguishes between different categories of AI use (such as decision support versus decision-making), and allocates responsibilities between AI providers and deployers. This provides the necessary legal context for understanding both the opportunities and the limits of AI deployment in the legal sphere.

## 8. THE AI ACT

Lately, the EU is promoting digitalisation policies aimed at improving the use and reuse of data and digital infrastructure across sectors, including within the judiciary. These initiatives are reflected in EU legislation governing cross-border judicial cooperation and are closely connected to broader concerns such as the protection of critical infrastructure and cybersecurity. AI adds another layer of complexity to this. The AI Act specifically defines “administration of justice” as a high-risk system to which the AI Act fully applies (Regulation (EU) 2024/1689, Art. 6 and Annex III, Point 8, point a). Under such term, AI systems are meant “intended to be used by a judicial authority or on their behalf to assist a judicial authority in researching and interpreting facts and the law and in applying the law to a concrete set of facts, or to be used in a similar way in alternative dispute resolution.” (Regulation (EU) 2024/1689, Art. 6 and Annex III, Point 8, point a). Therefore, the high risk nature relates only to systems connected with the decision-making process. Further, certain chatbots or legal assistants of a generative type might fall under the generative AI provisions, including with a systemic risk and systems interacting with humans to which specific provisions of the AI Act apply (Regulation (EU) 2024/1689, Arts. 50 - 55).

Also, there are possible cases of AI use in the legal sphere that are specifically excluded from the definition of high-risk systems under the AI Act. This relates to cases where the system does not pose a significant risk to health, safety and fundamental rights, not influencing decision-making. This relates to systems intended for a narrow procedural task, to improve results of a previously completed human activity, to detect decision-making patterns, or intended for a preparatory task to decision-making (Regulation (EU) 2024/1689, Art. 6(3)). This includes tasks such as anonymisation, filling, linguistic check and improvement, etc. However, it seems that there is to a certain extent a grey area between preparation of decision-making and decision-making as such.

Such provisions would apply where the legal entity is the provider (Regulation (EU) 2024/1689, Art. 3, point 3) or the deployer (Regulation (EU) 2024/1689, Art. 3, point 4) of an AI system in the legal sphere, for example when a judicial institution/law firm develops its own system or it makes operational such a system for the use of its employees. Both categories could also overlap, for example a legal entity purchases a system but later further enhances it according to its needs. In cases of substantial modifications (Regulation (EU) 2024/1689, Art. 3, point 23) the deployer can also become the provider (Regulation (EU) 2024/1689, Art. 25(1)). The following obligations apply (Regulation (EU) 2024/1689, Art. 16) to a producer of legal systems defined as high-risk, namely the establishment of a risk management system through the entire life-cycle, (Regulation (EU) 2024/1689, Art. 9) a data governance system referring to training, validation and testing data, including assessment of possible biases, (Regulation (EU) 2024/1689, Art. 10) technical documentation, (Regulation (EU) 2024/1689, Art. 11) log record-keeping, (Regulation (EU) 2024/1689, Arts. 12, 18, 19) transparency towards deployers (e.g., instructions), (Regulation (EU) 2024/1689, Art. 13) human oversight, including awareness of automation bias, (Regulation (EU) 2024/1689, Art. 14) providing accurateness, robustness and cyber security, (Regulation (EU) 2024/1689, Art. 15) as well as establishing a quality management system,

(Regulation (EU) 2024/1689, Art. 17) corrective actions, (Regulation (EU) 2024/1689, Art. 20) cooperation with competent authorities, (Regulation (EU) 2024/1689, Art. 21) etc. In comparison deployers have, inter alia, obligations regarding the use it in accordance with instructions, human oversight, log-keeping, information obligations, human rights impact assessments and registration (for certain deployers) (Regulation (EU) 2024/1689, Arts. 26 and 27). All this is an addition to other possible obligations based on other legislation, such as data protection, cyber security, non-discrimination.

Besides this, it has to be taken into account that certain practices are prohibited, such as subliminal, deceptive or manipulative techniques, exploiting vulnerabilities, certain forms of social scoring, certain forms of predictive policing, facial recognition based on untargeted scrapping, certain forms of biometric classifications and real-time biometric data (Regulation (EU) 2024/1689, Art. 5). Consequently, the AI Act and connected legal rules (codes of practice, guidelines, standards)<sup>23</sup> provide a very comprehensive and detailed system for the production and deployment of at least certain AI systems in the legal sphere, including notification and supervision bodies, as well as a system of penalties.

## 9. COUNCIL OF EUROPE CONVENTION ON AI

The Convention provides rules for the public sector or private actors acting on their behalf (Framework Convention on Artificial Intelligence and Human Rights, Democracy and the Rule of Law. 2025, Art. 3(1)(a)). For private entities states have more flexibility as they are bound by the “object and purpose” of the Convention. In that regard they may apply the same principles or other appropriate measures, confirmed by a declaration (Framework Convention on Artificial Intelligence and Human Rights, Democracy and the Rule of Law. 2025, Art. 3(1)(b)). There are important exclusions, namely national security, defence and research activities.<sup>24</sup> It provides for two general obligations, namely protection of human rights, (Framework Convention on Artificial Intelligence and Human Rights, Democracy and the Rule of Law. 2025, Art. 4) and

---

<sup>23</sup> European Commission, 2025, General-Purpose AI Code of Practice, available at: <https://digital-strategy.ec.europa.eu/en/policies/contents-code-gpai> (10.10.2025); Commission Guidelines on prohibited artificial intelligence practices established by Regulation (EU) 2024/1689 (C(2025) 5052 final). In that regard it is a pity that recent Commission’s Apply AI Strategy (COM/2025/723 final) does not have a more specific chapter on legal/judicial use of AI. Also, the Council conclusions on the use of AI in the field of justice (doc. 16933/24) are of a very general nature. On the other hand, a much more detailed strategy has been adopted by individual institutions, such as the CJEU – see under [https://curia.europa.eu/jcms/upload/docs/application/pdf/2023-11/cjeu\\_ai\\_strategy.pdf](https://curia.europa.eu/jcms/upload/docs/application/pdf/2023-11/cjeu_ai_strategy.pdf). It provides for efficiency, enhancing quality and consistency of judicial decisions, increasing access to justice and transparency, provides for principles (e.g., fairness, impartiality, non-discrimination, transparency, traceability, privacy and data protection, human oversight), and addresses risks.

<sup>24</sup> Framework Convention on Artificial Intelligence and Human Rights, Democracy and the Rule of Law. 2025, Art. 3(2) to (4). However, when it comes to national security the framers tried to alter states on their fundamental rights obligations regarding national security by referring to “the understanding that such activities are conducted in a manner consistent with applicable international law, including international human rights obligations, and with respect for its democratic institutions and processes.”

integrity of the democratic process and the rule of law (Framework Convention on Artificial Intelligence and Human Rights, Democracy and the Rule of Law. 2025, Art. 5). In that regard, judicial independence and access to justice are specifically highlighted. Such general obligations are followed by certain principles, namely human dignity and individual autonomy, transparency and oversight (e.g. identification of AI content), accountability and responsibility, equality and non-discrimination (e.g., negative and positive obligations), privacy and data protection, reliability and safe innovation (e.g. testing environment) (Framework Convention on Artificial Intelligence and Human Rights, Democracy and the Rule of Law. 2025, Arts. 6 to 13). There is a specific chapter on remedies demanding, inter alia, adequate documentation, adequate information to understand the decision and the system as such, and a complaint possibility to competent authorities. In addition, also procedural safeguards and rights have to be provided if systems “significantly” impact human rights, including information of interacting with AI (Framework Convention on Artificial Intelligence and Human Rights, Democracy and the Rule of Law. 2025, Arts. 14 and 15).

A risk assessment and management framework and measures are foreseen referring to “actual and potential impacts to human rights, democracy and the rule of law. Certain quality elements of such measures are provided, namely taking account of the context and use, severity and probability of impact, perspective of stakeholders, applied through the life-cycle, monitoring of risks, documentation and prior testing (Framework Convention on Artificial Intelligence and Human Rights, Democracy and the Rule of Law. 2025, Art. 16(1) and (2)). There is a specific provision on a possible ban of certain systems (Framework Convention on Artificial Intelligence and Human Rights, Democracy and the Rule of Law. 2025, Art. 16(4)). Regarding implementation, there are provisions, inter alia referring to non-discrimination, persons with disabilities and children, public consultations, and digital literacy (Framework Convention on Artificial Intelligence and Human Rights, Democracy and the Rule of Law. 2025, Arts. 17 to 22).

## 10. CONCLUSION

This analysis demonstrates that the deployment of AI in legal practice and the judiciary raises systemic risks that can directly affect some basic legal principles, including confidentiality, professional independence, equality before the law, procedural fairness, judicial reasoning and public trust in the administration of justice. Although AI is frequently described as a neutral tool which improves efficiency, its practical use shows consequences that cannot be addressed only through technical safeguards or market-oriented regulatory approaches.

The provided EU example represent a significant regulatory achievement. Together with the Council of Europe instrument it represents core set of obligations concerning risk management, transparency, human oversight, accountability and fundamental rights protection. However, the above analysis also shows that these instruments remain largely horizontal, primarily designed for broad applicability across sectors.

The legal sphere would need, in addition, also more focused instruments. Risks such as confidentiality breaches, hallucinations, automation bias, algorithmic discrimination, opacity, and fragmented liability regimes have qualitatively different implications when they arise in legal advice or judicial decision-making. Such an instrument should include safeguards tailored to the legal sector, such as clear limits between acceptable AI support and excessive reliance on automated outputs, requirements for human review, clear transparency and explainability rules and liability rules applicable to AI systems. The legal sphere should not be treated as just another high-risk sector, but as a key area for protecting fundamental rights and democratic systems.

### References

1. Developments in the Law – Discrimination. 2025. Resetting Antidiscrimination Law in the Age of AI, Chapter One. *Harvard Law Review*, Vol. 138, No. 6, pp. 1562-1584.
2. EDPB. 2024. *Opinion 28/2024 on certain data protection aspects related to the processing of personal data in the context of AI models*.
3. Hildebrandt, M. 2020. *Law for Computer Scientists and Other Folk*. Oxford: Oxford University Press.
4. Magesh, V., Surani, F., Dahl, M., Suzgun, M., Manning, C. D. & Ho, D. E. 2025. *Hallucination-Free? Assessing the Reliability of Leading AI Legal Research Tools*, *Journal of Empirical Legal Studies*, Vol. 22/ No. 2, pp 216-242
5. OECD (2025), *Governing with Artificial Intelligence: The State of Play and Way Forward in Core Government Functions*, OECD Publishing, Paris, <https://doi.org/10.1787/795de142-en>.
6. Susskind, R. 2023. *Tomorrow's Lawyers*. 3<sup>rd</sup> ed. Oxford: Oxford University Press.
7. Wachter, S., Mittelstadt, B. & Russell, C. 2021. Why Fairness Cannot Be Automated: Bridging the Gap Between EU Non-Discrimination Law and AI. *Computer Law & Security Review*, Vol. 41. <https://www.sciencedirect.com/science/article/abs/pii/S0267364921000406>.
8. Yeung, K. 2018. Algorithmic Regulation: A Critical Interrogation. *Regulation & Governance*, Vol.12 No. (4), pp.505-523.

### Legal Sources

1. Council Directive 85/374/EEC of 25 July 1985 on liability for defective products. OJ L 210, 7.8.1985.
2. Directive (EU) 2024/2853 of the European Parliament and of the Council of 23 October 2024 on liability for defective products and repealing Council Directive 85/374/EEC. OJ L, 2024/2853, 18.11.2024.
3. Proposal for a Directive on adapting non-contractual liability rules to artificial intelligence. 2022. COM(2022)0496.

4. Proposal for a Regulation amending EU digital law (Digital Omnibus). 2025. COM(2025) 837 final.
5. Regulation (EU) 2016/679 (General Data Protection Regulation – GDPR). OJ L 119, 4.5.2016.
6. Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828.
7. CJEU, Case C-251/21. 2023. *Meta Platforms Inc and Others v Bundeskartellamt*. ECLI:EU:C:2023:537.
8. CJEU, Case C-413/23 P. 2025. *European Data Protection Supervisor v Single Resolution Board*. ECLI:EU:C:2025:645.
9. CJEU, Case C-634/21. 2023. *Schufa*. ECLI:EU:C:2023:957.
10. *State v. Loomis*. 2016. 881 N.W.2d 749 (Wis.).

#### ***Internet Sources***

1. Ambrogi, R. 2025. AI Hallucinations Strike Again: Two More Cases Where Lawyers Face Judicial Wrath for Fake Citations. *LawNext*, 14 May 2025, Available at: <https://www.lawnext.com/2025/05/ai-hallucinations-strike-again-two-more-cases-where-lawyers-face-judicial-wrath-for-fake-citations.html>. (10.10.2025)
2. Bhatia, A., Desai, A., Jiang, K. & Moheyuddin, H. 2025. AI and Privacy: A Guide to California's Recently Passed Legislation. *California Lawyers Association*, Available at: <https://calawyers.org/privacy-law/ai-and-privacy-a-guide-to-californias-recently-passed-legislation/>. (10.10.2025)
3. CCBE, 2019, Charter of Core Principles of the European Legal Profession, point b, and Code of Conduct of European Lawyers, point 2.3. Available at: [https://www.ccbe.eu/fileadmin/speciality\\_distribution/public/documents/DEONTOLOGY/DEON\\_CoC/EN\\_DEON\\_CoC.pdf](https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/DEONTOLOGY/DEON_CoC/EN_DEON_CoC.pdf) (15.10.2025)
4. CCBE. 2022. *Guide on the Use of AI-Based Tools by Lawyers and Law Firms*. Available at: [https://www.ccbe.eu/fileadmin/speciality\\_distribution/public/documents/IT\\_LAW/ITL\\_Reports\\_studies/EN\\_ITL\\_20220331\\_Guide-AI4L.pdf](https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/IT_LAW/ITL_Reports_studies/EN_ITL_20220331_Guide-AI4L.pdf) (10.10.2025)
5. See also CCBE, 2025, Guide on the Use of Generative AI by Lawyers, available at: [https://www.ccbe.eu/fileadmin/speciality\\_distribution/public/documents/IT\\_LAW/ITL\\_Guides\\_recommendations/EN\\_ITL\\_20251002\\_CCBE-guide-on-the-use-of-the-use-of-generative-AI-for-lawyers.pdf](https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/IT_LAW/ITL_Guides_recommendations/EN_ITL_20251002_CCBE-guide-on-the-use-of-the-use-of-generative-AI-for-lawyers.pdf) (10.10.2025)
6. Council of Europe. 2024. *Framework Convention on Artificial Intelligence and Human Rights, Democracy and the Rule of Law*. CETS 225. Available at: <https://rm.coe.int/1680afae3c> (10.10.2025)
7. Council of Europe. 2025. *Guide on Article 6, Right to a fair trial (civil limb)*. Available at: <https://rm.coe.int/1680700aaf> (10.10.2025)

8. Council of Europe. 2025. *Guide on Article 6, Right to a fair trial (criminal limb)*. Available at: <https://rm.coe.int/1680304c4e> (10.10.2025)
9. European Commission for the Efficiency of Justice (CEPEJ), 2018, *European Ethical Charter on the Use of Artificial Intelligence in Judicial Systems and their environment*, <https://rm.coe.int/ethical-charter-en-for-publication-4-december-2018/16808f699c> (10.10.2025).
10. European Bars Federation (FBE). 2024. *European Lawyers in the Era of ChatGPT – Guidelines 2.0 on how lawyers should take advantage of the opportunities offered by large language models and generative AI*. Available at: <https://www.fbe.org/wp-content/uploads/2024/10/European-lawyers-in-the-era-of-ChatGPT-Guidelines-2.0-on-how-lawyers-should-take-advantage-of-the-opportunities-offered-by-large-language-models-and-generative-AI.pdf> (10.10.2025)
11. European Commission, 2025, *General-Purpose AI Code of Practice*, available at: <https://digital-strategy.ec.europa.eu/en/policies/contents-code-gpai> (10.10.2025); *Commission Guidelines on prohibited artificial intelligence practices established by Regulation (EU) 2024/1689 (C(2025) 5052 final)*. Available at: <https://digital-strategy.ec.europa.eu/en/library/commission-publishes-guidelines-prohibited-artificial-intelligence-ai-practices-defined-ai-act> (10.10.2025)
12. Goraya, A., Makhani, A. & Nigam, S. 2025. *Digital Strangers in Litigation: Does Sharing with AI Breach Privilege?* International Bar Association, available at: <https://www.ibanet.org/Digital-strangers-in-litigation>. (10.10.2025)
13. OECD/LEGAL/0449. 2019 and 2024. Available at: <https://legalinstruments.oecd.org/en/instruments/oecd-legal-0449> (10.10.2025).
14. Odubela, A. 2025. *AI, Client Secrets, and the Lawyer's Duty of Confidentiality*. Leeds Beckett University Law School Blog, 21 October 2025, <https://www.leedsbeckett.ac.uk/blogs/leeds-law-school/2025/10/ai-client-secrets-and-the-lawyers-duty-of-confidentiality/>.
15. *Practical Guidance for the Use of Generative AI in the Practice of Law*. 2024. Available at: <https://www.calbar.ca.gov/sites/default/files/portals/0/documents/ethics/Generative-AI-Practical-Guidance.pdf> (10.10.2025)
16. 2025. *Developments in the Law - Discrimination: Resetting Antidiscrimination Law in the Age of AI*, Chapter One, Vol. 138 Issue 6, *Harvard Law Review* 1562. Available at: <https://harvardlawreview.org/print/vol-138/resetting-antidiscrimination-law-in-the-age-of-ai/> (10.10.2025)

## POSITIVE OBLIGATIONS OF THE STATE IN CRIMINAL PROCEEDINGS – DUTY TO PROTECT / DUTY TO PUNISH

Zoran Pavlović\*  
Ištvan Laslo Gal\*\*

*The sovereign right of the state to punish is exercised through the criminal justice system in order to protect the legal order, based on the principles of legality and fairness. In the introductory part, the paper discusses fairness as an ethical and legal standard of criminal proceedings, along with the demand for equal treatment of the accused and the victim. Special emphasis was placed on the positive obligations of the state not only to punish the perpetrator of the criminal act, but also to actively protect the victim during the entire procedure, especially in cases of violation of her rights, such as disclosure of personal data, invasion of privacy or secondary victimization through "victim blaming". In the second part of the paper, two examples of violations, rather than protection of the rights of victims in criminal proceedings, are presented, along with issues of responsibility for the violations committed. The central part of the paper analyzes the relevant standards of the European Convention on Human Rights, ECtHR judgments, provisions of the RS Constitution and the Code of Criminal Procedure, as well as their application in court practice, in order to establish a fair balance between punishment and protection of human rights. The last example from the ECtHR's practice and the decision from 2025 shows all the weaknesses of the system and issues of non-respect of the state's obligation to protect the victim. In conclusion, the authors point out the need to create a system of protection and a model in which the positive obligations of the state in criminal proceedings will be possible to be realized. Deficiencies in enabling the realization of the state's positive obligations not only in punishment, but also in protection represent violations from Article 13 of the ECHR, but also violations of already established standards.*

**KEYWORDS:** *positive obligations of the state, The right to punish, Protection of victims' rights, Standards in the actions of state authorities.*

---

\* PhD, full profesor, Faculty of Law for Commerce and Judiciary in Novi Sad, University Business Academy in Novi Sad.

ORCID: <https://orcid.org/0000-0002-9625-1298>

E-mail: [zoran.pav@hotmail.com](mailto:zoran.pav@hotmail.com)

\*\* PhD, full profesor Faculty of Law University of Pecs.

ORCID: <https://orcid.org/0000-0002-0258-8587>

E-mail: [gal.istvan.laszlo@gmail.com](mailto:gal.istvan.laszlo@gmail.com)

## 1. INTRODUCTION

The sovereign right of the state to punish - *ius puniendi* is a fundamental right of every state, which is realized through the criminal legal system in order to sanction violations of rights and protect the legal order. Punishment and protection of rights are based on two inseparable principles, legal and just, as Aristotle established that all legal things are by default and just (Aristotel, 2023, p. 93). This ethical principle is particularly important in criminal proceedings and implies equal treatment not only of the perpetrator but also of the victim, in order to restore the social balance that was disturbed by the commission of the crime. In criminal law, the principle of fair treatment has not yet been fully defined. Following the thoughts of Kant (White, 2011), we conclude that society cannot function without respecting rules applicable to all, making justice the universal basis of legislation, and not the result of ad hoc circumstances. Until the moment when we consider fairness for society as an abstraction through justice in a concrete case, (Radbruch, 1980, 52) we have a relatively broad consensus, but when we talk about justice in concrete cases, things are not so uniform or simple. The positive obligation of the state provided for in Article 6, paragraph 3.c of the European Convention on Human Rights and Fundamental Freedoms, defined in the same way as in Article 33, paragraph 3 of the Constitution of the RS, is specified in Article 77 of the Code of Criminal Procedure. The European Convention on Human Rights and the Constitution of the RS state that every defendant has the right to a lawyer if the interests of justice require it, while Article 77 of the Code of Criminal Procedure talks about the defense of the poor with the professional help of a lawyer when reasons of fairness dictate it.

The state's positive obligations of punishment and protection, through the prism of the rights of the accused and the rights of victims in criminal proceedings, have become issues of standards of respect for human rights in society. The Code of Criminal Procedure, as a kind of Magna Carta libertatem of human rights, gives very detailed obligations of the state, not only through the power of punishment, but also as assistance to citizens in criminal proceedings, regardless of their procedural role. Thus, the issue of justice, legality and fairness is brought down from the philosophical to the real level in criminal proceedings, through the practice of national courts, but also of the European Court of Human Rights (ECtHR). While the traditional focus of the procedure was on the guarantees of a fair trial for the accused, the modern understanding of the protection of human rights emphasizes that the victim also has a set of procedural and material rights that the state must respect. The doctrine of positive obligations of the state is particularly relevant, within which two key concepts are developed: **duty to protect** and **duty to punish**.

In the context of criminal proceedings, these obligations require the state to prevent violence, to effectively conduct an investigation, to make the prosecution effective, but also to protect the victim from secondary victimization. Although it can often be read in the works of theorists that the criminal law *ultima ratio* comes only at the end of a life event, the reasons for both general and special prevention are present as well as the existence of the state's right to punish. That is why the formulation of retribution in Article 42, paragraph 4 of the Criminal Code must be read exclusively through the principle

of fairness and proportionality, balancing between the committed act and the severity of the punishment (and not as stated by the legislator of criminal sanctions).

The authors of this paper are somewhat of a minority with the idea that all these rules and obligations of the state must apply equally to both subjects, the accused and the victim. This non-equality in treatment, through several examples from the practice of the last few years, reminds us that we must not forget the basic principles of the criminal procedure, the role of procedural subjects, but also the phases of the criminal procedure. Therefore, criminal proceedings by their very nature are governed by the principle of **nullum crimen sine iure, nulla poena sine lege**. While the pre-trial and investigative proceedings are not public, until then the main trial can be declared secret, the public can be excluded or it can be public. Therefore, there is no crime without a court, but no punishment without the law, but also, there is no public in the investigative procedure, which is often violated by various entities in the criminal procedure and outside it. That is why the question of how the state will realize its positive obligations towards the accused and towards the victim is of utmost importance. All this implies the existence of legally binding standards, the application of which in practice also requires adequate institutional capacities for the purpose of effective implementation of standards established by law. To the extent that these standards are successfully implemented in practice, the implementation of the state's obligations will be effective.

And it all depends on people, although sometimes one gets the impression that by using artificial intelligence in certain stages of the procedure, errors and omissions to the detriment of the victim or the defendant would be avoided, that those stages of the criminal procedure would be carried out without the human factor. Many questions are raised in this way, but let's start solving them in order.

## **2. DOCTRINE OF POSITIVE OBLIGATIONS OF THE STATE: DUTY TO PROTECT AND DUTY TO PUNISH**

The European Convention on Human Rights is primarily based on the negative obligations of the state, which prevent the state from arbitrarily encroaching on individual rights. However, through the practice of the European Court of Human Rights, the doctrine of positive obligations has also developed, according to which the state must act actively to protect individuals from violations of their rights by third parties.

The obligation to protect includes all measures that the state can reasonably take to prevent harm to the victim's life and integrity. This issue has become a topic of interest quite late, not only in Serbia, Hungary or other countries in the region, but also at the international level. In criminal proceedings, the protection of the accused and his rights is truly an asset of modern criminal law and is an important issue in all democratic states. At the same time, it is important to establish a balance between the rights of the accused and the rights and protection of the victim, because none of the participants in the criminal proceedings should have any advantage over the other subject. In the last few decades, in the practice of the ECtHR, support for victims has been raised to the level of rights and obligations of the

state, to ensure an efficient and simple system of support for victims of all criminal acts. The Court set the standard of "real and imminent danger": the state violates the Convention if it knew or should have known of a real risk to the victim and did not take adequate measures (Osman v. UK). This standard is often applied in the context of domestic violence, persecution and gender-based violence (e.g. Kontrová v. Slovakia, Opuz v. Turkey).

On the other hand, the obligation to punish refers to the need for the state to ensure an efficient, independent and effective criminal procedure that can result in adequate sanctioning of the perpetrator. The ECtHR emphasizes that the criminal procedure must be "practical and effective", not "theoretical and illusory". Ineffective investigation or impunity of violence may represent a violation of Article 2 (right to life), Article 3 (prohibition of torture and inhuman treatment) or Article 8 (right to private life, threatened by violation of the rule that the investigation is not public).

Many irregularities in the performance of procedural actions in criminal proceedings do not mean that the state did not protect itself through the legislative framework and foresee such situations, as well as that they must influence the adoption of a legal decision in the form of a final verdict. For example, in the case of a violation of the right to a trial within a reasonable time, this does not necessarily mean that an illegal or improper decision was made. Therefore, the solution to this violation of the rights of both the defendant and the victim could be in non-procedural models of protection, such as administrative supervision, application of the rules of labor law, disciplinary responsibility, checking the personnel structure and the like. Some special procedural punishment during criminal proceedings could mean that some of the victim's rights are denied, such as the right to an effective investigation in serious crimes. That is why it is very questionable to ask why we do not refer to the fulfillment of obligations from Article 13 of the ECHR - the right to an effective legal remedy - more often. Namely, they must be applied not only at the theoretical level of explanation, but also in the practice of competent state authorities. The effectiveness of a legal remedy is always viewed *in concreto*, as a real possibility of submitting a legal remedy, and carrying out the procedure according to it in a reasonable and short time. Otherwise, we enter into a new violation, namely a violation from Article 6 of the ECHR.

Regardless of the judicial model, whether the investigation is prosecutorial or judicial, whether the person has the status of a victim or victim of a criminal offense, regardless of the stage of the proceedings in which the case is located, the standard of proceeding according to an effective legal remedy must be respected, and the protection of the victim's rights, as well as the right of the state to punish must be effective, fair, regular and legal. The lack of academic works on the violation of the victim's right to an effective legal remedy against violations of their rights is not justified, and the reasons for this may be different. That is why the rulings of the European Court of Human Rights are still the main source of law for these issues, which therefore concern not only the right to punishment, but also the protection of the victim's rights, in the full sense of the word: protection. This means that the victim must have, as a priority, preventive means of protection against the violation of his rights in criminal proceedings, and then, according to the rules of civil law, compensation rights.

### 3. TWO EXAMPLES AND RELATED QUESTIONS

It all started as news - the name of a famous former football player, accusations of blackmail and fraud in the spotlight. The former football player and coach of Crvena Zvezda became the victim of blackmail of 50,000 euros, but the serious criminal case was deepened by the fact that the criminal complaint, the victim's statement and other evidence from the investigation became public.

A former soccer player and the son of the famous soccer player Dušan Savić and a well-known Serbian journalist and writer, he became a victim of blackmail after a person allegedly demanded 50,000 euros from him. Suspect A. K. (21) from Belgrade was arrested and the police searched his apartment, and he was ordered to be detained for 30 days due to the danger that he could manipulate the evidence while at large.<sup>1</sup>

Just a few days after the news spread, information arrived - Vujadin Savić lost his job within the professional staff of Crvena zvezda, where he was an assistant coach until recently. The club announced that the termination of cooperation was due to "private reasons". Although this case was written about in almost all daily and weekly newspapers, discussed on social networks, the key question remained unanswered - how is it possible that the contents of the criminal report and evidence from the investigative procedure end up on the front pages?

That was not all. A few days after that, a photo of the computer screen taken by the prosecutor's office with the victim's statement and other evidence appeared in public.

According to the request of the Special Department for Suppression of Corruption of the Higher Public Prosecutor's Office in Belgrade, checks are being carried out in the competent public prosecutor's office as to whether the evidence from the investigation, as a non-public phase of the procedure, in the form of a photo of the computer screen, came to the public, and thus contaminated the criminal procedure. But, on the other hand, what is much more important, the victim not only lost his job, but the general public, which has the right to be informed, as well as the professional public, was and is more interested in this evidence - the statement in the investigation given by the victim, than in the criminal act itself. If information had not appeared at the beginning that it was a criminal act of extortion or blackmail (and we are talking about different criminal acts with different threatened punishments and actions of execution), no one would have known why the victim filed a criminal complaint and the defendant was detained. Before the court's decision, the public decided that the victim was guilty because he communicated with a transgender person, and what they learned from the published evidence - the victim's statement.

Although in the criminal legislation of the RS, the crime of extortion and blackmail (as a special form of extortion) are distinguished, colloquially known as blackmail in the older literature, and blackmail in the newer literature, the crime itself was almost never discussed, but more about the morality of the victim of the crime. We believe this sociological phenomenon will be investigated in other social humanities, but what is important for this case is that the reaction of the competent state authorities to protect the

<sup>1</sup> <https://www.blic.rs/sudbine/isplivali-detalji-o-uhapsenoj-ak-tri-muskarca-su-upala-usred-noci-ustan-i-pretukli/04phb46> (12.10.2025)

victim was not, to put it mildly, at least with the aim of protection from new traumatization. Given that at the time of writing this paper, the epilogue of the court proceedings is still unknown, we can state here that certain stereotypes and prejudices in relation to the victim prevailed in relation to the suspect and the determination of his potential guilt. The critical narrative and logic of thinking was thus absent, creating the fiction that the victim is actually being tried, and not establishing the facts related to the criminal act of extortion or blackmailing the suspect.

This case and the proceedings in it show many problems in the judicial system, the smallest of which are related to legal, quite good and harmonized solutions with the ECHR and other relevant international documents.

Another example refers to the murder of 9 children and a security guard at the Vladislav Ribnikar school in Belgrade, on May 3, 2023. year, when 5 more children and a history teacher were wounded. After the inspection, a press conference was held for the public. On that occasion, a high-ranking police officer showed the public evidence from the criminal proceedings, showing it to the cameras for 11 seconds, namely a paper with the names of children who were potential victims, with all the details about who they are and what classes they go to.

There is no doubt that it is about the secondary victimization of the victims, but not only by the public, which informed the public about these topics from various criminal acts as in a featurette, but also violated the rule that the investigation is not public.

The fact is that the competent public prosecutor's offices did not react *ex officio*, but only after the criminal report of the parents in the case of the school and the child victims, and that we have not yet received a decision based on it, and in the case of the football player, the public has very little information about what the prosecutor's office is doing in relation to the violation of the rule that the investigation as a phase of the criminal procedure is not public, and that the evidence from the investigation was recorded from the computer of the Public Prosecutor's Office.

The length of the criminal proceedings is observed for each specific case separately, but based on the data presented so far and known to the public, it is clear that in these two cases there was also a violation of the victim's right to access the court, because this right does not mean only that the proceedings before the court start, but also that the proceedings are resolved, which in the case of long trials means a violation of the state's positive obligations to protect the basic human rights and freedoms of victims of criminal acts through the criminal justice system.

About how the victims feel, we can only guess at this moment.

#### **4. VICTIM'S RIGHTS IN CRIMINAL PROCEEDINGS AND PROHIBITION OF SECONDARY VICTIMIZATION**

The rights of the victim in the process include not only the right to an effective investigation, the right to privacy protection, the right to respect for dignity, but also the right to a court proceeding without unnecessary retraumatization.

Secondary victimization (**victim-blaming**) represents a situation in which state institutions, instead of protecting the victim, repeat or deepen the trauma by treating him as responsible, unreliable or "immoral". The ECtHR considers that this practice may constitute a violation of Article 3 (no one may be subjected to... humiliating treatment), because such treatment exposes the victim to humiliation and degradation. Here we highlight the following judgments:

*J.L. c. Italy* (2021)<sup>2</sup>: prohibition of moral condemnation of the victim

Judgment of *J.L. c. Italy* represents a turning point in the judicial protection of victims from moral condemnation. The ECtHR concluded that there was a violation of Article 8, because it mixes moral and cultural stereotypes with legal criteria, and violates the victim's right to dignity and private life.

The state, instead of protecting the victim's rights, contributed to her stigmatization through court proceedings. This violated the state's positive obligation to protect the victim.

This judgment is key to the topic of the paper because it directly deals with the issue of moral condemnation of the victim in criminal proceedings. Instead of protection in criminal proceedings, we got the opposite: a violation of the right to respect for private and family life.

*M.C. c. Bulgaria* (2003)<sup>3</sup>: prohibition of stereotypes about sexual violence

In this case, the European Court emphasized the state's obligation that the investigation must be based on facts and not on moral judgments or stereotypes. The verdict is thus directly related to the concepts of duty to punish and duty to protect.

In the case of *Y. v. Slovenia* (2015)<sup>4</sup>: protection of the victim from humiliating interrogation that may constitute a violation of Article 3. This judgment deepens the standard that the victim must be protected from interrogation that has the purpose of discrediting his character, rather than elucidating the facts.

And finally, but not least, let us say a few words about the procedural rulings from the criminal law of Cyprus, which are also mentioned in the case of *X v. Cyprus*, petition number 40733/22.<sup>5</sup> The decision of the ECtHR established that in Cyprus, through specific legal solutions, there is an obligation of the state that includes the right to protect

---

<sup>2</sup> CASE OF J.L. v. ITALY, (Application no. 5671/16), 2021, available at: <https://hudoc.echr.coe.int/eng?i=001-210300> (15.10.2025)

<sup>3</sup> M.C. v. BULGARIA, (Application no. 39272/98), 2003, available at: <https://hudoc.echr.coe.int/fre?i=001-61521> (15.10.2025)

<sup>4</sup> Y. v. SLOVENIA, (Application no. 41107/10), 2015, available at: <https://hudoc.echr.coe.int/fre?i=001-154728>

<sup>5</sup> X v. CYPRUS, (Application no. 40733/22), 2025, available at: <https://hudoc.echr.coe.int/fre?i=001-241992> (15.10.2025)

victims during criminal investigations and the right to privacy, as rules that apply to both parties in the proceedings.

The reaction of investigative and prosecuting authorities to allegations of rape of victim H. did not fulfill the positive obligation of the state to apply relevant criminal provisions in practice through effective investigation and prosecution:

On 13 July 2019, the applicant, a British citizen, while on holiday in Ayia Napa, met a man, S.Y., an Israeli citizen, who was staying in the same hotel as her.

X claimed that in the early morning hours of July 17, 2019, she was raped by S.Y. and his friends (twelve people in total) whom he first invited to the hotel room where they were staying. The police took two statements from X on the day of the incident. On July 27, 2019, X made a third, supplementary statement. In those statements, X confirmed that she had consensual sexual intercourse with S.Y. on two occasions before the alleged rape, although on both occasions his friends persisted in entering the room despite being asked to leave.

After six hours of investigation on the evening of July 27, 2019, X signed a retraction statement stating that her account of events was false. On the same day, the lead investigator suggested that the case be classified as "unsubstantiated." X, due to the withdrawal of the allegation, was accused and convicted of the criminal offense of false reporting and other criminal offenses and sentenced to four months in prison, suspended for three years. After an appeal, the Supreme Court overturned her verdict and acquitted her, finding that the withdrawal of allegations was not carried out under conditions with the necessary protective measures.

In March 2022, the State Prosecutor's Office re-examined the decision to suspend the investigation. The review was conducted as if X had not made a statement withdrawing the criminal charges and a decision was made not to reopen the case.

The violations considered by the ECHR related to Articles 3 and 8 of the ECHR. The court noted the existence of a legislative framework for the protection of the rights of victims of sexual violence. In particular, the domestic law criminalized rape by directly referring to the absence of consent, while the state additionally enacted laws concerning the rights, support and protection of victims of crimes.

The police began investigating X's report without undue delay. They quickly located suspects, secured warrants, collected DNA samples and other evidence, and did not delay in questioning witnesses. The speed of the investigation was therefore not disputed.

However, the case was marked by a series of shortcomings on the part of the investigative authorities, the prosecution and the first-instance court. At the heart of the case was the premature termination of X's allegations of rape, which was caused by her retracting her initial statements and the immediate initiation of criminal proceedings against X herself, culminating in her conviction for harming the public interest. However, the Supreme Court overturned that conviction on appeal, after finding some of the lapses in the investigation and deficiencies in the trial court's assessment.

Although the judgment of the Supreme Court was an acknowledgment of the shortcomings in the initial phase of the investigation and the lack of thoroughness, the Court, after combining the issue with its merits and examining it at its own discretion,

considered that X had not lost her victim status. The Supreme Court's findings could not satisfy the requirement of an effective investigation, as these initial deficiencies affected the effectiveness of the entire investigation. Moreover, despite those findings, the State Attorney's office, in reviewing the decision to suspend the investigation, supported the approach taken by both the lead investigator and the trial court in its assessment, with the main exception of not taking into account H's retraction statement. In addition, H made further complaints about the effectiveness of the investigation. Therefore, she could still claim to be the victim of the violation she complains about under Article 34 of the ECHR.

The court reiterated that investigating authorities are obliged to take all reasonably possible steps to secure all available evidence of the incident they are investigating. It was up to the authorities to investigate all the facts and decide based on all the circumstances. There were a number of shortcomings in the investigation, such as the failure to obtain sufficient forensic and witness evidence, which could not be considered isolated failures. However, particular importance was given to the failure to examine whether there was consent. In fact, none of the criminal procedure authorities engaged in any meaningful examination of the evidence that could indicate a lack of consent. No mention was made of X's consumption of alcohol or traces of cocaine in her urine and how this might have affected her ability to consent. Her express disagreement with the suggestion that she have sex with any of the suspects, the fact that at least one of them felt offended by her, and the fact that the suspects showed little respect for her desire for privacy on all three occasions when they persisted in entering the room despite being specifically asked to leave, were not discussed or considered.

