

SEMI-ANNUAL SCHOLARLY LEGAL JOURNAL  
OF COMENIUS UNIVERSITY BRATISLAVA  
FACULTY OF LAW

# BRATISLAVA LAW REVIEW

---

*Vol 9 No Spec (2025)*

---

UNWRITTEN SOURCES OF LAW



p-ISSN 2585-7088

e-ISSN 2644-6359

EV: 5519/17

DOI: 10.46282/blr.2025.9.Spec

## EDITOR IN CHIEF

Ondrej Blažo / Comenius University Bratislava, Slovakia

## EDITORIAL BOARD

Ondrej Hamulák / Palacký University in Olomouc, Czechia  
Bernardo Cortese / University of Padua, Italy  
Gábor Hamza / Eötvös Loránd University in Budapest, Hungary  
Matej Horvat / Comenius University Bratislava, Slovakia  
Philip M. Genty / Columbia Law School, USA  
Peter Lysina / Comenius University Bratislava, Slovakia  
Joseph Marko / University of Graz, Austria  
Katriin Nyman-Metcalf / Tallinn University of Technology, Estonia  
Matthias Niedobitek / Chemnitz University of Technology, Germany  
Wojciech Piątek / Adam Mickiewicz University in Poznań, Poland  
Václav Stehlík / Palacký University in Olomouc, Czechia  
Tomáš Strémy / Comenius University Bratislava, Slovakia  
Márton Várju / Hungarian Academy of Sciences, Hungary

## EDITORIAL OFFICE

*Executive editor:*

Olexij M. Meteňkanyč

*Junior executive editors:*

Martin Búran

Maximilián Kiko

Ema Mikulová

Petra Paľuchová

## CONTACT

Comenius University Bratislava

Faculty of Law

Šafárikovo nám. 6

811 00 Bratislava

Slovakia

blr@flaw.uniba.sk

IČO: 00 397 865

Published twice a year by Comenius University Bratislava, Faculty of Law  
print and online:

<https://blr.flaw.uniba.sk>

<https://doi.org/10.46282/blr>

Volume 9 Special Issue "Unwritten Sources of Law" was published on 28th December 2025

Texts © Comenius University Bratislava, Faculty of Law, and authors, 2025

Cover and Layout © Štefan Blažo, 2025

The readers may read, download, copy, distribute, print, search, or link to the full texts of all of the Article of the Journal and use them for any other lawful purpose under specified Creative Commons Licence (CC BY-NC-ND 4.0).

---

## EDITORIAL

To foster and streamline academic discussion on specific topics, the editorial team of *Bratislava Law Review* has decided to launch special issues on selected areas and to invite guest editors for each of them. The first of these special issues is devoted to *Unwritten Sources of Law* and may serve as a blueprint for future special issues. The inspiration for the topic of this special issue traces back to the panel “*Bratislava Legal Forum 2024: Unwritten Law of the European Union*,” held at the Faculty of Law, Comenius University Bratislava. The discussion in that panel adopted a broader perspective on unwritten sources of law, extending beyond the traditionally discussed general principles of law in EU legal doctrine. The panellists identified “sources of law” also in the Roman law heritage, rules of economics, as well as in legal systems outside the EU legal order, such as the EFTA framework. Hence, we decided to promote this broader approach to sources of law and to encourage authors to engage with the phenomenon of unwritten sources of law beyond traditional conceptual boundaries.

Indeed, unwritten sources of law constitute a traditional concept which, in certain areas of law, is well established and has relatively precise contours. Public international law and common law serve as paradigmatic examples of fields in which unwritten sources of law occupy an irreplaceable position. In areas of law such as constitutional law, legal principles, traditions, and a teleological approach to interpretation are essential for maintaining constitutional law as a living instrument. The call for papers introduced a topic at the intersection of legal theory and practice, cutting across doctrinal fields, jurisdictions, and methodologies, and invited contributions on the roles, limits, and forms of unwritten normativity: from constitutional practice and judicial reasoning to private-law principles, living law, and the epistemic and technological conditions of contemporary law. Deliberately interdisciplinary in scope, the issue demonstrates that unwritten sources of law constitute a plurality of normative and epistemic mechanisms whose operation varies across legal contexts.

The papers in this issue confirmed that unwritten normativity is neither marginal nor purely theoretical, but a recurring feature of legal life across multiple domains. Although in the legal systems of continental Europe unwritten sources appear to be gradually marginalised in favour of written sources, especially in light of the multilayered production of law within the European Union legal order, they nonetheless maintain their importance. In a world where statutes, by-laws, and contracts are increasingly drafted with the assistance of artificial intelligence, unwritten sources of law cannot compete with the precision of machine-generated legal texts. However, unwritten law, grounded in human culture, human heritage, human memory, and social expectations, serves as a humanising factor of law, underpinning the importance of human agency in interpreting, understanding, and applying law in situations that are legally, socially, or morally complex.

Unwritten sources of law, whether formal, material, or epistemic, do not only reflect what the law *is*, but also what it *ought to be*, what it *should be*, or how it is *perceived*. Thus, unwritten law is not merely a historical relic of ancient legal systems gradually replaced by written forms but may also serve as guidance for adapting written law to the changing conditions of society.

The contributions may be read as organised around several interrelated dimensions of unwritten normativity, moving from institutional settings to broader epistemic and technological contexts.

The cluster of contributions is addressing unwritten norms within constitutional and institutional frameworks. *M. Antoš and F. Horák's "Unwritten Rules in the Czech Constitutional Law: A Functional Analysis"* distinguishes three functionally different constructs: **constitutional custom** as norm-creating, established **constitutional practice** as interpretive, and **constitutional convention** as a politically enforced, non-binding

regulator of constitutional relations. Through functional analysis, the article offers a clearer analytical framework for understanding the diverse roles of unwritten rules within the Czech constitutional system. M. Giba and F. Pažitný, in "The Problem of the Definition and Application of Unwritten Sources of Constitutional Norms in the Slovak Constitutional System," also clarify the **terminology** and **classification** of such norms and apply these theoretical distinctions to Slovak constitutional practice. A. Barut's "Judicial Activism as an Unwritten Source of Law? A Normative Approach" analyses whether and under what conditions judicial activism may function as an unwritten source of law. The article distinguishes illegitimate forms of activism from necessary activism grounded in shared moral values and legal principles, and proposes normative criteria for assessing the legitimacy of such judicial lawmaking.

A second group of contributions explores unwritten principles as corrective or background norms in adjudication, particularly in private law. K. Drnovšek and N. Samec Berghaus, in "Rebus Sic Stantibus in the Age of Artificial Intelligence," analyse contractual justice as an unwritten corrective to rigid contractual certainty (the doctrine of **rebus sic stantibus**). Based on a comparative study of more than twenty European legal systems, they show that while technological tools may enable partial automation, fairness ultimately depends on judicial discretion grounded in principles such as equity and good faith. D. Moravcová's "Nationality in International Private Law: Relic or Relevance" examines the **unwritten presumption of single nationality**, questioning its continued relevance in light of increasing mobility and plural affiliations.

The focus then shifts to unwritten normativity in international and transnational contexts. A. Mahmutovic's "The Role of the International Court of Justice in Shaping Customary International Law" examines the ICJ's role in clarifying and shaping **customary international law** as a central source of the international legal order. The article analyses the balance between traditional custom formation based on state practice and *opinio juris* and more recent, accelerated dynamics driven by collective commitments, while cautioning against judicial overreach that could detach custom from practice and undermine its legitimacy. V. Rashica's "The Use of Digital Diplomacy by Intergovernmental Organisations: The Case of the United Nations" examines how evolving communicative practices, including **digital diplomacy**, shape contemporary processes of norm promotion and legitimacy.

Bridging law and society, L. Garayová's "Kinship Care as Living Law – an Unwritten Source of Child Protection Law" conceptualises **informal care arrangements** as living law shaped by social norms and moral obligations, highlighting both their resilience and the risks associated with their legal invisibility.

The issue also expands the notion of unwritten sources into the cultural and epistemic domain. R. Kasinec's "Movies as an Epistemic Source of Law and Its Influence on Lawmaking Process" explores **film as a medium capable of shaping legal consciousness** and, in certain cases, influencing legislative processes.

At a more abstract level, M. Mazzocca's "Three Axioms on Unwritten (Sources of) Law" offers a philosophical framework addressing the **ontological, epistemological, and functional dimensions of unwritten law**, providing conceptual tools for navigating between formalism and abstraction. D. Šoltys's "The Bionic Turn in Legal Epistemology" examines how AI, cybernetics, and data-driven legal tools challenge traditional understandings of legal knowledge and sources of law. By introducing the concept of the **"bionic lawyer,"** the article explores whether advanced analytical technologies can move beyond mediating legal information to become factual sources of law, framing this transformation as an open theoretical and ethical question for contemporary legal theory.