The police, and then the investigating authorities, accepted the statements of the suspects that rape did not happen for granted, despite the testimony that S.Y. said he would arrange sex with his friends with X; that certain suspects rudely expressed their intention to have sex with X on July 17, 2019; that blood was found in many places and on the clothes worn by X and on her body; that there were bruises and scratches on X's body; that there was no prior connection between X and most of the other suspects; and X's behavior after the incident. In the court decision, the illogicalities in the statements of the suspects were not mentioned either. The authorities' reluctance to pursue further investigations or prosecute appeared to be based on X's sexual freedom and behavior.

Her credibility seems to be judged through gender bias and a victim-blaming attitude. By focusing on X's prior behavior, authorities appeared to suggest that because she had allegedly previously participated in group sexual activities, she would not have refused to engage in such activities on the day of the alleged rape. The court reiterated that circumstances concerning the victim's behavior or personality cannot relieve the authorities of their obligation to conduct an effective investigation.

The court further noted a selective and inconsistent approach to the evaluation of evidence, which indicates bias. Although the lead investigator's decision to drop the investigation and the state attorney's decision not to reopen it were based largely on the inconsistencies in X's statements, they did not take into account the circumstances under which those statements were made and the psychological effect the alleged rape may

have had on her at the time, or that she may still be intoxicated with alcohol, cocaine, or a sedative given to her by a friend. It was also unclear whether X had time to sleep or rest between the alleged rape and her first and second statements.

H, who was eighteen years old at the time and was a foreigner, alone in Cyprus, was referred to a psychologist only two days after the alleged rape. Although she was interrogated by a policewoman for the first two statements, this was done in the absence of a lawyer, psychologist or social welfare service. After six hours of investigation on the evening of 27 July 2019, X withdrew her report after midnight. In the circumstances, there was persuasiveness in her argument that long and repeated interviews had led to withdrawal.

The above, together with the numerous interviews that X had to go through repeating her statement to the authorities, was also evidence of re-victimization due to the authorities' failure to adopt a victim-sensitive approach and conduct the investigation in a manner that would alleviate the claimant's suffering.

The Court noted that this case revealed certain prejudices regarding women in Cyprus which hindered the effective protection of X's rights as victims of gender-based violence and which, if not reversed, risked creating a background of impunity, discouraging victims' trust in the criminal justice system.

## 5. INSTEAD OF CONCLUSION:

### Protection of the Victim Through the Dimensions of the State's Positive Obligations

- Procedural protection (effective investigation and sanctioning)  
The state must ensure a structured, efficient and independent procedure. Judgments of *M.C. c. Bulgaria*, *Opuz v. Turkey* and *Valiulienė* confirm that the ineffectiveness of the procedure represents a violation of the Convention rights and obligations of the state to protect.
- Substantive legal protection (legal recognition of violence)  
The European Court of Human Rights insists that legal standards are not based on moral concepts that have long since ceased to be acceptable as such (e.g. the "real" victim resists). The judgment of *M.C. c. Bulgaria* is a central example of exactly this kind of behavior by state authorities who decided in this case before the proceedings before the European Court.
- Protection of dignity (prohibition of condemning the victim)

Judgments of *J.L. c. Italy* and *Y. v. Slovenia* clearly states that the state must prevent secondary victimization and moral condemnation of the victim during the procedure. This includes ESPECIALLY:

- prohibition of using the victim's private life for discrediting,
- the obligation to protect the privacy and integrity of the victim.

To conclude that the practice of the European Court of Human Rights shows that the concepts of duty to protect and duty to punish are of key importance for understanding the rights of victims in criminal proceedings. The state is obliged not only to conduct an effective investigation and punish the perpetrator, but also to ensure that the procedure does not turn into a moral questioning of the victim. National justice systems should develop an approach that guarantees dignity, protection and respect to victims, regardless of their behavior, lifestyle or moral beliefs of others. The state has a clear obligation: the victim must not be "blamed" for the violence he experienced. This represents the core of the modern standard of human rights protection in criminal justice. Therefore, without victim blaming in the criminal procedure, through respect for the basic principles of the procedure, the positive obligation of the state, as we defined it at the beginning, cannot be realized.

Finally, but not least, we should mention that in Serbia the issue of training civil servants working in judicial bodies is reduced to education in the field of ethics and integrity. Unfortunately, according to the existing legal solutions, their training is not the responsibility of the Judicial Academy, but of the body that deals with the education of civil servants. Based on personal experience and work in the judiciary, the authors have the impression that the release of evidence from the investigative procedure will therefore be reduced to the fact that the typist is to blame for the fact that the data became public. But, let's not prejudice, and the decision will definitely be up to the competent court to say the last word.

For all irregular (and some illegal) procedural actions in criminal proceedings, universal protection measures cannot be foreseen, because they have a different impact on the passing of a fair, regular and legal verdict. However it seems that the right of the state to punish has a well-developed mechanism in our criminal procedural law, the victim's right to protection is not only in the appropriate norms of criminal procedural law, but also in non-procedural mechanisms within the judicial hierarchy, good organization of work and internal and external control of regularity in action that does not contradict an independent and independent judiciary. We can say, especially in examples from Serbian life, that due to the improper work of state bodies and services, the victim was additionally punished by a repeated violation of one of her rights by the state. Bearing in mind the fact that it is often impossible to correct the injustice inflicted on the victim by non-competent state bodies that were related to the criminal act, the only possibility that appears to enable the victim the right to protection remains the violation of the right from Article 13 of the ECHR. It is essential for the fulfillment of the state's obligations under this article that an effective legal remedy must be present not only by theoretical reference to the violation from Article 13 of the Convention, but also in practice.

In other words, after learning about a violation of one of the victim's rights from Article 13 of the Convention, it is necessary to pay extra attention to the effectiveness of the procedure for the established violation during the duration of the procedure, so that the protection of the victim's rights, as a positive legal obligation of the state, is not invisible due to delays in the procedure, unnecessary additional checks or conflicts of jurisdiction. The decisions of many bodies that monitor court proceedings in the RS

confirm the author's position that there are violations of victims' rights during the proceedings, while the rights of suspects and defendants are protected to a greater extent. We will not give an answer at all whether through the existing model of a complaint directly to a higher prosecutor or through a corresponding request to other criminal procedure bodies, greater protection of the victim's rights can be achieved. Because, we believe that if the existing legal mechanisms do not provide effective legal protection fulfilling the positive legal obligation of the state towards the victim, then we should look for new solutions.

To reduce the above to a general conclusion that when the state foresees a certain protection of convention rights, and at the same time does not implement such protections itself in concrete procedures because it does not implement them through existing mechanisms or through the behavior of state authorities, this represents a violation of the positive obligations of the state in relation to the right of the victim (and/or the defendant). Considering the presented jurisprudence of the ECtHR, as well as a detailed analysis of one of the cases, there is no doubt that it is time to work on the creation of a system of protection and enforcement of positive legal obligations of the state in criminal proceedings, both those related to the duty to punish and those related to the duty to protect, without separating the obligations of the state in relation to the status of the subject whose right is violated or threatened. The rhetorical question about the use of artificial intelligence in some areas where violations clearly occur, in terms of minimizing abuses, makes complete sense. The robot Sophia (wisdom) in this sense offered the authors several possible solutions, but about that in another paper.

## References

- Aristotel. (2023). *Nikomahova etika*, Kosmos BG Nova knjiga PG
- Radbruh, G., *Filozofija prava*, Belgrade: Nolit, 1980.
- White, M. D. (2011). *Kantian Ethics and Economics: Autonomy, Dignity, and Character*, available at: <https://www.themontrealreview.com/2009/Kantian-ethics-and-economics.php> (10.10.2025)
- Internet sources
- <https://www.blic.rs/sudbine/isplivali-detalji-o-uhapsenij-ak-tri-muskarca-su-upalautsred-noci-u-stan-i-pretukli/04phb46> (12.10.2025)
- Case Law
- CASE OF J.L. v. ITALY, (Application no. 5671/16), 2021, available at: <https://hudoc.echr.coe.int/eng?i=001-210300> (15.10.2025)
- M.C. v. BULGARIA, (Application no. 39272/98), 2003, available at: <https://hudoc.echr.coe.int/fre?i=001-61521> (15.10.2025)
- X v. CYPRUS, (Application no. 40733/22), 2025, available at: <https://hudoc.echr.coe.int/fre?i=001-241992> (15.10.2025)
- Y. v. SLOVENIA, (Application no. 41107/10), 2015, available at: <https://hudoc.echr.coe.int/fre?i=001-154728>

## CRIMINAL LAW PROTECTION OF THE TAX SYSTEM: THE CHALLENGES OF DIGITALIZATION

Vladimir Šipovac\*  
Dejan Logarušić\*\*

*In this paper, the authors explore the criminal law protection of the tax system of the Republic of Serbia, as well as the challenges posed by the digitalization of the entire tax system. Digitalization has fundamentally reshaped contemporary tax systems and transformed the instruments used to protect them under criminal law. The transition from paper-based, manual procedures to automated electronic systems, combined with the emergence of cryptocurrencies and cross-border digital commerce, has created both new opportunities for improving tax discipline and new channels for tax evasion. In the Republic of Serbia, these changes are reflected in the development of the E-Taxes portal (E-Porezi) and the Tax Administration Transformation Program 2021–2025, which aim to modernize the Tax Administration, increase efficiency and align domestic regulations with European Union standards (Ministry of Finance, 2020).*

*This paper analyzes the criminal law protection of the Serbian tax system in the context of digitalization. It first presents the normative framework of criminal protection, focusing on the criminal offense of tax evasion and related computer and economic crimes. It then examines the impact of digitalization on tax procedure, with particular attention to cybersecurity, the evidentiary value of digital data, and the institutional role of the Tax Administration and Tax Police. A separate section is devoted to cryptocurrencies and blockchain as instruments that may facilitate tax evasion and money laundering. Through a comparative overview of EU regulations and international initiatives, the paper identifies shortcomings and challenges of the domestic system. Finally, it formulates recommendations for legislative, institutional and technological reforms necessary to ensure effective criminal law protection of Serbia's digital tax system.*

**KEYWORDS:** Tax system, Criminal law, Digitalization, Serbia, Tax evasion, Cybercrime, Cryptocurrencies, Blockchain, E-Taxes.

---

\* Doctor of Law, assistant professor, Faculty of Law for Commerce and Judiciary in Novi Sad, University Business Academy in Novi Sad.

E-mail: [vladimir.sipovac@pravni-fakultet.info](mailto:vladimir.sipovac@pravni-fakultet.info)

\*\* Doctor of Law, associate professor, Faculty of Law for Commerce and Judiciary in Novi Sad, University Business Academy in Novi Sad.

E-mail: [dejan.logarusic@pravni-fakultet.info](mailto:dejan.logarusic@pravni-fakultet.info)

## 1. INTRODUCTION

Criminal law has traditionally served as the “ultima ratio” instrument for protecting the tax system, reserved for the most serious and socially harmful forms of tax violations. While lesser irregularities may be addressed through administrative and misdemeanor sanctions, intentional and large-scale avoidance of tax obligations is sanctioned as a criminal offense, reflecting the high level of social danger attached to undermining public revenues (Popović, 2012).

The environment in which tax systems operate today is, however, significantly different from that in which the central tax crimes were originally defined. Digital transformation has changed the way economic transactions are conducted, recorded and reported. Electronic payment systems, online platforms, electronic invoices, integrated databases, cloud computing and, more recently, decentralized blockchain networks, have all contributed to the creation of a complex digital ecosystem. This ecosystem provides tax administrations with more data and more powerful analytical tools, but at the same time opens up new technical and legal challenges (Radulović, 2010; Kostić & Pavlović, 2020).

The Republic of Serbia finds itself in the middle of this transformation. As a state in transition and an EU candidate country, it is simultaneously modernizing its Tax Administration and harmonizing its legal framework with European standards. The E-Taxes portal and the Tax Administration Transformation Program 2021–2025 are the most visible manifestations of this process (Ministry of Finance, 2020). Nevertheless, digitalization of tax administration does not automatically guarantee greater tax discipline; without adequate criminal law mechanisms, trained staff and technological resources, the tax system can become vulnerable to new forms of evasion and cybercrime.

The central aim of this paper is to examine whether and to what extent the existing criminal law framework in Serbia is capable of responding to the challenges of digitalization in the tax field. To achieve this, the paper will: (1) analyze the normative framework for criminal law protection of the tax system; (2) present the main elements of tax digitalization, including the E-Taxes portal and transformation program; (3) discuss cybersecurity and digital evidence in tax proceedings; (4) explore the role of cryptocurrencies and blockchain in tax evasion schemes; and (5) propose recommendations for further reforms.

## 2. CRIMINAL LAW FRAMEWORK FOR PROTECTION OF THE TAX SYSTEM IN SERBIA

The core of criminal law protection of the tax system in Serbia is found in the Criminal Code (KZ RS), particularly in Article 229 (tax evasion), complemented by a number of related offenses (falsification of documents, computer fraud, unauthorized access to computer data). Additionally, the Law on Tax Procedure and Tax Administration (ZPPPA) and the Law on Misdemeanors provide administrative and misdemeanor mechanisms that interact with criminal law responses (Popović, 2012; *Official Gazette of RS*, 80/2002–138/2022).

The framework relies on dedicated bodies for detection and prosecution: Tax Administration (Tax Inspectors): They identify potential tax offenses during routine audits and inspections. If grounds for suspicion of a crime exist, they prepare a report.

Since the Tax Administration of the Republic of Serbia has problems with number of employees, the detection of violations cannot be high because employees are overloaded with regular daily tasks, so some cases that seem suspicious are not sufficiently analyzed and ultimately processed. This opens up an opportunity to introduce modern systems such as applications that use artificial intelligence that could very easily detect violations and create work orders for inspectors who are in charge of that specific type of violation. This would achieve better detection of violations and simplify the process of initiating procedures that would ultimately lead to the punishment of violators. In the previous period, this possibility did not exist because digitalization was not implemented, but now, with the formation of E-administration and the E-tax portal, there is a possibility to create an electronic tax inspector who would be powered by artificial intelligence and have access to information like a physical inspector, and could detect violators much faster and easier.

### ***2.1. Tax evasion***

Article 229 KZ RS defines tax evasion as a criminal offense committed by a person who, with the intent to fully or partially avoid paying taxes, contributions or other prescribed duties, provides false information about legally prescribed obligations, fails to report them, or otherwise conceals data relevant for determining such obligations (Radulović, 2010). The offense is completed when, as a result of such behavior, the obligation is not determined or collected at all or in full.

Key elements include:

- Actus reus – providing false information, failing to file returns, maintaining false records or using fictitious invoices;
- Mens rea – specific intent to avoid paying tax;
- Harmful effect – non-payment or reduced payment of tax.

In practice, this provision has primarily been applied to classical forms of evasion: under-reporting income, concealing transactions, double bookkeeping or non-payment of VAT. However, digitalization introduces new modes of behavior (e.g., manipulation of electronic accounting systems, use of crypto assets, falsification of electronic invoices) that formally fit within Article 229, but raise complex evidentiary and procedural questions.

The dividing line between aggressive tax avoidance (exploiting legal loopholes) and outright tax evasion can sometimes be a gray area, but the determining factor is the presence of wilful, dishonest conduct.

By adopting the E-invoicing Regulation and launching the SEF service (Regulation on Electronic Invoicing), i.e. by digitizing invoices, this form of tax evasion has been greatly reduced, because since invoices are created in the electronic cloud, they are visible at any time to both parties involved in issuing and receiving invoices and to tax

inspectors. The biggest advantage of an electronic invoice is that it is impossible to make changes to invoices, as was the case before this electronic system existed. In practice, before the launch of such an electronic system, when there were some changes in business, parties would cancel the existing invoice and issue a new invoice under the same number and date, which is not permitted by law. The existence of this service also enables cross-checking of what was invoiced and what was declared in the value added tax return. By creating an electronic tax inspector, he could very easily perform this operation by easily checking the amount invoiced on the E-invoice portal and the amount reported on the E-tax portal in the value added tax return.

### ***2.2. Crimes related economic and computer crimes***

Besides tax evasion, several criminal offenses become highly relevant in the digital context:

- Falsification of documents – now including electronic documents and electronic invoices;
- Computer fraud – using information systems to obtain unlawful gain;
- Unauthorized access to protected computer data – typical for cyber attacks on tax systems;
- Abuse of position of responsibility – when internal staff manipulate tax data;
- Money laundering – often linked with tax evasion proceeds (Petrović & Kostić, 2019).

These offenses constitute a broader framework within which digital tax crimes can be addressed. However, their application still largely depends on the ability of investigators and prosecutors to understand and prove complex digital patterns.

In the tax system of the Republic of Serbia, there are still lump-sum taxpayers, who are not required to keep business books, and are thus allowed to withdraw funds without justification, which contributes to the fact that money laundering cannot be stopped. For almost a decade, the Ministry of Finance has been announcing the abolition of lump-sum taxpayers precisely in order to eliminate this type of business without keeping business books and abolish a large part of the shadow economy that operates by laundering money for other taxpayers who keep business books and do not have the opportunity to withdraw funds from their accounts without justification.

### ***2.3. Relationship with administrative and misdemeanour sanctions***

The Law on Tax Procedure and Tax Administration establishes a detailed system of administrative obligations and misdemeanour sanctions for tax offenses. Late filing of returns, untimely payment, failure to keep proper records and other forms of non-compliance are usually sanctioned by fines, which may encourage voluntary correction and settlement of obligations (Gogić, 2020). Amendments to ZPPPA have introduced stricter penalties in order to promote tax discipline.

The borderline between misdemeanors and criminal offenses becomes blurred when digital tools are used. An electronic omission (for example, failure to submit an XML invoice) can be an unintentional error or part of a broader scheme to hide taxable transactions. Distinguishing negligent non-compliance from deliberate criminal evasion becomes more difficult when actions occur exclusively in digital space. This complicates classification and raises questions of legal certainty.

### **3. DIGITALIYATION OF THE TAX SYSTEM AND THE E-TAXES PORTAL**

Digitalization of the tax system in Serbia is closely tied to the development of e-government and the broader reform of public administration. The E-Taxes portal is a key instrument enabling taxpayers to perform most interactions with the Tax Administration electronically (Chamber of Commerce of Serbia, 2018).

#### ***3.1. Functionalities and advantages of E-taxes***

Through E-Taxes, taxpayers can:

- submit electronic tax returns;
- review current and historical tax obligations;
- receive electronic decisions and notifications;
- authorize accountants to act on their behalf;
- obtain tax certificates without visiting local offices.

The advantages are multiple:

- reduced administrative burden and queuing;
- faster communication;
- reduction of human error in data entry;
- better traceability and audit trail of submissions;
- potential reduction of corruption by limiting direct personal contact.

From the perspective of tax discipline, the system makes it more difficult to “get lost” in the paperwork: obligations and deadlines are visible, and the administration has better insight into the behavior of taxpayers.

The tax system of the Republic of Serbia is almost completely digitalized. It has been announced that by the end of the current year, the system will be completely digitalized, and nothing can be submitted in paper form, but only electronically, which will facilitate the functioning of both the Tax Administration and users who do not have to physically come to the Tax Administration. The digitalization of the Tax Administration also speeds up the control process because everything is in electronic form and available to tax inspectors at the click of a button. The deficit of tax inspectors could be solved by creating an electronic tax inspector using artificial intelligence who would perform basic tax control and signal tax inspectors about possible tax violations.

### **3.2. Tax Administration Transformation Program 2021–2025**

The Tax Administration Transformation Program 2021–2025 is designed to complete the transition from a fragmented, paper-based administration to a centralized, digitally equipped institution (Ministry of Finance, 2020). Its main elements include:

- restructuring and reduction of local offices;
- development of modern IT infrastructure;
- introduction of risk-based selection of taxpayers for audits;
- improvement of human resources, including training in digital competencies;
- expansion of electronic services for taxpayers;
- alignment with EU standards and international best practices.

The International Monetary Fund (IMF, 2024) emphasizes that the decline in the number of tax inspectors in Serbia is worrying, making it necessary to increasingly rely on digital tools for detecting irregularities. However, this also increases the importance of cybersecurity and the need for adequate criminal law protection of electronic systems.

### **3.3. Risks and vulnerabilities**

The Tax Administration of the Republic of Serbia, as an integral part of the Ministry of Finance, has limited resources and a certain systematization according to which the amount of wages is determined. The Tax Administration does not have the ability to determine the amount of wages of an employee on its own, so we come to the problem that programmers who could be employed by the Tax Administration and additionally modernize the E-Tax system do not want to work due to low salaries, because in the economy they have up to three times higher salaries for the same job description. The Tax Administration is forced to cooperate with external companies that perform part of the maintenance, modernization and security of the E-Tax portal, which leads to a security risk because neither these companies nor their employees have passed the security checks required to be a civil servant.

Despite its advantages, digitalization entails several risks:

- Cybersecurity threats – hacking attacks, ransomware, data breaches and unauthorized access to sensitive taxpayer information;
- Manipulation or loss of data – whether by external attackers or internal abuse;
- Identity theft and misuse of electronic signatures – where criminals file returns or change data in the name of another person;
- Dependence on IT infrastructure – system failures can paralyze the work of the Tax Administration.

From a criminal law perspective, these risks raise questions about how to qualify and sanction unauthorized access, data manipulation and misuse of the system, as well as how to prove that a particular taxpayer or employee participated in such conduct.

#### 4. CYBERSECURITY, DIGITAL EVIDENCE AND TAX OFFENSES

One of the most complex consequences of digitalization is the transformation of evidence used in tax and criminal proceedings. Instead of paper documents and physical traces, investigators are increasingly dealing with digital logs, databases, emails, blockchain records and metadata (Radulović, 2010).

The biggest flaw and challenge for the future of the E-Taxes portal is that it is worked on by external collaborators who are not employed by the Ministry of Finance system, and they operate on the principle of work orders that they fix errors that are presented to them or make changes to the system that are requested of them. If they were employed by the Tax Administration, they would be able to monitor and secure the system on a daily basis, because as the Tax Administration improves its systems, people on the other side of the law find new loopholes in the system to carry out their criminal intentions.

##### *4.1. Specific features of digital evidence*

This requires specialized forensic methods to collect, preserve and analyze digital evidence in a manner acceptable to courts. Chain of custody becomes crucial, as any irregularity can cast doubt on authenticity. Most of the problems that arise with the introduction of digitalization can be solved by introducing block chain technology in every part of the system, thus it would be possible to see if someone changed the data, who changed the data, when they changed the data and what the data was like before they changed it.

Digital evidence is:

- **intangible and volatile** – can be easily deleted or altered;
- **reproducible** – can be copied endlessly without degrading;
- **distributed** – data may be stored on servers in different jurisdictions;
- **dependent on system integrity** – the evidentiary value depends on the reliability of the system that generated the data.

##### *4.2. Cyber-enabled tax evasion*

These behaviors often combine elements of tax evasion and computer crime, blurring the lines between different offense categories (Kostić & Pavlović, 2020). Investigators must understand both the tax and technical components of the case. Introducing the electronic signature of documents by the tax administration, the problem of manipulation of electronic invoices has been solved in one part. The Tax Administration also solved the problem of the programs used by accounting firms by creating the SEF portal, where all invoices are stored and exchanged, so they cannot change them without being noticed by tax inspectors.

Digitalization opens space for cyber-enabled forms of tax evasion, such as:

- manipulation of electronic invoices;
- alteration of data in accounting software;

- unauthorized access to the E-Taxes system;
- creation of fictitious entities through online registration;
- use of malware to intercept or modify financial data.

### ***4.3. Challenges for Criminal Procedure***

Serbian criminal procedure law was largely drafted for a world of physical documents and traditional searches. The emergence of digital evidence raises several questions:

- how to properly seize electronic devices and data;
- how to ensure the integrity and authenticity of digital evidence;
- how to secure international cooperation for accessing data stored abroad;
- how to interpret complex technical evidence before courts whose members may lack IT expertise.

Without adequate procedural rules and expert support, criminal proceedings in digital tax cases can be long, expensive and uncertain. It is no longer possible to issue new invoices in paper form, but there are still invoices in circulation that were issued before the establishment of the SEF system, so it is a very small percentage that will decrease over time and will disappear. In vigilance, as there is a change of generations in the Tax Administration, there may be a problem that young tax inspectors will not know how to recognize fraud on paper invoices, as they have not been used for some time, and there are fewer and fewer older tax inspectors who know this.

## **5. CRYPTOCURRENCIES, BLOCKCHAIN AND TAX EVASION**

The emergence of cryptocurrencies and blockchain technology represents one of the greatest challenges for tax administrations across the world. Cryptocurrencies can be used as investment assets, a means of payment or a method of transferring value across borders with minimal oversight. The Law on Digital Assets primarily regulates providers of services related to digital assets (while individual natural and legal entities as such are generally not subject to regulation, i.e. they can trade freely).

According to the Law on Digital Assets, providers of services related to digital assets (except providers of advisory services) must obtain permission from the competent authorities. Most service providers will need permission from both competent authorities, i.e. both the NBS and the Commission.

A number of conditions have been prescribed that service providers must fulfill, including the minimum capital required to obtain a permit. This capital ranges between EUR 20,000 and EUR 125,000, and depends on the type of service that a specific service provider will provide.

Most of the prescribed conditions, for example proving the origin of the capital, non-conviction of the management, and similarly, are characteristic of financial institutions

Mining of digital assets is not regulated by the Law on Digital Assets and can be carried out freely, both as a natural person and as a legal entity.

### **5.1. Tax treatment of crypto currencies**

In Serbia, cryptocurrencies are regulated as *digital assets*.( *Official Gazette of the Republic of Serbia*, No. 153/2020) Income realized through the sale or exchange of cryptocurrencies is generally subject to capital gains tax for individuals or corporate profit tax for legal entities. However, the effectiveness of taxation depends on the Tax Administration's ability to detect such transactions and link them to specific taxpayers.

Opinion of the Ministry of Finance of the Republic of Serbia No. 413 00 168 2017 04 of October 26, 2017 (VAT Law), since bitcoin digital currency is not a legal tender in the Republic of Serbia, it is not possible to apply the provisions of Article 25 paragraph 1 point 1 of the Value Added Tax Act, which provides for no right to deduct the previous tax in the case of business and intermediation in business with legal means of payment. cryptocurrency is subject to VAT in the Republic of Serbia.

### **5.2. Mechanisms of crypto-based tax evasion**

Cryptocurrencies may be used for tax evasion by:

- converting undeclared income into crypto assets;
- using foreign or decentralized exchanges without reporting;
- transferring assets through privacy-enhancing technologies (mixers, “privacy coins”);
- hiding ownership behind pseudonymous wallets;
- using decentralized finance (DeFi) protocols to move funds without banks.

In such cases, monitoring is significantly more difficult than in traditional banking where each transaction passes through regulated intermediaries. With the introduction of digitization, the Republic of Serbia gained the ability to monitor all financial transactions, so the NBS has a monitoring system for all transactions, and it has the obligation to inform the Tax Administration about this, which then checks whether that person has submitted an appropriate report and thus justified his transaction, if it is determined that the Tax Administration is not officially submitting a report based on the amount of funds it received from the NBS. The problem that happens is that the National Bank of Serbia reports twice to the Tax Administration about the transfer of the same funds because, for example, a person receives funds in his foreign currency account in a foreign currency, and then in order to use those funds, he has to convert them into domestic currency, and the NBS recognizes that conversion as a new transaction, so it often happens that the official tax return is of double value.

### 5.3. Criminal law dimension

From the standpoint of criminal law, cryptocurrencies can serve both as:

- an object of tax evasion (concealed income or gains), and
- an instrument of money laundering, where tax evasion proceeds are “cycled” through crypto markets.

International organizations such as the OECD and FATF are developing standards (e.g., the Crypto-Asset Reporting Framework) to increase transparency and enable automatic exchange of information on crypto transactions. For Serbia, harmonization with these standards will be crucial for preventing the use of cryptocurrencies as a tool for tax evasion. By harmonizing its standards with EU standards, all funds that come from foreign systems can be automatically recognized and properly filed in the tax return.

## 6. ECONOMIC AND PSYCHOLOGICAL ASPECTS OF DIGITAL TAX PENALTIES

Criminal sanctions and other penalties do not operate in a vacuum; their effects depend on how taxpayers perceive the tax system, the fairness of rules and the probability of detection (Gogić, 2020). The effectiveness of tax penalties in achieving tax discipline depends on a number of factors, including the manner in which the penalties are implemented, the level of transparency of the tax system, and societal perceptions of justice. Research shows that penalties can be effective in discouraging tax evasion when they are balanced and fair, but also when the tax administration is able to enforce them without discrimination. In countries with an efficient tax administration, such as Germany or Canada, fines are part of a broader strategy that includes continuous control and advanced methods of monitoring tax obligations (Šipovac & Logarušić, 2024).

### 6.1. Psychological effects

However, punitive policy may not always be the most effective means of achieving tax discipline. In many cases, alternative measures, such as rewarding regular tax payments or educating taxpayers about their obligations, can have an equal or even better effect. Voluntary tax reporting programs, in which taxpayers have the option to report their debt without fear of penalties, have also shown success in raising revenue and reducing tax evasion in countries such as Italy.

At the same time, preventive measures, such as regular tax audits and supervision of high-risk sectors, can act as an additional way to improve tax discipline. These measures, combined with fair and consistent punishment of violations, allow maintaining a stable tax system that is acceptable to most taxpayers.

Digitalization changes perceptions in at least three ways:

1. Higher perceived probability of detection – electronic trails make it harder to “hide”, which can enhance the deterrent effect of sanctions (Topić Pavković & Popović, 2020).
2. Fear of automation – some taxpayers may fear that algorithms will punish them for minor or unintentional errors, reducing trust in the system.
3. Need for transparency – if the operation of risk-assessment systems is opaque, it may generate suspicion and resistance among taxpayers.

An effective response to digital challenges must combine preventive and repressive measures.

Prevention measures includes:

- strengthening cybersecurity of the Tax Administration and E-Taxes;
- regular security audits and penetration tests;
- education of taxpayers about digital tools and risks;
- development of user-friendly platforms that reduce unintentional errors;
- use of analytical tools for early detection of irregularities.

Repressive mechanisms should be proportionate and reserved for the most serious forms of intentional violations, in order not to undermine voluntary compliance. Sanctions in regulated systems have an effect, but in systems that are collapsing, they can have the opposite effect, so it is necessary to carefully measure how much punishment should be for the committed violation, because it often happens that the punishment is up to five times higher than the omission, which is not due to intention, but due to the impossibility of settlement, and in this way we put the taxpayer in an even more unenviable situation. The problem arises because there is no provision in the legal regulations that someone who has made the first violation should receive a warning, but is immediately fined, which leads to a counter effect where the taxpayer who has been regularly settling everything until that moment, and now for the first, perhaps unintentional violation, immediately receives a fine that seriously burdens him economically.

Repressive mechanisms in criminal law must clearly sanction:

- unauthorized access to tax systems;
- manipulation or destruction of electronic tax data;
- use of cryptocurrencies for concealing taxable income;
- participation in cyber-enabled tax evasion schemes.

## ***6.2. Economic effects***

An orderly system that works does not rely on the economic effects of punishment, although systems that are in a budget deficit often reach for stricter measures, more frequent controls and an insistence on punishment in order to generate more funds for the budget, which can lead to an instant influx of funds, but this leads to a counter-effect because many of those taxpayers consciously did not pay their tax obligations in order to remain solvent and somehow managed to save themselves from collapse.

From an economic perspective:

- digitalization can reduce compliance costs for honest taxpayers,
- increase the efficiency of tax collection,
- but also impose adaptation costs on small and medium enterprises that lack digital skills.

Excessively harsh sanctions in a digital environment can lead to the closure of small businesses or push them into the grey economy if they feel unable to comply with complex digital requirements.

The Law on Tax Procedure and Tax Administration prescribes the issuing of warnings and misdemeanor fines for breaking the deadline for paying taxes and contributions (*Official Gazette of RS*, No. 80/2002...138/2022). The deadline for the payment of profit tax and value added tax is the 15<sup>th</sup> of the month, and at the end of the month, if the taxpayer is late with the payment by at least one day, according to the procedure, he receives a warning with accrued interest and a misdemeanor order (Misdemeanor Act, 2020). The problem with such a solution to raising tax discipline is that the punishments are linear, so for a debt of several hundreds of dinars and several million, the same misdemeanor order is issued, so the legal entity receives a misdemeanor order in the amount of 100,000.00 dinars and the responsible person 10,000 dinars. Entrepreneurs have the same practice, so regardless of the amount of debt that has not been settled, the owner of the entrepreneurial shop will receive a misdemeanor order in the amount of 50,000.00 dinars. In case of misdemeanor orders issued in this way, there is a payment term clause, so if a legal entity or entrepreneur settles the issued misdemeanor order, the sum will be halved.

Through the practice of issuing misdemeanor orders, it is possible to achieve higher income, reduce the number of warnings issued, but also to bring problems to business entities that are already in an unenviable position, so for example 100.00 dinars debt, they must now pay 25,000 dinars or 50,000.00 dinars within eight days if they do not comply with the deadline of the issued misdemeanor order. The Tax Administration should think about the proposal to introduce misdemeanor orders according to the amount of the debt for which a warning was issued, so that they do not create a bigger problem for business entities than they have achieved the effect of regularly paying their obligations to the Tax Administration in the following period. In practice, it has been shown that there are several groups of business entities that do not execute their payments on time, so we have: 1) negligent business entities that do not check given payment orders, so it happens that the bank refuses to execute the payment order due to an error in the order, 2) calculators who have funds, but do not want to transfer them to the accounts of the tax administration because they may need them to pay suppliers and 3) critical ones who really do not have funds and every month they have a problem to make their payments to the state. The last group is the most affected by the issuance of these misdemeanor orders, thus putting them in even greater trouble and the possibility of shutting down the business entity. The group we called calculators is less threatened, but they can easily move to the critical group with these penalties. The group called

negligent will certainly not be satisfied with the punishments, because in practice they know that they are punished for a mistake that they did not make, but in the process of payment through the bank, post office or payment points, there was a stoppage and the funds were transferred on another day when the deadline had already expired.

## 7. CONCLUSION

Digitalization has opened a new chapter in the development of the tax system in the Republic of Serbia. The E-Taxes portal and the Tax Administration Transformation Program 2021–2025 have significantly improved efficiency and transparency, but have also created new risks that cannot be adequately addressed without a modern and technologically informed criminal law framework.

The tax, as well as the tax system, is a very dynamic and complex phenomenon that constantly evolves over time and therefore must be less flexible and must adapt to new conditions in the economic system. The Republic of Serbia is a country in transition, which has been in the process of joining the European Union for a long time, and is constantly harmonizing its tax system. The Tax Administration of the Republic of Serbia bases its reform on having a modern system without any continuity with the old one.

The existing criminal law provisions provide a solid basis for protecting the tax system, but they are not fully adapted to the realities of electronic communication, cybercrime and crypto-assets. The future of effective criminal law protection of the digital tax system in Serbia lies in continuous harmonization with European and international standards, strengthening institutional capacities and balancing punitive responses with preventive and educational measures. Only in this way can the tax system be simultaneously efficient, fair and resilient in the face of the challenges of the digital age.

The analysis above shows that the Serbian system of criminal law protection of the tax system faces a number of challenges:

- the normative framework was largely created before the full development of digital technologies;
- institutions lack sufficient specialized knowledge in digital forensics, cybersecurity and crypto-assets (IMF, 2024);
- international cooperation mechanisms are still developing;
- trust in digital tax administration is fragile.

To address these challenges, several reform directions can be proposed:

1. Legislative modernization – clarify and update provisions on tax evasion and related offenses to explicitly include digital modalities (electronic invoices, data manipulation, crypto-assets).
2. Institutional capacity building – invest in training prosecutors, judges, tax inspectors and police officers in the field of cybercrime and blockchain analysis.
3. Technological support – procure forensic tools capable of analyzing large data sets and tracing crypto transactions.

4. International cooperation – intensify cooperation with EU bodies and international organizations (OECD, FATF, Europol).
5. Balanced sanctioning policy – reserve criminal law for the most serious cases, while strengthening preventive and educational measures for ordinary taxpayers.

Tax penalties have a significant impact on achieving tax discipline in orderly systems, but in a system that is on the verge of collapse, it can lead to the opposite effect. The effectiveness of penalties depends on their fairness, strict enforcement and the way taxpayers are perceived in the tax system. Pressure on taxpayers can lead to an instant inflow of funds into the state budget, but it can also create a counter effect and increase tax disobedience of taxpayers. Although they can successfully discourage tax evasion, over-reliance on penalties can be counterproductive and lead to financial problems for individual taxpayers and the economy as a whole. The Tax Administration currently has a good framework that needs to be worked on in order to make it more acceptable for the entire system. Issuing tax violations is a system that is effective for business entities that have funds, and with them there is a noticeable increase in discipline in the following months from the issuance of misdemeanor orders, but there is a counter effect for business entities that have limited or no funds where they are in a problem and every a month late with their payments, which requires them to be charged even higher, and they find themselves in a problem from which they have no way out. The tax administration should make changes to the law in which it would provide for warnings for taxpayers who have committed an offense for the first time, and also that the punishment is carried out by assessing the amount of the tax offense in order to prevent small taxpayers who have committed a small monetary offense from being punished in the same way as large taxpayers who commit a tax offense in the amount of millions.

### References

1. Antolisei, F. 2008. *Manuale di diritto penale, parte speciale*. Milano: Giuffrè editore.
2. Gogić, N. 2020. Poreska politika i efekti oporezivanja u Republici Srbiji. *Ekonomski izvori*, god. 2020, br. 17, str. 14–27. [In English: Gogić, N. 2020. Tax policy and effects of taxation in the Republic of Serbia, *Economic sources*, Year 2020, issue 17, pp. 14–27].
3. Kostić, J. 2016. Tax crimes in Italian legislation. *Strani pravni život*, 4, str. 135–154. [In English: Kostić, J. 2016. Tax crimes in Italian legislation. *Foreign legal life*, 4, pp. 135–154].
4. Kostić, J., Pavlović, Z. 2020. Poreski delikti u zakonodavstvu Savezne Republike Nemačke. *Strani pravni život: teorija, zakonodavstvo, praksa*, god. 64, br. 1, str. 141–153. [In English: Kostić, J., Pavlović, Z. 2020. Tax offenses in the legislation of the Federal Republic of Germany, *Foreign legal life: theory, legislation, practice*, Vol. 64, No. 1, 2020, pp. 141–153].