Taken together, the contributions in this special issue do not seek to impose a single definition of **"unwritten sources of law,"** but instead offer a set of complementary perspectives illustrating how unwritten normativity operates across different legal contexts: as custom, practice, convention, corrective principle, living law, epistemic influence, or technologically mediated legal knowledge. The issue invites readers to approach unwritten sources neither as marginal exceptions nor as a residual category, but as a domain that requires its own analytical vocabulary and methodological attention.

We would like to express our sincere gratitude to all authors for their contributions and to the reviewers for their careful and constructive engagement, without which this special issue would not have been possible. We hope that the issue will stimulate further scholarly discussion and reach a wide readership, and we see it as the first step in a continuing series of thematic special issues through which **Bratislava Law Review** aims to engage the legal academic community – both in Slovakia and internationally – on timely and intellectually challenging topics.

Ondrej Blažo and Olexij M. Meteňkanyč

## ABOUT THE JOURNAL

Bratislava Law Review is an international legal journal published by the Faculty of Law of Comenius University Bratislava, Slovakia (till the end of 2019 it was published by Wolters Kluwer in cooperation with the Faculty of Law of the Comenius University in Bratislava). It seeks to support legal discourse and research and promote critical legal thinking in a global extent. The journal offers a platform for fruitful scholarly discussions via various channels – be it lengthy scholarly papers, discussion papers, book reviews, annotations, or conference reports. Bratislava Law Review focuses on publishing papers not only from the area of legal theory and legal philosophy but also other topics with international aspects (international law, EU law, regulation of the global business). Comparative papers and papers devoted to interesting trends and issues in national law that reflect various global challenges and could inspire legal knowledge and its application in other countries are also welcomed.

The Bratislava Law Review has adopted multidisciplinary and interdisciplinary, but also cross-disciplinary coverage. This is also the reason why members of the Bratislava Law Review Editorial Board are experts both in legal sciences and legal practice as well as in related disciplines – to ensure cross-cutting knowledge throughout all legal sciences, branches, and fields of law. The Editorial Board consisting of foreign scholars-experts in the above fields, as well as a double-blind external peer review, provide a guarantee of the high standard of the contributions published. In this way, the Bratislava Law Review hopes to provide space for presenting a diversity of opinions and approaches to up-to-date legal issues and problems, aiming in this way to contribute to an overall rise in standards of legal science in the CEE region.

## INSTRUCTIONS FOR AUTHORS

Publishing with the scientific journal Bratislava Law Review means publishing with the Faculty of Law of Comenius University Bratislava, the oldest and leading law school in Slovakia.

The Journal seeks to publish original research papers that make a significant contribution to all fields of law, in particular European, comparative and international law. To achieve the aim of the journal, we encourage authors to submit significant articles from all other branches of law and legal scholarship that can help shape the everchanging legal knowledge in the area of Central and Eastern Europe and in particular the V4 countries and Danube region. Book reviews, annotations and various legal and scholarly reports are also accepted for publication. Bratislava Law Review is committed to support the growth of new generation of researchers and scholars in all fields of legal studies and the journal therefore accepts also junior researchers' papers (particularly students enrolled in Ph.D., JSD and equal study programmes).

The papers shall be submitted directly via journal's webpage which enables authors to follow editorial process.

All papers are subject to an anti-plagiarism check via iThenticate.

Submissions are free of charge.

Authors, reviewers, and editorial team shall follow the Editorial Ethics and the Code of Conduct published on the journal's webpage.

---

 TABLE OF CONTENTS:

UNWRITTEN RULES IN THE CZECH CONSTITUTIONAL LAW: A FUNCTIONAL ANALYSIS Marek Antoš & Filip Horák	11
JUDICIAL ACTIVISM AS AN UNWRITTEN SOURCE OF LAW? A NORMATIVE APPROACH Arkadiusz Barut	31
REBUS SIC STANTIBUS IN THE AGE OF ARTIFICIAL INTELLIGENCE: THE VITAL ROLE OF JUDICIAL DISCRETION IN CONTRACTUAL JUSTICE Klemen Drnovšek & Nataša Samec Berghaus	47
KINSHIP CARE AS LIVING LAW - AN UNWRITTEN SOURCE OF CHILD PROTECTION LAW Lilla Garayová	63
THE PROBLEM OF THE DEFINITION AND APPLICATION OF UNWRITTEN SOURCES OF CONSTITUTIONAL NORMS IN THE SLOVAK CONSTITUTIONAL SYSTEM Marián Giba & František Pažitný	83
MOVIES AS AN EPISTEMIC SOURCE OF LAW AND ITS INFLUENCE ON LAWMAKING PROCESS Rudolf Kasinec	103
THE ROLE OF THE INTERNATIONAL COURT OF JUSTICE IN SHAPING CUSTOMARY INTERNATIONAL LAW Adnan Mahmutovic	119
THREE AXIOMS ON UNWRITTEN (SOURCES OF) LAW Marco Mazzocca	137
NATIONALITY IN INTERNATIONAL PRIVATE LAW: RELIC OR RELEVANCE Dominka Moravcová	147
THE USE OF DIGITAL DIPLOMACY BY INTERGOVERNMENTAL ORGANISATIONS: THE CASE OF THE UNITED NATIONS Viona Rashica	161
THE BIONIC TURN IN LEGAL EPISTEMOLOGY: SOME REMARKS ON THE FUSION OF LAW AND CYBERNETICS, LEGAL INFORMATION AND DATA, SOURCES OF LAW AND HYBRID INTELLIGENCE Dominik Šoltys	175



# UNWRITTEN SOURCES OF LAW



UNWRITTEN RULES IN THE CZECH CONSTITUTIONAL  
LAW: A FUNCTIONAL ANALYSIS

doc. JUDr. PhDr. Marek Antoš, Ph.D., LL.M.  
Associate Professor  
Charles University, Faculty of Law  
Department of Constitutional Law  
Nám. Curieových 7, 116 40 Praha 1  
Czech Republic  
[antos@prf.cuni.cz](mailto:antos@prf.cuni.cz)  
ORCID: 0000-0002-5619-5965

JUDr. PhDr. Filip Horák Ph.D.  
Assistant Professor  
Charles University, Faculty of Law  
Department of Constitutional Law  
Nám. Curieových 7, 116 40 Praha 1  
Czech Republic  
[horakfil@prf.cuni.cz](mailto:horakfil@prf.cuni.cz)  
ORCID: 0000-0002-7846-6308

This work was supported by the European Regional Development Fund project "Center for Inequality and Open Society" (no.:CZ.02.01.01/00/23\_025/0008690).

**Abstract:** *Unwritten rules are an essential and inherent aspect of any constitutional system, including that of the Czech Republic. However, there are significant differences in opinions regarding their character and importance for the functioning of Czech constitutional law. As a result, the current academic discussion results in persistent uncertainty about what unwritten rules actually are, which term should be used to describe them, and what status they should be assigned within the constitutional legal framework. This article employs the method of functional analysis to identify and define three distinct constitutional legal constructs. Although these constructs share certain common features (unwritten nature, *usus longaevis*, *opinio necessitatis*, and relevance to the functioning of the constitutional system), they differ in other respects, with each fulfilling a unique role in the Czech constitutional framework. The first construct, referred to as constitutional custom, has a norm-creating function, enabling it to independently establish new constitutional norms. The second construct, established constitutional practice, is relevant for interpreting the constitution and serves an interpretive and argumentative function by solidifying one of the originally pluralistic interpretations of the written provisions of the constitution. Lastly, the third identified construct, referred to as constitutional convention, has a preventive and moderating function. It is not legally binding or judicially enforceable. However, it can be effectively enforced through extra-legal, typically political, mechanisms. We believe that distinguishing these three separate constructs with their differing functions will help clarify the existing ambiguities surrounding unwritten rules (not only) in Czech constitutional law and prevent potential issues arising from the substitution or hybridisation of these constructs.*

**Key words:** *Unwritten Rules; Constitutional Custom; Established Constitutional Practice; Constitutional Convention; Functional Analysis*

**Suggested citation:**

Antoš, M., Horák, F. (2025). Unwritten Rules in the Czech Constitutional Law: A Functional Analysis. *Bratislava Law Review*, 9(Spec), 11-30. <https://doi.org/10.46282/blr.2025.9.Spec.1008>

**Submitted:** 31 March 2025

**Accepted:** 13 November 2025

**Published:** 28 December 2025

1. INTRODUCTION<sup>1</sup>

Unwritten rules appear to some extent in all forms of government. They form the living, dynamic part of the constitutional system, enabling its adaptability to changing social conditions (Killey, 2014). At the same time, they serve (even in systems of written

<sup>1</sup> The authors declare that this work was inspired by an article originally published in Czech (see Antoš, M. and Horák, F. (2024). Nepsaná pravidla v ústavním systému: Ústavní obyčej, ustálená ústavní praxe a ústavní zvyklost. [Unwritten Rules in the Constitutional System: Constitutional Custom, Established Constitutional Practice and Constitutional Convention], *Právník*, 163(2), 120-136). However, in order to make the Czech legal environment more accessible to foreign readers, some detailed information has been omitted, important explanatory parts have been added and the text has been restructured.

constitutional law) to fill gaps (Baxa, 1917; Neubauer, 1947) and clarify ambiguous and potentially conflicting areas (Killey, 2014) in traditionally austere and abstractly formulated constitutional texts. It seems, therefore, that unwritten rules are an indispensable part of the constitutional system (if it is to function, see Dicey, 1885; Forsey, 1984), and a key tool for studying it (if we are to truly understand its functioning, see Forsey, 1984).

Despite the importance of unwritten rules for the constitutional system, the literature varies significantly regarding their definition and status. Even in the Anglo-Saxon constitutional doctrine, which has dealt with this issue most thoroughly (e.g., Chand, 1938; Cooray, 1979; Dicey, 1885; Dodek, 2011; Forsey, 1984; Heard, 1991; Killey, 2014; Marshall, 2001; Plaxton, 2016; Twomey, 2011) we find several approaches (Heard, 1989). The traditional approach completely excludes the applicability of unwritten rules before the courts and sees the sanction for their violation purely in the political realm or in the form of public disapproval (Dicey, 1885; Heard, 2012). Some authors, however, admit that although the courts cannot directly enforce them, they are recognisable and usable by them as interpretative and argumentative tools through which written constitutional law is shaped (Ahmed, Albert and Perry, 2019; Marshall and Moodie, 1971; Vermeule, 2013). There are also authors who consider them legally binding rules governing the behaviour of constitutional actors (Jennings, 1943), or even sources of constitutional law (Allan, 1993). Various approaches can also be observed, for example, in the German constitutional tradition. On the one hand, there is legally binding customary law (*Gewohnheitsrecht*, see Tomuschat, 1972), on the other hand, there are non-binding rules arising from established practice (*ständige Staatspraxis, unbeanstandet gebliebene Staatspraxis*). However, it seems that in the German tradition, based on written, codified constitutional law, less attention is paid to the issue of unwritten rules and their definition (Morlok, 2002).

This observation naturally applies to the Czech constitutional tradition as well, which is also based on a system of written and codified constitutional law. Despite several important works (Kindlová, 2008; Kysela, 2008; Píša, 2014), there is still a lack of comprehensive systematic analysis of unwritten rules in the Czech constitutional system. As a result of this gap in our knowledge, the doctrine, and even the case law, diverge not only in terms of the definition and status of unwritten rules but also in diverse and often overlapping terminology (Antoš et al., 2024). It can thus be stated that unwritten rules in the constitutional system, regardless of the terms used to describe them, can be characterised in the Czech constitutional legal environment as so-called empty shells (Arendt, 2006; Horák, 2019), essentially fillable with any content.

The unified and clear terminology, however, serves to ensure mutual understanding. When everyone talks about something different but uses the same term, or conversely, talks about the same thing but uses different terms, it is difficult to find common ground; we simply do not understand each other. The aim of this article is therefore not only to highlight the prevailing conceptual ambiguity but also to propose a new terminological distinction. We would like to bring order to the outlined dismal situation by using functional analysis, a method based on examining the role that individual constructs play in the constitutional system and especially in constitutional legal argumentation (i.e., their functions). This methodological tool was created precisely to enable systematic analysis of constructs that are too vague to be examined and defined in terms of content and has so far been applied to human dignity (Horák, 2022a), as well as other constitutional legal values (i.e., freedom, equality, and justice, see Horák, 2022b). We are convinced that unwritten rules in the constitutional system are another ideal candidate for the application of this approach.

After a brief theoretical conceptualisation and demonstration of the conceptual ambiguity of unwritten rules in the Czech constitutional law (Chapter 1), we apply the method of functional analysis to both, the Czech case law and academic literature (Chapter 2) and identify three distinct constructs which all share the characteristic features of unwritten rules (unwritten nature, *usus longaevis*, *opinio necessitatis*, relevance for the functioning of the constitutional system) but differ in other respects (Chapter 3). The first of them is constitutional custom, which is characterised by a normative, respectively norm-creating function, and is therefore capable of creating new constitutional norms independently of the text of the constitution. The second construct is established practice relevant to the interpretation of the constitution (hereinafter referred to as "established constitutional practice") with an interpretative and argumentative function, which fixes one of the possible interpretations of the written provision of the constitution. Finally, the third identified construct is constitutional convention, which serves the function of preventing and moderating conflicts between relevant constitutional actors. Constitutional convention is not legally binding but can be very effectively enforced by extra-legal, typically political instruments. At the same time, it differs from mere constitutional traditions, which, unlike it, lack a sufficient degree of relevance for the functioning of the constitutional system.

## 2. AMBIGUITY OF UNWRITTEN RULES IN THE CZECH CONSTITUTIONAL LAW

In this paper, we use four constitutive parameters to clearly define unwritten rules and to distinguish them from other similar concepts. Hence, for us, the unwritten rules are certain established rules of behaviour formed as a result of long-term<sup>2</sup> and repeated use (i.e., *usus longaevis*), which create the conviction of relevant constitutional actors about the need to follow them for the future (i.e., *opinio necessitatis*). These rules of behaviour, although not explicitly prescribed by any provision of written constitutional law (i.e., *unwritten nature*), have a sufficient degree of relevance for the functioning of the constitutional system (i.e., *non-negligibility*).

We thus leave aside the construct we refer to as constitutional tradition, which includes only such irrelevant rules of behaviour that their possible non-compliance would not affect the functioning of the system and would not be sanctioned in any way (cf. Pavlíček, 2015). Among constitutional traditions in the Czech Republic, we can include, for example, the use of presidential fanfares during official public events, the fact that the President's portrait is depicted on stamps or hangs in the classrooms in primary and secondary schools, or that the government, after its appointment, comes to the grave of the first Czechoslovakian president Tomáš Garrigue Masaryk.

However, even excluding the constitutional traditions from the scope of unwritten rules and focusing solely on the rules that fulfil all the four aforementioned characteristic features does not solve the problem of ambiguity which can be clearly demonstrated using several examples of the Czech Constitutional Court's case law.

The first and arguably most important example is the Judgment of the Czech Constitutional Court,<sup>3</sup> in which the Court ruled on the dispute between the President of

---

<sup>2</sup> One of the anonymous reviewers rightly pointed out the ambiguity of the term "long-term" and raised the question of how long a period is necessary for such a practice to become established, especially concerning presidential powers where 10 years might represent only two successive terms of a single officeholder. We believe that no specific minimum time duration can be definitively established, but we consider it crucial that the creation and application of the rule must involve more than one specific actor (i.e., it cannot be established and consolidated solely during the term(s) of one specific officeholder).

<sup>3</sup> Czech Republic, Constitutional Court, Pl. ÚS 14/01 (20 June 2001).

the republic and the Prime Minister (and the government) regarding the way in which the three of the seven members of the Bank Council (namely the Governor and the two Vice-Governors) of the Czech National Bank should be appointed.

The President relied on the Art. 62 (k) of the Constitution of the Czech Republic (hereinafter "**the Constitution**"), which states that the President appoints all members of the Bank Council without the need of countersignature of the Prime Minister or a member of the government designated by him. The Prime Minister disagreed since according to him the Constitution does not specify the number of members of the Bank Council nor their status and competencies. This can be learned only from the ČNB Act,<sup>4</sup> which states that "*the Bank Council shall consist of seven members, comprising the Governor of the Czech National Bank, two Vice-Governors of the Czech National Bank, and four other members of the Bank Council of the Czech National Bank*"<sup>5</sup> and that "*the Governor, Vice-Governors, and other members shall be appointed and relieved from office by the President of the Republic.*"<sup>6</sup> The Prime Minister therefore argued that the power of the President to appoint the Governor and Vice-Governors does not follow from the Art 62(k) of the Constitution, but from the Art. 63, para 2 of the Constitution, which states that the President has (besides the powers explicitly enumerated in the Art. 62 and 63, para. 1 of the Constitution) also powers entrusted to him by a statute. The powers included in the Art 63, however, require a countersignature of the Prime Minister or a member of the government designated by him to be valid, which did not happen in the disputed case.