5. Ministarstvo finansija. 2020. *Program transformacije poreske administracije 2021–2025*. Beograd: Vlada Republike Srbije. [In English: Ministry of Finance. 2020. Tax Administration Transformation Program 2021–2025. Belgrade: Government of the Republic of Serbia].
6. MMF. 2024. Zabrinjava dramatičan pad broja poreskih inspektora. Available at: <https://www.paragraf.rs/dnevne-vesti/040424/040424-vest11.html> (5.6.2025). [In English: IMF. 2024. The dramatic decline in the number of tax inspectors is worrying].
7. Petrović, N., Kostić, J. 2019. *Finansijski kriminalitet i korupcija*. Institut za uporedno pravo, str. 195–307. [In English: Petrović, N., Kostić, J. 2019. Financial fraud and corruption, Institute for Comparative Law, pp. 195–307].
8. Popović, D. 2012. *Poresko pravo, osmo izdanje*. Beograd: Pravni fakultet Univerziteta u Beogradu. [In English: Popović, D. 2012. Tax law, eighth edition. Belgrade: Faculty of Law, University of Belgrade].
9. Radulović, Lj. 2010. Krivično delo poreske utaje iz čl. 229 KZ RS – akcenti na sudске prakse. *Pravo i privreda*, vol. 47, br. 4–6, pp. 463–475. [In English: Radulović, Lj. 2010. Criminal offense of tax evasion from art. 229 CC of the RS – accents on judicial practice, Law and Economy, Vol. 47, No. 4–6, pp. 463–475].
10. Topić Pavković, B., Popović, J. 2020. Poreski sistem i efekti umanjenja poreske osnovice poreza na dohodak u Republici Srpskoj. *Naučni časopis za ekonomiju, Financiranje*. [In English: Topić Pavković, B., Popović, J. 2020. Tax system and the effects of reducing the tax base of income tax in the Republic of Srpska, Scientific Journal of Economics, Financing].
11. Šipovac, V., Logarušić, D. 2024. The impact of tax penalties on the achievement of tax disciplines. in: *IX International Scientific Thematic Conference Penal populism and impact on the work of institutions*, pp. 157 – 168.

### ***Legal Sources***

1. Law on digital assets (*Official Gazette of the Republic of Serbia*, No. 153/2020 – in application from June 30, 2021).
2. Law on tax procedure and tax administration (*Official Gazette of RS*, No. 80/2002...138/2022).
3. Law on value added tax (*Official Gazette of RS*, No. 84/2004, 86/2004 - amended, 61/2005, 61/2007, 93/2012, 108/2013, 6/2014 - harmonized din. ex., 68/2014 - other law, 142/2014, 5/2015 - harmonized din. ex., 83/2015, 5/2016 - harmonized din. ex., 108/2016, 7/2017 - harmonized din. ex., 113/2017, 13/2018 - harmonized din. ex., 30/2018, 4/2019 - harmonized din. ex., 72/2019, 8/2020 - harmonized din. ex., 153/2020, 138/2022 and 94/2024).
4. Rulebook on electronic invoicing (*Official Gazette of RS*, No. 47/2023, 116/2023, 65/2024, 73/2024, 101/2024, 107/2024, 56/2025, 85/2025).



## A CRITICAL REFLECTION ON THE CONCEPT OF TRUTH IN INTERNATIONAL CRIMINAL JUSTICE

Svetlana Nenadić\*

*Study provides a critical examination of the role of international criminal tribunals in establishing truth, highlighting the complex interplay between law, politics, and sociocultural elements in an international setting. It emphasise the limitations of judicial narratives in capturing the full scope of mass atrocities. Contextual element, including political influence and representativeness of prosecuted crimes, are analyzed as factors shaping the perceived legitimacy of trials. Procedural frameworks, such as rules of evidence and plea agreements, are scrutinized for their impact on both the completeness of factual findings and the protection of defendants' rights. Subjective elements, witness reliability, trauma, and cultural factors are analyzed as factors shaping the legitimacy of evidentiary process. The study also addresses criticisms from scholars regarding the Eurocentric and culturally conditioned assumptions underlying international criminal justice, questioning the capacity of tribunals to operate effectively in diverse sociocultural contexts. By interrogating these dimensions, the study argues that while international criminal trials aim to enforce accountability and advance reconciliation, they simultaneously produce selective narratives that may diverge from historical reality, raising important questions about justice, legitimacy, and the ethics of international adjudication.*

**KEYWORDS:** *International Criminal Justice, International Community, Truth in Criminal Procedure, International Criminal Tribunals*

---

\* The First Basic Public Prosecutor's Office in Belgrade, Serbia  
ORCID: <https://orcid.org/0009-0004-1379-0926>  
E-mail: [svetlananenadic11@gmail.com](mailto:svetlananenadic11@gmail.com)

## 1. CRITICAL REVIEW OF INTERNATIONAL CRIMINAL JUSTICE

International criminal law arose under the auspices of the international community and carries out the function of international criminal justice. The function of international criminal courts is an extension of the function of international law. Therefore, it is wrong to emphasize only the criminal law function of international criminal justice, while simultaneously ignoring the fact that international criminal courts are international creations, with all the burdens and challenges of the international community.

International community is not a teleological, but a practical association (Koskenniemi, 2010, p. 90). It is not designed to achieve the ultimate goals of peace, justice, and truth, but to coordinate practical actions between particular understandings of the highest goals of the international community. To say that international law is for "peace", "security" and "justice" is to say that it is for peace, security and justice *as agreed and understood between the members of the system* (Henkin, p. 91).

International community, as a practical association, is based on voluntariness. The search for justice and truth, independent of the will and interests of individual members of the community, is a rather unnatural setting for international law. If truth and justice are sought, it is done solely in the interest of the survival of the international community itself and the maintenance of the existing power relations and value system within the community. International criminal justice, as construct of international law, is a political project. The narrative of international criminal justice, although veiled in the authority of neutral intervention in post-conflict societies, is not neutral, but is shaped by the global human rights movement and liberal ideology.

After the collapse of the USSR, as one of the most powerful players in the international community, historic triumph of liberal democracy and foretold a new era of peace and prosperity, was crowned by the formation of ad hoc international tribunals (Wilson, 2011, p. 2). The creation of these institutions has been seen as one of the most extensive waves of construction in contemporary international relations (Drumbl, p. 10), the fastest growing and most influential branch of international law and global politics (Combs, 2010, p. 1), which has contributed strengthening the existing power relations in the international community. The crowning achievement of international criminal justice is creation of the International Criminal Court, whose role was to herald a new world based on international law and the constitutionalization of the international order (Koskenniemi, 2002a pp. 159-175, p. 160).

Liberal ideology understands the problems of society as problems of crime and opts for punishment rather than appeasement. It makes a "millennial shift, from appeasement to justice as the dominant factor in world affairs".<sup>1</sup> International criminal justice assumes that the political and military contexts in which crimes occurred are the same as the contexts surrounding other criminal behavior (Kennedy, p. 129). At the same time, rising standards for combating impunity and promoting victims' rights are being promoted as a remedy for massive and systematic human rights violations. This

---

<sup>1</sup> Statements by lawyer Geoffrey Robertson quoted according to T. Kelsall, *Culture under Cross-Examination: International Justice and the Special Court for Sierra Leone*, Cambridge University Press, 2009, p. 7.

approach is justified by the fact that individual criminal responsibility replaces collective attribution of blame and that justice dispels the call for revenge, because when the court convicts the perpetrator, the victims' demands for revenge are met (Stover & Weinstein, 2004, pp. 3-4). International criminal law does not inquire into the roots of violence, nor does it seek to pacify it; its function is narrowly focused on assigning guilt and sanctioning wrongdoing.

Therefore, it is not surprising that international criminal justice is often seen as a "new" or "liberal" imperialism, "liberal peace", "international judicial intervention" or "international law fundamentalism" (Kelsall, 2009, p. 8). The main line of criticism is based on the thesis that international criminal law functions more as an instrument for preserving power relations in the international community than as a neutral agent of protection against violations of rights. African theorists are pointing out that international humanitarian law was shaped by colonialism<sup>2</sup> and that the role of international criminal courts is to produce a global moral narrative about Africa.<sup>3</sup> They perceive international law and international criminal law as a system of reproduction of existing power relations in the international community. It is characterized by selectivity in the application and interpretation of international norms, a lack of sensitivity to issues of colonialism, as well as conflict resolution through so-called humanitarian missions that serve to legitimize the expansion of power, economic control, or simply the conquest of territory.

Above the fact that international criminal courts operate in an unnatural environment of international law, their role is significantly more complex than that of regular criminal courts, for which violence is a social anomaly, not a social rule. International crimes, such as genocide, resemble ordinary crimes such as murder, but require additional elements of context, intent, scope, or gravity. While so-called ordinary crimes are the work of individuals, social deviants, international crimes require a certain degree of participation by the state, which should protect society from the violence (Schabas, 2001, p. 22).

From the perspective of criminal law, there is nothing to object to the individualization of guilt for international crimes. However, from the point of view of international criminal law, the individualized focus is not neutral in its effects, because the focus on the individual can serve the population to relieve itself from responsibility (Koskenniemi, 2002a, p. 14) and can distort rather than reveal the truth.

The European project of humanizing war (Mégret, 2006, p. 36) creates the illusion that there is a law in unwar and that the application of international criminal law will lead to a linear progression of warfare in which each subsequent war would be milder and less violent. The function of international criminal courts is to prevent impunity by intimidating future leaders who wish to resolve the conflict through war. International criminal justice requires even more than that. International criminal courts set themselves the task of resolving, through criminal justice mechanisms, once and for all

<sup>2</sup> See: A. Anghie, *Imperialism, Sovereignty, and the Making of International Law*, Cambridge University Press, 2005.

<sup>3</sup> See: K. M. Clark, *Affective Justice*, Duke University Press, 2019.

the "destructive potential of the unresolved past" (Clark, 2009, p. 425) and create a better society in which everyone will reconcile when they face themselves with the judicial truth, and crimes will no longer be repeated. Yet the brutality of the conflicts we are witnessing today, three decades after the supposed triumph of international criminal justice through the *ad hoc* tribunals, suggests that this belief was, at best, naïve.

International criminal courts are not under a legal duty to establish the full truth in criminal proceedings. International criminal procedural law contains no rule that would oblige them to uncover the truth about mass violence. However, in the political arena, the decisions of international courts are presented not only as "international justice" but also as "international truth" about historical events. This leads to the judicialization of history, whereby international criminal courts become authorized interpreters of those events. At the same time, the didactic role of international criminal courts is emphasized, suggesting that these courts are aimed more at educating populations than at establishing the truth. Consequently, the notion of truth in international criminal proceedings is no longer merely a matter of criminal law; it has acquired an international legal dimension with inherent political consequences.

The binary outcome of criminal justice — guilty/not guilty — is necessary for legal clarity, but it disregards the social and historical causes and the complexity of the conflict, resulting in an excessive ethical simplification. The problems of a society in conflict are not linear, yet the criminal-law approach offers a black-and-white picture of the conflict, one of "good guys and bad guys". Garapon notes that the concept of international criminal justice risks falling into a form of Manichaean justice (Garapon, 2004., p. 725). Such Manichaean justice renders the search for the causes of the conflict superfluous and produces an emotional mobilization of the audience that inhibits critical reflection.

This approach further polarizes war-torn societies, in which empathy for one group overlaps with the demonization of another, thereby hindering the long-term process of dealing with the past and achieving reconciliation. The binary outcome of trials before international criminal courts carries yet another risk: the possibility of an acquittal. If this occurs, does it mean that the international community, as the patron of international criminal justice, does not acknowledge that the crime took place and does not recognize the victims of that crime? The political effects of judgments follow the same binary logic, except that this logic becomes even more simplified in political discourse. Thus, the political effect of an acquittal leads to the clear conclusion that crimes not covered by a final conviction are deemed not to exist, and their victims are not recognized.

At the zenith of its influence, international criminal law was the subject of exaltation and inspiring rhetoric; however, in recent times, the luster of international criminal law has faded (Combs, 2010, p. 2). The reason for this lies in the fact that international criminal courts have largely failed to achieve their objectives — to deter potential future perpetrators and to reconcile populations in post-conflict societies.

## 2. DO CRIMINAL LAW AND INTERNATIONAL CRIMINAL LAW DEAL WITH THE ISSUE OF TRUTH?

The relationship between criminal law and truth is reflected in three questions: what constitutes truth in a trial, whether it is possible to uncover it, and whether the purpose of criminal proceedings should be the discovery of truth. In judicial rhetoric and popular discourse, truth is often presented as the primary purpose of a trial. In judicial rhetoric and popular discourse, one sometimes encounters solemn pronouncements that truth is the basic purpose of all adjudication (Damaska, 1998, p. 301). Consequently, criminal proceedings would be the instrument for arriving at the truth, procedural rules the instructions for using that instrument, and substantive criminal law the form into which the truth must fit. As Laudan emphasizes, the judiciary functions as an *epistemological machine* (Laudan, 2006. p.2).

Truth is limited by the capacities of human cognition, while judicial truth is further constrained by procedural and evidentiary rules. In criminal proceedings, truth is a legal construct. It rests on the standard of proof beyond a reasonable doubt, which serves as a balance between the risk of error and the teleological purpose of establishing the truth (Klamberg, 2013, p. 197). Judicial truth rests on the horizon of human knowledge, which procedural law defines as the threshold sufficient for a court's decision. The procedural threshold of proof beyond a reasonable doubt produces a result in a binary code – guilty/not guilty. The essence of the epistemological framework of a criminal court is not the question of what actually happened in the past, but whether the specific accused is guilty or not.

However, it is possible to distinguish between actual, or true, guilt and the truth as determined by a court's judgment. Likewise, actual, or true, innocence can be distinguished from the innocence presumed in criminal proceedings under the principle of the presumption of innocence. Even when the law is correctly applied, a court may err by convicting an innocent person or acquitting a guilty one, because legal rules do not guarantee that the outcome will reflect the truth.

The fact is that judicial systems remain blind to truths that have never been the subject of their decisions. Numerous crimes were never brought before a court. Yet the fact that a particular crime from the past did not undergo juridical scrutiny does not mean it did not occur. Likewise, the inability to prove a certain fact in criminal proceedings does not imply that the fact does not exist, for "the impossibility of proving x does not mean that x does not exist." (Laudan, 2006. p.94). Ultimately, a criminal court addresses only those factual questions that are legally relevant and pays no attention to other aspects of a past event, such as historical, sociological, political, or other analyses. While these questions fall outside the domain of criminal law, they remain within the broader sphere of truth regarding the event.

Thomas Aquinas argues that truth is not a value in itself; rather, faith is the value, and truth is only its object.<sup>4</sup> In this sense, the value lies in trust in the law, which stems

---

<sup>4</sup> Aquinas, *Summa Theologiae*, II-II, q.109, available at: <https://www.newadvent.org/summa/3109.htm>

from truth as the object of evaluation. Laudan emphasizes that truth is not a guarantee of justice, but it is an essential precondition for it (Laudan, 2006, p.2). Confidence in criminal justice rests on the belief that courts will render a truthful judgment, thereby sustaining societal trust that the guilty will be punished and the innocent acquitted (Hillier & Dingwall, 2021, p.11). Seen in this light, truth is not merely an instrument of the trial for achieving its procedural goals; it acquires a meta-legal significance upon which the fairness and legitimacy of the proceedings directly depend.

The central point of distinction between the two major criminal procedure systems—the Continental European (inquisitorial) and the Anglo-Saxon (adversarial)—is their approach to the concept of truth.

The Continental European procedure is based on the idea that an objective reconstruction of reality is possible, meaning that material truth is attainable and can be reached “self-propelled judicial inquiry, an inquiry only slightly affected by party initiative” (Damaska, 1997, p. 107) that is, through the court’s own initiative in gathering evidence. On the other hand, the adversarial model rests on the notion that cognitive limitations prevent the attainment of objective truth through neutral investigation (Damaska, 1997, p. 95). Thus, an adversarial court operates on the assumption that truth is reached through party initiative and the “vigorous clash of evidence” (Landsman, 1988, p.2). For a Continental European court, truth extends beyond what the parties present, and the court actively seeks it; it is material and objective. In contrast, for an adversarial court, truth is relative, dependent on the parties’ perceptions, and is sought through the contest of testimony; it is formal, interpretative, relative, or procedural.<sup>5</sup>

The difference is further reflected in the parties’ evidentiary initiative and the standard of proof. International criminal courts are hybrid models of the two major criminal procedure systems, which poses a particular challenge for the court as an “epistemological machine,” because blending procedural rules results in a range of intractable procedural challenges and legal gaps, requiring a high degree of interpretive flexibility of legal norms, which in turn leads to legal uncertainty.

In international proceedings, the adversarial system has generally prevailed, with one important difference: the absence of a jury, that is, the absence of lay participants in the trial and decision-making process (Casesse, 2005, pp. 442.-457). This trend began with the establishment of the Nuremberg Tribunal (IMT) immediately following the end of the war in Europe. Although the Tribunal was created by the victorious powers—the USA, the UK, the USSR, and France—the US delegate to the negotiations arrived with a draft that served as the foundation for the discussions (Casesse, 2005, p. 443). The Tokyo Tribunal (IMTFE) was modeled on Nuremberg, established by the Allies in response to war crimes committed by Japan in the Far East.

The second wave of the development of international criminal procedural law took place during the 1990s with the establishment of the ICTY and ICTR. The tribunals’ statutes were created through United Nations Security Council resolutions under

---

<sup>5</sup> Buisman, *Ascertainment of the truth in international criminal justice*, PhD submission, January 2012 Brunel University, School of Law, p. 47., available at: <https://scispace.com/pdf/ascertainment-of-the-truth-in-international-criminal-justice-20dhyh0pgo.pdf>

Chapter VII of the UN Charter, which empowers the Council to take measures to maintain international peace and security (UNSC Resolution 827, 25 May 1993.; UNSC Resolution 955 од 8 November 1994). Further development of this model was left to the Rules of Procedure and Evidence, which were adopted by the judges under the authority of the Statute. The U.S. State Department provided a draft of the procedural rules, personnel, and additional logistical support. The Tribunal began its work based on the procedural rules of the New York State Bar, which established a classic adversarial procedure (Wilson, 2011, p. 55). The judges had the authority to amend and supplement the Rules, and from their adoption in 1993 until 2015, they were modified over 40 times. The fact that the procedural rules were changed more than 40 times demonstrates that the tribunals functioned as procedural “living laboratories” (Kuczynska, 2014, p. 7) and legal uncertainty became an inherent part of the judicial processes.

The third wave of international criminal procedure rules emerged with the creation of the ICC, as an attempt to materialize the 19<sup>th</sup>-century idea of establishing a permanent international criminal court. In theory, it is suggested that the Nuremberg trials represent a breakthrough, the ad hoc tribunals a renaissance, and the ICC a consolidation of international criminal justice (Werle, 2020, 1-27). The ICC was established under an international treaty the Rome Statute, which sets out the Court’s jurisdiction, structure, and functions. To date, 125 countries have ratified the Statute; however, some of the world’s most powerful political and military actors, including the USA, China, Russia, India, Israel, Saudi Arabia, and Turkey, remain non-parties, raising questions about the ICC’s political and legal legitimacy. Furthermore, the recent imposition of sanctions on ICC judges and prosecutors raises the question of whether such an undertaking is possible within the international community as „a system not designed to realise ultimate ends but to co/ordinate practical action between existing communities“ (Koskeniemi, 2010, p. 3).

The Rome Statute features a mixed-type procedure, intertwining legal institutions from both systems and it places greater emphasis on the question of truth compared to earlier international criminal courts. The Prosecutor functions as a judicial authority similar to an investigating judge (Schabas, 2001, p. 103), with the goal of establishing the accurate factual situation, which falls under the duty to ascertain the truth. Although the evidentiary initiative lies with the parties, the trial chamber has the authority to order the collection and presentation of new evidence, beyond that proposed by the parties. The principle of establishing the truth before the ICC is neither fully accepted nor entirely rejected; rather, it applies in a limited scope, the investigation and confirmation-of-charges phases are closer to the Continental European model, while the trial phase is closer to the adversarial model (Шкунрић, 2022, p. 300).

### 3. A CRITICAL REVIEW OF THE ABILITY OF INTERNATIONAL CRIMINAL COURTS TO ADDRESS THE ISSUE OF TRUTH

#### 3.1. *The Political-Contextual Framework*

International criminal procedural law is characterized by a specific relationship between law and politics, which is not typical for other branches of law within national legal systems (Bleckmann, 2005, p. 296). An example of this is Article 16 of the Rome Statute, which provides that the Security Council may defer or suspend an investigation or prosecution for a period of 12 months. The Security Council can initiate, prevent, or halt any investigation or prosecution, and thereby affect the establishment of truth regarding any crime, if political considerations guide its member states. The permanent members can shape the policy of prosecution and decision-making at the ICC, even though most of them are not parties to the Rome Statute. This provision represents a compromise between law and politics and highlights its potential to undermine the judicial independence of the ICC (Clarke & Koulen, 2014, p. 298).

The effectiveness of international criminal law largely depends on the cooperation of states with international courts and states are often unwilling to cooperate when the interests of the prosecution conflict with the interests of the state in possession of the evidence. For example, in the Blaškić case, Croatia argued that the International Tribunal did not have the authority to adjudicate or decide on Croatia's claims concerning national security. Referring to the Corfu Channel case, Croatia maintained that determining the needs of a state's national security is a fundamental attribute of its sovereignty. The trial chamber concluded that a state cannot be relieved of its obligations simply by claiming that its security is at risk.<sup>6</sup> Similarly, Slobodan Milošević was handed over to The Hague only after the United States threatened to withdraw its \$500 million contribution from the IMF fund designated for aid to Yugoslavia (Goldsmith, 2003, p. 93). In practice, this issue is even more pronounced at the ICC, which places greater emphasis on state sovereignty. The obligation to cooperate with the Court applies only to member states, and non-member states are not bound by such obligations unless the Security Council specifically mandates their cooperation.

States often obstruct procedural actions. In the Tadić and Kayishema cases, the defense complained of interference by the state authorities of Bosnia and Herzegovina and Rwanda. The appellate chambers<sup>7</sup> upheld these concerns, emphasizing that such occurrences lie beyond the Court's control, and concluded that the principle of equality of arms applies only to conditions within the Court's control, not to factors outside it, thereby effectively legitimizing procedural asymmetry.

---

<sup>6</sup> *Prosecutor v. Blaskic*, ICTY, No.IT-9414-AR108bis, Judgment on the Request of the Republic of Croatia for Review of the Decision of the Trial Chamber II of 18 July 1997 (Oct 29 1997), para 61

<sup>7</sup> *Prosecutor v. Tadic*, ICTY, A. Ch, 15 July 1999, paras 45-49, *Kayishema and Ruzindana*, ICTR, A. Ch., 1 June 2001, paras 67-75.

Contextual elements pertain to the necessity of situating crimes within a collective, political, and historical framework. The prosecution of crimes against humanity entails systematic and widespread acts, while genocide requires the presence of *dolus specialis*. These crimes are also characterized by discriminatory intent. Such features establish a clear distinction between homicide and genocide (Ракић, 2022. p.78).

Historical and political context becomes facts of criminal-law relevance, linked to the crime on the basis of causation and determination (Wilson, 2011, p.79). The prosecutor is obliged to prove their existence and their direct connection to the crime. However, these elements are difficult to establish with precision and often belong more to the realm of belief than to that of verifiable facts. An example of this is Prosecutor Geoffrey Nice's strategy in the trial of Slobodan Milošević<sup>8</sup>, as discussed by Wilson (Wilson, 2011, pp. 103.-108). He notes that, before the proceedings were terminated due to the defendant's death, in the early months of 2006, Nice consulted with the prosecution team regarding the closing arguments, specifically on what should serve as the starting point for a historical discussion of the origins of nationalist ideology. On that occasion, Nice recommended beginning with the *Field of Blackbirds* in Kosovo in 1389 and tracing connections from there to the defendant's crimes. Wilson reports that one member of the prosecution team, whom he later interviewed, stated: "No one can be prosecuted for what someone else did in 1389."

Delving into a people's history and culture, and reaching several centuries back into historical events and myths to establish the collective element of a contemporary crime, appears more as an expression of dominance than as a legitimate and lawful legal act. Moreover, such a "legal" argument fundamentally undermines the presumption of innocence, since the mere fact that the defendant belongs to a particular culture—assessed as a source of the crime—implies that his intent to commit the crime is inevitable. Considering the dialectical relationship between facts and legal characterization, it is legitimate to pose the question: to what extent do historical and political contextual facts influence the legal qualification of a crime, and to what extent does the reverse hold true? In other words, does the perception of the historical and political context sought by the prosecution depend on a pre-established conception of legal qualification?

The final contextual-political element is the tendency of international criminal justice to focus primarily on crimes that possess a representative character.<sup>9</sup> In the *Milutinović* case, the chamber invoked this principle to promote a more efficient indictment and suggested that the Prosecutor delete three counts.<sup>10</sup> Representativeness constitutes a process of selection aimed at identifying crimes that best exemplify the broader set of offenses (Ненадић, 2024, p. 543). Selection is guided by criteria of persuasiveness and authenticity, such as location, timing, the scale of the crime in terms of the number of victims, the gravity of the offense in terms of mode of commission, legal classification, relevant circumstances, the type of victims, and similar factors.<sup>11</sup> Practical considera-

<sup>8</sup> *Prosecutor v. Slobodan Milosevic*, ICTY, IT-02-54.

<sup>9</sup> *Rule 73 bis (D) ICTY*

<sup>10</sup> *Prosecutor v. Milan Milutinovic, et al*, ICTY, Decision on application of Rule 73 bis, 2006, IT-05-87-T, para 10-12

<sup>11</sup> *Rule 73 bis (D) ICTY*

tions are also taken into account, including the availability of evidence, the feasibility of collecting evidence from the crime scene, and the assessment of states' willingness to cooperate in providing evidence. A consequence of this focus on representativeness is that courts become blind to crimes that are not deemed representative, giving rise to what may be termed "blind spots" in the judicial narrative (Borda, 2021, p. 116). From the perspective of truth as a goal, the fact that a particular crime is not deemed sufficiently noteworthy for the court does not imply that it did not occur, nor that it lacks relevance from the standpoint of legal and historical truth.

### 3.2. The Procedural Framework

The procedural framework accommodates the existence of legal presumptions and facts that are exempt from evidentiary proof. Rules governing the selection of evidence are designed to uphold legal certainty and ensure ethical propriety. The principle of legal certainty dictates that generally known and notorious facts, facts whose proof is precluded by law, and legal presumptions are not subject to evidentiary demonstration. In Anglo-Saxon procedural law, the adjudication of generally known facts is regulated by the doctrine of *judicial notice*, (Бајовић, 2015, p. 156) a practice that has been extensively incorporated into the jurisprudence of the ICTY and ICTR.

Rules of Procedure and Evidence ICTY<sup>12</sup> provide for the recognition of facts in two instances. First, there is the formal acknowledgment of generally known facts, and second, the recognition of facts established by prior judgments or documentary evidence from other proceedings that relate to the factual issues under consideration in the current trial. Thus, the Court is entitled to accept certain facts as established by taking them from previous judgments or other cases, without requiring the parties' consent regarding the degree of proof of those facts. Although the Court does not permit the recognition of facts that directly implicate the guilt of the accused<sup>13</sup>, such broad authority nonetheless results in an expansion of the concept of generally known facts, beyond the realm of mere factual matter, to encompass the defining characteristics of a criminal act and its legal classification ((Бајовић, 2015, p. 175).

The Court justified such practice on the grounds of ensuring consistency and uniformity in decisions concerning factual matters, particularly where divergence in the determination of facts would be unjust.<sup>14</sup> The Court exhibits a tendency to preserve the consistency of its rulings and to prevent the issuance of contradictory decisions in similar factual circumstances, thereby prioritizing consistency as a value over the factual accuracy of individual judgments. Moreover, the adoption of evidence and findings from previous cases relieves the prosecutor of the burden of proof. The ICC appropriately departs from this experimental practice by recognizing *judicial notice*, but in a

---

<sup>12</sup> Rule 94

<sup>13</sup> *Prosecutor v. Sikirica, et al.*, ICTY, Decision on Prosecution's Motion for Judicial Notice of Adjudicated Facts. Case No.IT-95-8-PT, T. Ch., 27 September 2000, para. 3.

<sup>14</sup> Decision on Appeal against "Decision on Prosecution's Motion for Judicial Notice and Admission of Evidence", Case No.SCSL-04-14-AR73, App.Ch, 16 May 2005, para 22.

significantly more restrictive form,<sup>15</sup> acknowledging as established only those facts that are universally accepted, such as geographical or historical facts that are undisputed.

In international criminal justice, negotiated pleas were initially not permitted. The prevailing position at the outset was that concluding an agreement on the admission of a criminal act was impermissible. The original ICTY Statute makes no reference to the possibility of entering into plea agreements. This position, rooted in the traditions of the continental European system, was justified on the grounds that plea bargaining places the accused under pressure to waive procedural rights, excludes victims from the process, and simultaneously risks rewarding criminals for cooperation rather than punishing them for their crimes.<sup>16</sup> However, the *ad hoc* tribunals eventually abandoned this initial stance and began to implement plea agreements. Several factors explain this shift in practice: pressure from donors to expedite proceedings and financial constraints; the desire to quickly demonstrate tangible results; the aim of preventing the retraumatization of victims and the fading of their memories; and the promotion of reconciliation (Henham & Drumbl, 2005, p. 49).

The first accused to enter into an agreement with the ICTY was Dražen Erdemović, under unusual circumstances. Erdemović admitted guilt for his participation in the killing of 1,200 Muslim men at a farm near Pilica; however, this admission was not the result of a formal plea agreement, as such agreements were not yet provided for under the Rules of Procedure. Erdemović's defense counsel expressed surprise at the fact that Erdemović was convicted without a trial, noting that, as a lawyer, he was unfamiliar with the institution of plea bargaining, and that the accused's admission reflected a moral rather than a legal position on the part of his client (Tochilovsky, 2014, p. 378). The Appeals Chamber found that Erdemović had not been properly informed regarding the agreement and subsequently overturned the conviction. One month after the Appeals Chamber's decision, the Rules of Procedure were amended through the introduction of Article 62bis, which initially allowed for plea agreements. Following the Erdemović case, the practice of plea bargaining became increasingly common, although it was not formally and fully codified until three years later with the enactment of Article 62ter, which explicitly provides that the Prosecutor and the Defense may reach an agreement specifying the possible "concessions" the Prosecutor may offer the accused in exchange for an admission of guilt.

In the subsequent period, the Prosecutor's Office, under the banner of a "triumph of pragmatism" (Jorgansen, 2002, p. 407) granted numerous "concessions" to the accused, such as reducing the legal classification of the offense, or offering more lenient sanctions in exchange for a guilty plea. However, in practice, other elements of

---

<sup>15</sup> Rule 69, Rules of Procedure and Evidence ICC

<sup>16</sup> Arguments presented by the President of the ICTY, Antonio Cassese, in a report to diplomatic missions dated February 11, 1994, cited according to: M.P. Scharf, 'Trading Justice for Efficiency,' *Journal of International Criminal Justice*, no. 2, 2004, 1070-1081, p. 1073. In the same speech, opposing plea bargaining, Cassese emphasized that the Tribunal is not a municipal court but a court created to adjudicate the most serious crimes. More on this can be found in: J. N. Clark, 2009, p. 417. Therefore, it is justified to conclude that plea bargaining before the Tribunal was initially considered 'inappropriate. See: Combs, 2007, p. 59.

negotiation emerged, such as: prosecutor's promise to take measures for the protection of the accused and their family members<sup>17</sup>, commitments by the accused to testify in high-profile cases<sup>18</sup>, the defense's waiver of certain procedural actions<sup>19</sup>, the waiver of appeal<sup>20</sup>, assurances that evidence held by the Tribunal would not be disclosed to national courts<sup>21</sup>, and recommendations regarding the location of the convicted person's detention.<sup>22</sup> The Court advanced various arguments to justify plea agreements. In the cases of Erdemović, Plavšić, and Sikirica, the Court cited reasons of procedural economy (Petrig, 2008, p. 27). In Todorović, the Tribunal noted that "an admission of guilt is always significant from the perspective of establishing the truth"<sup>23</sup>; in Deronjić, that an admission "tends to promote the process of reconciliation"<sup>24</sup>; and in Zelenović, that a plea agreement relieves the victims from providing testimony in court and from repeatedly reliving their trauma.<sup>25</sup>

Criticism of plea agreements is based on several arguments: the accused is subjected to informal pressure to waive his/her procedural rights; perpetrators of criminal acts are rewarded for cooperating with the Prosecutor without being adequately punished for the crimes they committed; the sanctions imposed are disproportionate to the offenses; plea bargaining excludes public access to the trial, while introducing confidentiality into negotiations; victims of the crimes are excluded from the negotiation process, thereby preventing the criminal procedure from fulfilling its cathartic function (Ненадић, 2020, pp. 656-657).

In practice, plea bargaining can result in a de facto amnesty for criminal acts for which, pursuant to the Convention on the Prevention and Punishment of the Crime of Genocide and the Geneva Conventions, no one may be granted amnesty. Dropping certain charges for the sake of expediency is incompatible with the obligation to prosecute, as "sacrificing genocide for judicial economy is inconsistent with the spirit of the international treaty" (Petrig, 2008, p. 27). Once a plea agreement is concluded, it is never possible to know whether the prosecutor had sufficient evidence for the offenses subsequently waived through the agreement, or whether those offenses merely served as a bargaining tool. Plea bargaining leads to an incomplete truth (Clark, 2009, p. 424), that is, the minimal common denominator of the agreed-upon version of events. Judgments

---

<sup>17</sup> *Prosecutor v. Deronjic*, Case No. IT-02-61, Plea Agreement, 29 September 2003, para 11

<sup>18</sup> An example mentioned is the plea agreement of Milan Babić with the prosecution, in which he agreed to testify in a case that was, for the prosecution, much more important, the case of Slobodan Milošević. See: *Prosecutor v. Babić*, ICTY Case No. IT-03-72-S, Sentencing Judgment, 29 June 2004, paras 65, 69.

<sup>19</sup> *Prosecutor v. Todorović*, ICTY Case No. IT-95-9/1-S, Sentencing Judgment, July 31 2001, para 6,

<sup>20</sup> *Prosecutor v. Obrenović*, ICTY Case No. IT-02-60/2-S, Sentencing Judgment, 10 December 2003, para 15,

<sup>21</sup> *Prosecutor v. Zelenović*, ICTY Case No. IT-96-23/2-S, Decision on the Prosecution's Motion to Withdraw the Motion Under Rule 11bis, May 8, 2007

<sup>22</sup> *Prosecutor v. Nzabirinda*, ICTR Case No. ICTR-01-77, Judgment and Sentence, 23 February 2007, para 97

<sup>23</sup> *Prosecutor v. Todorović*, ICTY Case IT-95-9/1-S, Judgment, 31 July 2001., para 81, *Prosecutor v. Seruendo*, ICTR Case -2005-84-I, Judgment and Sentence, 12 June 2006, para 34.

<sup>24</sup> *Prosecutor v. Deronjic*, ICTY Case IT-02-61-S, Judgment, 30 March 2004, para 134

<sup>25</sup> *Prosecutor v. Zelenovic*, ICTY Case IT-96-23/2-S, Sentencing Judgment, 4 April 2007, para 45

based on such agreements constitute “negotiated historical records” (A. Petrig, 2008, p. 15) which subsequently create a gap between the judicial findings and the historical facts of the specific case (Clark, 2009, p. 427). The Rome Statute does not endorse this legal experiment; on the contrary, Article 65(4) explicitly provides that any discussions between the prosecutor and the defence concerning the amendment of charges, an admission of guilt, or the sentence proposed for the accused in relation to the committed criminal act, shall have no bearing on the Court.

### ***3.3. Subjective Elements in International Criminal Law***

In the Nuremberg Trials, the role of witnesses was secondary to documentary evidence. Vast quantity of archival and administrative records maintained by the regime itself—including orders, reports, prisoner lists, and official accounts—enabled the prosecutors to construct a comprehensive case without relying on extensive witness testimony. Witnesses were primarily used to corroborate documents and provide context, while the focus on documentary evidence allowed for a precise and detailed reconstruction of events and individual responsibility. This practice illustrates how the procedural emphasis on written evidence facilitated the efficient prosecution of a wide range of war crimes, reducing the uncertainty that might arise from relying solely on witness testimony.

With the strengthening of human rights and the growing awareness of potential criminal liability, the architects of contemporary crimes often refrain from leaving written traces. Prosecutors can no longer rely primarily on documents as evidence. Orders are frequently issued orally, and the gravest crimes are often entrusted to paramilitary forces or rogue groups without clear chains of command. Due to the principle of state cooperation and the voluntary nature of assistance in international criminal law, contemporary prosecutors must rely on the collaboration of states to obtain scarce documentation. Consequently, modern trials before international criminal courts are based almost exclusively on the testimony of eyewitnesses, other witnesses, and expert witnesses. The reliability and credibility of such testimony constitute a significant challenge, as witness accounts are inherently fallible and must be critically assessed.

Combs, who studied the establishment of facts before *ad hoc* tribunals, highlights a significant obstacle to fact-finding during criminal proceedings: educational deficits and cultural factors (Combs, 2007, p. 100). At the time of the trials, literacy rates were only 35% in Sierra Leone and less than two-thirds in Rwanda. Witnesses frequently lacked knowledge of facts directly concerning themselves, let alone the world around them. They were often unable to provide precise dates, durations, distances, or numerical estimates, nor could they interpret two-dimensional representations such as maps or charts (Combs, 2007, pp. 23 – 38). Questions were frequently misunderstood. These deficits led to errors in the reproduction and interpretation of memories, which, in turn, were often mischaracterized as lying or inconsistencies in testimony, resulting in the discrediting of such witnesses. The cognitive capacities of a witness are affected by the temporal gap between the commission of the crime and the trial, which increases the likelihood that witnesses will

be exposed to a large amount of potentially distorting information concerning past crimes (Combs, 2007, pp. 16 - 17). This may lead to revisions of testimony, as new information acquired after the event is often incorporated into memory, supplementing or altering it, sometimes in dramatic ways (Wells & Loftus, 2013, p. 621).