In solving this dispute, the Court, among other arguments adopted also the reasoning based on unwritten rules. However, the Court was not able to agree on a single understanding and use of unwritten rules (for details, see Brunclík et al., 2023). The majority opinion admitted that both (i.e., the President's and the Prime Minister's) interpretations of the Constitution are possible and used the unwritten rule as an interpretational tool helping the majority of the Court to decide in favour one of them. Consequently, the majority opinion held that, "*The interpretation of Art. 62 to the effect that it grants the President of the Republic the right to appoint all members of the Bank Council without the need for countersignature, has been respected and followed in practice without interruption since 1993 until the debate, in the year 2000, on the act amending the ČNB Act. This interpretation has been confirmed, and is even gradually developing into a constitutional convention.*"<sup>7</sup>

In contrast, the dissenting opinion by Justices Güttler, Holeček, Janů, Zeněk Kessler, and Malenovský came to the conclusion that the written law can only be interpreted in one way, i.e., that the countersignature is required for the appointments to be valid. Consequently, the dissenting judges argued that the mentioned unwritten rule stating that the countersignature is not required is *contra constitutionem* rather than *praeter constitutionem*. However, according to dissenting opinion even such an unwritten rule "*cannot be a priori ruled out, as a constitutional convention can be a norm of constitutional law capable of derogating basically any written constitutional rule. The quantity and quality of practice that should lead to the emergence of convention contra constitutionem must, however, be significantly higher than the volume and quality of practice leading to the emergence of convention praeter constitutionem, because convention-creating practice does not enter a legally indifferent space as a concentrated expression of generally permitted behaviour, which is the case of practice praeter*

---

<sup>4</sup> Act No. 6/1993 Coll. on the Czech National Bank (ČNB Act), Czech Republic.

<sup>5</sup> Act No. 6/1993 Coll., on the Czech National Bank (ČNB Act), Czech Republic, para. 1.

<sup>6</sup> Act No. 6/1993 Coll., on the Czech National Bank (ČNB Act), Czech Republic, para. 2.

<sup>7</sup> Czech Republic, Constitutional Court, Pl. ÚS 14/01 (20 June 2001), majority opinion.

*constitutionem, but must overcome the feeling of the bindingness of a constitutionally valid countersignature requirement.*<sup>8</sup> For dissenting judges, therefore, the unwritten rules are not only mere interpretational tools, but potentially also the self-standing sources of new constitutional norms.

The second example which illustrates yet another understanding of unwritten rules is the judgment of the Czech Constitutional Court,<sup>9</sup> in which the Court ruled on the dispute between the President of the Republic and the Chairperson of the Supreme Court who proposed the Court to quash the President's appointment of the second Vice-Chairperson to the Supreme Court (for details, see Brunclík et al., 2023). She argued that by appointing the second Vice-Chairperson the President acted *ultra vires*, since although the Art. 62(f) of the Constitution states that the President appoints Vice-Chairpersons (in plural), this provision has been in accordance with Art. 15 of the Act on courts and judges,<sup>10</sup> in a way that there is only one Vice-Chairperson of the Supreme Court at any given time and that such an interpretation "*has been respected and adhered to since 1993, making this interpretation and application a constitutional convention.*"<sup>11</sup>

Even though the Court ruled in favour of the Chairperson of the Supreme Court, it did so without any arguments based on unwritten rules. More importantly, Justice Rychetský stated in his dissenting opinion that "*to review the constitutional act issued by the President of the Republic in accordance with Art. 62 of the Constitution from the point of view of compliance with constitutional conventions and also compliance with sub-constitutional law (...) is a power that was not entrusted to the Constitutional Court by the Constitution.*"<sup>12</sup> It can be concluded that the Constitutional Court avoided to understand the unwritten rules as either the sources of constitutional legal norms or interpretational tools in this case. On the contrary it adopted the approach avoiding the justiciability of such rules.

From these illustrative examples we can summarise that the understanding and use of unwritten rules are far from clear and unified in the Czech constitutional law. This is further underlined by the ambiguous terminology used by the academic literature. We can encounter terms such as constitutional custom (Filip, 2003), constitutional convention (Kindlová, 2008; Kyselá, 2008), political convention (Klíma, 2005, 2006), parliamentary convention (Filip, 2003), constitutional practice, or tradition.<sup>13</sup> Some authors distinguish between some of these terms conceptually (Gerloch, 2021), while others consider them entirely interchangeable (Pavlíček, 2015; Syllová, 2007). Hence, we believe that this chaotic situation can (and should) be remedied using the functional analysis.

### 3. METHOD OF FUNCTIONAL ANALYSIS

The essence of functional analysis is to define constructs by their functions in the system, rather than by the terms used to describe them or their content (Horák, 2022a). For constructs that are too vague, variably, and often mutually contradictorily

---

<sup>8</sup> Czech Republic, Constitutional Court, Pl. ÚS 14/01 (20 June 2001), dissenting opinion by Justices Güttler, Holeček, Janů, Kessler, and Malenovský.

<sup>9</sup> Czech Republic, Constitutional Court, Pl. ÚS 87/06 (12 September 2007).

<sup>10</sup> Act of Law No. 6/2002 Coll., on courts and judges, Czech Republic.

<sup>11</sup> Czech Republic, Constitutional Court, Pl. ÚS 87/06 (12 September 2007), majority opinion.

<sup>12</sup> Czech Republic, Constitutional Court, Pl. ÚS 87/06 (12 September 2007), dissenting opinion by Justice Rychetský.

<sup>13</sup> Czech Republic, Constitutional Court, Pl. ÚS 14/01 (20 June 2001), both the majority opinion and concurring opinion by Justices Holländer and Jurka.

defined in terms of their content, this is the only way to systematically work with them. From the definition of the functions of individual constructs in the Czech constitutional system, we can deduce their functional characteristics using three variables that reflect the characteristic properties of each such defined construct, i.e., its strengths and also its limits.

As these variables, we have selected: a) normative power, which reflects the position of the construct in the constitutional order of the Czech Republic and indicates how conflicts between this construct and written provisions of various legal powers should be resolved; b) applicability before the court, dealing with the question of whether courts can apply the construct as a normative argument directly, indirectly, or not at all; and finally c) content width, determining the scope of the construct, i.e., how broad the potential spectrum of situations in which the construct can be legitimately applied is (for details on criteria used, see Horák, 2022a, 2022b).

We applied the method of functional analysis to identify individual constructs and define their characteristic features, including limits for their use, to relevant case law of Czech courts and also Czech academic literature.

#### 4. RESULTING FUNCTIONALLY DEFINED CONSTRUCTS

Based on the conducted functional analysis, three distinct types of the unwritten rules (i.e., the established rules of behaviour that meet all the above parameters, namely *usus longaevis*, *opinio necessitatis*, *unwritten nature* and *non-negligibility*) can be distinguished which we have labelled as constitutional custom, established constitutional practice, and constitutional convention.

We note that while the definition of individual constructs by their functions is universally applicable across different constitutional systems, the determination of their characteristic features is not. The individual characteristic features do not only arise from the (universal) function of the construct but also significantly from the nature and basic principles of each specific constitutional system in which the construct is to be used. In this regard, it is particularly important to emphasise that the Czech Republic has a system of written constitutional law with a material core protected by the eternity clause,<sup>14</sup> which includes, among other things, the principles of popular sovereignty, separation of powers, and legal certainty. Our conclusions, which arise from the functional analysis of the individual constructs examined in the Czech Republic, are therefore not universally valid and cannot be transferred without further ado to other legal systems that do not meet the above characteristics.

##### 4.1 Constitutional Custom

The first functionally defined construct we will deal with is constitutional custom, whose function in the constitutional system is norm-creating. In other words, constitutional custom can be defined as a distinct source of constitutional law carrying a legally enforceable rule of behaviour (i.e., a constitutional norm). From the norm-creating function of this construct, its strong characteristic features, as well as its limitations, derive.

First, as an independent source, constitutional custom does not need any basis in written constitutional law. On the contrary, it is capable of creating new constitutional

---

<sup>14</sup> Constitution of the Czech Republic, Art. 9 paras. 2-3.

norms and possibly even changing norms enshrined in written constitutional law.<sup>15</sup> In other words, it is possible to imagine the existence of a constitutional custom *contra constitutionem*, which could prevail over a norm contained in a written provision through interpretative rules of *lex posterior derogat legi priori* or *lex specialis derogat legi generali*. It can thus be stated that constitutional custom functionally has high normative power.

Furthermore, since constitutional custom is a distinct source of constitutional law carrying constitutional norms just like any provision of written constitutional law, it is directly applicable as a legal argument before the court, which functionally indicates high applicability before the court.

These two very strong characteristic features are, however, problematic in the Czech constitutional system for at least three reasons. Firstly, they can significantly reduce the level of legal certainty and predictability of the law, as they allow the creation of new or modification of existing constitutional norms without their clear, sufficiently precise, and explicit enshrinement in the text of a legal regulation (constitutional statute). Secondly, they disrupt the principle of the separation of powers,<sup>16</sup> as the one who will ultimately create (or, if we want, "discover" and "declare" their existence) new constitutional norms will be the judiciary, not the legislature. This is also related to our third objection, which is the democratic deficit, as the constitution-making competence was explicitly entrusted to the Parliament by the Constitution,<sup>17</sup> both chambers of which are elected in free and direct elections based on universal and equal suffrage.<sup>18</sup> By allowing the creation or modification of constitutional norms through custom, we would thus interfere with the values and principles that we rank among the material core of the Czech constitution.