Trials before international criminal courts are replete with accounts of atrocities, mass killings, torture, intimidation, persecution of civilians, rape, sexual abuse, and the like. Victims of such crimes may develop post-traumatic stress disorder (PTSD), which explicitly affects memory function by creating disparities between neutral and traumatic recollections (Sparr & Bremner, 2005, p.76). Traumatic memory can lead to dissociative amnesia in victims and memory disturbances, including concentration difficulties (Sparr & Bremner, 2005, p.76). Psychologists engaged in ICTY cases observed that a rape victim, who claimed never to have repressed her memories, provided several differing testimonies in which she described the physical characteristics of her assailant inconsistently (Sparr & Bremner, 2005, p.71). Furthermore, victims often confuse memories of events that never occurred with memories of actual events (Wells & Loftus, 2013, p. 627). These factors contribute to the experience of testimony as a form of torture. For instance, during the exhaustive examination of a witness in the *Niyitegeka* case, the witness stated that he felt fatigued and subsequently lost consciousness (Combs, 2007, p. 40).

Although international criminal justice is grounded in the principle of individual criminal responsibility, trials before international criminal courts are often perceived not as trials of an individual, but of a collective. Such trials feature witnesses who testify with the conviction that they are entitled to be biased. In the *Limaj*<sup>26</sup> case, the court observed that witnesses altered their testimony under the influence of the KLA and explained that issues of group values are particularly significant given the cultural background of witnesses of Albanian origin in Kosovo, which can affect the willingness of some witnesses to testify truthfully during the proceedings. A similar example exists on the victims' side. A group of Tutsi survivors organized under the name IBUKA, and witnesses stated that this organization was responsible for false and fabricated accusations against individuals, as well as for having established fabricated testimony as a standard practice.<sup>27</sup>

It also occurred that witnesses gave false testimony to avoid their own liability, which is common when lower-ranking individuals testify against higher-ranking officers or due to personal animosities, which can be particularly significant in wartime circumstances. Combs also points to the element of financial incentives for witnesses (Combs, 2007, p. 139), such as coverage of travel and accommodation expenses and medical care, which they would not have access to in their home country. Some witnesses perceived this as an opportunity to earn money, making testifying attractive, and they offered to testify about events they had no knowledge of. All of these factors affected the quality of the testimony.

Combs identifies certain cultural specificities that have proven particularly salient in the context of international criminal trials. She emphasizes the presence of cultural

---

<sup>26</sup> *Prosecutor v. Limaj*, ICTY, IT-03-66-T, T. Ch., Judgment, 30 November 2005, para 13

<sup>27</sup> Nahimana Transcript, Mar. 13, 2003, at 34

taboos that may constrain a witness's capacity to testify, particularly in cases involving sexual elements (Combs, 2007, p. 74). Furthermore, she observes that in some societies, discussing the deceased is proscribed, and narrating acts of violence is construed as an invitation for such violence to recur. These cultural norms contributed to the production of highly ambiguous and cautious testimonies among some Rwandan witnesses, who were often reluctant to provide direct accounts of the violent acts (Combs, 2007, p. 89., p. 83).

Additionally, prosecutorial attempts to conduct identification procedures repeatedly encountered obstacles, as numerous Rwandan witnesses refused to identify the accused by pointing, a gesture proscribed within their cultural norms (N. Combs, 2007, p. 92). At the trial of Mladic<sup>28</sup> before the ICTY, the prosecutor asked witness whether he personally knew Kulin Ban, the 12<sup>th</sup>-century Bosnian ruler. Although this question evidently reflected a misunderstanding of the witness's testimony, it illustrated the prosecution's disregard for the cultural context of the community. This misstep elicited ridicule among members of all warring parties, highlighting the Tribunal's limited appreciation for the cultural and historical realities of Bosnia and Herzegovina.

Cultural elements are also significant from the perspective of the type of criminal procedural system. Dramble notes that the transplantation of domestic Western criminal law into an international context rests on the problematic fiction that Western judicial modalities are value-neutral and universal; in reality, they are deeply culturally conditioned (Drumbl, 2005, p. 551). Kordon cautions that adversarial systems entail numerous implicit expectations of witnesses, including the presumption that witnesses possess basic prior knowledge of judicial procedures and the language of the courtroom (Cordon, 2003, p.168).

The most forceful critique of the work of international criminal courts, from the perspective of cultural considerations as been offered by scholars within the TWAIL (Third World Approaches to International Law). Highlighting the Eurocentric nature of international criminal justice, they question the capacity of international criminal courts to adequately understand local cultural contexts. Mutua, for instance, constructs a three-dimensional SVS (savage-victim-savior) metaphor of human rights. In metaphor human rights institutions, including international criminal courts, tend to assume the role of the savior, operating within a set of culturally grounded norms and practices derived from liberal thought and philosophy, which are unfamiliar to the societal fabric of the communities they seek to "rescue" (Mutua, 2001, p. 204).

Kelsall appropriately raises the following questions: Is judicial intervention a form of cultural imperialism? Can international criminal trials function satisfactorily within unfamiliar cultural contexts? What are the prospects for the rule of law to gain legitimacy when international interventions are imposed upon local cultural beliefs and practices? (Kelsall, 2009, p.8)

---

<sup>28</sup> See: <https://n1info.rs/region/a35249-Sa-sudjenja-Ratku-Mladicu-Da-li-ste-poznavali-Kulina-bana/>

#### 4. CONCLUSION

Criminal law scholars have long recognized that *legal truth* and *historical truth* are far from congruent (Koskenniemi, 2011, p. 179). They are likewise aware that, for the court, regardless of whether it labels its truth-seeking function as the pursuit of “material truth” or as adherence to the “beyond a reasonable doubt” standard, ascertaining the truth does not constitute its primary objective. For a multitude of other objectives, such as: fairness, due process, legal certainty, the protection of the rights of the parties, efficiency, and expediency, inevitably constrain the pursuit of truth. In domestic legal systems, the relationship between legal truth and the factual truth about a historical event is not typically emphasized as a particularly significant issue. The reason lies in the fact that the community, to a greater or lesser extent, trusts the judiciary that rendered the decision. In peacetime conditions, national communities are not in conflict; judicial decisions are respected as the determinations of institutions in which confidence has been vested, and they are rarely employed as political instruments against a factual or political opponent.

However, the situation is markedly different in the realm of international criminal justice. No matter how strongly international justice insists that individual responsibility does not reflect the responsibility of the collectivity to which the individual belongs, in practice, and particularly within the sphere of international politics, the judgments often function as political instruments that one community deploys against another. At the same time, given the destructive potential of an unresolved past for communities affected by conflict, international criminal justice is frequently perceived as a continuation of the conflict by legal means. For this reason, the question of truth assumes particular importance before international criminal tribunals. Parties emerging from conflict tend to seek truth, as a remedy for a fractured society and as a source of hope for reconciliation, more readily than they seek the accountability of individual perpetrators.

The path toward truth in international criminal courts is considerably more arduous than that faced by national courts. Numerous substantive, procedural, contextual, political, and factual obstacles, unknown to domestic judiciaries, stand in the way. In addition, the pressure placed on these courts is immeasurably greater, and the expectations of conflict-affected parties and the international community are often unrealistic. Nevertheless, it is encouraging that the ICC has abandoned the „legal experiments“ conducted by the *ad hoc* tribunals, which facilitated the prosecutor’s task, at the expense of diminishing the value of truth in relation to other procedural principles. This development offers hope that international criminal justice has learned the lesson that truth matters.

There is relatively little theoretical literature that takes a critical view of international criminal justice. International criminal justice carries a substantial burden of moral responsibility, and its decisions are frequently interpreted as delivering a supreme ethical judgment on past events. Criticism of these courts can therefore be construed as an attempt to relativize atrocities or as a form of historical revisionism. As a result, it is a demanding task to critique international criminal tribunals while simultaneously

avoiding accusations of relativization or revisionism. Despite the moral authority associated with international criminal judgments, the field still requires sustained critical reflection. Such scrutiny does not diminish the gravity of atrocity crimes, nor does it invite relativization; rather, it strengthens the legitimacy and integrity of international criminal justice as a system tasked with producing authoritative legal truths about deeply contested histories.

### References

1. Aquinas, T. — *Summa Theologiae*, II-II, доступно на: <https://www.newadvent.org/summa/3109.htm>
2. Anghie, A. 2005. *Imperialism, Sovereignty, and the Making of International Law*, Cambridge University Press.
3. Borda, A. Z. 2021. *Histories Written by International Criminal Courts and Tribunals*, T.M.C. Asser Press.
4. Buisman, C. 2012. *Ascertainment of the Truth in International Criminal Justice*, PhD thesis, Brunel University, School of Law, доступно на: <https://scispace.com/pdf/ascertainment-of-the-truth-in-international-criminal-justice-20dhyh0pgo.pdf>
5. Cassese, A. 2005. *Међународно кривично право*, Београдски центар за људска права.
6. Clark, J. N. 2009. “Plea Bargaining at the ICTY: Guilty Pleas and Reconciliation”, *The European Journal of International Law*, vol. 20, no. 2.
7. Clarke, K. M. 2019. *Affective Justice*, Duke University Press.
8. Clarke, K. M., & Koulen, S. J. 2014. “The Legal Politics of the Article 16 Decision...”, *African Journal of Legal Studies*, 7.
9. Combs, N. 2007. *Guilty Pleas in International Criminal Law*, Stanford University Press.
10. Combs, N. 2010. *Fact Finding without Facts*, Cambridge University Press.
11. Cordon, I. M., Goodman, G. S., & Anderson, S. J. 2003. “Children in Court”, у: van Koppen, P. J. & Penrod, S. D. (eds.), *Adversarial versus Inquisitorial Justice*, Springer.
12. Damaska, M. 1997. *Evidence Law Adrift*, Yale University Press.
13. Damaska, M. 1998. “Truth in Adjudication”, *UC Law Journal*, vol. 49, iss. 2.
14. Drumbl, M. A. 2005. “Collective Violence and Individual Punishment...”, *Northwestern University Law Review*, 99(2).
15. Drumbl, M. A. 2007. *Atrocity, Punishment, and International Law*, Cambridge University Press.
16. Garapon, A. 2004. “Three Challenges for International Criminal Justice”, *Journal of International Criminal Justice*, vol. 2.
17. Goldsmith, J. 2003. “The Self-defeating International Criminal Court”, *U. Chi. L. Rev.*, 70.

18. Henham, R., & Drumbl, M. 2005. "Plea Bargaining at the ICTY...", *Criminal Law Forum*, 16.
19. Hillier, T., & Dingwall, G. 2021. *Criminal Justice and Persuasion of Truth*, Bristol University Press.
20. Jorgansen, N. H. B. 2002. "The Genocide Acquittal in the Sikirica Case...", *Leiden Journal of International Law*.
21. Kelsall, T. 2009. *Culture under Cross-Examination: International Justice and the SCSL*, Cambridge University Press.
22. Kennedy, D. 2004. *The Dark Sides of Virtue*, Princeton University Press.
23. Klamberg, M. 2013. *Evidence in International Criminal Trials*, Martinus Nijhoff Publishers.
24. Koskeniemi, M. 2002a. "Between Impunity and Show Trials", *Max Planck Yearbook of UN Law*, 6(1).
25. Koskeniemi, M. 2002b. "The Lady Doth Protest Too Much...", *The Modern Law Review*, vol. 65, no. 2.
26. Koskeniemi, M. 2010. "What is International Law For?", y: Evans, M. (ed.), *International Law* (3<sup>rd</sup> ed.), Oxford University Press.
27. Kuczynska, H. 2014. *The Accusation Model Before the ICC*, Springer.
28. Laudan, L. 2006. *Truth, Error and Criminal Law*, Cambridge University Press.
29. Landsman, S. 1988. *Readings on Adversarial Justice*, West Publishing.
30. Mégret, F. 2006. "From 'Savages' to 'Unlawful Combatants'...", y: Orford, A. (ed.), *International Law and its Others*, Cambridge University Press.
31. Mutua, M. 2001. "Savages, Victims, and Saviors: The Metaphor of Human Rights", *Harvard International Law Journal*, vol. 42, no. 1.
32. Petrig, A. 2008. "Negotiated Justice and the Goals of International Criminal Tribunals", *Chicago Kent Journal of International and Comparative Law*, vol. 8.
33. Schabas, W. A. 2012. *Unimaginable Atrocities*, Oxford University Press.
34. Schabas, W. A. 2001. *An Introduction to the International Criminal Court*, Cambridge University Press.
35. Scharf, M. P. 2004. "Trading Justice for Efficiency", *Journal of International Criminal Justice*, no. 2.
36. Sparr, L. F., & Bremner, J. D. 2005. "Post-traumatic Stress Disorder and Memory...", *J Am Acad Psychiatry Law*, 33(1).
37. Stover, E., & Weinstein, H. M. 2004. "Introduction: Conflict, Justice and Reclamation", y: *My Neighbour, My Enemy*, Cambridge University Press.
38. Tochilovsky, V. 2014. *The Law and Jurisprudence of the ICTs and Courts*, Intersentia.
39. Wells, G. L., & Loftus, E. F. 2013. "Eyewitness Memory for People and Events", y: Otto & Weiner (eds.), *Handbook of Psychology*, vol. 11, Wiley, доступно на: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2201954](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2201954)
40. Werle, G. 2020. *Principles of International Criminal Law* (2<sup>nd</sup> ed.), Cambridge University Press.
41. Wilson, R. A. 2011. *Writing History in International Criminal Trials*, Cambridge University Press.

42. Бајовић, В. 2015. *О чињеницама и истини у кривичном процесу*, Правни факултет Универзитета у Београду.
43. Ненадић, С. 2020. “Споразум о признању кривичног дела пред МКП...”, *Зборник УМКП*, 656–657.
44. Ненадић, С. 2024. *Правна и историјска истина у лимбу између љубави и мржње*, *Зборник УМКП*, 533–550.
45. Ракић, Б. 2022. “Усташки геноцид над Србима — *dolus specialis* који траје”, *Найредак*, III/2, 69–102.
46. Шкулић, М. 2005. *Међународни кривични суд*, Правни факултет Универзитета у Београду.
47. Шкунрић, А. 2022. „Елементи начела утврђивања истине у нормативном оквиру поступка пред МКС“, *Crimen*, XIII(3).

### **Case Law**

1. Prosecutor v Tadic, ICTY, Case No. IT-94-1-T
2. Prosecutor v. Kayishema and Ruzindana, ICTR, Case No. ICTR-95-1-T
3. Prosecutor v. Slobodan Milosevic, ICTY, Case No. IT-02-54.
4. Prosecutor v Milan Milutinovic, et al, ICTY, Case No. IT-05-87-T
5. Prosecutor v. Sikirica, et al., ICTY, Case No.IT-95-8-PT
6. Prosecutor v. Deronjic, Case No, IT-02-61,
7. Prosecutor v. Babic, ICTY Case No.IT-03-72-S
8. Prosecutor v. Todorović, ICTY Case No. IT-95-9/1-S
9. Prosecutor v. Obrenović, ICTY Case No. IT-02-60/2-S
10. Prosecutor v. Zelenović, ICTY Case No. IT-96-23/2-S
11. Prosecutor v. Nzabirinda, ICTR Case No. ICTR-01-77
12. Prosecutor v. Todorović, ICTY Case No. IT-95-9/1-S
13. Prosecutor v. Serugendo, ICTR Case No. IT-2005-84-I
14. Prosecutor v. Deronjic, ICTY Case No. IT-02-61-S
15. Prosecutor v. Zelenovic, ICTY Case No. IT-96-23/2-S
16. Prosecutor v. Limaj, ICTY, Case No. IT-03-66-T



# ENHANCING EU LEGAL AND POLITICAL COMMITMENT TO THE ICC: STRATEGIES TO SECURE ARRESTS AND COMBAT IMPUNITY

Ajna Jodanović\*

Almir Beridan\*\*

*The enforcement of arrest warrants issued by the International Criminal Court (ICC) remains one of the most persistent challenges of international criminal justice. Although all European Union (EU) Member States are parties to the Rome Statute and are therefore bound by a clear obligation to arrest and surrender persons sought by the Court, practice demonstrates that compliance has been uneven and, in some instances, influenced by political considerations. At the same time, the European Union possesses significant legal, political, and economic leverage that could be mobilised to support ICC arrest cooperation, both internally and in its relations with third States. This potential, however, has not yet been translated into a coherent and operational approach. This paper examines how the EU can strengthen its legal and political commitment to the ICC by addressing the gap between formal obligations and effective enforcement. It situates cooperation with the Court within the EU's treaty-based commitment to international law, multilateralism, and the fight against impunity, and critically assesses the limitations of the existing EU-ICC cooperation framework, with particular attention to the execution of arrest warrants. The analysis is based on qualitative legal and policy research drawing on the Rome Statute, relevant provisions of the Treaty on European Union, EU policy instruments, and ICC practice. The paper argues that a more coherent and strategically coordinated EU approach—combining enhanced internal coordination among Member States with the systematic use of external policy instruments—could significantly improve the enforcement of ICC arrest warrants and reinforce the Union's credibility as a supporter of international criminal justice.*

**KEYWORDS:** *International Criminal Court, European Union, Arrest Warrants, Cooperation, International Criminal Justice.*

---

\* Associate Professor, Faculty of Law, University of Bihać.  
E-mail: [ajna\\_x@hotmail.com](mailto:ajna_x@hotmail.com)

\*\* DDRCCA President and Project Manager, B&H and Germany.  
E-mail: [almir.beridan@gmail.com](mailto:almir.beridan@gmail.com)

## 1. INTRODUCTION

The International Criminal Court (hereinafter: ICC) conducts proceedings in accordance with internationally recognised fair trial standards, ensuring respect for the rights of the accused while providing protection for witnesses and meaningful avenues for victim participation. Its case law has addressed a broad spectrum of serious international crimes, including the recruitment and use of child soldiers, murder, rape, attacks against civilian populations, and the destruction of cultural heritage. In cases resulting in conviction, ICC judges have ordered reparations as a means of acknowledging and redressing harm suffered by victims. With the support of more than 120 States Parties, the Rome Statute system aims not only to secure accountability for the gravest crimes, but also to contribute to social recovery, stability, and the promotion of lasting peace.<sup>1</sup>

The enforcement of arrest warrants issued by the ICC remains one of the most persistent structural challenges facing contemporary international criminal justice. Although the Court is mandated to prosecute those responsible for genocide, crimes against humanity, war crimes, and the crime of aggression, its effectiveness is intrinsically dependent on the cooperation of states, particularly with respect to arrest and surrender. Lacking any autonomous enforcement capacity, the ICC must rely almost entirely on national authorities to give effect to its judicial decisions. This dependence has repeatedly revealed a gap between the Court's formal authority and its practical ability to secure the appearance of suspects before it (Schabas, 2016, pp. 1021–1026; Cryer *et al.*, 2019, pp. 387–395).

European Union (hereinafter: EU) action in support of the ICC is primarily directed at responding to external challenges to the Court's mandate, including measures aimed at undermining its judges and staff through political pressure or the threat of sanctions. In this context, the EU has made use of public statements, diplomatic démarches, and formal interventions to defend the Court's independence and institutional integrity. At the same time, the Union actively promotes the universality of the Rome Statute by encouraging ratification or accession through human rights dialogues, targeted diplomatic engagement with specific states, and the inclusion of provisions in agreements with non-EU partners that call for adherence to the Rome Statute framework.

The rules governing international cooperation can be found both in international law laying down the rules applicable to inter-ethnic relations and in domestic law defining the measures, conditions and modalities that States perceive as cooperation (Liakopoulos, 2019, p.375.).

Notwithstanding the relative legal clarity of cooperation obligations under the Rome Statute, practice reveals persistent shortcomings in their implementation. Arrest warrants issued by the ICC have, in numerous instances, remained unenforced for extended periods, while persons sought by the Court have been able to travel to, and remain within, the territory of States Parties without being apprehended (International Criminal Court, various years; Lee, 2014). Such patterns of non-enforcement are widely

---

<sup>1</sup> See more at: European External Action Service (EEAS). *International criminal justice*. Available at: [https://www.eeas.europa.eu/eeas/international-criminal-justice\\_en](https://www.eeas.europa.eu/eeas/international-criminal-justice_en) (25.9.2025).

understood not as the result of uncertainty in the applicable legal framework, but rather as a consequence of political considerations, diplomatic sensitivities, and strategic calculations on the part of states. These dynamics have contributed to selective cooperation with the Court and have fuelled broader concerns regarding impunity and the politicisation of international criminal justice (Nouwen and Werner, 2010).<sup>2</sup>

This tension between binding legal obligation and political discretion is particularly evident within the European Union. All EU Member States are parties to the Rome Statute and have, at least formally, incorporated its core cooperation obligations into their domestic legal orders. In parallel, the EU's constitutional framework explicitly commits the Union to the promotion of international law, respect for human rights, and the fight against impunity as guiding principles of its external action. These commitments, enshrined in the Treaty on European Union, situate support for international criminal justice — and cooperation with the ICC in particular—within the normative foundations of the EU's legal order.<sup>3</sup>

The coexistence of extensive formal commitments with uneven enforcement practice makes the European Union a particularly revealing setting in which to examine challenges related to compliance with international criminal law obligations. It also raises questions concerning the coherence and effectiveness of the Union's collective approach to supporting the International Criminal Court (Gaeta, 2007).

The EU's relevance in this respect is not limited to the internal conduct of its Member States. Acting as a global actor, the Union exercises significant political, diplomatic, and economic influence through a broad array of external policy instruments, including its trade and development policy and the European Neighbourhood Policy (Bartels, 2008). The European Union has repeatedly reaffirmed its political and diplomatic commitment to the ICC and to the fight against impunity, framing international criminal justice as central to its normative values and external policy. Yet, multiple recent assessments and institutional reports note that this declaratory support has rarely translated into a coherent, Union-wide operational strategy aimed at ensuring consistent execution of ICC arrest warrants, both within the EU and in its engagement with third countries.<sup>4</sup>

---

<sup>2</sup> See also: European Parliament, Directorate-General for External Policies (2014) *Mainstreaming support for the International Criminal Court in the EU's external action*. Brussels: European Parliament. Available at: [https://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/433844/EXPO-DROI\\_ET\(2014\)433844\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/433844/EXPO-DROI_ET(2014)433844_EN.pdf) (25.9.2025).

<sup>3</sup> European Union (2016) *Consolidated version of the Treaty on European Union*. Official Journal of the European Union, C 202, 7 June, pp. 13–46, Arts 3(5) and 21.; Council of the European Union (2003) *Council Common Position 2003/444/CFSP of 16 June 2003 on the International Criminal Court*. Official Journal of the European Union, L 150, 18 June, pp. 67–69. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32003E0444> (25.9.2025).

<sup>4</sup> Council of the European Union (various years) *Council Conclusions on the International Criminal Court*. Brussels; European Parliament, Directorate-General for External Policies (2014) *Mainstreaming support for the International Criminal Court in the EU's external action*. Brussels: European Parliament. Available at: [https://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/433844/EXPO-DROI\\_ET\(2014\)433844\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/433844/EXPO-DROI_ET(2014)433844_EN.pdf) (25.9.2025). Human Rights Watch (2024) *EU cooperation in International Criminal Court arrests*, 26 November. Available at: <https://www.hrw.org/news/2024/11/26/eu-cooperation-international-criminal-court-arrests>

Against this background, this paper examines how the European Union might strengthen its legal and political commitment to the ICC by developing more coherent and effective approaches to the enforcement of arrest warrants. Its primary objective is to identify strategies that are both legally sound and politically feasible, capable of narrowing the gap between formal obligations and practical compliance. The analysis is guided by the following research question: how can the EU more effectively mobilise its internal legal framework and external policy instruments in order to support the execution of ICC arrest warrants and contribute to the broader objective of combating impunity for international crimes?

Methodologically, the paper is based on qualitative legal and policy analysis. It draws on primary sources, including the Rome Statute, relevant provisions of the Treaty on European Union, EU Council decisions and policy documents, as well as ICC cooperation practice, complemented by selected academic literature and relevant jurisprudence. Rather than seeking to provide an exhaustive empirical account, the paper adopts a focused normative approach, advancing a set of concrete proposals grounded in existing legal competences and institutional practice. This approach is intended to capture the complex interaction between law and politics that characterises cooperation with the ICC in practice (McCrudden, 2006).

## 2. LEGAL AND INSTITUTIONAL FRAMEWORK FOR ICC ARRESTS IN THE EUROPEAN UNION

This chapter examines the legal and institutional framework governing the enforcement of International Criminal Court arrest warrants within the European Union. It begins by analysing the binding obligations imposed on States Parties under the Rome Statute in relation to cooperation, arrest, and surrender. It then places these obligations within the EU's constitutional order, with particular attention to the Union's treaty-based commitment to the promotion of international law and the fight against impunity. Finally, it considers the existing EU–ICC cooperation framework, outlining its normative foundations and identifying the main institutional constraints that affect the practical execution of ICC arrest warrants.

### *2.1. Obligations under the Rome Statute*

The Rome Statute establishes a cooperation regime that is central to the functioning of the International Criminal Court, reflecting the Court's structural reliance on states for the enforcement of its judicial decisions. Pursuant to Article 86 of the Statute, States Parties are under a general obligation to cooperate fully with the Court (International Criminal Court, 1998). This general duty constitutes the cornerstone of the ICC's

---

(25.9.2025).; European Parliament Policy Department for External Relations (2025) *Mechanisms of international justice to fight impunity*. Brussels: European Parliament. Available at: [https://www.europarl.europa.eu/RegData/etudes/STUD/2025/775282/EXPO\\_STU\(2025\)775282\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2025/775282/EXPO_STU(2025)775282_EN.pdf) (25.9.2025).

cooperation framework and applies to all forms of assistance envisaged under Part 9 of the Statute (Schabas, 2016; Cryer *et al.*, 2019).

The obligation of cooperation is given concrete expression through a series of provisions governing arrest and surrender. Article 89 of the Rome Statute requires States Parties to comply with requests for the arrest and surrender of persons sought by the Court, in accordance with procedures established under their domestic law. This obligation is framed as mandatory and forms a central component of the Statute's enforcement regime, reflecting the Court's dependence on national authorities for the execution of arrest warrants (International Criminal Court, 1998; Cryer *et al.*, 2019). Article 91 of the Rome Statute further specifies the formal requirements that must accompany requests for arrest and surrender, while Article 90 addresses situations involving competing requests for extradition or surrender. These provisions are widely understood as forming part of a mandatory cooperation regime designed to minimise discretionary refusal and to structure the resolution of conflicts between competing international obligations (International Criminal Court, 1998; Schabas, 2016; Cryer *et al.*, 2019; Kreß and Prost, 2016). Taken together, these provisions establish a legal framework aimed at enabling the arrest and surrender of persons sought by the Court when present on the territory of a State Party, while leaving their practical effectiveness dependent on state compliance.

Importantly, the Rome Statute does not confer political discretion on States Parties to refuse cooperation with the Court. While domestic procedural law governs the modalities through which arrest and surrender are carried out, the underlying duty to comply with requests for cooperation is mandatory in nature and derives directly from the obligations assumed under treaty law (International Criminal Court, 1998; Schabas, 2016; Cryer *et al.*, 2019).

In the absence of a legally recognised ground for non-cooperation under the Rome Statute, a failure by a State Party to arrest or surrender a person sought by the Court constitutes a breach of the obligations assumed under the Statute (International Criminal Court, 1998; Schabas, 2016; Cryer *et al.*, 2019). The cooperation regime is thus intended to bridge the gap between the Court's judicial authority and its lack of autonomous enforcement powers by translating arrest and surrender into binding obligations of cooperation under international law (International Criminal Court, 1998, Art. 86, 89–91; Schabas, 2016, pp. 1009–1027; Cryer *et al.*, 2019, pp. 387–395).

The obligations arising under the Rome Statute establish a clear and legally robust framework of cooperation, requiring States Parties to give effect to the International Criminal Court's requests for arrest and surrender. Although the Statute accords a degree of procedural autonomy to domestic legal systems and provides mechanisms to address potential conflicts of obligations, it leaves little room for ambiguity as to the binding nature of the duty to execute the Court's arrest warrants. Yet the effectiveness of this cooperation regime ultimately rests on the willingness of states to translate formal legal commitments into concrete action. This inherent reliance on state compliance forms the critical backdrop against which the European Union's role must be assessed, both as a collective of States Parties subject to the Rome Statute and as a legal order that professes a foundational commitment to international law and the fight against impunity.

## 2.2 EU Treaty Commitments to International Criminal Justice

The obligations arising under the Rome Statute are embedded within a broader constitutional context for European Union Member States, shaped not only by their individual status as States Parties to the Statute but also by the normative commitments enshrined in the EU's founding treaties. Although the European Union is not itself a party to the Rome Statute, its constitutional framework articulates a sustained commitment to the promotion of international law, multilateralism, and accountability for serious international crimes (European Union, 2016, Arts. 3(5), 21).

Article 3(5) of the Treaty on European Union provides that, in its relations with the wider world, the Union shall uphold and promote its values and contribute to the strict observance and development of international law. This provision situates respect for international legal obligations at the core of the Union's external identity, rather than framing it as a matter of contingent political choice. In the field of international criminal justice, Article 3(5) TEU has therefore been understood as furnishing a constitutional basis for the Union's political and legal support for institutions such as the International Criminal Court and for its principled opposition to impunity for grave international crimes (European Union, 2016, Art. 3(5); Cremona and De Witte, 2008). *Read together, Articles 3(5) and 21 TEU situate international criminal justice within the Union's treaty-defined objectives by anchoring cooperation with international institutions, including the ICC, in the EU's foundational commitment to international law, multilateralism, and the rule of law, rather than framing such cooperation as a purely discretionary policy choice* (European Union, 2016, Art. 21; Mannes, 2002, pp. 239–243).

While these treaty provisions do not confer direct competences on the European Union to enforce ICC arrest warrants, they nonetheless give rise to a requirement of constitutional coherence in the Union's external action. Member States are expected to exercise their national powers—including those relating to arrest and surrender under the Rome Statute—in a manner that does not undermine the Union's collective commitment to international law and the fight against impunity. In this respect, the EU treaties, read in light of the principle of sincere cooperation and the emerging doctrine of coherence in EU external relations law, provide an essential normative and legal framework within which the Union may legitimately seek to promote, coordinate, and reinforce compliance with ICC obligations, both internally among its Member States and externally in its relations with third countries (European Union, 2016, Arts. 3(5), 4(3), 21; Hillion, 2008, pp. 10–36).

Taken together, Articles 3(5), 4(3), and 21 TEU establish a constitutional framework that, while not conferring direct enforcement powers on the European Union, situates cooperation with international criminal justice within the Union's treaty-defined objectives. These provisions require both the Union and its Member States to act consistently with their shared commitment to international law, multilateralism, and the fight against impunity. Accordingly, support for the International Criminal Court cannot be reduced to a matter of political discretion but must be understood in light of the constitutional principles governing the Union's external action. This framework provides the basis for assessing how the EU has sought to translate its normative commitments into concrete policies and institutional practices, examined in the following section.

### **2.3 EU–ICC Cooperation Framework**

The EU and its member states have long been strong advocates for the ICC and have made legally binding commitments to promote the universality and integrity of the Rome Statute, the Court's founding treaty. The EU has pledged to support the ICC's independence, cooperation with the Court, and the implementation of the principle of complementarity, which ensures that the ICC acts only when national authorities do not genuinely investigate and prosecute, as appropriate, international crimes. This firm support has been essential to the ICC's functioning since its establishment more than 20 years ago.<sup>5</sup>

Although the European Union is not a party to the Rome Statute and therefore does not bear direct treaty-based obligations of cooperation with the International Criminal Court, it has nonetheless developed a distinct institutional and policy framework aimed at supporting the Court and facilitating compliance by its Member States. This framework reflects the Union's treaty-based commitment to the promotion of international law and the fight against impunity, as articulated in Articles 3(5) and 21 TEU, and situates support for the ICC within the broader objectives of the EU's external action (European Union, 2016, Arts 3(5), 21).

The central policy instrument underpinning this framework is Council Common Position 2003/444/CFSP on the International Criminal Court, adopted shortly after the entry into force of the Rome Statute. Through the Common Position, the EU and its Member States commit themselves to supporting the universality and integrity of the Rome Statute, safeguarding the independence of the Court, and promoting effective cooperation with its activities. While the Common Position does not create legally binding obligations comparable to those arising under the Rome Statute, it establishes a shared policy orientation intended to guide Member State conduct and to promote consistency with the Union's collective objectives in the field of international criminal justice (Council of the European Union, 2003).

This policy commitment has been reaffirmed and further elaborated through successive Council Conclusions on the International Criminal Court, which consistently emphasise the European Union's strong political support for the Court and underline the importance of full cooperation by States Parties. In more recent iterations, the Council has explicitly acknowledged the persistent challenges associated with the execution of ICC arrest warrants and has called for more coordinated and effective action, both within the Union and in its external relations with third countries. Although these instruments remain non-binding in nature, they play a significant role in shaping expectations of Member State conduct and in sustaining political pressure for compliance (Council of the European Union, various years).

At the institutional level, cooperation between the European Union and the International Criminal Court is further reflected in regular contacts and structured dialogues with the Court's organs, including the Office of the Prosecutor and the Registry.

---

<sup>5</sup> See more at: International Commission of Jurists (ICJ) (2025) *EU: Joint statement calls for strong defense of the ICC amid rising geopolitical tensions*. Available at: <https://www.icj.org/eu-joint-statement-calls-for-strong-defense-of-the-icc-amid-rising-geopolitical-tensions/> (25.9.2025).

EU delegations in third countries are routinely tasked with supporting ICC-related objectives through political dialogue, diplomatic démarches, and engagement with host-state authorities. In addition, the Union makes use of its external financial instruments to provide practical and financial support to the Court and to related capacity-building initiatives, thereby strengthening the ICC's institutional effectiveness without assuming responsibility for the enforcement of arrest warrants (European Parliament, 2014).

Notwithstanding these measures, the EU–ICC cooperation framework remains subject to significant structural limitations. In particular, the absence of binding EU-level mechanisms capable of ensuring the execution of ICC arrest warrants means that the effectiveness of EU support continues to depend primarily on the political will and domestic legal practice of individual Member States. As a result, EU action in this field has often been characterised by fragmentation and a reliance on soft-law instruments, rather than by a comprehensive and operational strategy capable of addressing obstacles to arrest and surrender. This structural weakness underscores the persistent gap between the Union's normative commitments and practical outcomes, and provides the context for the strategies examined in the subsequent sections of this paper (European Parliament, 2014; Council of the European Union, various years).

In sum, the EU–ICC cooperation framework embodies a sustained political and institutional commitment to supporting the International Criminal Court, articulated through a range of policy, diplomatic, and financial instruments. However, the absence of binding EU-level mechanisms capable of ensuring the execution of ICC arrest warrants means that this framework remains largely dependent on soft-law coordination and the political will of individual Member States. This structural imbalance between normative commitment and operational capacity provides the backdrop for the strategies developed in the following section.

### **3. STRENGTHENING THE EUROPEAN UNION'S COMMITMENT TO THE ENFORCEMENT OF ICC ARREST WARRANTS**

Building on the legal and institutional framework examined in the preceding chapter, this section turns to the practical and structural challenges surrounding the enforcement of ICC arrest warrants and the role of the European Union in addressing them. It moves beyond the identification of formal obligations to examine the persistent gap between the EU's normative commitment to international criminal justice and the realities of arrest cooperation in practice. By situating the enforcement deficit within a broader context of political constraints, institutional fragmentation, and external pressure on the Court, this chapter lays the groundwork for a critical assessment of the EU's existing approach and the rationale for its strategic reorientation. It thereby provides the analytical bridge between the descriptive legal framework and the set of concrete strategies proposed in the following sections.

### 3.1 Context: The Enforcement Gap in International Criminal Justice

The foregoing analysis has shown that, despite the European Union's consistent and sustained political support for the International Criminal Court, a discernible gap persists between the Union's normative commitments and the effective enforcement of ICC arrest warrants in practice (Schabas, 2016, pp. 1009–1027; European Parliament, 2014). While the legal obligation to arrest and surrender individuals sought by the Court is clearly established under the Rome Statute, the translation of these obligations into concrete enforcement outcomes has remained uneven, revealing structural weaknesses in the existing cooperation framework.

International criminal courts and tribunals operate within a persistent enforcement paradox, defined by the tension between their extensive mandates and their lack of autonomous enforcement powers. Despite the establishment of a permanent International Criminal Court as a major advance in international criminal justice, the Court remains structurally dependent on state cooperation, particularly for the arrest and surrender of suspects.<sup>6</sup>

Within the EU, this structural enforcement paradox becomes particularly visible. All EU Member States are parties to the Rome Statute and have formally accepted the obligation to arrest and surrender persons sought by the Court. At the same time, the EU's constitutional framework expressly commits the Union to the promotion of international law, multilateralism, and the fight against impunity as guiding principles of its external action. Yet the EU's practice demonstrates how this broader enforcement paradox materialises in a concrete regional context, as a persistent gap remains between the Union's declared support for the ICC and the effective execution of its arrest warrants. (Schabas, 2016; European Parliament, 2014). This makes the European Union a particularly revealing case study for examining the structural limits of international criminal justice enforcement.

The preservation of the integrity of the Rome Statute<sup>7</sup> constitutes one of the central priorities within the European Union's contemporary policy framework on support for the International Criminal Court, which is implemented through a diversified and multi-layered set of measures. Upholding the Court's integrity entails not only safeguarding its foundational legal principles, but also navigating the inherent tensions that may arise between strict adherence to legality and broader political considerations.<sup>8</sup> In pursuit of these objectives, the EU expresses political support for the Court through formal statements and resolutions addressing key moments in the Court's work, including the election of its

---

<sup>6</sup> See more at: ICC Forum (n.d.) *Arrest*. Available at: <https://iccforum.com/arrest> (25.9.2025).

<sup>7</sup> International Criminal Court (2021) *Rome Statute of the International Criminal Court*. The Hague: International Criminal Court. Available at: <https://www.icc-cpi.int/sites/default/files/2024-05/Rome-Statute-eng.pdf> (25.9.2025).

<sup>8</sup> Bekou, O. and Mistry, H. (2014) *Mainstreaming support for the International Criminal Court in the EU's policies*. Brussels: European Parliament, Directorate-General for External Policies of the Union, Policy Department (PE 433.844 EN). Available at: [https://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/433844/EXPO-DROI\\_ET\(2014\)433844\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/433844/EXPO-DROI_ET(2014)433844_EN.pdf) (25.9.2025).

officials, the issuance and execution of arrest warrants, the transfer of accused persons, the delivery of judicial decisions, and the submission of referrals (Bekou, O., 2021, p. 7)

A persistent challenge to the effective enforcement of International Criminal Court arrest warrants within the European Union stems from the fragmented manner in which obligations arising under the Rome Statute are incorporated into national legal systems. Although all EU Member States are parties to the Statute, domestic rules governing arrest and surrender in ICC-related proceedings continue to differ substantially with regard to procedural arrangements, institutional responsibilities, and the treatment of issues such as immunities and competing international obligations. Scholarly analyses have consistently pointed to that these divergences contribute to legal uncertainty and uneven cooperation practices, thereby weakening the consistency and overall effectiveness of ICC arrest enforcement across the Union (Bekou and Birkett, 2016; Lhotsky; 2016; Schabas, 2017; Tladi; 2015; Tladi, 2018).

From a theoretical perspective, such fragmentation sits uneasily with the principle of sincere cooperation enshrined in Article 4(3) TEU. As reflected in the EU external relations literature, including the work of Eeckhout (2011) and Van Elsuwege (2010), this principle entails more than formal compliance with Union law and encompasses a duty of practical coordination where Member State conduct bears upon the credibility and effectiveness of the Union's external action. Given that support for the International Criminal Court forms an established component of the EU's external policy framework, persistent discrepancies in domestic implementation may therefore be understood as structural impediments to the effective pursuit of that objective, rather than as mere expressions of national procedural autonomy.

Harmonisation in this context should not be understood as implying the centralisation of enforcement powers at the EU level, nor the wholesale unification of national criminal law. As reflected in the scholarship on EU criminal law, including the work of Mitsilegas (2016) and Weyembergh (2005), harmonisation has predominantly taken the form of approximation through minimum standards and shared interpretative frameworks, designed to limit excessive divergence while leaving a significant margin of discretion to the Member States.

Applied to cooperation with the ICC, such an approach would be directed at core aspects of arrest and surrender procedures, notably the execution of ICC warrants, the management of situations involving competing extradition or surrender requests, and the treatment of claims relating to official capacity or immunities. These are areas in which scholarly analysis has repeatedly highlighted divergent approaches at the national level, reflecting both legal and institutional variation in the implementation of international obligations (Akande, 2009).

A recurring challenge that the European Union must take into account in shaping its future approach to the International Criminal Court concerns the persistent failure of certain States to arrest or surrender individuals sought by the Court. Questions relating to arrest and surrender are likely to affect virtually all future scenarios of cooperation with the ICC and may continue to represent a structural difficulty for the Court. Addressing this challenge requires sustained efforts to resolve outstanding arrest warrants, alongside

the application of political pressure to ensure compliance with new requests for cooperation. As of 10 September 2021, the Court had issued a total of 36 arrest warrants, of which 20 had been executed, three had been withdrawn following the death of the suspects, and 12 remained outstanding, with the individuals concerned still at large.<sup>9</sup>

### **3.2 The EU's Existing Framework and Its Structural Limits**

The European Union's relationship with the International Criminal Court is shaped by a comprehensive legal and policy framework that underscores its enduring commitment to international criminal justice. A central component of this framework is the Agreement between the European Union and the International Criminal Court on cooperation and assistance, concluded pursuant to Council Decision 2006/313/CFSP and in force since 1 May 2006, which establishes structured channels of cooperation between the EU, acting as an international organisation, and the Court. This agreement is complemented by Council Decision 2011/168/CFSP, which sets out the Union's broader strategic objectives in relation to the ICC, including the promotion of universal adherence to the Rome Statute, the protection of the Court's independence, support for its effective and efficient operation, the strengthening of cooperation—including in matters relating to the execution of arrest warrants—and the implementation of the principle of complementarity. Taken together, these instruments confer a coordinating role on the Council of the European Union and the High Representative, while integrating ICC-related commitments into both the internal and external dimensions of EU action, ranging from diplomatic engagement with third States to legislative, technical, and capacity-building assistance, as well as responses to instances of non-cooperation. As such, this normative and institutional configuration not only frames the EU's formal relationship with the ICC, but also serves as the reference point against which the practical effectiveness of EU efforts to secure compliance with ICC arrest warrants must be evaluated.<sup>10</sup>

Within this existing policy framework, the European Union has also taken a number of concrete institutional steps to promote cooperation with the Court.

The European Union has proactively encouraged its Member States to conclude framework agreements designed to strengthen cooperation with the International Criminal Court. At the institutional level, the Council of the European Union has elevated cooperation to one of the core priorities shaping the EU–ICC relationship, ensuring that it is systematically addressed within the agenda of the International Criminal Court sub-group of the Working Party on Public International Law. In parallel, the European Commission has supported initiatives aimed at addressing instances of

---

<sup>9</sup> International Criminal Court (2021) *The Prosecutor of the International Criminal Court, Mr Karim A. Khan QC, concludes his first visit to Sudan with the signing of a new Memorandum of Understanding ensuring greater cooperation*, 17 August. Available at: <https://data.consilium.europa.eu/doc/document/ST-6783-2013-INIT/en/pdf> (25.9.2025).

<sup>10</sup> European Union (2006) *Agreement between the European Union and the International Criminal Court (ICC)*. Available at: <https://eur-lex.europa.eu/EN/legal-content/summary/agreement-between-the-eu-and-the-international-criminal-court-icc.html> (25.9.2025).

non-cooperation, including the provision of financial support for informational materials on arrest procedures as part of broader, arrest-oriented communication efforts. Building on these existing measures, the EU should further consolidate its approach, with a view not only to remedying specific cooperation shortcomings, but also to ensuring sustained political backing for the Court in situations of non-cooperation. This requires consistent and coordinated political and diplomatic support by both EU institutions and the Member States (Bekou, 2021, p. 9).

### ***3.3. Rationale for a Strategic Reorientation***

Recent geopolitical developments have further exposed the vulnerability of the International Criminal Court to sustained political pressure and coercive measures by powerful states and their allies. Targeted sanctions, legislative initiatives criminalising cooperation with the Court, retaliatory arrest warrants against ICC officials, and cyber operations directed at the Court's infrastructure illustrate the increasingly hostile environment in which the ICC is expected to fulfil its mandate. Such measures are not merely symbolic; they risk impairing the Court's operational capacity, discouraging cooperation by states and non-state actors, and ultimately undermining the enforcement of ICC arrest warrants.<sup>11</sup>

Against this backdrop, the European Union's role as a long-standing supporter of international criminal justice acquires renewed importance. While the Union and its Member States have consistently affirmed their commitment to the universality, integrity, and independence of the Rome Statute system, recent episodes of delayed institutional responses, selective compliance with arrest obligations, and equivocal political signalling risk weakening the credibility of EU action. The effectiveness of ICC arrest warrants depends not only on their legal validity, but also on the readiness of States Parties to defend the Court against external interference and to demonstrate, through consistent practice, that cooperation with the ICC is not optional or contingent.

Strengthening the European Union's commitment to the enforcement of ICC arrest warrants therefore requires a dual focus. On the one hand, EU institutions and Member States must reaffirm, through clear political leadership and coordinated action, their opposition to measures that seek to intimidate the Court or obstruct its work, including through the activation of available protective instruments such as the EU Blocking Statute. On the other hand, credibility in defending the Court externally is inseparable from compliance internally. Failures by Member States to execute arrest warrants, tolerate the presence of ICC fugitives, or publicly question the authority of the Court's decisions erode not only the effectiveness of ICC enforcement, but also the Union's broader commitment to the rule of law and equality before international justice.

In this sense, the defence of the ICC and the enforcement of its arrest warrants are mutually reinforcing objectives. A credible EU strategy to combat impunity must

---

<sup>11</sup> See more at: International Commission of Jurists (ICJ) (2025) *EU: Joint statement calls for strong defense of the ICC amid rising geopolitical tensions*. Available at: <https://www.icj.org/eu-joint-statement-calls-for-strong-defense-of-the-icc-amid-rising-geopolitical-tensions/> (25.9.2025).

therefore combine institutional protection of the Court, principled resistance to external pressure, and unwavering adherence by Member States to their obligations under the Rome Statute. Without such coherence between law, policy, and practice, the Union risks sending a signal of selectivity that undermines both the authority of the ICC and the normative foundations of the international legal order.

Looking ahead, the EU's approach to cooperation should also incorporate more nuanced and preventive strategies that address underlying causes of non-cooperation. Evidence suggests that prolonged preliminary examinations—such as the investigation concerning Georgia, which remained at the preliminary stage for approximately eight years—can diminish prospects for effective cooperation, while also adversely affecting victims and witnesses and placing additional strain on the Court's already limited resources (IER, 2020). The European Union should therefore engage closely with the Court in exploring ways to promote more expeditious proceedings, with a view to enhancing both the effectiveness of cooperation and the overall delivery of international criminal justice (Bekou, 2021, p. 9).

Taken together, these approaches reflect an understanding of cooperation with the International Criminal Court as a shared responsibility, one that requires sustained engagement across legal, political, and institutional domains (Human Rights Watch, 2024).

### ***3.4. Transition to the Proposed Strategies***

Against this background, this chapter sets out interrelated strategies through which the European Union could strengthen its legal and political commitment to the execution of International Criminal Court arrest warrants. The proposed strategies are deliberately framed to operate within the limits of the Union's existing competences, while seeking to make more effective use of its constitutional framework, policy instruments, and external leverage as defined by the EU treaties (European Union, 2016, Arts. 3(5), 4(3), 21; Cremona and De Witte, 2008). Rather than advocating radical institutional reform or the transfer of enforcement powers to the EU level, the analysis focuses on measures that are legally sound, politically realistic, and capable of producing tangible improvements in arrest cooperation in practice (Hillion, 2008, pp. 10–36).

The proposed strategies address both the internal and external dimensions of European Union action in relation to the enforcement of ICC arrest warrants (Council of the European Union, 2018). Internally, they seek to mitigate fragmentation among Member States by strengthening harmonisation, procedural integration, and operational coordination in the domestic implementation of obligations arising under the Rome Statute, within the European Union's existing legal framework (Bekou and Mistry, 2014; Schabas, 2016, pp. 1009–1027; Cryer *et al.*, 2019, pp. 387–395). Externally, they aim to leverage the European Union's diplomatic, economic, and contractual relationships to promote cooperation with the International Criminal Court beyond EU territory, consistent with the Union's self-understanding as a normative and multilateral actor in international affairs (Manners, 2002, pp. 239–243). In practical terms, this external engagement draws on a range of policy and contractual instruments—particularly within

the framework of the European Neighbourhood Policy and other cooperation arrangements—which combine political dialogue, conditionality, and normative objectives, while remaining characterised by challenges of coherence and effectiveness in implementation (Cremona, 2008, pp. 251–262; 263–281; 294–300; Bartels, 2008).

Within the limits of the existing EU legal framework, greater convergence could be promoted through a combination of EU-level guidance, coordinated legislative initiatives, and enhanced judicial and prosecutorial dialogue. In this context, soft-law instruments and operational coordination mechanisms, supported by bodies such as Eurojust, offer particular advantages by facilitating the exchange of expertise and best practices, while enabling national authorities to draw on ICC jurisprudence as a shared interpretative reference point. As Peers (2011) and Koutrakos (2013) observe, such forms of coordination are especially well suited to areas in which the Union lacks direct enforcement competences but nonetheless seeks to promote coherence in Member State action.

By narrowing interpretative divergence and fostering greater consistency in domestic practice, enhanced harmonisation would improve both the predictability and effectiveness of ICC arrest cooperation within the European Union. More broadly, it would contribute to closing the gap between the Union's normative commitments and their practical implementation, thereby contributing to the credibility of the EU as a coherent and reliable supporter of international criminal justice (Sjursen, 2006).

The extent to which the European Union can effectively uphold the international legal order, particularly in the field of international criminal justice and cooperation with the ICC, remains an open and pressing question. The Union has long presented itself as a committed advocate of a rules-based international system, anchored in multilateral cooperation and centred on the United Nations. This professed commitment to international law and multilateralism is firmly embedded in the EU's constitutional framework and reiterated across a wide range of policy instruments. Nevertheless, questions persist as to the depth, consistency, and practical effectiveness of the Union's engagement with international law, particularly in light of contemporary challenges that increasingly test the resilience of the international legal order.<sup>12</sup>

#### 4. CONCLUSION

The analysis undertaken in this paper confirms that the persistent difficulties surrounding the execution of ICC arrest warrants are not the result of gaps in the applicable legal framework. Rather, they reflect a combination of fragmented domestic implementation and inconsistent political engagement, even among European Union Member States that are formally bound by the Rome Statute and publicly committed to the fight against impunity. This dissonance between legal obligation and enforcement practice continues to undermine the effectiveness of international criminal

---

<sup>12</sup> Wouters, J. (2025) 'Can the European Union Save the International Legal Order?', *Global Policy*. Available at: <https://www.globalpolicyjournal.com/blog/29/07/2025/can-european-union-save-international-legal-order> (25.9.2025).

justice. For the European Union, these findings highlight the importance of translating long-standing normative commitments into more coherent and sustained action. While the Union lacks direct enforcement powers in the field of arrest and surrender, it retains significant capacity to shape outcomes through coordination, guidance, and the strategic use of its external policy instruments. A more consistent approach—both internally among Member States and externally in relations with third countries—would strengthen the credibility of EU action and reinforce the authority of the International Criminal Court. Looking ahead, the effectiveness of the ICC will increasingly depend on the willingness of its strongest supporters to defend the Court not only in principle, but also in practice. In a context of growing political contestation and selective compliance, a more deliberate and coordinated EU strategy on arrest enforcement could play a decisive role in narrowing the gap between legal commitment and accountability, thereby contributing to the resilience of the international legal order and the broader fight against impunity.

### References

1. Akande, D. 2009. The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bashir's Immunities. *Journal of International Criminal Justice*, 7(2), pp. 333–352.
2. Bartels, L. 2008. The trade and development policy of the European Union. In: Cremona, M. (ed.), *Developments in EU External Relations Law*. Oxford: Oxford University Press, pp. 449–472.
3. Bekou, O. and Birkett, D.J. (eds.) 2016. *Cooperation and the International Criminal Court: Perspectives from Theory and Practice*. Vol. 4. Leiden; Boston: Brill Nijhoff.
4. Cremona, M. 2008. The European Neighbourhood Policy: More than a Partnership? In: Cremona, M. (ed.), *Developments in EU External Relations Law*. Oxford: Oxford University Press, pp. 244–300.
5. Cremona, M. and De Witte, B. (eds.) 2008. *EU Foreign Relations Law: Constitutional Fundamentals*. Oxford and Portland, OR: Hart Publishing.
6. Cryer, R., Friman, H., Robinson, D. and Wilmshurst, E. 2019. *An Introduction to International Criminal Law and Procedure*. 4<sup>th</sup> edn. Cambridge: Cambridge University Press.
7. Eeckhout, P. 2011. *EU External Relations Law*. 2<sup>nd</sup> edn. Oxford: Oxford University Press.
8. Gaeta, P. 2007. The European Union and the International Criminal Court. *International Criminal Law Review*, 7(1), pp. 1–17.
9. Hillion, C. 2008. Tous pour un, un pour tous! Coherence in the External Relations of the European Union. In: Cremona, M. (ed.), *Developments in EU External Relations Law*. Oxford: Oxford University Press, pp. 10–36.
10. Koutrakos, P. 2013. *The EU Common Security and Defence Policy*. Oxford: Oxford University Press.

11. Krefß, C. and Prost, K. 2016. Article 90. In: Triffterer, O. (ed.), *The Rome Statute of the International Criminal Court: A Commentary*. 3<sup>rd</sup> edn. Oxford: Hart Publishing. Available at: [https://www.department-ambos.uni-goettingen.de/data/documents/Veroeffentlichungen/Triffterer\\_Ambos\\_Rome\\_Statute\\_Commentary\\_3<sup>rd</sup>\\_ed\\_2016.pdf](https://www.department-ambos.uni-goettingen.de/data/documents/Veroeffentlichungen/Triffterer_Ambos_Rome_Statute_Commentary_3rd_ed_2016.pdf). (25.9.2025).
12. Lee, J. 2014. State non-cooperation and the enforcement crisis at the International Criminal Court. *Journal of International Criminal Justice*, 12(4), pp. 755–779.
13. Lhotsky, J. 2016. The ICC arrest warrant for the Sudanese President Omar al-Bashir in connection with his visit to the Republic of South Africa. *Czech Yearbook of Public & Private International Law*, 7(1), pp. 330–341.
14. Manners, I. 2002. Normative Power Europe: A Contradiction in Terms? *Journal of Common Market Studies*, 40(2), pp. 235–258.
15. McCrudden, C. 2006. Legal research and the social sciences. *Law Quarterly Review*, 122, pp. 632–650.
16. Mitsilegas, V. 2016. *EU Criminal Law after Lisbon: Rights, Trust and the Transformation of Justice in Europe*. Oxford: Hart Publishing.
17. Nouwen, S.M.H. and Werner, W.G. 2010. Doing justice to the political: the International Criminal Court in Uganda and Sudan. *European Journal of International Law*, 21(4), pp. 941–965.
18. Peers, S. 2011. *EU Justice and Home Affairs Law*. 3<sup>rd</sup> edn. Oxford: Oxford University Press.
19. Schabas, W.A. 2016. *The International Criminal Court: A Commentary on the Rome Statute*. 2<sup>nd</sup> edn. Oxford: Oxford University Press.
20. Schabas, W.A. 2017. *An Introduction to the International Criminal Court*. 5<sup>th</sup> edn. Cambridge: Cambridge University Press.
21. Sjusren, H. 2006. The EU as a normative power: How can this be? *Journal of European Public Policy*, 13(2), pp. 235–251.
22. Tladi, D. 2015. The International Criminal Court and the Duty to Arrest and Surrender: The Case of Omar Al-Bashir in South Africa. *Zeitschrift für Internationale Strafrechtsdogmatik*, pp. 493–500. Available at: [https://www.zis-online.com/dat/artikel/2015\\_10\\_953.pdf](https://www.zis-online.com/dat/artikel/2015_10_953.pdf) (25.9.2025).
23. Tladi, D. 2018. The International Criminal Court arrest warrant for Al-Bashir: Between international law and politics. *Journal of International Criminal Justice*, 16(1), pp. 25–46.
24. Van Elsuwege, P. 2010. From sincere cooperation to effective cooperation? *European Law Review*, 35(5), pp. 682–703.
25. Weyembergh, A. 2005. Approximation of criminal laws, the constitutional treaty and the Hague Programme. *Common Market Law Review*, 42(6), pp. 1567–1597.
26. Wouters, J. 2025. Can the European Union Save the International Legal Order? *Global Policy*. Available at: <https://www.globalpolicyjournal.com/blog/29/07/2025/can-european-union-save-international-legal-order> (25.9.2025).

### **Legal and Official Documents**

1. Council of the European Union (2003) *Council Common Position 2003/444/CFSP of 16 June 2003 on the International Criminal Court*. Official Journal of the European Union, L 150, 18 June, pp. 67–69. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32003E0444>
2. Council of the European Union (2006) *Council Decision 2006/313/CFSP of 10 April 2006 concerning the conclusion of the Agreement between the International Criminal Court and the European Union on cooperation and assistance*. Official Journal of the European Union, L 115, 28 April, p. 49.
3. European Parliament, Directorate-General for External Policies (2014) *Mainstreaming support for the International Criminal Court in the EU's external action*. Brussels: European Parliament. Available at: [https://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/433844/EXPO-DROI\\_ET\(2014\)433844\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/433844/EXPO-DROI_ET(2014)433844_EN.pdf)
4. European Parliament Policy Department for External Relations (2025) *Mechanisms of international justice to fight impunity*. Brussels: European Parliament. Available at:  
[https://www.europarl.europa.eu/RegData/etudes/STUD/2025/775282/EXPO\\_STU\(2025\)775282\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2025/775282/EXPO_STU(2025)775282_EN.pdf)
5. European Union (2006) *Agreement between the International Criminal Court and the European Union on cooperation and assistance*. Official Journal of the European Union, L 115, 28 April, pp. 50–56.
6. European Union (2016) *Consolidated version of the Treaty on European Union*. Official Journal of the European Union, C 202, 7 June, pp. 13–46.
7. Independent Expert Review (IER) (2020) *Independent Expert Review of the International Criminal Court and the Rome Statute System: Final Report*. The Hague: Assembly of States Parties to the Rome Statute.
8. International Criminal Court (1998) *Rome Statute of the International Criminal Court*. Rome, 17 July 1998.

### **Reports and Policy Documents**

1. Bekou, O. and Mistry, H. (2014) *Mainstreaming support for the International Criminal Court in the EU's policies*. Brussels: European Parliament, Directorate-General for External Policies of the Union, Policy Department (PE 433.844 EN). Available at: [https://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/433844/EXPO-DROI\\_ET\(2014\)433844\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/433844/EXPO-DROI_ET(2014)433844_EN.pdf)
2. Bekou, O. (2021) *The role of the ICC since its foundation and possible scenarios for the future: political support and cooperation by states*. Brussels: Policy Department for External Relations, European Parliament. Available at: [https://www.europarl.europa.eu/RegData/etudes/STUD/2021/653659/EXPO\\_STU\(2021\)653659\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2021/653659/EXPO_STU(2021)653659_EN.pdf)

### ***Internet Sources***

1. European External Action Service (EEAS). *International criminal justice*. Available at: [https://www.eeas.europa.eu/eeas/international-criminal-justice\\_en](https://www.eeas.europa.eu/eeas/international-criminal-justice_en) (25.9.2025).
2. Human Rights Watch (2024) *EU cooperation in International Criminal Court arrests*, 26 November. Available at: <https://www.hrw.org/news/2024/11/26/eu-cooperation-international-criminal-court-arrests> (25.9.2025).
3. ICC Forum (n.d.) *Arrest*. Available at: <https://iccforum.com/arrest> (25.9.2025).
4. International Commission of Jurists (ICJ) (2025) *EU: Joint statement calls for strong defense of the ICC amid rising geopolitical tensions*. Available at: <https://www.icj.org/eu-joint-statement-calls-for-strong-defense-of-the-icc-amid-rising-geopolitical-tensions/> (25.9.2025).
5. International Criminal Court (2021) *Rome Statute of the International Criminal Court*. The Hague: International Criminal Court. Available at: <https://www.icc-cpi.int/sites/default/files/2024-05/Rome-Statute-eng.pdf> (25.9.2025).
6. International Criminal Court (2021) *The Prosecutor of the International Criminal Court, Mr Karim A. A. Khan QC, concludes his first visit to Sudan with the signing of a new Memorandum of Understanding ensuring greater cooperation*, 17 August. Available at: <https://data.consilium.europa.eu/doc/document/ST-6783-2013-INIT/en/pdf> (25.9.2025).

## PRIVATE PRISONS AS AN ASPECT OF NEOLIBERAL PENOLOGY

Nenad Bingulac\*  
Dalibor Krstinić\*\*

*This research is based on the analysis of the phenomenon of private prisons as one of the key aspects of neoliberal penology. This approach has significantly transformed the traditional understanding of the penal system over the past decades. The research provides a conceptual overview of the theoretical foundations of neoliberal ideology, starting with the emphasis on the free market, privatization of public powers, efficiency and the minimal role of the state, and through this prism the paper examines how these ideas shape contemporary models of penal system management. In addition to pointing to historical examples of private prisons as certain precursors of this idea or need, the focus is on the participation of private prisons in today's penal system. Given that private prisons first emerged and developed in the United States of America, a separate part of the research is dedicated to this issue. Under the influence of neoliberalism, the idea of private prisons gradually spread to other jurisdictions, creating a new paradigm in which deprivation of liberty has also become a subject of market interest. The original goal of this research is to point out the impact of the neoliberal economy on the penal system, through a presentation and analysis of the representation of private prisons around the world, with an attempt to consider the issue of their justification not only in an economic sense, i.e. the issue of efficiency, costs, institutional responsibility, but also in the sense of whether they have an impact on achieving the purpose of imprisonment for perpetrators of criminal acts. In this research, by using historical methods, analytical methods and comparative methods, an attempt is made to achieve the most comprehensive analysis of the issue of private prisons, all in order to better understand this relatively new form of penal policy that has arisen from economic social transformation, i.e. from broader socio-political circumstances in which the goal is market logic.*

**KEYWORDS:** *imprisonment, neoliberalism, penology, private prisons, public-private partnerships.*

---

\* Doctor of Law, full professor, Faculty of Law for Commerce and Judiciary in Novi Sad, University Business Academy in Novi Sad.

E-mail: [nbingulac@pravni-fakultet.info](mailto:nbingulac@pravni-fakultet.info).

\*\* Doctor of Law, associate professor, Faculty of Law for Commerce and Judiciary in Novi Sad, University Business Academy in Novi Sad.

E-mail: [dkrstinic@pravni-fakultet.info](mailto:dkrstinic@pravni-fakultet.info)

## 1. INTRODUCTION

The search for an adequate purpose of punishment, that is, in the sense of criminal law, seems constant and unattainable. For each type of criminal sanction there is both a positive and a negative aspect. Any sanction has its effectiveness only if it is perfectly personalized. In these needs to find an excellent balance between general and special prevention, the modern transformation of penal systems in recent decades cannot be understood without considering the broader ideological and political-economic framework in which they take place.

One of the most influential processes in this regard is the rise of neoliberalism, a doctrine that has shaped the roles of the state, the market and the individual in recent decades. Neoliberal ideology is based on the free market, deregulation, fiscal discipline and the limitation of the public sector, insisting on economic efficiency and sustainability as the dominant social value. This transformation was not limited to the economic and social sector, but also penetrated the sphere of penology, leading to the creation of the concept of neoliberal penology. This model, especially when it comes to prison sentences, is viewed through the prism of governance, rationalization of resources and market logic.

The change of human values under the influence of neoliberalism represents the first and key segment in understanding the emergence of such new penological practices. Bearing in mind the negative effects of neoliberalism, poverty, marginalization and crime are increasingly seen as personal rather than social problems. Within such a normative environment, the idea of private prisons becomes not only technically possible, but also ideologically and economically justified.

The emergence of private prisons is one of the most controversial aspects of the modern penal system. Proponents emphasize savings, flexibility, efficiency and the questionable legitimacy of the state's monopoly function over punishment, while critics emphasize the risk of conflicts of interest, lack of transparency, motivation to increase the number of convicts, endangering human rights. Within the framework of neoliberal penology, private prisons are not only an organizational model, but an expression of a deep change in the understanding of the purpose of punishment and the way in which society deals with illegal behavior.

Precisely for these reasons, the subject of this paper is the analysis of private prisons as an aspect of neoliberal penology, where the research relies on several interconnected thematic entities. The aim is to show how these areas together form a coherent framework for understanding the private penal sector as an ideological, political and economic product of a specific social moment.

## 2. INFLUENCE OF NEOLIBERALISM ON CHANGING HUMAN VALUES

The idea to renew liberal tendencies in the sphere of economic theory appeared about fifty years ago. The initial momentum of liberalization was called neoliberalism and initially represented changes in the sphere of conducting national economic policy,

primarily in the USA and Great Britain, but also in the framework of international exchange with the countries of South America. Neoliberal changes or, according to some authors, the revolution also had an impact on ideology (Bourdieu, 1999, p. 20).

From a modern perspective, neoliberalism can be seen as much more than economic policy, because it actually represents "the tendency to translate the entire human reality (emotional, social, psychological, philosophical components) into a market way of functioning". As a result, we have that the exchange of goods and trade do not represent only an economic category. They are implemented in the processes of international integration and globalization and that each of us has become an actor of neoliberalization (Tomka, 2004, p. 213).

The neoliberal concept actually represents the Anglo-Saxon type of capitalism. Another distinguishing characteristic of it is that it is market-oriented capitalism. The existence of a high degree of aggressiveness of globalization, that is, "market fundamentalism", as some authors call it, affected the entire world market, which resulted in the so-called "forced to adapt to the laissez-faire global economy". This had the effect of renouncing the traditional values of the welfare state (Josifidis, 2004, p. 5). The aforementioned change in human reality has led to different views on the rule of the market in developed countries, while the question of social justice has been raised. (Josifidis, 2004a, p. 7). Over the decades, advocacy for neoliberalism, especially in transition economies, sometimes more and sometimes less discreetly, it caused such a way of thinking and perception of economic relations to be implemented in society (Josifidis, 2001, P. 15), and therefore the consequences can be seen in the penal policies towards perpetrators of criminal acts.

Neoliberalism can practically be seen as a political-economic doctrine in which it starts from the assumption that the free market, private property and freedom of economic choice are the basic and desirable way of organizing social and economic reality. (Harvey, 2020, p. 11). Certain authors believe that neoliberalism can be defined as "a doctrine that is an ethic in itself on the market". In other words, human engagement is valued by the market and neoliberal mechanisms are the only acceptable measure of value and success. (Harvey, 2005, p. 64). In the context of the aforementioned, the role of the state should be reduced to minimal active management of the economy, but to create institutional frameworks starting with laws, protection of private property and formal conditions for market exchange (Đuričić, 2015, p. 71).

Seen from the point of view of neoliberalism, the market and private property become the central foundations of the social order. As a result, we have a process of privatization of public companies and goods, deregulation of economic and market processes, liberalization of capital and trade, with a reduction in state participation. (Jovanović, 2020, p. 41). In theory, it is presented as an initiative to unleash creative and entrepreneurial freedom, encourage initiative, efficiency and economic dynamism. (Harvey, 2020, p. 30).

In practice, it can often be observed both globally and in numerous European countries that the initial ideas of neoliberalism have side effects that are reflected in the growth of inequality among citizens, the degradation of public services, the commodification of goods that were previously public and available, as well as the reduction of social and collective rights. (Evans, 2013, p. 45).

In deeper consideration of the transition to neoliberalism in the history of the world economy, the USA and Great Britain had a relatively independent transition, while European countries as well as developing countries accepted neoliberal policies under the influence of the mentioned countries or through the pressure of international institutions. (Harvey, 2020, p. 3). In Europe, especially in Eastern and Central Europe, neoliberalism was "introduced" through economic reforms, privatizations, market liberalization and the redefinition of the role of the state (Koljević, 2019, p. 745). It is important because the care of a new citizen's perception of economic values and the evaluation of some circumstances that were not of importance to the average person easily penetrated into the penal system and raising the question of all support, say prison sentences, and the justification of investing in that form of penal system from which society, that is, the general population, does not see the "benefit".

The development of neoliberal Europe was followed by a process in which political subjectivity, collective rights and state sovereignty became "suppressed" in relation to the interests of global capital and neoliberal economic structures. More side effects were observed, namely the atomization of society and individualism (Koljević, 2019, p. 750).

One of the key criticisms of neoliberalism refers to the fact that it creates or leads to general well-being, but rather to the concentration of wealth and power in the hands of a small number of citizens (Milić, 2019, p. 15). The majority of the population, especially the working class and vulnerable social groups, lose access to basic goods and services, which indirectly leads to a weakening of social protection and an increase in economic and social insecurity (Perišić, 2018, p. 1081). Under such circumstances, as already mentioned, the justification of, for example, a prison sentence is often considered, because it is perceived as a cost to the state or society due to the provision of living conditions, i.e. serving a prison sentence in the sense of providing food, electricity, water, as well as others necessities.

The values of social justice, solidarity, equality and collective responsibility are lost or marginalized, which affects the structure of society, power relations and the quality of life of the majority. (Vukotić, 2014, p. 19).

### **3. REVIEW OF CARCER AND ERGASTULUM DURING THE PERIOD OF ANCIENT ROME AS A FORM OF SOCIAL REACTION**

In this research, it is not the point to deal with the classic historical development of the issue of private prisons, starting with the prison sentence in terms of its realization from the very idea of punishment and whether it was initially a punishment or, according to modern terminology, a detention measure, and what were its goals and whether there was a justification for such a sanction and the degree of its humanity in that period, looking through the conditions of execution but also through the "system and forms" of other punishments that existed at the time, but it is necessary to point out certain historical facts that may not have been literal the sources and reasons for the justification of the existence of private prisons in the world, but indisputably point to people's perception on this matter.

It is indisputable that in many aspects, Ancient Rome is one of the most influential historical, cultural and certainly legal structures of the ancient world. In the context of institutional and non-institutional punishment, they left a significant mark on later European models of sanctions. The Roman approach to prison at the time was significantly different from the modern understanding, i.e. prison did not represent "punishment in itself", but as a temporary and utilitarian means to ensure the presence accused, prevention of escape, public shaming and disciplining of slaves. In this context, state public prisons (carcer) and private slave prisons (ergastulum) are distinguished. (Robinson, 1995, p. 21).

It should be noted that Roman law did not attach great importance to the so-called prisons because punishment was based on public executions of the punishment, i.e. its visibility and speed of execution, and therefore the punishments at that time were based on fines, corporal punishment, exile, forced labor, confiscation of property, loss of civil rights and the death penalty. Objectively, prisons based on the idea of social reaction of that time were not productive. (Harries, 2007, p. 58)

Carcer is the most famous Roman state prison, or perhaps more precisely, a public detention institution. (Feligioni, 2025). Considering it as a detention facility, the building was located in the center of the city, near the Roman Forum. Its basic function was to guard the accused until the verdict or the execution of the sentence. (Robinson, 1995, p. 87) In addition to the aforementioned, there are also reports that it was sometimes used as a place of execution, especially by strangulation in its underground chambers, of which there is some evidence in Tullianum. (Mommsen, 1903, p. 312)

The conditions for "life" in Carcer were practically no conditions. It was dark and humid rooms, with minimal ventilation, and there was often a high degree of overcrowding. These circumstances were "justified" by functionality and the sense that Carcer was not a place intended for a long stay, that is, serving a sentence, but as a place of detention before the execution of the sentence, which in the period of time should not represent a long wait. (Harries, 2007, p. 110)

The carcerus has existed since the earliest stages of the Roman Republic (most likely since the 7<sup>th</sup> century BC) and functioned throughout Roman history, making it one of the longest-lasting institutions of its kind in the ancient world. (Mommsen, 1903, p. 312) In the later periods of Rome with the late antique reforms and reorganization of the penal system, carcer increasingly gave way to new forms of social reaction, namely forced labor, mining camps and dungeons, which began to take on the function of long-term deprivation of liberty. (Harries, 2007, p. 180)

Unlike the carcer, the ergastulum was a private detention and disciplinary institution, intended exclusively for slaves. (Werner, 2006). It is usually built as a semi-subterranean or underground space with minimal openings for light, all with the aim of preventing escape without the need for constant surveillance. (Molina, 2017, p. 390) In the ergastulum, slaves were often shackled, isolated from other slaves. The punishment of slaves was justified especially those who were considered disobedient, dangerous or prone to escape. On larger estates, the ergastulum also functions as a forced workspace. (Bradley, 1994, p. 42).

Ancient Roman law defined a slave as property (*res mancipi*), and therefore gave the *dominus* broad jurisdiction over the slave's life. The justification for a private prison for slaves as well as the justification for forced labor was based on the economic and legal foundations of the Roman slave system. In this sense, the state did not interfere in the management of *ergastulums* except in cases of extreme abuse. Essentially observed behavior towards slaves and even in terms of punishment and imprisonment in the *ergastulum* was interpreted as part of the private autonomy of the Roman family. (Garnsey, 1996, p. 115)

*Ergastulum* develops during the late Republic, a period of intense expansion of slave labor, when large estates and *latifundia* require strict control mechanisms. (Hopkins, 1978, p. 100) This model survives until late antiquity, and disappears only with the transformation of the slave system into the *colonus* (is a specific institution of Roman postclassical law), where there is a greater concentration on labor exploitation. Under these circumstances, *ergastulum* gradually loses its meaning and disappears from legal and social practice. (Bradley, 1994, p. 120).

In the later periods of the development of the Roman penal system, it moved towards models based on long-term deprivation of liberty with forced labor. The most characteristic forms are mining camps (*metalla*), forced public works (*opera publica*) - construction of roads, temples, etc. (Robinson, 1995, p. 150).

#### 4. TRANSFORMATION OF PENAL POLICIES

In the previous consideration of the basic premises of neoliberalism as through the ideological economic aspect, changes were pointed out in the way society organizes the economy, the state, and social protection. Through citizens and general perception, these changes infiltrate the institutions that determine and implement sanctions. The neoliberal paradigm, the state reduces public benefits, promotes privatization as well as market management, so according to the same principle, courts and penal institutions are subject to consideration of their efficient operation, profit making, cost ownership and whether there is a market exchange. The mentioned has noticeable consequences for penology, i.e. in the way fines, prison sentences, and public service are manifested in modern societies. Penal policy can be considered from both a legal and a theoretical perspective (Bingulac, 2024, p. 275).

Some authors indicate that neoliberalism had a direct impact on penal policy and the structure of the prison system (Ron, 2011, p. 481), and that these changes occurred simultaneously and jointly. (Wacquant, 2009, p. 20). In this sense, prison does not cease to be the "final place" for the perpetrator of the crime (Wacquant, 2016, p. 39). Some authors believe that the existing purpose of the prison sentence needs to be expanded. In cases where the person serving the sentence has caused damage to someone or the community, the state can use the prison sentence as a means of compensating for the damage done. In parallel, it can also implement work integration into society after serving the sentence (De Beir, 2023, p. 20).

The most visible concrete manifestation of the neoliberal transformation in penology is the appearance of private prisons, that is, one could say the privatization of prison

sentences. In one of the researches that dealt with this problem, it is argued that neoliberal reform, market logic and privatization practically introduce competition and profit into the area that until then was the exclusive jurisdiction of the state. (Pavićević, 2023, p. 595).