From the above, we deduce that the use of constitutional custom in the Czech constitutional system should be very limited. Originally, we even thought that there was no room for its application at all; however, we eventually came to the conclusion that there is indeed a narrow space for it, which derives from Art 9, para. 2 of the Constitution, which defines the material core of the Constitution as "*the essential requirements for a democratic state governed by the rule of law*"<sup>19</sup> and forbids its future changes or amendments. The only hypothetical case of legitimate use of constitutional custom, in our opinion, would be a situation where a substantial change in circumstances would cause a provision of written constitutional law to become evidently contrary to the material core of the constitution, and relevant constitutional actors would respond to such a constitutional crisis by simply ignoring the problematic provision instead of enacting an appropriate amendment to the constitutional order. If this state persisted for a long time, it would eventually lead to the creation and maintenance of a long-term "unconstitutional practice," about which the actors would be convinced that, despite its contradiction with a specific provision of the constitutional order, it is entirely in line with the principles and values contained in the material core of the constitution. We believe that in such a case, it could be a constitutional custom that, relying on Art. 9, para. 2, would be capable of changing or abolishing the original problematic rule contained in the constitutional text.

---

<sup>15</sup> This characterisation is based on the notion of customs in public international law (see Čepelka and Šturma, 2003; Fon and Parisi, 2009).

<sup>16</sup> Constitution of the Czech Republic, Art. 2, para. 1.

<sup>17</sup> Constitution of the Czech Republic, Art. 9, para. 1 in connection with Art 39, para. 4.

<sup>18</sup> Constitution of the Czech Republic, Art. 18, paras. 1-2.

<sup>19</sup> Constitution of the Czech Republic, Art. 9, para. 2.

For example, let us imagine a (somewhat apocalyptic) situation in which a pandemic of an incurable disease reduced the average life expectancy of the citizens of the Czech Republic to about 40 years, and the constitution-maker did not respond by changing the conditions for running for the mandate in the Senate or the office of the President of the Republic or the conditions for the appointment of a judge of the Constitutional Court (which are all currently set to 40 years of age).<sup>20</sup>

In such a situation, the mentioned age limit would be clearly contrary to the essential requirements of a democratic rule of law, as it would limit the exercise of the mentioned functions to a very narrow group of citizens. Nevertheless, none of the actively legitimised subjects would propose to the Constitutional Court to annul the relevant provisions of the Constitution for their contradiction with the constitutional order (respectively its material core), nor would they be changed by a constitutional law. Instead, persons under 40 years of age would simply be elected or appointed to the mentioned bodies and such practise would last for a long time. However, this practise, in clear contradiction with the explicit wording of the Constitution, would not be challenged before the Constitutional court, as all relevant actors would be convinced that the existing age limit would, as a result, violate the principles of universal suffrage and equal access to public functions and potentially even the functionality of the above-mentioned constitutional bodies.

The result could be a legitimately created constitutional custom derogating the relevant provision of the Constitution, which could then (i.e., after fulfilling the requirement of *usus longaevis*) be directly applied as a legal argument before the court. This means that if, after years of such practice, someone turned to the Court with a proposal to declare a certain election or appointment invalid for contradiction with the constitutional text, the Court could no longer hold in favour, as it would have to give precedence to the custom over the written provision of the Constitution.<sup>21</sup>

It can thus be summarised that the high normative power and direct applicability before the court should be functionally compensated in the Czech Republic by an extremely low (respectively very limited) content width, as the legitimate use of constitutional custom should apply only in situations where relevant constitutional actors feel the need to bridge the unresolved contradiction between individual provisions of the constitutional order and the material core of the constitution. In other words, the content width of constitutional custom is limited by the content of the material core of the constitution.

For these reasons, we find constitutional customs in Czech jurisprudence only very rarely. More precisely, when we leave aside the indication in one Constitutional Court's judgment, where the Court stated that the constitution "*cannot exist outside of a minimal value and institutional consensus. It follows for the area of law that, even in a system of written law, fundamental legal principles and conventions are sources not only of law in general but also of constitutional law*",<sup>22</sup> the only case is the already mentioned dissenting opinion of Justices Güttler, Holeček, Janů, Kessler, and Malenovský to the

<sup>20</sup> Constitution of the Czech Republic, Art. 19, para. 2; Art. 57, para. 1 and Art. 84, para. 3.

<sup>21</sup> Cf. the decision of the Czech Republic, Constitutional Court, Pl. ÚS 34/16 (7 March 2017), in which Court rejected the constitutional complaint connected with the motion to quash a part of Art. 19, para. 2 of the Constitution, which sets the age limit for running to the Senate at 40 years arguing, *inter alia*, that Art. 9, para. 2 of the Constitution does not allow the Constitutional Court to review provisions which are already part of the Constitution. However, in her dissenting opinion, Justice Šimáčková stated that, provision in question is in accordance with the Constitution "*in the current legal, social and political context*", which opens up the possibility of a different assessment, should that context - as we describe in the hypothetical case - change fundamentally.

<sup>22</sup> Czech Republic, Constitutional Court, Pl. ÚS 33/97 (17 December 1997).

Constitutional Court's judgment concerning the appointment of the Governor and Vice-Governors of the Czech National Bank.<sup>23</sup> Let us reiterate that the judges in the mentioned dissenting opinion stated that "*the requirement of countersigning can be inferred from the Constitution, and any contrary constitutional custom, which would result from a series of appointment acts without countersigning, would have to be a custom contra constitutionem. Such an eventuality cannot be ruled out a priori, as constitutional custom (convention) can be a norm of constitutional law capable of derogating any written constitutional rule.*"<sup>24</sup> The dissenting judges however ultimately concluded that such a constitutional custom *contra constitutionem* had not been created in the question of the appointment of the Governor and Vice-Governors of the Czech National Bank, as the requirements of *usus longaevis* and *opinio necessitatis* were not sufficiently met. In this context, we only add that the requirement of conviction of the need to protect the material core of the constitution against a provision of the constitutional order that came into conflict with it could not have been met in this case either.

This rare occurrence of (at least potentially possible) constitutional custom, most likely inspired by the concept of customs in international public law (Čepelka and Šturma, 2003), has not prevailed in the jurisprudence of the Constitutional Court, and constitutional norm-making thus remains (in our opinion, rightly) exclusively in the hands of the Parliament in the Czech Republic. This conclusion is also supported by the analysis of academic literature. Although some authors theoretically describe the construct of constitutional custom (Gerloch, 2021; Kysela, 2008), most of them rather problematise its existence. Filip (2003) explicitly rejects the existence of this construct in Czech constitutional law, stating that customs and conventions are not sources of law. An exception in this regard is Syllová (2007), who admits the possibility of the existence of customs that would be *contra constitutionem* as an unresolved issue.

#### 4.2 Practice Relevant to the Interpretation of the Constitution (Established Constitutional Practice)

The second, and from the perspective of the functioning of the system of written (codified) constitutional law, significantly less problematic construct is established constitutional practice, which has an interpretative and argumentative function (Bailey, 2022) in the constitutional system.

From this function, we can deduce that established constitutional practice, unlike custom, cannot be considered a distinct source of constitutional law, as it does not carry any new constitutional norm. Therefore, it cannot change existing constitutional norms or be in conflict with them. On the other hand, it is not without normative relevance, as it is tool whereby norms contained in the provisions of written constitutional law are (bindingly) interpreted or – in cases of gaps in constitutional law – even supplemented (Cf. Melzer, 2010). It is thus possible to imagine established constitutional practice not only *secundum et intra constitutionem*, but to a limited extent also *praeter constitutionem*. In contrast to constitutional custom, it is clear that it must not be *contra constitutionem*; however, it can be *contra legem*. If a law or its individual provisions come into conflict with a provision of the constitutional order as interpreted through established constitutional practice, they must be annulled as unconstitutional. From this, we can

---

<sup>23</sup> Czech Republic, Constitutional Court, Pl. ÚS 14/01 (20 June 2001).

<sup>24</sup> Czech Republic, Constitutional Court, Pl. ÚS 14/01 (20 June 2001), dissenting opinion by Justices Güttler, Holeček, Janů, Kessler, and Malenovsky.

deduce that from the perspective of functional analysis, it is a construct of medium normative power.

From the connection of established constitutional practice to the provisions of written constitutional law, which are interpreted or even supplemented through it, it follows that, similarly to constitutional principles, it is also applicable in constitutional legal argumentation only indirectly, i.e., precisely through those directly applicable provisions of written constitutional law that we interpret or supplement using it, which functionally corresponds to medium applicability before the court. According to some authors, established practice and principles are essentially the same, differing only in the source of their knowledge. In the case of established practice, we derive interpretation from experience (i.e., empirically), while in the case of principles, from their logic, meaning, and purpose (i.e., rationally, see Heard, 1991).

The use of this construct is therefore not problematic from a functional perspective, on the contrary, it is desirable or even necessary. Compared to the interpretation and supplementation of constitutional law through rationalistic deduction based on general principles or values, the inductive empirical approach based on historical analysis of previous behaviour (in relation to the requirement of *usus longaevis*) and socio-psychological analysis of the current conviction (in relation to *opinio necessitatis*) of constitutional actors is subject to a significantly lower degree of subjectivity. In other words, established rules of behaviour are objectively ascertainable and analysable, whereas the meaning and content of abstract principles and values are inherently influenced by the subjective moral, political, or ideological background of each individual person interpreting and applying them (Horák, 2022b). More frequent use of established constitutional practice thus promises a higher degree of legal certainty and predictability of constitutional law compared to general principles. The validity of this claim, however, presupposes that the courts in their jurisprudence clearly and sufficiently precisely establish the necessary degree of fulfilment of both requirements for the formation of established constitutional practice, which they will subsequently consistently apply when utilising this construct (for possible ways of achieving this see Kindlová, 2008).

Emphasising this advantage of established constitutional practice, however, does not intend to diminish the importance of principles for the anchoring of the constitutional system in the liberal democratic value basis and the effective protection of the substantive rule of law.<sup>25</sup> It seems that established practice and principles can coexist and complement each other in constitutional legal argumentation. In the event of a conflict between established practice and principles, principles can serve as a very useful corrective. After all, Jennings (1943) supplemented the two basic requirements for the formation of this construct (i.e., *usus longaevis* and *opinio necessitatis*) with a third, which is precisely the conformity with (in the given constitutional system) leading principles and values. Hence our above statement that established constitutional practice can be *praeter constitutionem* only to a limited extent. When we extensively interpret or even supplement written constitutional law through established constitutional practice, we must do so in accordance with the mentioned key constitutional principles and values. Even long-term practice of constitutional actors will not fix an interpretation of the constitutional order that would contradict key constitutional principles and values, if only because it was never a possible (plausible) interpretation.

It can thus be summarised that established constitutional practice is limited in its applicability in two ways. Firstly, since established constitutional practice does not

---

<sup>25</sup> See e.g., Czech Republic, Constitutional Court, Pl. ÚS 19/93 (21 December 1993).

create or change constitutional norms but only supplements or serves to interpret them, its content width is limited by the content of the provisions of written constitutional law that we interpret using it or the extent of the gap in constitutional law that we are trying to bridge by supplementing existing provisions. Secondly, in interpreting or supplementing constitutional law, established constitutional practice must never come into conflict with the material core of the constitution. This functionally indicates the medium content width of this construct.

The construct of established constitutional practice appears under various labels in Czech academic literature quite often. It is worked with, for example, by Kindlová (2008), Kysela (2008), Gerloch (2021), or Syllová (2007).

The use of the construct of established constitutional practice, as well as its relationship to constitutional principles and values, can be further demonstrated through two examples in which Czech courts used established practice alongside a number of other arguments based on principles and values. The first is the already mentioned majority opinion in the judgment of the Constitutional Court on the question of countersigning the President's decision on the appointment of the Governor of the Czech National Bank.<sup>26</sup> The court, siding with the President of the Republic, uses several principles and values. For example, it speaks of the principles of proportionality of legal regulation and legal certainty, or the value of the independence of the Czech National Bank, which could be threatened if the government, and not exclusively the "non-partisan President," could interfere in the appointment of the Governor or Vice-Governors. The subjectivity of the argumentation based on principles or values is also evidenced by the fact that the requirements arising from the independence of the Czech National Bank were interpreted by Justices Gütler, Holeček, Janů, Kessler, and Malenovský in their aforementioned dissenting opinion in exactly the opposite way.<sup>27</sup> In their view, the President does not have to be non-partisan at all, and therefore sufficiently guarantee the independence of the Czech National Bank. On the contrary, they believe that independence will be best guaranteed if several constitutional bodies are involved in the appointment, which will mutually control each other and thus limit the potential arbitrariness of any of them.

As we have already mentioned above, in addition to these arguments based on principles and values, the majority of the plenary also works with established constitutional practice, stating that *"the legal opinion that Article 62 of the Constitution expresses the right of the President of the Republic to appoint all members of the Bank Board without countersignature was respected and practiced continuously from 1993 until the debates on the amendment to the ČNB Act in 2000. This interpretation was thus confirmed by the gradually developed constitutional convention. It is known that constitutional conventions have great significance in a constitutional state precisely because they compose the constitution into a functional whole and fill the space between the terse expression of constitutional principles and institutions and the variability of constitutional situations. In a democratic rule of law, it is hardly conceivable that the interpretation of the constitution and the corresponding constitutional conventions, respected and unchallenged throughout the existence of the Constitution, would be questioned by a purposeful misinterpretation of the constitution and with it the entire previous practice, including a number of decisions that have never been challenged."*<sup>28</sup>

---

<sup>26</sup> Czech Republic, Constitutional Court, Pl. ÚS 14/01 (20 June 2001), majority opinion.

<sup>27</sup> Czech Republic, Constitutional Court, Pl. ÚS 14/01 (20 June 2001), dissenting opinion by Justices Gütler, Holeček, Janů, Kessler, and Malenovský.

<sup>28</sup> Czech Republic, Constitutional Court, Pl. ÚS 14/01 (20 June 2001), majority opinion.

From a functional perspective, this is established constitutional practice mainly because the Court (or rather its majority) does not want to use it as a separate source of law that creates a new constitutional norm or changes the norms contained in the provisions of the Constitution, but as a tool through which it (merely) bindingly interprets the provisions of Art. 62(k) of the Constitution.

The problem with this decision, however, is that the majority opinion did not use the opportunity to clearly and sufficiently precisely establish criteria for verifying the existence of established constitutional practice (i.e., *usus longaevis* and *opinio necessitatis*) for the future. On the contrary, the decision states that “*the essential aspect of this fact is not the verification of the extent to which the formal requirements of ‘constitutional convention’ are met [...].*”<sup>29</sup> Instead of an empirically ascertainable construct that has the potential to bring much-needed objectivity to constitutional legal argumentation, the majority opinion unfortunately ultimately used just another largely subjective argument, as evidenced by the fact that the very existence of the established constitutional practice declared by the majority opinion was questioned or at least intensely debated by both dissenting opinions.<sup>30</sup> We are therefore convinced that although the majority opinion used the construct of established constitutional practice from a functional perspective, its true potential unfortunately remained unfulfilled.

The second example of the use of established constitutional practice can be observed in the judgment of the Supreme Administrative Court,<sup>31</sup> ruling on the dispute between the President of the Republic and a nominees-in-waiting to the offices of judge. In the case the President refused to appoint several court nominees-in-waiting to the offices of judge even though they satisfied all legal requirements, and the government issued a resolution recommending the Prime Minister countersign the decision of the President on the appointment of candidates. He did so, because he believed that no one should be appointed to the office of a judge before she or he turns 30 years of age. However, Act on courts and judges<sup>32</sup> did not require them to be over 30 at that time.

After this refusal the Government issued yet another resolution which included all the refused nominees-in-waiting which were under 30. The President, however, remained inactive and did not decide on the appointment or refusal to appoint at all till one of the concerned a nominees-in-waiting approached the administrative courts (for details, see Brunclík et al., 2023).

The Supreme Administrative Court stated that the President (being in this particular case in a role of mere administrative authority rather than a head of the state) is obliged to decide properly (i.e., in accordance with the law and with sufficient justification) and in a timely manner on all nominees-in-waiting to the offices of judge listed in the Government’s resolution. In its reasoning, the Court used several principles (e.g., the principle of strict legality, the prohibition of arbitrariness, or the principle of government responsibility for countersigned acts of the President of the Republic) as well as (and for us importantly) established constitutional practice, the content of which in this case should be the properly and timely executed “*The reaction of the President of the Republic to the initiative of the (...) Government, by which a set of candidates for the positions of judges is submitted together with accompanying documents. The Supreme*

---

<sup>29</sup> Czech Republic, Constitutional Court, Pl. ÚS 14/01 (20 June 2001), majority opinion.

<sup>30</sup> Czech Republic, Constitutional Court, Pl. ÚS 14/01 (20 June 2001), dissenting opinion by Justices Güttler, Holeček, Janů, Kessler, and Malenovský and concurring opinion by Justices Holländer and Jurka.