As a matter of fact, in recent decades, the number of prison sentences imposed has been increasing due to stricter prison policies, and therefore, without considering whether it is justified or not, the prison population has increased. As some authors state, the same was observed in the comparative analysis at interstate levels. Although the question arises objectively that people have become more prone to crimes in recent years or that the problem is in penal policy, the factual situation is indisputable. (Petković, 2017, p. 113). The issue of private prisons, under the influence of neoliberalism, and under the justification of efficiency and savings, because it reduces the burden on the state in terms of costs that are "transferred" to private companies is developing from the aforementioned. (Dimovski, 2015, p. 20)

However, there is a justified fear that due to "efficiency", and due to the loss of profit based on savings in the provision of "prison services", there may be a decrease in quality, which means a decrease in funds for investment in rehabilitation, education, psychosocial assistance... (Petković, 2017, p. 128). Under these circumstances, prisoners may represent a "cost" that needs to be optimized, it may mean that the market logic is not necessarily compatible with the goals of the execution of the sentence.

The cultural and political context of the privatization of the sector of execution of criminal sanctions raises the question of whether, under the auspices of the neoliberal point of view of economics, prisoners become a kind of "commodity" through the provision of "prison services" stipulated by law by private companies with the sole aim of making a profit. Circumstances set in this way can raise questions about the legitimacy of such a system, but also about the structural inequality between primary and state prisons (Hamerton, 2023, p. 90).

Penology as a science of punishment certainly aims at rehabilitation, reintegration and reduction of recidivism rates. However, under the influence of neoliberal policies, penal policy is changing dramatically. The evolution of the labor market, social policies and the penal system related to each other and to neoliberal ideas related to the utilitarian individual and the role of the state. In order to study the neoliberalization of punishment, it is necessary to understand individualization. The influence of the individualization of the punishment and the expected consequences create the creation of the penal system and the transformation of the labor market and social policy (González-Sánchez, 2024, p. 35).

## **5. THE PHENOMENON OF THE PRIVATE PRISON**

Although it is not the goal of this research to investigate the development of private prisons in the USA, it is still necessary to point out that the initial beginnings of their development followed as early as 1854.

In previous parts of this research, it was indicated that they are synonymous with private prisons in the USA. In this sense, modern private prisons began in 1984 in Tennessee when the Correctional Corporation of America, now known as CoreCivic, was awarded a contract to take over a facility in Shelby County which resulted in the creation of more private prisons. Even then, the question was asked what is the purpose of private prisons, and the justification was that there is a much lower level of bureaucracy and therefore more efficient functioning. In addition to the above, it was often pointed out that private prisons can reduce overcrowding and save taxpayers' money (Groff, 2025).

During the gold rush in California, which resulted in a high level of crime, the idea arose to convert ships into prisons, and that's how prison ships were born. The most famous private prison was built by the inmates of one such ship called the *Waban*. This ship was located in San Quentin, in San Francisco Bay, on twenty acres of land purchased by the state. Completed in 1854. This prison was run by a group of individuals who rented the facility and then hired the inmates as forced labor. Not long after this beginning of private prisons in San Quentin in the organization and management of private prisons was unsuccessful. Conditions in the prison were so bad that in 1858 the state decided to take over (Chaddock, 2025). Certain sources indicate that there was another attempt at private prisons in 1849 (a couple of years before *Waban*) and that it was the ship *Euphemia*. (Winfrey, 2013).

The twenty-first century private prison industry in America is also associated with the founding of the Corrections Corporation of America (CCA) in Nashville, Tennessee in 1983, chaired by Thomas Beasley. As a lawyer and as a businessman, he was remembered for being a great advocate of private prisons, and in addition to the aforementioned, he will be remembered for declaring in 1988 that prisons can be sold "like cars, real estate or hamburgers" (Appleman, 2025, p. 572).

When looking at the issue of private prisons in the US today, it can be seen that there are still oscillations on the question of the justification of their existence. Some authors point out that based on the multitude of studies, no consensus can be reached on whether private prisons actually save money or provide a better service (in terms of conditions for both employees and prisoners) than state prisons. In 2016, the Department of Justice under President Barack Obama released a report by its Office of Inspector General that criticized private prisons, saying they did not save money and were less efficient than state facilities. This was followed by an announcement by the Ministry of Justice that the Bureau of Prisons (BOP) will gradually terminate contracts with private prison companies. With the election of Donald Trump as president, things have changed. His administration campaigned on a law-and-order, anti-immigration platform, and therefore revoked the decision to terminate contracts with private prisons, with the perception that an increase in the number of felons and detained immigrants would follow, which gave special importance and value to private prison companies. With the election of President Joe Biden, the proposal to terminate contracts with private prisons has been re-initiated. This initiative lasted until Trump was re-elected as president when he reversed Biden's decision and continued with a positive stance on the existence of private prisons (Lauren, 2025).

From what has been shown, it can be easily concluded that politics or state administration has a special influence on the positive or negative view of the issue of private prisons, as it has on many other aspects of society. Political rhetoric is a significant factor that shapes public opinion, so it can present private prisons as an effective solution or condemn them as a morally unacceptable profit-making scheme that aims solely for profit. It is not uncommon to see politicians advocating a tougher policy on crime, then the state administration often sees private prisons as a quick and cheap way to increase capacity, favoring the narrative of their supposed suitability and ability over the inefficient state prison system. On the other hand, clear and rigorous state control and supervision of state prisons, absolute implementation of all obligations defined by law, can represent the basis for "favoring" state prisons by creating an impression of responsibility and strength.

The question arises, what are the real grounds for the existence of private prisons, that is, what are the motives of the state administration to favor or diminish the importance of a prison system. In cases where the administration uses private prisons only to solve short-term budget problems, the positive commitment or positive effects perceived by the public will not be long-term because it will undoubtedly open the question of how to invest in state prisons. Then, a negative impression is created when there are speculative relationships between the administration and private prisons or strong connections and lobbying between politicians and owners of private prison companies, which can have the perception of corruption and conflict of interest.

If there is a real basis that is based on analyzes and projections or if it is about pilot projects on the basis of which certain functionality is tested, then in this way it is possible to rule out political will or arbitrariness. It was mentioned in the context of the presentation in the previous part of this research that one American administration favors private prisons, while the other has a completely opposite attitude, and the circumstances on the "field" are practically unchanged.

When the administration actively promotes private prisons as places with innovative rehabilitation programs or as partners, essentially the perception will be positive, but a negative perception will follow when the administration does not treat these entities as effective partners but as political or financial gain.

Looking at the state level in the USA in 2020, the use of private prisons varied significantly. In states such as Montana, Tennessee, and Arizona, the penal system relied heavily on private prisons, while about twenty states did not use private facilities at all (Groff, 2025).

We will make a brief overview of the capacities of private prisons in the USA. The first capacity of the private prison under the contract signed in 1983 with the establishment of the American Correctional Corporation was 350 beds. Of course, that contract also included obligations to design, build, and operate a minimum security prison facility in Houston for the Immigration and Naturalization Service. In the 1990s, the capacity of private prisons was significantly higher and amounted to 10,900 beds. A considerable increase in the capacity of private prisons was preceded by an extremely favorable period for the private prison industry, because during that period political and

economic positive arguments began to be established in the ruling structure. Due to the higher number of people sentenced to prison terms, but also due to the budgetary pressures faced by the US administration, it responded to private companies that managed the prison systems in the private sector, which resulted in a strong increase in the number of beds in the private prison sector. So since 1990 and with 10,900 beds, the contractual capacity of the industry increased to 85,201 beds in 1996. This high rate of growth is justified by reductions in construction and capital costs, reduced labor costs, expansion of bed capacity in jurisdictions subject to state and federal employment restrictions, lower operating costs, relief from additional government bureaucracy, and the ability to plan and control costs over the long term (Singal, 1998, p. 5).

Based on the last available data compiled in 2001, there are 116,626 private prison beds in the US. At that moment, it represented slightly less than 7% of the total number of state prison facilities in the USA (Austin, 2001, p. 6). Other data indicate that during 2019, the highest number of persons serving prison terms in private prisons in the USA was recorded, 115,428. convict. (Siyu, 2022). If you look statistically, you can see that at the moment when there were the most people serving prison sentences in private prisons, the number of people increased by 32%, while compared to the total increase in the prison population, it was 3%. (National Institute of Corrections, 2023).

According to data from June 2023, there are 96,730 people serving prison sentences in a total of 158 private prisons in the USA, which represents about 8% of the total prison population that year (Criminon International, 2023). Based on available data, at the beginning of 2025, 81,000 people are serving prison sentences in private prisons (Britannica, 2025).

Given that there is no single data on how many private prisons there are on a global level. It is indisputable that, based on the available data, the USA has the largest number of private prisons in the world, which is precisely why the previous focus was exclusively on the USA.

It is undeniable that the prison system is a global phenomenon. Statistics indicate an extremely high concentration in certain countries, so 50 countries of the world have approximately 90% of convicts from the total global prison population, and that is in the state prison system. This data points to the problem of mass incarceration, but also to unevenness. It is absolutely not appropriate to list all 50 states, but some of the countries that dominate these statistics will be pointed out. According to available data, the USA has the most prisoners, 2,121,600, followed by China with 1,649,804 prisoners, Brazil with 690,722 prisoners, Russia with 582,889 prisoners and India with 419,623 prisoners. While Canada has the fewest prisoners (out of those 50 countries) with 41,145, followed by El Salvador with 38,714 prisoners, Ecuador with 37,497 prisoners, Belarus with 34,600 prisoners and Kazakhstan with 33,989 prisoners. In order to supplement these data, it can be pointed out that there are private prisons in the USA, then there are none in China, but the prisoners are used for production work, Brazil has private prisons, Russia does not have private prisons, but the prisoners under electronic surveillance are employed in the private sector, India does not have private prisons, but the prisoners are employed in the private sector. Canada has private prisons, El Salvador does not have

private prisons, but prisoners under electronic surveillance are employed in the private sector, while Ecuador, Belarus and Kazakhstan do not have private prisons and do not employ prisoners in the private sector (Byrne, 2019, p. 481).

In the continuation of the research, data related to private prisons in Europe would be pointed out, but viewed in the context of the already mentioned group of 50 countries of the world, which has approximately 90% of convicts from the total global prison population. Europe is home to 10 of the 50 largest prison systems in the world. When it comes to private prisons, it can be pointed out that only four European countries have private prisons, namely the United Kingdom (England and Wales), France, Germany and Spain. (Byrne, 2019, p. 487).

Approximately 14% of all prisoners in the UK are in private prisons. In France, there has been a hybrid model in force for several decades, where it is actually a public-private partnership. According to the data, 68 out of 188 prisons in France are partially managed by the private sector and it is estimated that 50% of the total number of prisoners in France are located in these prisons.

The third European country that has private prisons is Spain. Special research has shown that the current capacities of private prisons are much larger than necessary, which results in higher costs. The number of prisoners in Spanish prisons is stagnant for various reasons, but one of the key ones is the use of electronic surveillance, i.e. house arrest.

The fourth European country that has private prisons is Germany. In fact, this is a public-private partnership, in which the public sector retains responsibility for the detention of persons, while the private partner is responsible for all other functions and services such as providing food, health care, maintenance and video surveillance.

The Russian Federation has the largest prison system in Europe, if we look at it as a partially European country, and it has no private prisons. Some sources indicate that in the future, private prisons may be established in order to solve problems related to locations in remote parts of the country (Byrne, 2019, p. 487).

During the conduct of this research, one specific feature was observed, namely that in many cases the same private companies appear as the owners of private prisons around the world. GEO is a company that manages private prisons, immigration centers, and mental health facilities. This company has private prisons in the US, Canada, the United Kingdom, South Africa and Australia. Sodexo is a company that does not manage the facilities themselves, but provides supporting services, and is otherwise the largest European private operator of prisons. The services it provides include food for inmates and staff, facility maintenance, hygiene maintenance, and training and education programs. This company has private prisons in Chile, France and Spain. Serco is a company that deals with services in transport, defense and healthcare. This company has private prisons in the United Kingdom, Australia and New Zealand. G4S is a large international security company that, in addition to managing prisons, also manages private immigration centers. This company has private prisons in the United Kingdom, South Africa and Australia. It was recently acquired by Allied Universal, which changes the ownership structure. (Investigate, 2021).

The largest private prison, if the measure is the number of beds, i.e. inmate capacity is the Reeves County Detention Complex located in Texas with 3,760 beds. This prison is managed by the GEO company (O'Rourke, 2025). The second largest private prison is Mangaung. It is located in Bloemfontein, South Africa, and has a capacity of about 3,000 prisoners. This prison is managed by the G4S company and is a maximum security prison. (Hopkins, 2025).

Although these data indicate that they are large prisons, which they actually are, it is necessary to point out that the largest state prison is the Terrorism Confinement Center and that it is located in El Salvador, while its capacity is 40,000 beds (NPR, 2025).

When looking at the issue of private prisons in the countries surrounding Serbia, it can be pointed out that only Hungary has a public-private partnership in two prisons, in Szombathely and Tiszalök. In both cases, the private partner was responsible for the construction, financing and maintenance of the facility, as well as for the provision of supporting services such as food, maintenance, hygiene, office equipment (Tóth, 2019).

## 6. CONCLUSION

The issue of private prisons can open many considerations and aspects. If viewed from the point of view of an average citizen who does not necessarily have to distrust state institutions, it would not surprise him to think that private prisons may be an opportunity for the perpetrators of criminal offenses to not serve a prison sentence at all and to be "pretended" to be in prison. Private prisons can have an "undertone that freedom can be bought". Also, private prisons can be experienced as a form of easier or even privileged way of serving a prison sentence. We believe that the possibility that an average citizen of Serbia will experience the institution of a private prison as a segment of a positive penal system is at a minimum. There is also absolutely a single opinion of the authors of this research that the average citizen does not see private prisons as a possible derivative of neoliberalism.

Research on private prisons as an aspect of neoliberal penology has shown that this phenomenon does not represent a mere organizational innovation in the penal system, but a profound change in the way contemporary societies understand and apply imprisonment.

The paper shows that private prisons arose as a result of economic, political and ideological processes that together form a completely new form of prison sentence execution in which market logic gradually takes over functions that were traditionally considered exclusively the sovereign privilege of the state. Although the percentage of existence of private prisons on a global level is small and I will be aware that the representation of the prison population in private prisons is up to eight percent of the total number of prisoners, this issue certainly deserves not only attention but adequate research.

In this research, the change of human values within the neoliberal social order was primarily considered. This change is not only an economic aspect, but also a change in social perception. Neoliberalism creates a culture of individualization that emphasizes

personal responsibility at the expense of social solidarity, thus relegating the structural causes of criminality to the background. Crime is increasingly interpreted as the result of bad choices, and not as a consequence of socioeconomic inequalities, as a result of which the application of stricter penal policies is justified and the resocial function of punishment is even partially neglected. In such an environment, especially among the broadest population, private prisons become the logical response of a system that recognizes efficiency, profit and control as key values, under the justification that it is not "realistic" that some "criminal" is languishing in prison with three meals at the expense of taxpayers.

Before the contemporary aspect of private prisons was considered in this research, attention was paid to the historical overview of the institutions *carcer* and *ergastulum* in ancient Rome. Although these forms of deprivation of liberty differ significantly from modern prison systems, they reveal that penal systems have never been completely divorced from economic interests and dominant social needs. *Carcer* served as a state instrument of containment and control, while *ergastulum* represented a form of forced labor whose organization was closer to private interests than public function. This historical parallel does not suggest that modern private prisons are identical to Roman institutions, but it does indicate that the instrumentalization of punishment for economic ends is not a new phenomenon. Contemporary private prisons can thus be seen in part as a modernized variant of the old continuum in which the prison population becomes an economic resource and penal institutions part of a wider network of production and management practices.

A special part of this research was related to the transformation of modern penal policies under the influence of neoliberalism. The analysis showed that the neoliberal model has a focus on management models and the way capital is realized through the organizational structure but also through the labor exploitation of prisoners. In this sense, a greater degree of sentencing of prison sentences and a tightening of the penal policy are stimulated. In practice, the neoliberal penal policy is more focused on repression than on prevention. With a higher degree of repressive behavior, the demand for additional prison capacity increases, which opens up space for private companies to take on the role of the state's partner in this sphere. The penal system creates circumstances of economic competition, and the prison sentence practically becomes an instrument of financial expansion.

The phenomenon of modern private prisons represents a complex element of neoliberal penology. Private prisons operate on the basis of contracts between the state and private companies that partially or fully take over the management of institutions for the execution of prison sentences. Their motives are exclusively profit, which depends on the constant influx of the prison population. This type of model creates risks related to the fact that the economic interest of companies can oppose the social and legal goals of punishment, that there is a real danger that profit becomes more important than resocialization, that the reduction of costs leads to the violation of human rights and that the number of persons sentenced to prison is constantly increasing, which can be achieved by the influence of those companies on political decisions and the penal policy itself. It also raises the question of whether it is still the exclusive right of the state to impose a prison sentence, or whether it is possible to delegate this authority without violating the legal foundations of modern society.

The analysis also showed that there are arguments that point to certain advantages of private prisons, such as flexibility, lower costs or more efficient management. Economic efficiency cannot be a criterion that diminishes the purpose of the imposed prison sentence, supervision during the implementation of the same and principled responsibility. The management of prisons must never be turned into a form of market competition, nor must it be equated in the broadest sense with the management of a tourist hotel in a location with a large influx of guests.

The public-private partnership in the concept of private prisons leads to a gradual loss of the boundary between the public and private sectors and debatable control mechanisms. It must not be overlooked that the punishment, especially the prison sentence, represents an extremely delicate social reaction.

In conclusion, private prisons as an aspect of neoliberal penology cannot be viewed in isolation. They are part of a complex set of ideological, economic and political processes that together are changing the nature of the modern penal system. Critical analysis points to the issue of delegating the state's repressive function to the private sector, but also shows certain theoretical economic lower costs. The penal system must not be a field for making profit, but an institution whose legitimacy is based on fairness, responsibility and the protection of human dignity and the protection of society in general.

## References

1. Appleman, L. 2025. The secret history of the carceral state. *Maryland Law Review*, 84, pp. 537–596.
2. Austin, J. and Coventry, G. 2001. Emerging issues on privatized prisons. U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Assistance.
3. Bingulac, N. and Krstinić, D. 2024. Lex talionis as an individual perception of penal policy. In: Kostić, J. and Matić Bošković, M. (eds.), *Penal Populism and the Impact on the Work of Institutions*, IX International Scientific Thematic Conference. Belgrade: Institute of Comparative Law; Institute of Criminological and Sociological Research; Judicial Academy, pp. 273–285.
4. Bourdieu, P. 1999. La philosophie sociale du néolibéralisme. Syndicat Général de la Fonction publique.
5. Bradley, K. 1994. *Slavery and Society at Rome*. Cambridge: Cambridge University Press, pp. 42–55, 120–138.
6. Britannica. 2025. Private Prisons. Available at: <https://www.britannica.com/procon/private-prisons-debatem> (10.09.2025).
7. Byrne, J., Kras, K. and Marmolejo, L. 2019. International perspectives on the privatization of corrections. *Criminology and Public Policy*, pp. 477–503.
8. Chaddock, D. 2025. Ships shaped early California prison system. California Department of Corrections and Rehabilitation. Available at: <https://www.cdcr.ca.gov/insidecdcr/2025/09/09/ships-shaped-early-california-prison-system/> (10.09.2025).

9. Criminon International. 2023. What Is the Scope of Private Prisons in the U.S.? Available at: <https://www.criminon.org/who-we-are/groups/criminon-international/what-is-the-scope-of-private-prisons-in-the-us/> (10.09.2025).
10. De Beir, C. 2023. *Neoliberalism Behind Bars: Public Private Partnership and the Penitentiary System: A Case Study of Haren (Belgium)*. Université Libre de Bruxelles.
11. Dimovski, D. and Milić, I. 2015. Privatni zatvori i penitencijarni sistem Srbije (Private prisons and the penitentiary system of Serbia). *Zbornik radova Pravnog fakulteta u Novom Sadu*, 49(2), pp. 749–767.
12. Evans, P.B. and Sewell, W.H. 2013. Neoliberalism: Policy regimes, international regimes, and social effects. In: Hall, P.A. and Lamont, M. (eds.), *Social Resilience in the Neoliberal Era*. Cambridge: Cambridge University Press, pp. 35–68.
13. Feligioni Tonizzo, L. 2025. On the topography of medieval prisons in Italy. Available at: <https://una-editions.fr/on-the-topography-of-medieval-prisons-in-italy> (10.09.2025).
14. Garnsey, P. 1996. *Ideas of Slavery from Aristotle to Augustine*. Cambridge: Cambridge University Press, pp. 112–119.
15. González-Sánchez, I. 2024. *Neoliberalism and Punishment*. London: Routledge.
16. Groff, B. 2024. Private Prison Industry: Overview. EBSCO Knowledge Advantage. Available at: <https://www.ebsco.com/research-starters/law/private-prison-industry-overview> (10.09.2025).
17. Hamerton, C. and Hobbs, S. 2023. *Privatising Criminal Justice History: Neoliberal Penalty and the Commodification of Crime*. London: Routledge.
18. Harries, J. 2007. *Law and Crime in the Roman World*. Cambridge: Cambridge University Press, pp. 58–72, 110–121.
19. Harvey, D. 2005. *The Neoliberal State*. Oxford: Oxford Academic.
20. Harvey, D. 2020. *A Brief History of Neoliberalism*. Oxford: Oxford Academic.
21. Hopkins, K. 1978. *Conquerors and Slaves*. Cambridge: Cambridge University Press, pp. 99–120.
22. Hopkins, R. 2025. The Business of Private Prisons. Global Justice Program. Available at: <https://globaljustice.yale.edu/news/business-private-prisons> (10.09.2025).
23. Investigate – AFSC. 2021. Private Prisons Internationally. Available at: <https://investigate.info/private-prisons-internationally> (10.09.2025).
24. Jovanović, M. 2020. Uspon doktrine neoliberalizma (The rise of the doctrine of neoliberalism). *Ekonomija: teorija i praksa*, 13(2), pp. 39–54.
25. Josifidis, K.L. 2001. Moderni kapitalizam – multiformnost vs uniformnost, II deo: Karakteristike američkog i globalnog kapitalizma (Modern capitalism – multiformity vs uniformity, Part II: Characteristics of American and global capitalism). *Privredna izgradnja*, 44(1–2), pp. 15–30.
26. Josifidis, K.L. 2004a. Politika vs ekonomija – nestabilnost i posledice (Politics vs economy – instability and consequences). *Ekonomski anali*, 47(1–2), pp. 5–16.
27. Josifidis, K.L. 2004. Neoliberalizam – sudbina ili izbor načina života u tranziciji (Neoliberalism – destiny or choice of lifestyle in transition). *Privredna izgradnja*, 47(1–2), pp. 5–16.

28. Koljević Griffith, B.N. 2019. Neoliberalna i postliberalna Evropa (Neoliberal and post-liberal Europe). *Sociološki pregled*, 53(3), pp. 741–761.
29. Lauren, E. 2025. Trump Reverses Biden Order that Eliminated DOJ Contracts with Private Prisons. Brennan Center for Justice. Available at: <https://www.brennancenter.org/our-work/analysis-opinion/trump-reverses-biden-order-eliminated-doj-contracts-private-prisons> (10.09.2025).
30. Milić, S. 2019. Uspon neoliberalizma i njegova kritika (The rise of neoliberalism and its critique). *Ekonomski signali: poslovni magazin*, 14(1), pp. 11–21.
31. Molina Vidal, J., Grau Mira, I., Llidó López, F. and Álvarez Tortosa, J.F. 2017. Housing slaves on estates: A proposed ergastulum at the Villa of Rufio (Giano dell'Umbria). *Journal of Roman Archaeology*, 30, pp. 387–406.
32. Mommsen, T. 1903. *The History of Rome*. Vol. 1. London: Bentley Publishers, pp. 312–318.
33. National Institute of Corrections. 2023. Private Prisons in the United States. Available at: <https://nicic.gov/weblink/private-prisons-in-united-states-2021> (10.09.2025).
34. NPR. 2025. What to know about CECOT, El Salvador's mega-prison for gang members. Available at: <https://www.npr.org/2025/03/17/g-s1-54206/el-salvador-mega-prison-cecot> (10.09.2025).
35. O'Rourke, R. 2025. New and Expanded Federal and State Prisons since 2000. Available at: <https://www.prisonersofthecensus.org/50states/newprisons.html> (10.09.2025).
36. Pavićević, O., Ilijić, M. and Milićević, M. 2023. Neoliberal Penal Policy and Prison Privatization. *Društvene i humanističke studije*, 8(1/22), pp. 595–614.
37. Perišić, N.D. 2018. Transformacija socijalne politike u Srbiji – osvrt na monografiju Danila Vukovića Preoblikovanje neoliberalizma – socijalna politika u Srbiji (Transformation of social policy in Serbia – review of the monograph...). *Sociološki pregled*, 52(3), pp. 1080–1087.
38. Petković, K. 2017. Kazna u Americi: kaznena politika u SAD-u u vrijeme kaznenog zaokreta i nakon njega (Punishment in America: penal policy in the US...). *Politička misao*, 53(3), pp. 111–138.
39. Robinson, O. 1995. *The Criminal Law of Ancient Rome*. Baltimore: Johns Hopkins University Press, pp. 21–45, 87–90.
40. Ron, L. 2011. Class and criminal justice in neoliberal times: Wacquant dissects the penal state. *Punishment & Society*, 13(4), pp. 480–488.
41. Singal, A. 1998. Private Prison Industry: A Statistical and Historical Analysis of Privatization. *Corrections Compendium*, 23, pp. 3–20.
42. Siyu, G., Ruoxin, W. and Xinyuan, W. 2022. Jail or hell: uncharted territory of US private prisons. Guangming. Available at: [https://en.gmw.cn/2022-03/18/content\\_35601995.htm](https://en.gmw.cn/2022-03/18/content_35601995.htm) (10.09.2025).
43. Tomka, G. 2004. Neoliberalizam – doktrina savremenog sveta (Neoliberalism – doctrine of the contemporary world). *Privredna izgradnja*, 47(3–4), pp. 213–232.

44. Tóth, T. 2019. The Hungarian correctional system on the path to modernisation. Justice Trends. Available at: <https://justice-trends.press/the-hungarian-correctional-system-on-the-path-to-modernisation> (10.09.2025).
45. Vukotić, V. 2014. (Anti)liberalizam i ekonomija ((Anti)liberalism and economy). Belgrade: Institute of Social Sciences, Centre for Economic Research, pp. 9–27.
46. Wacquant, L. 2009. *Punishing the Poor: The Neoliberal Government of Social Insecurity*. Durham: Duke University Press.
47. Wacquant, L. 2016. The punitive regulation of poverty in the neoliberal age. In: *The Poverty of Punishment*. Centre for Crime and Justice, pp. 38–40.
48. Werner, E. 2006. Ergastulum. *Brill's New Pauly Online*.
49. Winfrey, T. 2013. A California Prison's Maritime History. *San Quentin News*. Available at: <https://sanquentinnews.com/a-california-prisons-maritime-history/> (10.09.2025).



## BETWEEN LAW AND POLITICS: THE JUDICIAL EVOLUTION OF CHALLENGING ECONOMIC RESTRICTIONS IN THE PURSUIT OF JUSTICE

Dmitriy V. Galushko\*

*Economic restrictions, which many call sanctions, have become a dominant tool of coercive diplomacy in the 21<sup>st</sup> century, yet their legal legitimacy and humanitarian consequences remain fiercely contested. The paper critically examines how domestic and international courts are increasingly shaping the application of sanctions through judicial review, creating a dynamic controversy between legal principles and political imperatives. This article posits that the judicial evolution of challenging economic restrictions represents a pivotal struggle to build a "legal bridge" over the chasm of power politics. While courts cannot replace political solutions, they are progressively constructing a necessary framework of legal accountability. This evolution does not resolve the law-politics dichotomy but institutionalizes a process for challenging it, thereby reinforcing the Rule of Law in an arena traditionally dominated by pure Realpolitik. The ultimate pursuit of justice in this context is the subordination of coercive power to legal procedure and fundamental rights. The article provides a comprehensive analysis of this global trend, including a dedicated examination of the response within the Russian legal system to unilateral Western restrictive measures, positioning it as a case study of a sovereign state leveraging its domestic judicial apparatus to counteract externally imposed economic coercion.*

**KEYWORDS:** *Economic restrictions, Judicial review, Rule of law, Restrictions challenges, International courts, Legitimacy, Unilateral coercive measures, Sovereignty.*

---

\* PhD, Professor of the Department of Legal Regulation of Economic Activities, Financial University under the Government of the Russian Federation (Financial University), Moscow, Russia.  
ORCID: <https://orcid.org/0000-0002-9301-9565>  
E-mail: [galushkodv@gmail.com](mailto:galushkodv@gmail.com)

## 1. INTRODUCTION

The early 21<sup>st</sup> century has witnessed a profound and unsettling transformation in the instruments of international coercion, a shift that challenges the very foundations of the post-war international legal order. The age of declared armed conflicts has been increasingly supplemented, and in many cases supplanted, by the use of comprehensive economic restrictions as a primary tool of foreign policy. These measures, often unilaterally imposed by states or groups of states, have escalated from targeted instruments aimed at specific individuals or entities to broad-spectrum economic wars designed to exert maximum pressure on sovereign nations, their economies, and their populations. This paradigm shift has created a complex and contentious legal battlefield, where the traditional boundaries of sovereignty, non-intervention, and the legitimate use of economic power are being relentlessly tested and often deliberately eroded. The central dilemma of this new era lies in the acute tension between the political utility of these measures for the states imposing them and their deeply contested standing within the framework of international law, which is based on the principle of sovereign equality. This article argues that in response to this profound legitimacy crisis, a significant and multifaceted judicial evolution is underway across various jurisdictions. Domestic and international courts are increasingly being called upon to adjudicate the legality, proportionality, and application of economic restrictions, thereby carving out a crucial and necessary space for legal principle within a domain long considered the exclusive preserve of high politics and power dynamics. This process represents a nascent but growing "jurisprudential correction," a dynamic and often contentious dialogue between the executive branches that impose restrictions based on political imperatives and the judicial branches that are tasked with upholding the rule of law, protecting fundamental rights, and ensuring that state power is not exercised arbitrarily. This article will explore the intricate contours of this global judicial evolution, beginning with a detailed examination of the foundational legitimacy crisis that plagues unilateral restrictions, moving to a thorough analysis of the specific legal frontiers where judicial review is most active and impactful, incorporating a dedicated case study on the development of a distinct jurisprudence within the Russian Federation in response to Western sanctions, and concluding with a synthesized analysis of the persistent and unresolved tension between legal accountability and political necessity. Through this comprehensive examination, we will demonstrate that the pursuit of justice and legal order in the face of overwhelming and often extra-legal economic pressure is increasingly being channeled through courtrooms worldwide, where the principles of due process, proportionality, sovereign equality, and the protection of fundamental rights are being deployed as critical counterweights to unbridled coercive power.

## 2. THE FOUNDATIONAL LEGITIMACY CRISIS: DECONSTRUCTING THE SEMANTIC AND LEGAL FACADE OF "SANCTIONS"

At the very heart of the legal, political, and ethical controversy surrounding modern economic coercion lies a fundamental and deliberate dispute over terminology and, by extension, over legitimacy. This is not a mere academic exercise in semantics but a critical battle for the legal and moral high ground in the architecture of international relations. A precise and academically rigorous conceptual distinction must be drawn between "sanctions" and "restrictions," as this distinction carries profound implications for their legal validity, moral authority, and conformity with the established norms of international conduct. The persistent and often intentional conflation of these terms by imposing states constitutes a semantic strategy designed to cloak unilateral foreign policy actions in the legitimizing garb of collective, UN-mandated security measures (Giumelli, 2013).

In a strict legal sense, rooted in the architecture of the United Nations system, the term "sanctions" should be reserved exclusively for measures taken within the framework of international law, primarily through the mechanisms of the United Nations Security Council under Chapter VII of the UN Charter<sup>1</sup>. Such measures derive their legitimacy, however imperfect, from the collective security system established by the UN Charter, a treaty that constitutes a foundational cornerstone of the modern international legal order to which all member states, including the Russian Federation, have consented. They are, in theory, a collective and multilateral response to identified threats to international peace and security, imbued with a legitimacy that flows from a structured, albeit politically influenced, decision-making process involving the permanent members of the Security Council.

In stark contrast, the term "restrictions" or "unilateral coercive measures" accurately describes the plethora of coercive measures imposed by states or groups of states outside the mandatory UN framework. These measures are fundamentally an expression of sovereign will and a tool of national foreign policy that operates in a legal grey zone, deliberately circumventing the universal and collective mechanisms intended to maintain international order (Devaney, 2025, pp. 217-238). The legitimacy of such unilateral restrictions is deeply and fundamentally questionable from the perspective of core peremptory principles of international law enshrined in the very same UN Charter that the imposing states often claim to uphold.

The principle of the sovereign equality of states, articulated in Article 2(1) of the UN Charter, is rendered almost meaningless when a coalition of more powerful states can unilaterally dictate the economic terms of existence, financial operations, and trade relations to other sovereign entities (Hufbauer, Schott, Elliott & Oegg, 2019). This practice effectively creates a two-tier international system where a select group of nations arrogates unto itself the right to act as global legislator, prosecutor, and judge, a direct contravention of the foundational premise of sovereign equality. Similarly, the principle of

---

<sup>1</sup> United Nations (1945). Charter of the United Nations. Available at: <https://www.un.org/en/about-us/un-charter> (15.10.2025).

non-intervention in the domestic affairs of states, a cornerstone of the international system codified in Article 2(7) of the UN Charter, is directly and flagrantly undermined by comprehensive economic measures explicitly designed to force political, social, and economic change within a target state. The extensive restrictions imposed on the Russian Federation, targeting entire sectors of its economy and the livelihoods of its citizens, represent a textbook case of coercive intervention aimed at altering the sovereign policy choices of a state, a clear violation of this fundamental tenet of international law (Sputnik, 2023).

Furthermore, such restrictions often run counter to the spirit and specific provisions of international trade law. The foundational rules of the World Trade Organization (WTO), particularly the General Agreement on Tariffs and Trade (GATT), prohibit arbitrary and discriminatory trade practices and restrict the use of quantitative restrictions (World Trade Organization, 1947). The network of trade and financial restrictions imposed by the US, EU, and their allies constitutes a *de facto* withdrawal of most-favoured-nation treatment and the imposition of sweeping quantitative barriers, measures that are difficult to reconcile with their WTO obligations under the narrow security exceptions they frequently invoke (Titi, 2022). This creates a precedent that erodes the very foundation of the rules-based trading system that these nations have long championed.

The modern restrictive policy of certain Western states has acquired qualitatively new and alarming characteristics, transforming from an instrument of targeted political pressure into a system of large-scale, indiscriminate economic warfare that affects entire populations and seeks to decouple nations from the global economy (Sen, 2019). This phenomenon has been incorrectly normalized as a new "standard" of international relations, but in reality, it creates systemic challenges for the entire structure of the international legal order, undermining its predictability, fairness, and very purpose. The seizure of a state's sovereign foreign currency reserves, a measure with no precedent in recent history, demonstrates a move towards a form of financial arbitrariness that fundamentally undermines trust in the global financial architecture and violates the principle of state immunity.

It is precisely this systemic character and the foundational legitimacy gap that provide a compelling and necessary justification for the intervention of judicial bodies at all levels. When political acts, dressed in the language of necessity or morality, have such widespread and devastating consequences for individuals, companies, and the economic sovereignty of nations, the argument that they are purely "political questions" beyond the purview of law becomes not only untenable but also dangerous (Schmidt, 2022, pp. 53–81). It is this legitimacy vacuum that courts are increasingly being asked to fill, applying the timeless principles of law — such as proportionality, non-discrimination, and the protection of fundamental rights — to the novel challenges of modern economic coercion. The legal appeals and countermeasures pursued by the Russian Federation in various international fora are not merely retaliatory; they are a necessary defense of the principle that international relations must be governed by law, not by the raw power of unilateral coercion.

### 3. THE GLOBAL JUDICIAL RESPONSE: JURISPRUDENTIAL CORRECTION AS A NECESSARY COUNTERWEIGHT TO POLITICAL ARBITRARINESS

The contemporary international landscape is increasingly characterized by a troubling trend: the unilateral and often arbitrary imposition of restrictive measures by a coalition of states, led by the United States and the European Union, which operates outside the collective security framework of the United Nations Charter. This significant expansion of executive power in foreign policy, frequently justified under the nebulous rubric of "human rights" or "international security," has effectively created a regime of political arbitrariness that undermines the sovereign equality of states and the principles of a rules-based international order (Mulder, 2022). Faced with the paralysis and politicization of traditional diplomatic channels, where the voices of targeted nations are systematically marginalised, domestic and international courts have emerged as a crucial, albeit imperfect, forum for legal redress. This global shift towards a "jurisprudential correction" represents a vital development, wherein judicial bodies are progressively called upon to delineate the legal boundaries of what constitutes lawful countermeasures versus unlawful economic coercion, thereby acting as a necessary bulwark against the hegemonic application of might-makes-right policies.

This judicial phenomenon is not a coordinated conspiracy but an organic response to the profound legal vacuum and systemic violations created by politically motivated restrictions. For the Russian Federation and other nations facing such measures, this jurisprudential evolution offers a critical pathway to challenge their legality and seek accountability. At the international level, the advisory opinions and contentious case jurisprudence of the International Court of Justice (ICJ) provide a foundational framework for this correction. The Court has consistently emphasised that any use of coercive measures, including those not involving armed force, must comply with international law, including the principle of non-intervention in the domestic affairs of states as enshrined in Article 2(7) of the UN Charter<sup>2</sup>. The unilateral imposition of comprehensive sanctions regimes, which aim to destabilise a sovereign state's economy and society, represents a clear violation of this cornerstone principle. Furthermore, the legal mechanisms of the World Trade Organization (WTO), though currently hampered by political interference, have historically provided a venue to challenge unilateral trade restrictions that violate the core Most-Favoured-Nation and National Treatment principles of the GATT<sup>3</sup>. The systematic blockage of the WTO Appellate Body by the United States, however, demonstrates the political resistance to accepting binding judicial review of its coercive economic policies, a move that further underscores the necessity of alternative judicial avenues.

---

<sup>2</sup> ICJ 1986. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*. Merits, Judgment. I.C.J. Reports 1986, available at: <https://www.icj-cij.org/case/70> (10.10.2025)

<sup>3</sup> WTO. 2019. *United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products (DS381)*. Report of the Appellate Body, Available at: [https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds381\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds381_e.htm) (10.10.2025)

The jurisprudence of the European Court of Human Rights (ECtHR) is equally pivotal in this corrective process. While its direct jurisdiction regarding inter-state measures is complex, the Court's robust doctrine on the protection of property rights under Article 1 of Protocol No. 1 to the European Convention on Human Rights offers a powerful tool. The freezing of assets of Russian individuals and entities without due process, based on broad and often unsubstantiated categorisations, raises serious questions of proportionality and individual justice. The ECtHR has held that while states have a margin of appreciation in formulating foreign policy, any measure interfering with property rights must strike a "fair balance" between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights<sup>4</sup>. The blanket nature of many sanctions, which effectively presume guilt by nationality or association, fails this test spectacularly, constituting a collective punishment that is alien to the principles of liberal legalism that Western states purport to uphold.

The most potent and influential example of this jurisprudential correction within the Western legal sphere itself is the landmark rulings of the Court of Justice of the European Union (CJEU) in the *Kadi* saga. In these seminal decisions, the CJEU performed a radical act of judicial defence of its autonomous legal order, asserting that all EU acts, including those implementing UN Security Council resolutions, must be subject to review for compliance with the fundamental principles of EU law, notably the protection of human rights and the guarantee of effective judicial review<sup>5</sup>. The Court declared the regulations giving effect to the UN sanctions list against Mr. Kadi to be invalid, as they denied him the right to be informed of the evidence against him and the right to be heard. This jurisprudence is of paramount importance for Russia, as it establishes a powerful precedent that no political measure — whether originating from New York, Washington, or Brussels — is entirely beyond the reach of judicial scrutiny when it infringes upon fundamental legal principles. It exposes the hypocrisy of a system that demands legal exceptionalism for its own actions while preaching the universality of the rule of law. The logical extension of the *Kadi* principle is that the EU's own far-reaching sanctions against Russian nationals and companies must be implemented with rigorous procedural fairness, a standard they frequently fail to meet, thereby rendering them vulnerable to legal challenge on grounds of arbitrary application and violation of fundamental rights<sup>6</sup>.

At the domestic level, this trend of judicial pushback is also gaining momentum, creating fissures in the seemingly monolithic facade of political support for unrestricted coercion. National courts in jurisdictions traditionally aligned with US foreign policy,

---

<sup>4</sup> ECtHR (2013). Case of Oleynikov v Russia, Application no. 36703/04. Judgment of 14 March 2013, available at: <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-193014%22%5D%7D> (10.10.2025)

<sup>5</sup> Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities. C-402/05, available at: <https://curia.europa.eu/juris/liste.jsf?num=C-402/05> (10.10.2025)

<sup>6</sup> Eckes, C. 2014. 'EU restrictive measures against natural and legal persons: From counterterrorist to third country sanctions', 51, Common Market Law Review, Issue 3, pp. 869-905, available at: <https://kluwerlawonline.com/journalarticle/Common+Market+Law+Review/51.3/COLA2014064> (10.10.2025)

including Switzerland and the United Kingdom, are increasingly confronted with lawsuits challenging the implementation of sanctions. These cases often focus on the lack of procedural fairness, the disproportionality of the measures, and their conflict with national constitutional guarantees<sup>7</sup>. For instance, Swiss courts have been required to balance their country's foreign policy alignment with its deep-seated legal traditions of proportionality and individual rights protection. This domestic judicial activism exists in a state of constant tension with the traditional "political question" or "act of state" doctrines, which historically counselled judicial deference in matters of high foreign policy. However, the very scale and systemic nature of modern sanctions, which directly and profoundly impact the property, reputation, and livelihood of individuals, are forcing courts worldwide to narrow the scope of these deferential doctrines.

In conclusion, the emerging global judicial response to unilateral restrictive measures constitutes a necessary and legitimate form of jurisprudential correction. It serves as an essential counterweight to a political process that has become unmoored from the principles of sovereignty, non-intervention, and due process. For the Russian Federation, engaging with and leveraging these judicial mechanisms — from the ICJ to the CJEU and national courts — is not merely a tactical legal manoeuvre but a strategic imperative. It is a defence of the multilateral legal order against its unilateral usurpation and a powerful demonstration that the rule of law, however imperfectly applied, must ultimately prevail over the arbitrary rule of political force. This judicial trend reinforces Russia's long-standing legal and diplomatic position that the current practice of unilateral sanctions is not only politically destructive but also fundamentally unlawful.

#### **4. THE RUSSIAN JUDICIAL PRACTICE: FORGING A DOMESTIC JURISPRUDENCE AGAINST UNILATERAL COERCIVE MEASURES**

The response of the Russian judicial and legislative systems to the unprecedented wave of unilateral restrictive measures (URMs) imposed by the United States, the European Union, and other allied states presents a compelling and instructive case study of a sovereign state leveraging its domestic legal apparatus to counteract what it perceives as illegitimate external coercion. This development is not an isolated phenomenon but rather a specific manifestation of a global trend of jurisprudential pushback against the extraterritorial application of national laws, adapted to the unique legal, constitutional, and geopolitical circumstances of the Russian Federation (Sukhanova, 2024, pp. 79-89). The Russian approach is multifaceted, constituting a coherent strategy that involves proactive legislative action, strategic judicial interpretation, and the development of a distinct legal doctrine aimed at creating a comprehensive legal shield against the effects of external restrictions and affirming the primacy of Russian law within its jurisdiction. This process represents a deliberate effort to juridify a political conflict, translating it

---

<sup>7</sup> Cremona, M. (Ed.), *Structural principles in EU external relations law*. Portland ; Oxford : Hart Publishing, 2018. Available at: <https://hdl.handle.net/1814/60207> (10.10.2025)

into a domain where the state can exercise control and provide predictability for its economic operators, all while upholding the principle that the UN Security Council is the sole source of legitimate sanctions<sup>8</sup>.

The foundational legislative response was the adoption of Federal Law No. 281-FZ «On Special Economic Measures and Coercive Measures» of December 22, 2006<sup>9</sup>, and Federal Law of June 4, 2018 No. 127-FZ «On Measures of Influence (Counteraction) against Unfriendly Actions of the United States of America and Other Foreign States»<sup>10</sup>, commonly known as the "Countersanctions Laws". This law, while a political instrument of foreign policy, also created a new legal reality that Russian courts were subsequently required to interpret and enforce. It empowered the President of the Russian Federation to impose responsive special economic measures, including bans on the import and export of goods, suspension of economic and financial transactions, and prohibitions on the performance of works or provision of services. Crucially, from a judicial standpoint, the law provided a domestic legal basis for actions that would otherwise constitute a breach of contract or international commercial obligations, thereby reframing non-performance from a private law delict into an act of compliance with national public law. This legislative move was a critical first step in creating a legal "firewall" against the extraterritorial reach of foreign sanctions regimes, a necessity that became even more acute after February 2022 when the sanctions landscape expanded to include price caps, corporate boycotts, and bans on professional services (Galushko, 2024, pp. 24-28).

The jurisprudence that has developed in Russian courts concerning sanctions-related disputes can be broadly categorized into several key strands that reflect the core principles of state sovereignty, the defense of national economic interests, and the protection of the national legal order from external interference.

Firstly, in the realm of contract law, Russian courts have been faced with a deluge of cases where Russian companies and individuals have sought to be released from their contractual obligations, or to have the terms of contracts altered, due to the imposition of sanctions that make performance impossible, illegal, or commercially impracticable. In applying the provisions of the Russian Civil Code on force majeure (Article 401) and a material change of circumstances (Article 451), Russian courts have consistently and systematically recognized the imposition of blocking sanctions as a qualifying event. This judicial recognition provides crucial relief to Russian entities, preventing them from being held in breach of contract for failures resulting directly from the extraterritorial application of foreign laws that conflict with Russian law and policy. This

<sup>8</sup> The Foreign Policy Concept of the Russian Federation. 2023. Approved by Decree of the President of the Russian Federation No. 229, 31 March, Available at: [https://mid.ru/en/foreign\\_policy/fundamental\\_documents/1860586/?TSPD\\_101\\_R0=08765fb817ab2000327bcf2738b0e66eccaa45bcdce6e0f72e-372b5c430a5e8fea5d11bf6d90ac5608631bd50f1430004eeecd16f081eb2e99a91e0ff3433595b3fcfe1d07080-602a8fb04bcc43866036f1bf44c461a3fc3f63a3b3640cd73a](https://mid.ru/en/foreign_policy/fundamental_documents/1860586/?TSPD_101_R0=08765fb817ab2000327bcf2738b0e66eccaa45bcdce6e0f72e-372b5c430a5e8fea5d11bf6d90ac5608631bd50f1430004eeecd16f081eb2e99a91e0ff3433595b3fcfe1d07080-602a8fb04bcc43866036f1bf44c461a3fc3f63a3b3640cd73a) (10.10.2025)

<sup>9</sup> Federal Law No. 281-FZ «On Special Economic Measures and Coercive Measures», Available at: <http://pravo.gov.ru/proxy/ips/?docbody=&prevDoc=102434182&backlink=1&&nd=102111154> (10.10.2025)

<sup>10</sup> Federal Law of June 4, 2018 No. 127-FZ «On Measures of Influence (Counteraction) against Unfriendly Actions of the United States of America and Other Foreign States», Available at: <http://pravo.gov.ru/proxy/ips/?docbody=&prevDoc=602169685&backlink=1&&nd=102471134> (10.10.2025)

line of reasoning represents a pragmatic adaptation of the principle of *pacta sunt servanda*, acknowledging that supervening illegality or impossibility, imposed by a hostile third-party state, can disrupt the foundational assumptions of a commercial agreement. This approach is not merely theoretical but has been applied to protect Russian businesses from crippling liability for non-performance that is beyond their control.

Secondly, a significant and politically sensitive area of jurisprudence involves the implementation of Russia's responsive measures and their impact on both foreign and domestic entities. Russian courts generally uphold the state's broad discretionary right to take defensive measures based on national security and public interest, as outlined in the federal legislation. For instance, the rapid implementation of export bans, as seen with Government Decree No. 311<sup>11</sup>, has had a necessary rapid response. In the case of LLC "Company Vita-Orta," the legal entity was fined for attempting to export prosthetic components for warranty repair (Case No. A41-40119/2022)<sup>12</sup>. The courts, in such instances, have strictly upheld the letter of the law, emphasizing that participants in foreign economic activity are obliged to monitor and comply with current legislation.

Thirdly, and perhaps most innovatively, Russian courts have played a pivotal role in protecting the procedural rights of Russian citizens and legal entities directly targeted by foreign sanctions. The most groundbreaking development in this area is the introduction of Articles 248.1 and 248.2 into the Arbitrazh (Commercial) Procedure Code via Federal Law No. 171-FZ of June 8, 2020. These articles were specifically designed to counteract the effective denial of justice faced by Russian persons under sanctions in foreign courts and international arbitrations<sup>13</sup>. Article 248.1 establishes the exclusive jurisdiction of Russian courts over disputes involving sanctioned Russian persons. Article 248.2 introduces a mechanism akin to an anti-suit injunction, allowing a sanctioned Russian party to petition a Russian court to prohibit its foreign counterparty from initiating or continuing proceedings in a foreign court or arbitration.

The initial judicial application of these norms was cautious, with courts requiring concrete proof that the sanctions actually impeded access to justice. However, a landmark ruling by the Supreme Court of the Russian Federation on December 9, 2021 (Case No. A60-36897/2020)<sup>14</sup>, fundamentally shifted this interpretation. The Supreme Court established that the mere fact of being placed under restrictive measures by an "unfriendly" state is in itself sufficient to presume a restriction of access to justice. The Court

---

<sup>11</sup> On measures to implement the Decree of the President of the Russian Federation of March 8, 2022, No. 100: Decree of the Government of the Russian Federation of March 9, 2022, No. 311. (2022), Available at: <https://static.government.ru/media/acts/files/1202203100034.pdf> (10.10.2025)

<sup>12</sup> Ruling of the Arbitration Court of the Moscow District of 20 January 2023 No. F05-33013/2022 in Case No. A41-40119/2022. Available at: <https://kad.arbitr.ru> (10.10.2025)

<sup>13</sup> Explanatory Note to the draft federal law No. 754380-7 (2020) On amendments to certain legislative acts of the Russian Federation in order to protect the rights of certain categories of individuals and legal entities in connection with the unfriendly actions of the United States of America and other foreign states. Available at: <https://sozd.duma.gov.ru/bill/754380-7> (10.10.2025)

<sup>14</sup> Supreme Court of the Russian Federation. 2021. Ruling of the Judicial Chamber on Economic Disputes in case No. A60-36897/2020, 9 December, Available at: <https://www.garant.ru/products/ipo/prime/doc/403096216/> (10.10.2025)

reasoned that such measures "reputationally damage" Russian persons and place them in an inherently unequal and potentially biased position before a court in the jurisdiction that imposed the sanctions. This ruling significantly lowered the burden of proof for applicants and transformed Articles 248.1 and 248.2 into powerful legal shields. This jurisprudential evolution has been praised by some scholars as a necessary and effective tool for protecting Russian business.

The enforcement of these injunctions creates a complex interplay with international law, particularly the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. While an arbitration award rendered in violation of a Russian anti-suit injunction is unlikely to be set aside at the seat of arbitration or refused enforcement in other New York Convention states, its enforcement within the Russian Federation will almost certainly be denied. This creates a powerful disincentive for foreign counterparties with assets in Russia, thereby compelling them to submit to the jurisdiction of Russian courts.

In conclusion, the judicial practice in Russia is thus evolving towards a sophisticated model that asserts jurisdictional autonomy, prioritizes the stability of the national economic space, and systematically uses the tools of domestic law to mitigate the disruptive consequences of externally imposed economic warfare. This development, while rooted in the specific context of Russia's confrontation with the West and framed by its official policy of opposing "illegal unilateral coercive measures"<sup>15</sup>, contributes to the broader global narrative of how national judicial systems are being mobilized as key instruments of "legal counter-offense" to defend economic sovereignty. By providing a measure of justice and legal predictability for its nationals, the Russian judiciary is not merely applying the law but is actively participating in the forging of a new jurisprudence of resistance to unilateral coercive measures, setting a precedent that other states facing similar external pressure may well study and emulate.

## 5. CONCLUSION

The judicial evolution of challenging economic restrictions represents a pivotal and defining development in modern international law and relations, signaling a shift in how the international community grapples with the weaponization of economic interdependence. As unilateral and plurilateral restrictions have proliferated, becoming a normalized yet legally precarious instrument of foreign policy, their inherent legitimacy crisis has catalyzed a corresponding and powerful response from judicial bodies at both the international and domestic levels. This article has argued that through a sustained process of "jurisprudential correction," courts worldwide are increasingly asserting their role as a crucial

---

<sup>15</sup> The Foreign Policy Concept of the Russian Federation. 2023. Approved by Decree of the President of the Russian Federation No. 229, 31 March, Available at: [https://mid.ru/en/foreign\\_policy/fundamental\\_documents/1860586/?TSPD\\_101\\_R0=08765fb817ab2000327bcf2738b0e66eccaa45bcdce6e0f72e-372b5c430a5e8fea5d11bf6d90ac5608631bd50f1430004eeecde16f081eb2e99a91e0ff3433595b3fcfe1d07080-602a8fb04bcc43866036f1bf44c461a3fc3f63a3b3640cd73a](https://mid.ru/en/foreign_policy/fundamental_documents/1860586/?TSPD_101_R0=08765fb817ab2000327bcf2738b0e66eccaa45bcdce6e0f72e-372b5c430a5e8fea5d11bf6d90ac5608631bd50f1430004eeecde16f081eb2e99a91e0ff3433595b3fcfe1d07080-602a8fb04bcc43866036f1bf44c461a3fc3f63a3b3640cd73a) (10.10.2025)

counterweight, carving out an essential space for legal principle, procedural justice, and fundamental rights within the politically charged and often brutal arena of economic coercion. By focusing with growing sophistication on key legal frontiers such as proportionality, fundamental rights, and procedural legitimacy, the judiciary is imposing necessary and vital legal constraints on the exercise of coercive economic power, refusing to allow it to operate in a legal vacuum. This is not a seamless, universally consistent, or invariably successful project; it exists in a state of constant and dynamic tension with the political question doctrine and the ever-adaptive strategies of powerful states. Yet, the very act of adjudicating these measures, of subjecting them to the cold light of legal reasoning, signifies a profound and enduring commitment to the idea that no power, however great its political objectives or moral claims, should be entirely beyond the reach of law. The Russian judicial practice, as a specific case study, illustrates how this global trend manifests in a context of direct confrontation, where domestic law is mobilized to defend national economic sovereignty and provide stability. The pursuit of justice in this complex context is the relentless effort to ensure that the devastating impacts of economic warfare on individuals, companies, and the sovereign equality of states are mitigated by the enduring principles of due process, legal certainty, and the protection of fundamental rights. The judicial evolution, therefore, is not merely a technical legal phenomenon but a vital political, ethical, and civilizational struggle to uphold the rule of law and prevent a descent into a purely might-based international order. The future trajectory of international stability, justice, and the very relevance of international law will depend significantly on whether this judicial bridge between law and politics can be strengthened, expanded, and sustained against the relentless pressures of a new age of economic conflict and geopolitical fragmentation.

## References

1. Devaney, J. G. 2025. *On Sanctions and the Enforcement of International Law: A Rule of Law Analysis*. *Nordic Journal of International Law*, 94(3), 217–238. Brill. <https://doi.org/10.1163/15718107-bja10103>
2. Galushko, D. V. 2024. *Sankcionnyj kompliens kak sredstvo obespecheniâ èkonomičeskoj bezopasnosti predprinimatel'skoj deâtel'nosti [Sanctions Compliance as a Means of Ensuring the Economic Security of Business Activities]*. *Zakony Rossii: opyt, analiz, praktika*, (6), 24–28. (In Russ.).
3. Giumelli, F. 2013. *The Success of Sanctions: Lessons Learned from the EU Experience* (1<sup>st</sup> ed.). Routledge. <https://doi.org/10.4324/9781315552446>
4. Hufbauer, G. C., Schott, J. J., Elliott, K. A., & Oegg, B. 2019. *Economic Sanctions Reconsidered* (3<sup>rd</sup> ed.). Peterson Institute for International Economics.
5. Mulder, N. 2022. *The Economic Weapon: The Rise of Sanctions as a Tool of Modern War*. Yale University Press. <https://doi.org/10.2307/j.ctv240df1m>
6. Schmidt, J. 2022. *The Legality of Unilateral Extra-territorial Sanctions under International Law*. *Journal of Conflict and Security Law*, 27(1), 53–81. <https://doi.org/10.1093/jcsl/krac005>

7. Sen, J. 2019. *The Weaponisation of the Dollar: Policy Options for Small Countries*. LSE Research Online Documents on Economics, London School of Economics and Political Science, LSE Library.
8. Sukhanova, M. G. 2024. *Politiko-pravovoe otnoshenie Rossiiskoi Federatsii k odnostoronnim ogranichitel'nym meram (sanktsiiam) i ego otrazhenie v aktakh sudebnoi praktiki [The Political and Legal Attitude of the Russian Federation towards Unilateral Restrictive Measures (Sanctions) and Its Reflection in Acts of Judicial Practice]*. *Permskii yuridicheskii al'manakh*, 7, 79–89.
9. Titi, C. 2022. *The Right to Regulate in International Investment Law (Revisited)*. International and Comparative Law Research Center.

### **Internet Sources**

1. Cremona, M. 2018. *Structural Principles in EU External Relations Law*. Hart Publishing. Available at: <https://hdl.handle.net/2027/ucbk.eb0065540213> (10.10.2025)
2. Cremona, M. (Ed.), *Structural principles in EU external relations law*. Portland; Oxford : Hart Publishing, 2018. Available at: <https://hdl.handle.net/1814/60207> (10.10.2025)
3. ECtHR (2013). *Case of Oleynikov v Russia*, Application no. 36703/04. Judgment of 14 March 2013, available at: [https://hudoc.echr.coe.int/eng#%22itemid%22:\[%22001-193014%22\]](https://hudoc.echr.coe.int/eng#%22itemid%22:[%22001-193014%22]) (10.10.2025)
4. Eckes, C. 2014. *EU Restrictive Measures Against Natural and Legal Persons: From Counterterrorist to Third Country Sanctions*. *Common Market Law Review*, 51(3), 869–905. Available at: <https://kluwerlawonline.com/journalarticle/Common+Market+Law+Review/51.3/COLA2014064> (10.10.2025)
5. Eckes, C. 2014. 'EU restrictive measures against natural and legal persons: From counterterrorist to third country sanctions', 51, *Common Market Law Review*, Issue 3, pp. 869-905, available at: <https://kluwerlawonline.com/journalarticle/Common+Market+Law+Review/51.3/COLA2014064> (10.10.2025)
6. Explanatory Note to the draft federal law No. 754380-7 (2020) On amendments to certain legislative acts of the Russian Federation in order to protect the rights of certain categories of individuals and legal entities in connection with the unfriendly actions of the United States of America and other foreign states. Available at: <https://sozd.duma.gov.ru/bill/754380-7> (10.10.2025)
7. Federal Law No. 281-FZ «On Special Economic Measures and Coercive Measures», Available at: <http://pravo.gov.ru/proxy/ips/?docbody=&prevDoc=102434182&backlink=1&&nd=102111154> (10.10.2025)
8. Federal Law of June 4, 2018 No. 127-FZ «On Measures of Influence (Counteraction) against Unfriendly Actions of the United States of America and Other Foreign States», Available at: <http://pravo.gov.ru/proxy/ips/?docbody=&prevDoc=602169685&backlink=1&&nd=102471134> (10.10.2025)
9. ICJ 1986. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*. Merits, Judgment. I.C.J. Reports 1986, available at: <https://www.icj-cij.org/case/70> (10.10.2025)

10. On measures to implement the Decree of the President of the Russian Federation of March 8, 2022, No. 100: Decree of the Government of the Russian Federation of March 9, 2022, No. 311. (2022), Available at: <http://static.government.ru/media/acts/files/1202203100034.pdf> (10.10.2025)
11. Ruling of the Arbitration Court of the Moscow District of 20 January 2023 No. F05-33013/2022 in Case No. A41-40119/2022. Available at: <https://kad.arbitr.ru> (10.10.2025)
12. Supreme Court of the Russian Federation. 2021. Ruling of the Judicial Chamber on Economic Disputes in case No. A60-36897/2020, 9 December, Available at: <https://www.garant.ru/products/ipo/prime/doc/403096216/> (10.10.2025)
13. The Foreign Policy Concept of the Russian Federation. 2023. Approved by Decree of the President of the Russian Federation No. 229, 31 March, Available at: [https://mid.ru/en/foreign\\_policy/fundamental\\_documents/1860586/?TSPD\\_101\\_R0=08765fb817ab2000327bcf2738b0e66eccaa45bcdce6e0f72e372b5c430a5e8fea5d-11bf6d90ac5608631bd50f1430004eeecde16f081eb2e99a91e0ff3433595b3fcfe1d07080-602a8fb04bcc43866036f1bf44c461a3fc3f63a3b3640cd73a](https://mid.ru/en/foreign_policy/fundamental_documents/1860586/?TSPD_101_R0=08765fb817ab2000327bcf2738b0e66eccaa45bcdce6e0f72e372b5c430a5e8fea5d-11bf6d90ac5608631bd50f1430004eeecde16f081eb2e99a91e0ff3433595b3fcfe1d07080-602a8fb04bcc43866036f1bf44c461a3fc3f63a3b3640cd73a) (10.10.2025)
14. The Foreign Policy Concept of the Russian Federation. 2023. Approved by Decree of the President of the Russian Federation No. 229, 31 March, Available at: [https://mid.ru/en/foreign\\_policy/fundamental\\_documents/1860586/?TSPD\\_101\\_R0=08765fb817ab2000327bcf2738b0e66eccaa45bcdce6e0f72e372b5c430a5e8fea5d-11bf6d90ac5608631bd50f1430004eeecde16f081eb2e99a91e0ff3433595b3fcfe1d07080-602a8fb04bcc43866036f1bf44c461a3fc3f63a3b3640cd73a](https://mid.ru/en/foreign_policy/fundamental_documents/1860586/?TSPD_101_R0=08765fb817ab2000327bcf2738b0e66eccaa45bcdce6e0f72e372b5c430a5e8fea5d-11bf6d90ac5608631bd50f1430004eeecde16f081eb2e99a91e0ff3433595b3fcfe1d07080-602a8fb04bcc43866036f1bf44c461a3fc3f63a3b3640cd73a) (10.10.2025)
15. United Nations (1945). Charter of the United Nations. Available at: <https://www.un.org/en/about-us/un-charter> (15.10.2025).
16. WTO. 2019. United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products (DS381). Report of the Appellate Body, Available at: [https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds381\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds381_e.htm) (10.10.2025)
17. Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities. C-402/05, available at: <https://curia.europa.eu/juris/liste.jsf?num=C-402/05> (10.10.2025)



# UNIVERSALISM VS. REGIONALISM: THE FRAGMENTATION OF INTERNATIONAL LEGAL COOPERATION IN COMBATING CRIME ACROSS EURASIA

Konstantin V. Kantserov\*

*This article examines the complex interplay between the competing trends of universalism and regional fragmentation within the framework of international legal cooperation in combating transnational crime, with a specific focus on the Eurasian region. Using the Republic of Kazakhstan as a central case study, the analysis explores how the global push for legal harmonization, embodied in United Nations conventions and standardized norms, coexists and often conflicts with the countervailing forces of regionalism, resurgent nationalism, and steadfast sovereignty. The study argues that this duality creates a multi-layered and often contradictory legal landscape, where the implementation of universal standards is mediated through regional agreements and national interests. The article concludes that the future of effective cross-border crime prevention in Eurasia depends not on the victory of one trend over the other, but on the strategic management of their interaction, fostering bridges between global frameworks and regional particularities to ensure a more coherent and effective international legal order.*

**KEYWORDS:** *Universalism, Regionalism, Transnational crime, Sovereignty, Kazakhstan, Eurasian integration, Eurasian legal cooperation, Fragmentation.*

---

\* Post-graduate student of the Department of International Law, Diplomatic Academy of the Ministry of Foreign Affairs of the Russian Federation, (Moscow, Russia).  
E-mail: [kantserov.sop@list.ru](mailto:kantserov.sop@list.ru)

## 1. INTRODUCTION

The contemporary international legal order, particularly in the sphere of combating crime, is characterized by a complex and seemingly paradoxical dialectic between two concurrent processes: universalization and fragmentation (or regionalization) (Koskenniemi, 2007). On one hand, the forces of globalization necessitate unified, universal responses to transnational threats that defy national borders, such as organized crime, terrorism, corruption, and cybercrime. This has led to the proliferation of global conventions, the establishment of international criminal tribunals, and the promotion of universal legal standards (Cassese, 2008). On the other hand, this very process of globalization has simultaneously invigorated tendencies towards regionalism, nationalism, and the reassertion of cultural and legal particularities (Teubner, 2012). This phenomenon, often termed "fragmentation" in international legal scholarship, manifests as the creation of specialized, sometimes competing, regional treaty regimes and a resistance to ceding sovereign prerogatives to global institutions (International Law Commission, 2006). Nowhere is this tension more palpable than in the vast and strategically pivotal region of Eurasia, a space where global powers intersect, and where post-Soviet states navigate their unique path between their historical legacies and contemporary international integration (Lewis, 2012, pp. 1219-1237). This article posits that the interplay between universalism and regional fragmentation fundamentally shapes the efficacy and character of international legal cooperation in combating crime across Eurasia. Using the Republic of Kazakhstan as a primary case study—a nation actively engaged in both global and regional security architectures—this paper will dissect the legal and institutional manifestations of this duality (Zhenis, 2016, pp. 157-194). It will argue that while the pull of universal legal standards is strong and necessary for a coherent global response, the push of regional specificities, sovereignty concerns, and fragmented legal regimes creates a complex landscape where the implementation of international norms is often uneven, contested, and adapted to local contexts (Shaffer & Ginsburg, 2012, pp. 1-46). The analysis will proceed by first elucidating the theoretical underpinnings of universalism and fragmentation in international law. It will then trace the trajectory of universalism through key United Nations conventions and their implementation in Kazakhstan. Subsequently, the article will explore the countervailing force of fragmentation, examining regional organizations and the persistent challenges of sovereignty. Finally, it will assess the practical consequences of this dynamic for legal cooperation in Eurasia, concluding with reflections on the future of a harmonized, yet sufficiently flexible, international legal order for crime control.

The dialectic of universalism and fragmentation is not a contradiction but a natural feature of the evolution of international law, particularly under conditions of globalization (Simma & Pulkowski, 2006, pp. 483-529). As noted in scholarly works, globalization leads, on one hand, to universalization, unification, homogenization, and the consolidation of the modern world, while on the other, it fosters the revival of ethnicity, nationalism, and a growing interest in traditional values and national-cultural identity (Robertson, 1992). This inherent contradiction is embedded in the nature of the globalized,

information-driven world. The active growth of international cooperation has facilitated the expansion of the regulatory influence of international law into new areas of political, economic, social, and other spheres of life, including the fight against crime (Slaughter, 2004). Under this influence, individuals have become subjects of international law — a notion that seemed impossible at the beginning of the 20<sup>th</sup> century — with international criminal law norms now regulating their status as victims, witnesses, accused, and convicted persons (Cryer, Robinson & Vasiliev, 2019). International law has assumed the role of a global regulator, leading to institutional changes, including an increase in the number of international organizations endowed with broad competence, including for regulating and coordinating international cooperation in combating crime (Alter, 2014).

However, this vision of international law as a rigidly deterministic system of norms and institutions, reinforced by a mechanism of coercive enforcement, does not correspond to international legal realities (Koskeniemi, 2007). The strengthening interdependence of states in the context of globalization and world crises of various natures leads to the development of universal rules for regulating international relations, including international legal combat against crime. Yet, these processes frequently occur based on groundwork laid at regional, local, and bilateral levels (Berman, 2012). This phenomenon, identified by scholars as the "fragmentation of international law," is conditioned by the diversification and expansion of the scope of international law. According to the United Nations International Law Commission, which dedicated a 2006 report to the issue, the emergence of new and special types of legal regulation, "autonomous regimes," and geographically or functionally limited treaty systems creates significant problems (International Law Commission, 2006). The reasons for fragmentation, immanently inherent in international law, include the absence of a single center for international norm-making, the emergence of new spheres of international relations, the increasing complexity of the international legal system, and the lack of a subordinating hierarchy among international organs (Benvenisti & Downs, 2007, pp. 595-632). The development of the modern international legal order thus proceeds along the path of diversifying its substantive legal basis and complicating its structure, expressed in the emergence and strengthening of its constituent legal orders and treaty regimes, between which horizontal interconnections predominate (Krisch, 2010).

## **2. THE PULL OF UNIVERSALISM: GLOBAL STANDARDS AND KAZAKHSTAN'S INTEGRATION**

The centripetal force of universalism in international legal cooperation against crime represents a philosophical and practical response to the increasingly deterritorialized nature of contemporary criminal threats, creating what scholars have identified as a new paradigm in global governance where sovereignty becomes pooled and legal systems increasingly interoperable (Slaughter, 2004). This powerful trend finds its most authoritative embodiment in a sophisticated ecosystem of comprehensive United Nations conventions, which collectively constitute an evolving global *acquis criminel* that transcends traditional

jurisdictional boundaries and creates a web of reciprocal obligations designed to systematically dismantle the operational environments of transnational criminal networks (Mitsilegas, 2015). These instruments are far from merely symbolic diplomatic achievements; they represent the international community's most concerted endeavor to construct an impregnable common legal front, establishing an intricate latticework of legally binding commitments that aim to eliminate safe havens through normative harmonization and procedural alignment across diverse legal traditions. The cornerstone of this universalist edifice includes not only the seminal UN Convention against Transnational Organized Crime (UNTOC)<sup>1</sup> with its groundbreaking supplementary protocols targeting the specific mechanics of trafficking in persons, smuggling of migrants, and illicit manufacturing of and trafficking in firearms, but also the transformative UN Convention against Corruption (UNCAC)<sup>2</sup>, a remarkably comprehensive instrument that revolutionizes approaches to corruption through its pioneering emphasis on preventive measures, criminalization, international cooperation, and the groundbreaking imperative of asset recovery (Webb, 2005, pp. 191-229); furthermore, the International Convention for the Suppression of the Financing of Terrorism (1999)<sup>3</sup> strategically targets the financial infrastructure of terrorism through innovative jurisdictional provisions and cooperation mechanisms (Bantekas, 2003, pp. 315-333), while the foundational UN Drug Control conventions establish the bedrock principles for controlling illicit narcotics (Taylor & Jelsma, 2012). The operational logic permeating these frameworks is inherently and deliberately universalizing: they obligate states parties to precisely criminalize a defined and expanding set of conducts within their domestic legal systems through meticulous legislative incorporation, establish expansive and sometimes overlapping jurisdictional principles to create a net that ensures perpetrators cannot escape justice through jurisdictional arbitrage, and, most critically for functional cooperation in the Eurasian context, mandate engagement in robust, predictable mechanisms of mutual legal assistance that encompass evidence sharing, witness testimony, and asset freezing; streamline extradition procedures by limiting political offense exceptions and dual criminality requirements; facilitate joint investigative teams and coordinated law enforcement operations; and promote technical cooperation and capacity building (Nadelmann, 1990, pp. 479-526). This creates a powerful normative expectation of a seamless global network where legal systems, despite their profound historical, cultural, and doctrinal differences, can achieve what political systems often cannot — effective, predictable interoperability against common criminal adversaries that threaten global security and economic stability (Andreas & Nadelmann, 2006).

For a pivotal, strategically positioned Eurasian state like the Republic of Kazakhstan deliberate and strategic adherence to these universal instruments has constituted nothing less than a cornerstone of its foreign policy doctrine and a critical vector for its

---

<sup>1</sup> UN Convention against Transnational Organized Crime and the Protocols thereto. Available at: <https://www.unodc.org/unodc/en/organized-crime/intro/UNTOC.html> (8.6.2025)

<sup>2</sup> UN Convention against Corruption. Available at: [https://www.unodc.org/documents/brussels/UN\\_Convention\\_Against\\_Corruption.pdf](https://www.unodc.org/documents/brussels/UN_Convention_Against_Corruption.pdf) (8.6.2025)

<sup>3</sup> International Convention for the Suppression of the Financing of Terrorism. Available at: <https://www.un.org/law/cod/finterr.htm> (8.6.2025)

multidimensional integration into the global security, political, and economic architecture<sup>4</sup>. Kazakhstan's sequential ratification of these core conventions represents a powerful signal of its sovereign choice to irrevocably align itself with the mainstream of international legal order, consciously transcending its immediate regional affiliations and asserting its constitutional identity as a responsible, predictable global actor committed to the rule of law. As it is stated in Article 8 of the Constitution: «The Republic of Kazakhstan shall respect the principles and norms of international law, pursue a policy of cooperation and good-neighbourly relations among states, their equality and non-interference in each other's internal affairs, peaceful settlement of international disputes, and renounce the first use of armed force»<sup>5</sup>. This profound political commitment triggers what scholars have identified as the process of normative "infiltration" or penetration, a phenomenon where the norms and principles of international law progressively permeate and reshape domestic legal systems in an almost osmotic process following ratification, a transformative dynamic that operates largely independently of the specific doctrinal method of incorporation — be it monist or dualist — prevalent in a given national system. In the specific Kazakhstani context, this sustained normative infiltration has catalyzed nothing short of a deliberate, systematic, and ongoing program of fundamental legislative and institutional reform, effectively translating abstract universal treaty obligations into concrete, justiciable national law and operational practice<sup>6</sup>. To comply with the rigorous, detailed demands of UNCAC, for instance, Kazakhstan has undertaken a monumental legislative overhaul, not only adopting specialized framework legislation like the Law on Combatting Corruption<sup>7</sup> but also instituting a comprehensive, electronically managed asset declaration system for a wide spectrum of public officials<sup>8</sup>, establishing specialized anti-corruption prosecution and investigative agencies with enhanced operational autonomy, and fundamentally strengthening its entire legal framework for the identification, tracing, freezing, confiscation, and — most significantly — the return of illicitly acquired proceeds through novel legal mechanisms and international partnerships. Similarly, the comprehensive implementation of UNTOC has necessitated precise, technically complex amendments to the Criminal Code of Kazakhstan (Criminal Code of the Republic of Kazakhstan, 2014, Articles 283-285, 144, 218, 266, 288, etc.<sup>9</sup>), meticulously defining and penalizing participa-

<sup>4</sup> Concept of foreign policy of the Republic of Kazakhstan for 2020–2030. Available at: <https://adilet.zan.kz/eng/docs/U2000000280> (8.6.2025)

<sup>5</sup> Constitution of The Republic of Kazakhstan, Available at: <https://www.akorda.kz/en/constitution-of-the-republic-of-kazakhstan-50912> (11.5.2025)

<sup>6</sup> OECD: Baseline Report of the Fifth Round of Monitoring of Anti-Corruption Reforms in Kazakhstan. Available at: [https://www.oecd.org/en/publications/baseline-report-of-the-fifth-round-of-monitoring-of-anti-corruption-reforms-in-kazakhstan\\_c9652173-en.html](https://www.oecd.org/en/publications/baseline-report-of-the-fifth-round-of-monitoring-of-anti-corruption-reforms-in-kazakhstan_c9652173-en.html) (8.6.2025)

<sup>7</sup> On combating corruption: The Law of the Republic of Kazakhstan dated 18 November 2015 № 410-IV LRK. Available at: <https://adilet.zan.kz/eng/docs/Z1500000410> (8.6.2025)

<sup>8</sup> e-gov. Available at: [https://egov.kz/cms/ru/services/pass270\\_mf](https://egov.kz/cms/ru/services/pass270_mf) (8.6.2025)

<sup>9</sup> Mechanism for the Review of the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto (the UNTOC Review Mechanism): Kazakhstan. Available at: <https://www.unodc.org/unodc/en/organized-crime/intro/review-mechanism-untoc/country-profile/kazakhstan.html> (8.6.2025)

tion in structured organized criminal groups, criminalizing the increasingly sophisticated stages of money laundering from placement to integration, and introducing stringent procedural measures against the obstruction of justice. These are not merely perfunctory, formalistic transpositions of international text into national law; they represent a substantive, deep recalibration of the entire national legal and institutional order to meet a globally sanctioned benchmark of effectiveness, reflecting a conscious and strategic embrace of the universalist pull as a means of modernizing the state's legal infrastructure and enhancing its international credibility (Sidorova & Satbaeva, 2020, pp. 258-262).