<sup>31</sup> Czech Republic, Czech Supreme Administrative Court, 4 Ans 9/2007 – 197 (21 May 2008).

<sup>32</sup> Act of Law No. 6/2002 Coll., on courts and judges, Czech Republic.

*Administrative Court emphasises that the content of the convention is that the President reacts to the submitted initiative.*<sup>33</sup>

From a functional perspective, this is established constitutional practice mainly because the court first explicitly refers to the already cited and analysed passage of the majority opinion in judgment of the Czech Constitutional Court on the appointment of the Governor of the Czech National Bank, and further states that *"the formed constitutional convention both politically binds constitutional actors and serves as an interpretative guide for the interpretation of the Constitution by the Constitutional Court and ordinary courts."*<sup>34</sup> Again, it is more of a tool for (binding) interpretation of the already discussed provisions of Art. 63, para. 1(i), 3 and 4 of the Constitution than a source of law creating new or transforming existing constitutional norms.

Another example where the use of established constitutional practice seems very effective is the resolution of the question of whether the resignation of the Prime Minister automatically means the resignation of the entire government or not. The relevant provisions of the Art. 73 of the Constitution, which state that *"(1) The Prime Minister submits his resignation to the President of the Republic. Other members of the government submit their resignations to the President of the Republic through the Prime Minister. (2) The government shall submit its resignation if the Chamber of Deputies rejects its request for a vote of confidence, or if it adopts a resolution of no confidence. The government shall always submit its resignation after the constituent meeting of a newly elected Chamber of Deputies. (3) If the government submits its resignation in accordance with paragraph 2, the President of the Republic shall accept it"*, do not provide a clear answer. In the past, there was a debate in the doctrine about this, which can be simplified as a dispute between the "Prague school," which, following Professor Pavlíček, answered yes, and the "Brno school," which followed the opposite opinion of Professor Filip. We belong to the Prague school, but we also recognise the defensibility of the opposite interpretation, for which not insignificant arguments were also presented (see Antoš, 2022). However, this is a past defensibility: given that over the past 25 years a clear established constitutional practice has been created that corresponds to the first of the mentioned interpretations, the second originally possible interpretation is thus excluded.

#### 4.3 Constitutional Convention

The third functionally defined construct is the constitutional convention. In line with the traditional British concept (cf. Dicey, 1885; for review see Kindlová, 2008) it can be defined as an established rule of behaviour for constitutional bodies, the observance of which is expected, even though its violation does not result in legal sanctions, but only political sanctions or public disapproval. This construct thus operates somewhere between the legal and political levels of the constitutional system. We define the basic function of this construct within the constitutional system as the prevention and moderation of conflicts between constitutional actors. The constitutional convention thus functions as a lubricant, preventing the gears of the constitutional system from grinding to a halt.

Given the above, we can state that constitutional conventions do not create new or change existing constitutional norms, nor they serve to interpret or supplement them. At the same time, it is true that constitutional conventions cannot "override" even the provisions of ordinary law. If the legislature decides to incorporate a new legal rule into a

---

<sup>33</sup> Czech Republic, Czech Supreme Administrative Court, 4 Ans 9/2007 – 197 (21 May 2008).

<sup>34</sup> Czech Republic, Czech Supreme Administrative Court, 4 Ans 9/2007 – 197 (21 May 2008).

law that contradicts an existing constitutional convention, the constitutional convention will not stand up before court, and behaviour in accordance with such a convention should still be rejected by the court as unlawful (i.e., contrary to the newly established legal norm). This implies that the normative power of constitutional conventions in the legal system is low to none.

At this point, it is necessary to recall that, alongside law, there are other normative systems. The fact that constitutional conventions are not legally binding and enforceable does not mean that they are ineffective; on the contrary, it is conceivable that they are enforced even more effectively than if they were legally binding. A classic illustration is provided by Sophocles' famous tragedy *Antigone*, where there is a direct collision between a legal prohibition and an extra-legal command. Antigone decides to break the king's law, which forbids the burial of her brother, because she considers it her duty under religious laws and traditions. She follows higher principles dictated by her family ties and obligations, and considers them more important – more binding for her – than the legal regulations issued by the king.

Furthermore, since the constitutional convention does not create a legal obligation, it is logical that it cannot serve as a direct legal argument before the court. However, it is conceivable that if the convention is not in conflict with any constitutional or legal norm, the courts may take it into account to illustrate the context of a specific constitutional situation they are deciding on in individual cases. This functionally indicates low to none applicability before the court.

On the other hand, these established rules of behaviour can relate to a wide range of situations that may or may not be anticipated by the constitution-maker or legislature. In this respect, constitutional conventions can go far beyond or outside the framework of written provisions of the constitution or laws. Their content width is therefore high; it is limited only by the general characteristic of unwritten rules of the constitutional system, which is a sufficient degree of relevance for the constitutional system.

An example of constitutional conventions in the Czech Republic is that a newly appointed government presenting itself before the Chamber of Deputies with a request for confidence also presents a relatively detailed political program statement on this occasion. Such a requirement goes beyond the current written constitutional and legal framework<sup>35</sup> (content width), but it does not change or supplement constitutional law (normative power), as compliance with this obligation is not legally enforceable (applicability before the court). Nevertheless, it is likely that if the government did not present a political program statement, it would face increased criticism from the opposition and the public, and at least a minority government would find it more difficult to convince the necessary majority of present deputies and thus gain confidence. The political program statement can thus be seen as a tool that facilitates communication between the government requesting confidence and the Chamber of Deputies, as well as a tool for the Chamber of Deputies to control whether the government subsequently adheres to its political program statement. The political sanction for non-compliance with this rule of behaviour can then be the denial of confidence.

The construct of constitutional convention is emphasised in Czech academic literature by Klíma (2006) and, with certain reservations, also by Filip (2003), who states that customs and conventions are not sources of law and does not comment on their potential justiciability, from which we can infer that he rather does not admit it.

Since we do not consider constitutional conventions to be applicable (as a legal argument) before the court, it is relatively difficult to find their example in case law, with

---

<sup>35</sup> Constitution of the Czech Republic, Art. 68, para. 3.

the exception of the already mentioned Judgment of the Czech Constitutional Court concerning the President's power to appoint the (second) Vice-President of the Supreme Court.<sup>36</sup> Let us reiterate, what is crucial for the purposes of our analysis is the argument of Justice Rychetský in his dissenting opinion, where he states, among other things, that *"the petitioner did not challenge the President's power to issue such a decision and only objected to the 'breach of constitutional convention' [...], and the violation of Act No. 6/2002 Coll. [...] The President of the Supreme Court therefore did not claim or demonstrate the existence of a dispute between two state bodies over the scope of their competences (a competence dispute), but only under the pretext of a competence dispute between two state bodies actually demanded that the Constitutional Court review the constitutional act issued by the President of the Republic under Article 62 of the Constitution in terms of 'compliance with constitutional conventions' and assess its legality in terms of compliance with sub-constitutional law. This is, however, a competence that the Constitution did not entrust to the Constitutional Court."*<sup>37</sup>

Justice Rychetský thus explicitly states that the Constitutional Court was not entrusted with the competence to assess the compliance of the President's acts with constitutional conventions. In his view, this construct is therefore not directly or indirectly applicable before the court, and the obligations arising from constitutional conventions are not legally enforceable and sanctionable. From a functional perspective, such a characterisation precisely corresponds to the construct of constitutional convention as we work with it in this article.

## 5. CONCLUSION

Through our functional analysis, we have identified three distinct constructs, specifically constitutional custom, established constitutional practice, and constitutional convention. All these constructs can be collectively referred to as unwritten rules in the constitutional system and defined as established rules of behaviour formed as a result of long-term and repeated use (*usus longaevus*), which creates the conviction of relevant constitutional actors about the need to follow them for the future (*opinio necessitatis*). These rules, although not explicitly prescribed by any provision of written constitutional law, possess a sufficient degree of relevance for the functioning of the constitutional system, unlike constitutional traditions.

Despite this common definition, functional analysis shows that each of these constructs plays a different role in the constitutional system, from which their characteristic features arise, describing and limiting the functioning of each of these constructs in the Czech environment. These characteristic features are expressed through three variables: normative power, content width, and applicability before the court. The results of the functional analysis are summarised in Table 1. We have also supplemented it with selected specific examples of the occurrence of each of the examined constructs in the current Czech constitutional system.

---

<sup>36</sup> Czech Republic, Constitutional Court, Pl. ÚS 87/06 (12 September 2007).

<sup>37</sup> Czech Republic, Constitutional Court, Pl. ÚS 87/06 (12 September 2007), dissenting opinion by Justice Rychetský.