Beyond the direct, albeit complex, transposition of substantive criminal law provisions, the universalizing impulse manifests with equal, if not greater, force in the ambitious, long-term project to standardize the very procedures, principles, and administrative frameworks that underpin all forms of international judicial and law enforcement cooperation. This secondary, yet fundamentally crucial, layer of universalism is arguably more critical for day-to-day operational efficacy, as it seeks to overcome the immense practical friction and debilitating delays that routinely arise from divergent national legal procedures, evidentiary standards, and administrative cultures (McClellan, 2012). Under the sustained auspices of the United Nations, particularly through the expert work of the Crime Commission and the UN Office on Drugs and Crime (UNODC), this has led to the systematic development, promotion, and periodic updating of a suite of meticulously drafted model treaties and technical guides, which serve as universal blueprints for bilateral and multilateral engagement<sup>10</sup>. The Model Treaty on Extradition and the Model Treaty on Mutual Legal Assistance in Criminal Matters are strategically designed to provide a standardized, optimized template for states, incorporating best practices and balancing the interests of requesting and requested states. Their overarching purpose is to proactively harmonize cross-border judicial practices, pre-emptively eliminate loopholes in legislation and the possibility of obtaining asylum for sophisticated criminals who exploit legal pluralism, and create a predictable, efficient, and rights-respecting procedural environment for international cooperation<sup>11</sup>. The profound and enduring relevance of this granular standardizing mission was formally recognized as early as the Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders in Havana in 1990, which explicitly recommended the global adoption of such instruments to fortify the technical legal infrastructure against crime<sup>12</sup>. The vast theoretical ambition and comprehensive scope of this procedural universalism is perhaps best captured in expansive scholarly classifications, which envisions a vast, intricately interconnected ecosystem of international standards spanning the entire governance lifecycle of criminal justice. This ambitious taxon-

---

<sup>10</sup> UNODC (2022). Model Treaties on International Cooperation in Criminal Matters. Available at: <https://www.unodc.org/unodc/en/legal-tools/model-treaties-and-laws.html> (8.6.2025)

<sup>11</sup> UN General Assembly (2021). 14<sup>th</sup> United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Kyoto, 7–12 March 2021. Available at: [https://www.unodc.org/unodc/en/crimecongress/previous/14th\\_Kyoto\\_Congress](https://www.unodc.org/unodc/en/crimecongress/previous/14th_Kyoto_Congress) (8.6.2025)

<sup>12</sup> UN General Assembly (1990). Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August–7 September 1990. Available at: <https://www.unodc.org/congress/en/previous/previous-08.html> (8.6.2025)

omy spans from the macro-level of formulating evidence-based criminal policy and the fundamental sovereign acts of criminalization and penalization, through the operational and ethical standards for law enforcement and judicial bodies in investigating, adjudicating, and sentencing for crimes, to the intricate, detailed norms governing all forms of international cooperation — from extradition and mutual legal assistance to the transfer of prisoners and criminal proceedings — the specialized standards governing the rapidly evolving field of international criminal justice, and finally, the critically important human rights-based standards regulating penitentiary conditions, the social reintegration of offenders through post-penitentiary influence, and even the professional, educational, and technical support systems required for the entire judiciary and law enforcement apparatus to function effectively and accountably. This holistic, almost encyclopedic vision reflects the ultimate normative ambition of legal universalism: to engender a cohesive, minimum standard of lawful state behavior and procedural fairness deemed indispensable for ensuring a safe, stable, predictable, and harmonious global society in the face of transnational criminal threats<sup>13</sup>. For Kazakhstan, therefore, active and sophisticated engagement with these multifaceted standardizing efforts transcends the mere fulfillment of a static legal obligation; it represents a profound pragmatic and strategic necessity for a landlocked nation pursuing an assertive multi-vector foreign policy (Nyshanbayev, et al., 2024, pp. 43 – 63). Its future capacity to effectively cooperate with a vastly diverse array of international partners — from Council of Europe members to North American jurisdictions to Asian economic powers — is directly contingent upon its domestic capacity to fluently speak a common legal language, internalize globally accepted procedural norms, and operate seamlessly within a shared technical-judicial framework, thereby ensuring that its hard-won integration into the global community is not only diplomatically acknowledged but is also deep, operationally effective, and sustainable in the long-term struggle against cross-border crime.

### **3. THE PUSH OF FRAGMENTATION: REGIONALISM, SOVEREIGNTY, AND EURASIAN PARTICULARITIES**

While the universalist impulse seeks to weave a seamless tapestry of global legal norms, the reality of international law, particularly in the vast and strategically contested space of Eurasia, is one of a complex, fragmented mosaic. This fragmentation is not a sign of systemic failure but rather an inherent, structural feature of a decentralized international order, a phenomenon meticulously documented by scholars and recognized by bodies such as the UN International Law Commission (International Law Commission, 2006). The centrifugal forces of fragmentation, which pull authority and regulatory power away from universal centers and towards regional and national poles, are powerfully driven by two interconnected dynamics: the proliferation of regionalism and the resolute, often uncompromising, defense of state sovereignty. In Eurasia, these dynamics are amplified by

<sup>13</sup> UNODC. 2011. The Bangalore Principles of Judicial Conduct. Available at: <https://www.unodc.org/documents/ji/training/bangaloreprinciples.pdf> (8.6.2025)

the region's unique historical legacy, its position as a crossroads of civilizations, and the ongoing project of nation-building in the post-Soviet era (Libman & Vinokurov, 2012). The region has become a laboratory for what can be termed "sovereignty-conscious regionalism," where integration is pursued not to supersede the nation-state, but to reinforce it within a competitive global landscape. This has resulted in a dense thicket of overlapping and sometimes competing regional integration projects — including the Commonwealth of Independent States (CIS), the Eurasian Economic Union (EAEU), the Collective Security Treaty Organization (CSTO), and the Shanghai Cooperation Organization (SCO) — each developing its own autonomous legal regimes for combating crime (Kembayev, 2016, pp. 157-194). These regimes, while often paying rhetorical homage to universal standards, are fundamentally tailored to the specific political imperatives, security doctrines, and legal cultures of their members, creating a pluralistic and often contradictory legal space that stands in stark contrast to the ideal of a unified global legal order.

The theoretical underpinnings of this fragmentation are rooted in the very architecture of the international system. The absence of a supranational world legislature means that law-making is a decentralized, polycentric process. As new global challenges emerge — from cybercrime to transnational corruption — states respond not only through universal fora like the United Nations but also, and often more readily, through smaller, more manageable regional groupings. This leads to the creation of what the International Law Commission termed "specialized treaty systems" or "self-contained regimes," which operate with a significant degree of autonomy (International Law Commission, 2006). The reasons for this are manifold: the diversification and expansion of international law's subject matter, the emergence of new spheres of international relations requiring specialized regulation, and the inherent lack of a subordinating vertical hierarchy among international organs (Koskenniemi, & Leino, 2002, pp. 553–579). In Eurasia, this process is not merely a technical legal phenomenon but a deeply political one. The collapse of the Soviet Union created a legal vacuum and a pressing need for new frameworks of cooperation among newly independent states. The CIS, as the immediate successor structure, filled this void with agreements like the 1993 Minsk Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters (1993). This convention, and subsequent legal instruments, established a distinct post-Soviet legal sphere, creating simplified procedures for extradition, mutual legal assistance, and enforcement of judgments that were consciously designed to reflect the shared legal heritage and administrative practices of its members. This system operates in parallel to global conventions, effectively creating a preferential legal zone for intra-CIS cooperation that can sometimes circumvent more cumbersome universal procedures. For instance, the grounds for refusing extradition or the evidentiary standards required under the Minsk Convention may differ from those in UNTOC, allowing states a degree of forum-shopping, choosing the legal channel that best suits their immediate political or procedural needs (Sharueva, 2020), pp. 80-90).

This regional legal pluralism is further complicated by the security-focused mandates of organizations like the CSTO and SCO. The CSTO, conceived as a collective defense and security alliance, has developed sophisticated internal mechanisms for

coordinating operational-investigative activities, conducting joint counter-terrorism and anti-trafficking operations, and managing collective rapid reaction forces (Leshenyuk, 2022, pp. 145-156). Its legal framework is inherently closed and prioritizes the internal security of the bloc, often treating information and operational capabilities as privileged assets not automatically shared with universal bodies. Similarly, the SCO, with its foundational focus on combating the "three evils" of terrorism, separatism, and extremism, has established its unique Regional Anti-Terrorist Structure (RATS). RATS functions as a central hub for intelligence exchange and security collaboration, but its operational protocols and the very definition of what constitutes a "terrorist" or "extremist" act are shaped by the specific security paradigms and political sensitivities of its member states, particularly Russia and China (Aris, 2009, pp. 457–482). These definitions can be broader and more politically charged than those emerging from universal fora, reflecting a state-centric view of security that often conflates violent extremism with political dissent (Galushko, 2024, pp. 95-102). This creates a tangible fragmentation in the substantive law itself; an act may be classified and prosecuted as a form of "extremism" under SCO-influenced domestic laws and cooperation protocols, while falling outside the scope of similar definitions in other regional or universal systems. This divergence leads to a situation where legal cooperation is not merely a technical exercise but a politically charged alignment with a particular security worldview.

However, the most profound and resilient driver of fragmentation in Eurasia transcends institutional architecture and strikes at the very heart of the Westphalian order: the robust assertion of state sovereignty. The central problem, as articulated in the scholarly discourse, is the fundamental difficulty of "reconciling" state sovereignty with the demands of universal legal regimes, particularly those that involve supranational judicial oversight or impinge upon core sovereign functions like the administration of justice. This is most vividly illustrated by the widespread and deliberate distance maintained from the International Criminal Court (ICC) by most Eurasian states, including major powers like Russia, China, and Kazakhstan. The refusal to ratify the Rome Statute is not an oversight but a calculated political stance, rooted in a deep-seated apprehension towards ceding ultimate judicial authority to an external body. This reflects a sovereignty-centric legal culture that views the principle of non-interference as sacrosanct and perceives supranational jurisdiction as a potential tool for geopolitical manipulation. The process of globalization generates a dual effect: it fosters the development of global institutions, but it simultaneously triggers a powerful counter-reaction in the form of active regionalization and the re-entrenchment of sovereignty (Yakovlev, 2021, pp. 6-27). This is not a paradox but a dialectical process. For Kazakhstan, a nation pursuing a multi-vector foreign policy, sovereignty is the bedrock upon which all international engagement is built. This translates into a meticulously calibrated approach to legal cooperation, where the implementation of universal norms is invariably filtered through a stringent prism of national interest, constitutional identity, and political expediency.

A concrete and highly revealing manifestation of this sovereignty filter is evident in the complex arena of asset recovery under the UNCAC. The progressive obligations in Article 57 of UNCAC regarding the return of confiscated assets to a requesting state

represent a high-water mark of universalist ambition, challenging traditional notions of state control over confiscated property. However, for many Eurasian states, this obligation can clash with deeply entrenched domestic legal principles, powerful economic interests, and political considerations. The result is often a fragmented implementation, where the more state-discretionary approach of the earlier UNTOC — which leaves the disposal of confiscated assets to the domestic law of the confiscating state — is implicitly favored. A state may formally adhere to UNCAC while, in practice, interpreting its return obligations restrictively, for instance, by demanding an exceptionally high standard of proof from the requesting state or by prioritizing compensation for its own national damages. This creates a situation where the universal standard of UNCAC is *de facto* fragmented into a spectrum of national interpretations, each reflecting a different balance between international commitment and sovereign prerogative.

This sovereignty-conscious regionalism ultimately forges a distinct and durable Eurasian layer in the architecture of international legal cooperation. It facilitates a pragmatic, culturally resonant, and often efficient form of collaboration among states with a shared historical and legal substrate. The common linguistic, bureaucratic, and procedural legacy of the Soviet era lowers the transaction costs of cooperation within frameworks like the CIS, making them functionally attractive for routine legal assistance (Libman & Vinokurov, 2012). Yet, this very same system inherently risks creating a fragmented, inconsistent, and politically segmented regulatory patchwork across the continent. The absence of a clear hierarchy between universal and regional regimes, and the vast discretionary space retained by sovereign states, means that the pursuit of a unified global strategy against transnational crime is perpetually stymied. The international scholarly consensus largely acknowledges that the high tide of legal universalism that characterized the immediate post-Cold War era has receded (Koskeniemi & Leino, 2002, pp. 553–579). Subsequent global shocks, from the 2008 financial crisis to the COVID-19 pandemic, have dramatically accelerated this trend, forcefully reasserting the nation-state and sovereign regional blocs as the primary, most resilient actors in global governance. In this new reality, the fragmented, multi-polar legal order in Eurasia is not an anomaly but a harbinger of a broader global shift, where the interaction between universal norms and particularistic sovereignty will continue to define the contours and limits of international cooperation in combating crime.

#### 4. THE KAZAKHSTANI NEXUS: IMPLEMENTING INTERNATIONAL COOPERATION IN A FRAGMENTED LANDSCAPE

The Republic of Kazakhstan stands as a quintessential embodiment of the intricate and often contradictory interplay between the centripetal force of legal universalism and the centrifugal pull of regional fragmentation (Farhan, Khan & Sher, 2021). Its experience is not merely an illustrative example but a critical locus where the abstract tensions of international law are translated into the concrete realities of daily judicial

practice, diplomatic negotiation, and internal bureaucratic adaptation. As a vast, resource-rich nation strategically situated astride the historical and modern crossroads of Europe and Asia, Kazakhstan's foreign policy doctrine of multi-vectorism is fundamentally a pragmatic response to this very duality (Nyshanbayev, et al., 2024, pp. 915–924). This doctrine, when applied to the realm of international legal cooperation in combating crime, necessitates a continuous and sophisticated balancing act. The country must simultaneously project itself as a reliable and fully integrated participant in the global legal order, governed by universal norms, while also asserting its distinct identity and interests within Eurasian regional structures. This results in a national approach that is inherently hybrid, multi-layered, and constantly evolving — a legal and diplomatic tapestry woven from threads of global standards, regional allegiances, and national prerogatives. To understand this nexus is to move beyond theory and observe how a state navigates the fragmented architecture of modern international law, not as a passive recipient of norms, but as an active agent of interpretation, adaptation, and, at times, resistance.

The legislative journey of Kazakhstan since its independence offers a profound narrative of the universalist impulse in action. This has been a deliberate, state-driven project of legal harmonization aimed at aligning the national legal system with the demanding requirements of the core UN conventions it has ratified, notably the UNTOC, the UNCAC, and the international counter-terrorism framework<sup>14</sup>. This endeavor transcends mere symbolic compliance; it represents a deep, structural integration of global norms into the domestic legal fabric. The process has involved successive waves of reform to the Criminal Code, the Code of Criminal Procedure, and a host of specialized laws. For instance, the introduction and subsequent refinement of articles pertaining to money laundering required not only defining the crime itself but also establishing a comprehensive regulatory regime for financial monitoring, obliging banks and other institutions to perform customer due diligence and report suspicious transactions to a newly created financial intelligence unit. Similarly, incorporating the provisions of UNCAC necessitated the adoption of dedicated laws on combating corruption, which established systems for mandatory asset declaration for a wide range of public officials, created anti-corruption monitoring bodies, and defined conflicts of interest. The country's laws on international cooperation, particularly the procedures governing extradition and mutual legal assistance, were deliberately drafted to be broad and accommodating, theoretically enabling cooperation with any foreign state, irrespective of its legal tradition or the existence of a prior bilateral treaty. The underlying philosophy of this legislative overhaul is unequivocally universalist: it seeks to create a seamless interface between Kazakhstan's legal system and the global community, facilitating the frictionless exchange of suspects, evidence, and best practices. It is a testament to the powerful normative pull of the idea that a unified global front, built on common legal standards, is the most effective weapon against transnational criminal threats.

However, the lived reality of applying these harmonized laws reveals a far more complex picture, one where the fragmenting forces of regionalism and sovereignty consistently

---

<sup>14</sup> President of the Republic of Kazakhstan. 2014. Concept of Legal Policy for the Period from 2010 to 2020. Available at: [https://adilet.zan.kz/eng/docs/U090000858\\_\(8.6.2025\)](https://adilet.zan.kz/eng/docs/U090000858_(8.6.2025))

shape, and at times distort, the ideal of universal cooperation. The practical administration of justice creates a *de facto* two-tiered, or even multi-tiered, system of international legal engagement. Cooperation with fellow member states of the Commonwealth of Independent States (CIS), operating under the foundational 1993 Minsk Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters, is characterized by a distinct efficiency and institutional comfort. This framework functions as a powerful regional "autonomous regime," creating a simplified, quasi-internal legal space. Procedures for extradition and mutual legal assistance are often administrative and channeled through central authorities, typically the Offices of the Prosecutor General, bypassing the more protracted and judicially intensive pathways often required for cooperation with non-CIS states. This efficiency is rooted in a shared legal heritage derived from the Soviet past, which has resulted in strikingly similar procedural codes, overlapping legal terminologies, and a common institutional culture among judiciaries and law enforcement agencies. A request for legal assistance from Kyrgyzstan or Russia encounters a system that understands its conceptual underpinnings intuitively. In stark contrast, a similar request from a country like the United Kingdom or Canada, operating under a common law system with its own distinct rules of evidence, stringent human rights safeguards, and different prosecutorial discretions, must navigate a much more complex and formalized process. It requires meticulous translation, letters rogatory, and often faces judicial scrutiny regarding dual criminality and potential human rights concerns. This divergence means that for a Kazakhstani prosecutor, a case with a CIS dimension is often logistically and politically simpler to manage than one with a Western European dimension, despite the latter potentially involving a UN convention to which both states are party. This reality fragments the universalist ideal into a patchwork of regional preferences and path-dependent procedural realities.

This duality is further institutionalized and magnified through Kazakhstan's strategic, yet necessarily fragmented, engagement with the diverse ecosystem of international organizations. Its cooperation with quintessentially universal bodies like the UN Office on Drugs and Crime (UNODC) is deep and multifaceted, focused on the technical, apolitical domain of capacity-building<sup>15</sup>. This includes joint projects on strengthening border management, training financial investigators in complex asset tracing techniques, and enhancing forensic capabilities. This engagement is crucial for accessing global expertise, securing funding, and benchmarking national practices against international standards. Yet, operating in parallel is an equally, if not more, intense commitment to the security architectures of regional organizations. Within the Shanghai Cooperation Organization (SCO), Kazakhstan is a key player in a distinctly Eurasian model of security cooperation, one that prioritizes state security and stability, with a sharp focus on combating the "three evils" of terrorism, separatism, and extremism<sup>16</sup>. The cooperative mechanisms here — involving intelligence sharing, joint military and law enforcement exercises, and the operation

---

<sup>15</sup> Kazakhstan supports the new UNODC program for Central Asia. Available at: <https://www.gov.kz/memleket/entities/mfa/press/news/details/290146?lang=en#:~:text=The%20UNODC%20Program%20for%20Central,radical%20ideology%2C%20and%20other%20areas> (8.6.2025)

<sup>16</sup> Charter of the Shanghai Cooperation Organization (SCO), adopted on 7 June 2002. Available at: <https://www.mea.gov.in/Portal/LegalTreatiesDoc/000M3130.pdf> (8.6.2025)

of the SCO Regional Anti-Terrorist Structure (RATS) — represent a different philosophy, often more intergovernmental and less constrained by the individual-centric human rights frameworks that permeate some Western systems (Aris, 2009, pp. 457–482). Simultaneously, within the Eurasian Economic Union (EAEU), Kazakhstan's cooperation focuses on a specialized subset of crimes that threaten the common market: customs fraud, the movement of counterfeit goods, and illicit financial flows that exploit the integrated economic space<sup>17</sup>. This multi-vector engagement forces the Kazakhstani authorities to maintain parallel operational capacities. Officials from the National Security Committee may find themselves attending an UNODC workshop on human rights-compliant interrogation techniques one week, and participating in an SCO working group on counter-extremism that employs a different operational lexicon the next. This requires a constant, internal process of translation and adaptation, as the state navigates potentially conflicting priorities and legal interpretations emanating from these different systems. This skepticism is not born of isolationism, but rather a sovereignty-conscious calculation shared by other major powers in the region, including Russia and China. It reflects a deep-seated reluctance to cede ultimate judicial authority to a supranational body whose interpretations may clash with national interests or constitutional principles, thereby reinforcing the fragmentation of the international criminal justice landscape.

Nowhere is the tangible cost of this fragmentation more acutely felt than in the arduous and politically sensitive process of asset recovery. This area transforms the theoretical clash between universalism and sovereignty into a high-stakes legal and diplomatic challenge with direct fiscal and political consequences. The foundational legal grey area is stark: the UNCAC articulates a progressive regime that creates a strong presumption for the return of confiscated assets to the country of origin, particularly in cases of embezzlement of public funds (Art. 57). Conversely, the earlier UNTOC embodies a more state-discretionary approach, often leaving the ultimate disposition of confiscated assets to the domestic law of the state that effected the confiscation (Art. 14)<sup>18</sup>. For a state like Kazakhstan, which is actively engaged in strengthening its legal frameworks and international cooperation, this normative fragmentation creates a complex strategic environment. When acting as a requesting state Kazakhstan's legal teams are compelled to advocate for a broad interpretation of UNCAC. They must argue in foreign courts that the convention's spirit and letter mandate repatriation as a fundamental principle of restorative justice and international legal obligation.

Conversely, within the framework of its strategic partnerships and regional commitments, such as those with the Russian Federation and other CIS member states, cooperation often follows more streamlined, mutually agreed-upon principles rooted in shared legal heritage and bilateral treaties. In such cases, the discretionary elements of international conventions are exercised within a context of high trust and aligned interests,

---

<sup>17</sup> Treaty on the Eurasian Economic Union, 2014, Available at: [https://www.wto.org/english/thewto\\_e/acc\\_e/kaz\\_e/wtacckaz85\\_leg\\_1.pdf](https://www.wto.org/english/thewto_e/acc_e/kaz_e/wtacckaz85_leg_1.pdf) (5.6.2025)

<sup>18</sup> World Bank & UNODC. 2020. Asset Recovery Handbook: A Guide for Practitioners. Available at: <https://star.worldbank.org/publications/asset-recovery-handbook-guide-practitioners-second-edition> (8.6.2025)

facilitating pragmatic resolutions. This demonstrates Kazakhstan's balanced approach: it champions universal legal norms where effective, while simultaneously leveraging and reinforcing the efficient regional mechanisms that underpin its strategic relationships. The promotion of UN-model bilateral agreements on asset sharing is a technocratic attempt to bridge this chasm by creating pre-negotiated formulas. However, as the Kazakhstani experience demonstrates, the adoption of such models is itself a nuanced political and diplomatic process, contingent on a state's assessment of its international obligations and its sovereign priorities within a multi-vector foreign policy. Thus, even the solutions designed to mitigate fragmentation become arenas where a state must carefully calibrate its engagement, proving that the Kazakhstani nexus is not a temporary condition but a defining feature of its sophisticated and principled navigation of the international legal order.

## 5. CONCLUSION

The interplay between universalism and regional fragmentation in international legal cooperation against crime is not a transient phenomenon but a structural feature of the contemporary global order. In Eurasia, and as exemplified by Kazakhstan, this duality creates a complex, multi-layered system where global standards provide an aspirational framework, but regional agreements and sovereign prerogatives often dictate the terms of practical engagement. The universalizing trend, manifested in UN conventions and the push for standardization, is essential for setting a common baseline and facilitating cooperation across diverse legal systems. It represents a collective acknowledgment that globalized criminal threats require globalized legal and institutional responses.

However, the countervailing trend of fragmentation, driven by regionalism, resurgent nationalism, and the enduring primacy of state sovereignty, ensures that the implementation of these universal norms is neither automatic nor uniform. The proliferation of regional regimes in Eurasia offers valuable platforms for cooperation among states with shared interests and similar legal traditions, but it also risks creating a fragmented legal space with competing norms and jurisdictions. The case of Kazakhstan demonstrates that states can successfully navigate this duality by adopting a flexible, multi-vector approach that embraces universal standards while actively participating in regional frameworks that address immediate security concerns.

The future of effective international legal cooperation in combating crime across Eurasia does not lie in the triumph of one trend over the other, but in their managed co-existence and constructive interaction. The challenge for the international community, and for states like Kazakhstan, is to strengthen the bridges between universal and regional systems. This can be achieved by ensuring that regional agreements incorporate and reinforce, rather than undermine, universal standards; by promoting the role of universal bodies like UNODC in providing technical support and serving as a clearinghouse for best practices; and by fostering dialogue between regional organizations to minimize jurisdictional conflicts. The "infiltration" of international criminal law into national systems will continue, but its path and pace will be shaped by the enduring

tension between the imperative of global unity and the reality of regional and national diversity. Finding a sustainable balance between these forces is the key to building a more secure and just legal order for Eurasia and the world.

### References

1. Alter, K. J. 2014. *The New Terrain of International Law: Courts, Politics, Rights*. Princeton: Princeton University Press.
2. Andreas, P. and Nadelmann, E. 2006. *Policing the Globe: Criminalization and Crime Control in International Relations*. Oxford: Oxford University Press.
3. Aris, S. 2009. *The Shanghai Cooperation Organisation: 'Tackling the Three Evils'. A Regional Response to Non-traditional Security Challenges or an Anti-Western Bloc?* *Europe-Asia Studies*, 61(3), 457–482. DOI: 10.1080/09668130902753309.
4. Bantekas, I. 2003. *The International Law of Terrorist Financing*. *The American Journal of International Law*, 97(2), 315–333.
5. Benvenisti, E. and Downs, G. W. 2007. *The Empire's New Clothes: Political Economy and the Fragmentation of International Law*. *Stanford Law Review*, 60(2), 595–632.
6. Berman, P. S. 2012. *Global Legal Pluralism: A Jurisprudence of Law Beyond Borders*. Cambridge: Cambridge University Press.
7. Cassese, A. 2008. *International Criminal Law*. 2<sup>nd</sup> ed. Oxford: Oxford University Press.
8. Cryer, R., Robinson, D. and Vasiliev, S. 2019. *An Introduction to International Criminal Law and Procedure*. 5<sup>th</sup> ed. Cambridge: Cambridge University Press.
9. Farhan, S. M., Khan, M. U. and Sher, N. 2021. *Kazakhstan's Multi-Vector Foreign Policy and Regional Approach — Economic and Diplomatic Success*. *Pakistan Journal of International Affairs*, 4(4). DOI: 10.52337/pjia.v4i4.385.
10. Galushko, D. V. 2024. *K voprosu o vliyanii fragmentatsii mezhdunarodnogo prava na razvitie integratsionnykh protsessov* [On the issue of the influence of international law fragmentation on the development of integration processes]. *Rossiiskii zhurnal pravovykh issledovaniy* [Russian Journal of Legal Studies], 11(3), 95–102. DOI: 10.17816/RJLS634737.
11. International Law Commission. 2006. *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*. Report of the Study Group of the International Law Commission. A/CN.4/L.682.
12. Kembayev, Z. 2016. *Regional Integration in Eurasia: The Legal and Political Framework*. *Review of Central and East European Law*, 41(2), 157–194.
13. Koskeniemi, M. 2007. *From Apology to Utopia: The Structure of International Legal Argument*. Reissue with new Epilogue. Cambridge: Cambridge University Press.
14. Koskeniemi, M. and Leino, P. 2002. *Fragmentation of International Law? Post-modern Anxieties*. *Leiden Journal of International Law*, 15(3), 553–579. DOI: 10.1017/S0922156502000262.

15. Krisch, N. 2010. *Beyond Constitutionalism: The Pluralist Structure of Postnational Law*. Oxford: Oxford University Press.
16. Leshenyuk, O. N. 2022. *Ukrepnenie regional'noy sistemy kollektivnoy bezopasnosti v ramkakh ODKB* [Strengthening the Regional Collective Security System within the CSTO]. *Sovremennaya Evropa*, 3(110), 145–156. DOI: 10.31857/S0201708322030111.
17. Lewis, D. 2012. *Who's Socialising Whom? Regional Organisations and the Normative Contests in Central Asia*. *Europe-Asia Studies*, 64(7), 1219–1237.
18. Libman, A. and Vinokurov, E. 2012.  *Holding-Together Integration: 20 Years of the Post-Soviet Integration*. London and New York: Palgrave Macmillan.
19. McClean, D. 2012. *International Co-operation in Civil and Criminal Matters*. 3<sup>rd</sup> ed. Oxford: Oxford University Press.
20. Mitsilegas, V. 2015. *The Criminalisation of Migration in Europe: Challenges for Human Rights and the Rule of Law*. Berlin: Springer.
21. Nadelmann, E. A. 1990. *Global Prohibition Regimes: The Evolution of Norms in International Society*. *International Organization*, 44(4), 479–526.
22. Nyshanbayev, N., Bekov, K., Baizakov, Z. and Amangeldy, A. 2024. *The Republic of Kazakhstan's Multi-Vector Foreign Policy*. *New Perspectives*, 33(1), 43–63.
23. Nyshanbayev, N., Tarman, B., Tolen, Z., Samay, A. and Agybay, Z. 2024. *The Republic of Kazakhstan's Multi-Vector Foreign Policy: Re-evaluation under President Tokayev*. *Kasetsart Journal of Social Sciences*, 45(3), 915–924.
24. Robertson, R. 1992. *Globalization: Social Theory and Global Culture*. London: Sage.
25. Shaffer, G. and Ginsburg, T. 2012. *The Empirical Turn in International Legal Scholarship*. *American Journal of International Law*, 106(1), 1–46.
26. Sharueva, M. V. 2020. *Problemy sudebnoy praktiki po delam ob ékstraditsii v Rossii i na postsovetском prostranstve* [Problems of judicial practice in extradition cases in Russia and the post-Soviet space]. *Vestnik RGGU. Seriya: Yevraziyskie issledovaniya. Istoriya. Politologiya. Mezhdunarodnye otnosheniya*, (1), 80–90. DOI: 10.28995/2686-7648-2020-1-80-90.
27. Sidorova, N. V. and Satbaeva, K. Kh. 2020. *Printsipy mezhdunarodnogo prava i ugolovnaya politika Respubliki Kazakhstan* [Principles of International Law and Criminal Policy of the Republic of Kazakhstan]. In: Proshchalygin, R. A. (ed.), *Sovremennye problemy gosudarstva i prava*. Novosibirsk: Sibirskii universitet potrebitel'skoi kooperatsii, 258–262.
28. Simma, B. and Pulkowski, D. 2006. *Of Planets and the Universe: Self-Contained Regimes in International Law*. *European Journal of International Law*, 17(3), 483–529.
29. Slaughter, A.-M. 2004. *A New World Order*. Princeton: Princeton University Press.
30. Taylor, D. B. and Jelsma, M. 2012. *The UN Drug Control Conventions: The Limits of Latitude*. IDPC Series on Legislative Reform of Drug Policies No. 18. Retrieved from: <http://dx.doi.org/10.2139/ssrn.2184316>.
31. Teubner, G. 2012. *Constitutional Fragments: Societal Constitutionalism and Globalization*. Oxford: Oxford University Press.

32. Webb, P. 2005. *The United Nations Convention Against Corruption: Global Achievement or Missed Opportunity?* Journal of International Economic Law, 8(1), 191–229.
33. Yakovlev, P. P. 2021. *Global'nyy Yug: kontseptual'nyye podkhody i sotsial'no-ekonomicheskiye protsessy* [Global South: conceptual approaches and socio-economic processes]. Kontury global'nykh transformatsiy: politika, ekonomika, pravo [Outlines of Global Transformations: Politics, Economics, Law], 14(2), 6–27. DOI: 10.23932/2542-0240-2021-14-2-1.

### ***Legal Sources***

1. Commonwealth of Independent States. 1993. *Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters*. Signed 22 January 1993.
2. Constitution of The Republic of Kazakhstan, Available at: <https://www.akorda.kz/en/constitution-of-the-republic-of-kazakhstan-50912> (11.5.2025)
3. Treaty on the Eurasian Economic Union, 2014, Available at: [https://www.wto.org/english/thewto\\_e/acc\\_e/kaz\\_e/wtacckaz85\\_leg\\_1.pdf](https://www.wto.org/english/thewto_e/acc_e/kaz_e/wtacckaz85_leg_1.pdf) (5.6.2025)

### ***Internet Sources***

1. Charter of the Shanghai Cooperation Organization (SCO), adopted on 7 June 2002. Available at: <https://www.mea.gov.in/Portal/LegalTreatiesDoc/000M3130.pdf> (8.6.2025)
2. Concept of foreign policy of the Republic of Kazakhstan for 2020–2030. Available at: <https://adilet.zan.kz/eng/docs/U2000000280> (8.6.2025)
3. e-gov. Available at: [https://egov.kz/cms/ru/services/pass270\\_mf](https://egov.kz/cms/ru/services/pass270_mf) (8.6.2025)
4. International Convention for the Suppression of the Financing of Terrorism. Available at: <https://www.un.org/law/cod/finterr.htm> (8.6.2025)
5. KazakhstansupportsthenewUNODCprogramforCentralAsia. Available at: <https://www.gov.kz/memleket/entities/mfa/press/news/details/290146?lang=en#:~:text=The%20UNODC%20Program%20for%20Central,radical%20ideology%2C%20and%20other%20areas.> (8.6.2025)
6. Mechanism for the Review of the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto (the UNTOC Review Mechanism): Kazakhstan. Available at: <https://www.unodc.org/unodc/en/organized-crime/intro/review-mechanism-untoc/country-profile/kazakhstan.html> (8.6.2025)
7. OECD: Baseline Report of the Fifth Round of Monitoring of Anti-Corruption Reforms in Kazakhstan. Available at: [https://www.oecd.org/en/publications/baseline-report-of-the-fifth-round-of-monitoring-of-anti-corruption-reforms-in-kazakhstan\\_c9652173-en.html](https://www.oecd.org/en/publications/baseline-report-of-the-fifth-round-of-monitoring-of-anti-corruption-reforms-in-kazakhstan_c9652173-en.html) (8.6.2025)
8. On combating corruption: The Law of the Republic of Kazakhstan dated 18 November 2015 № 410-IV LRK. Available at: <https://adilet.zan.kz/eng/docs/Z1500000410> (8.6.2025)

9. President of the Republic of Kazakhstan. 2014. Concept of Legal Policy for the Period from 2010 to 2020. Available at: [https://adilet.zan.kz/eng/docs/U090000858\\_](https://adilet.zan.kz/eng/docs/U090000858_) (8.6.2025)
10. Treaty on the Eurasian Economic Union. 2014. Available at: [https://www.wto.org/english/thewto\\_e/acc\\_e/kaz\\_e/wtacckaz85\\_leg\\_1.pdf](https://www.wto.org/english/thewto_e/acc_e/kaz_e/wtacckaz85_leg_1.pdf) (8.6.2025)
11. UN Convention against Corruption. Available at: [https://www.unodc.org/documents/brussels/UN\\_Convention\\_Against\\_Corruption.pdf](https://www.unodc.org/documents/brussels/UN_Convention_Against_Corruption.pdf) (8.6.2025)
12. UN Convention against Transnational Organized Crime and the Protocols thereto. Available at: <https://www.unodc.org/unodc/en/organized-crime/intro/UNTOC.html> (8.6.2025)
13. UN General Assembly (1990). *Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August–7 September 1990*. Available at: <https://www.unodc.org/congress/en/previous/previous-08.html> (8.6.2025)
14. UN General Assembly (2021). *14<sup>th</sup> United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Kyoto, 7–12 March 2021*. Available at: [https://www.unodc.org/unodc/en/crimecongress/previous/14th\\_Kyoto\\_Congress](https://www.unodc.org/unodc/en/crimecongress/previous/14th_Kyoto_Congress) (8.6.2025)
15. UNODC. 2011. *The Bangalore Principles of Judicial Conduct*. Available at: <https://www.unodc.org/documents/ji/training/bangaloreprinciples.pdf> (8.6.2025)
16. UNODC (2022). *Model Treaties on International Cooperation in Criminal Matters*. Available at: <https://www.unodc.org/unodc/en/legal-tools/model-treaties-and-laws.html> (8.6.2025)
17. World Bank & UNODC. 2020. *Asset Recovery Handbook: A Guide for Practitioners*. Available at: <https://star.worldbank.org/publications/asset-recovery-handbook-guide-practitioners-second-edition> (8.6.2025)



CIP - Каталогизација у публикацији  
Народна библиотека Србије, Београд

343(082)

347.962(082)

347.962:004(082)

**INTERNATIONAL scientific thematic conference Shaping justice: how penal law and the judiciary address contemporary societal challenges (10 ; 2025 ; Beograd)**

Thematic conference proceedings of international significance / X international scientific thematic conference Shaping justice: how penal law and the judiciary address contemporary societal challenges, Belgrade, november 2025 ; urednici, editors Marina Matić Bošković, Jelena Kostić. - Belgrade : Institute of Comparative Law : Institute of Criminological and Sociological Research, 2025 (Belgrade : Birograf comp). - VIII, 236 str. ; 25 cm

"This proceedings is a result of research within the project 'Adapting the legal framework to social and technological changes with a special focus on artificial intelligence'... " --> kolofon. - Tiraž 100. - Str. 7-8: Foreword / Marina Matić Bošković, Jelena Kostić. - Napomene i bibliografske reference uz tekst. - Bibliografija uz svaki rad.

ISBN 978-86-82582-45-8 (ICL)

ISBN 978-86-80756-86-8 (ICSR)

1. Matić Bošković, Marina M., 1977- [urednik] [autor dodatnog teksta]

a) Кривично право -- Зборници b) Судство -- Зборници v) Судство -- Дигиталне технологије -- Зборници

COBISS.SR-ID 184854281



**ISBN 978-86-82582-45-8 (IUP)**  
**ISBN 978-86-80756-86-8 (IKSI)**