**Table 1: Results of Functional Analysis of Constructs of Constitutional Custom, Established Constitutional Practice, and Constitutional Convention**

<b>Construct</b>	<b>Constitutional Custom</b>	<b>Established Constitutional Practice</b>	<b>Constitutional Convention</b>
Function in the Constitutional System	Norm-creating	Interpretative, Argumentative	Preventive, Moderating
Normative Power	High	Medium	Low/None
Content Width	Low	Medium	High
Applicability Before the Court	High	Medium	Low/None
Examples	None so far	<ol style="list-style-type: none"> <li>1. The resignation of the Prime Minister means the resignation of the entire government</li> <li>2. The Governor and Vice-Governors of the Czech National Bank are appointed without countersignature</li> <li>3. The President shall properly and in a timely manner decide on all nominees-in-waiting to the offices of judge listed in the Government's resolution recommending the countersignature of the President's decision on their appointment</li> <li>4. Non-application of the 30-day deadline for the Senate's decision on Constitutional Acts.</li> </ol>	The government requesting confidence presents itself before the Chamber of Deputies with a program statement

Constitutional customs have a norm-creating function because they create new or change existing constitutional norms. Their existence is considered problematic in a system of written (codified) constitutional law in terms of clarity and predictability of constitutional law, separation of powers, and democratic deficit. Therefore, their strong characteristic features (i.e., high normative power and direct applicability before the court) should be compensated by very low (limited) content width. Established practice relevant to the interpretation of the constitution has an interpretative and argumentative function because it serves as a tool for interpreting and possibly supplementing written constitutional law. The balance of this construct arises mainly from the fact that all three of its characteristic features can be described as being of medium strength. Finally, constitutional conventions, due to their ability to support the smooth and effective conduct of constitutional processes and offer easier solutions to conflict situations that might otherwise threaten to stall the constitutional system, have a preventive and moderating function. Their strong characteristic feature is content width, as they are applicable to a very wide range of constitutional situations without having to rely on specific provisions of written constitutional law. This strong feature is, however, compensated by low to none normative power and applicability before the court. The use of the last two mentioned constructs is considered (not only) in a system of written

(codified) constitutional law to be entirely legitimate, desirable, and even indispensable in some situations.

We believe that the functional approach we have applied and the results we have achieved through this approach can help bridge the existing uncertainty surrounding the status and role of unwritten rules in Czech doctrine and case law. This uncertainty (or mutual misunderstanding) concerns not only the issue of terminology but also the much more important issue of content and meaning. In other words, we argue that the case law and doctrine of constitutional law have so far used various words to refer to not one, but three constructs, leading to disputes about their content and status in the legal system, as well as the risk of their substitution or hybridisation (see Horák, 2006b).

#### BIBLIOGRAPHY:

- Ahmed, F., Albert, R. and Perry, A. (2019). Judging Constitutional Conventions. *International Journal of Constitutional Law*, 17(3), 787–806, <https://doi.org/10.1093/icon/moz060>
- Allan, T. R. S. (1993). *Law, Liberty, and Justice, The Legal Foundation of British Constitutionalism*. Oxford: Clarendon Press.
- Antoš, M. (2022). Demise předsedy vlády = demise vlády? V Čechách (spíše) ano, na Moravě (možná) ne [Resignation of the Prime Minister = resignation of the government? In Bohemia (rather) yes, in Moravia (maybe) no]. In: Benák, J., Filip, J. and Šimíček, V. (eds.), *Pocta Janu Svatoňovi k 70. narozeninám* (pp. 209-231). Brno: Masarykova univerzita.
- Antoš, M., Brunclík, M., Hájek, L., Kindlová, M., Kubát, M. and Vincze, A. (2024). Constitutional Conventions in Central Europe: Insights from Experts. *Problems of Post-Communism*, online first, 1–9, <https://doi.org/10.1080/10758216.2024.2374706>
- Antoš, M. and Horák, F. (2024). Nepsaná pravidla v ústavním systému: Ústavní obyčej, ustálená ústavní praxe a ústavní zvyklost. [Unwritten Rules in the Constitutional System: Constitutional Custom, Established Constitutional Practice and Constitutional Convention]. *Právník*, 163(2), 120-136.
- Arendt, H. (2006). *Between past and future: Eight Exercises in Political Thought*. New York: Penguin.
- Bailey, D. (2022). Settled Practice in Statutory Interpretation. *The Cambridge Law Journal*, 81(1), 28–49, <https://doi.org/10.1017/S0008197322000034>
- Brunclík, M., Kubát, M., Vincze, A., Kindlová, M., Antoš, M., Horák, F. and Hájek, L. (2023). *Power beyond constitutions: Presidential constitutional conventions in Central Europe*. Cham: Springer Nature, <https://doi.org/10.1007/978-3-031-34244-8>
- Čepelka, Č. and Šturma, P. (2003). *Mezinárodní právo veřejné [Public International Law]*. Praha: Eurolex Bohemia.
- Chand, B. (1938). Conventions of the Constitution. *Journal of Legislation and International Law*, 20(4), 222–229.
- Cooray, L. J. M. (1979). *Conventions, the Australian Constitution and the Future*. Sydney: Legal Books.
- Dicey, A. V. (1885). *Lectures Introductory to the Study of the Law of the Constitution*. London: Macmillan.
- Dodek, A. (2011). Courting Constitutional Danger: Constitutional Conventions and the Legacy of the Patriation Reference. *Supreme Court Law Review*, 54(5), 117–142.

- Filip, J. (2003). *Ústavní právo České Republiky 1. Základní pojmy a instituty Ústavní základy ČR [Constitutional Law of the Czech Republic 1. Basic Concepts and Institutions Constitutional Foundations of the Czech Republic]*. Brno: Masarykova univerzita.
- Fon, V. and Parisi, F. (2009). Stability and Change in International Customary Law. *Supreme Court Economic Review*, 17(1), 279–309, <https://doi.org/10.1086/656058>.
- Forsey, E. A. (1984). The Courts and the Conventions of the Constitution. *University of New Brunswick Law Journal*, 33(1), 11–41.
- Gerloch, A. (2021). *Teorie práva [Theory of Law]*. Plzeň: Aleš Čeněk.
- Heard, A. (1989). Recognizing the Variety among Constitutional Conventions. *Canadian Journal of Political Science*, 22(1), 63–82, <https://doi.org/10.1017/S0008423900000846>
- Heard, A. (1991). *Canadian Constitutional Conventions: The Marriage of Law and Politics*. Toronto: Oxford University Press.
- Heard, A. (2012). Constitutional Conventions: The Heart of the Living Constitution. *Journal of Parliamentary and Political Law*, 6, 319–338.
- Horák, F. (2019). Krize hodnot a soudobé právo [The Crisis of Values and Contemporary Law]. *Jurisprudence*, 28(4), 28–41.
- Horák, F. (2022a). Human Dignity in Legal Argumentation: A Functional Perspective. *European Constitutional Law Review*, 18(2), 237–263, <https://doi.org/10.1017/S1574019622000141>
- Horák, F. (2022b). *Střet hodnot. Funkcionální analýza konstruktů rovnosti, svobody, spravedlnosti a důstojnosti v ústavněprávní argumentaci [Clash of values. Functional analysis of equality, freedom, justice and dignity constructs in constitutional argumentation]*. Praha: Leges.
- Jennings, I. (1943). *The Law and the Constitution*. London: University of London Press.
- Killey, I. (2014). *Constitutional Conventions in Australia. An Introduction to the Unwritten Rules of Australia's Constitutions*. London: Anthem Press.
- Kindlová, M. (2008). Ústavní zvyklosti jako součást ústavy (komparace commonwealthského přístupu a judikatury Ústavního soudu ČR) [Constitutional conventions as part of the Constitution (comparison of the commonwealth approach and the jurisprudence of the Constitutional Court of the Czech Republic)]. In: Klíma, K. and Jirásek, J. (eds.), *Pocta Jánů Gronsckému* (pp. 300–317). Plzeň: Aleš Čeněk.
- Klíma, K. (2005). Článek 68 [Article 68]. In: Klíma, K. (ed.), *Komentář k Ústavě a Listině [Commentary on the Constitution and the Charter]* (pp. 339–342). Plzeň: Aleš Čeněk.
- Klíma, K. (2006). *Ústavní právo [Constitutional Law]*. Plzeň: Aleš Čeněk.
- Kysela, J. (2008). Ústavní principy, ústavní konvence a ústavní inženýrství [Constitutional Principles, Constitutional Conventions and Constitutional Engineering]. In: Klíma, K. and Jirásek, J. (eds.), *Pocta Jánů Gronsckému* (pp. 121–136). Plzeň: Aleš Čeněk.
- Marshall, G. (2001). *Constitutional Conventions: The Rules and Forms of Political Accountability*. Oxford: Clarendon Press.
- Marshall, G. and Moodie, G. C. (1971). *Some Problems of the Constitution*. London: Hutchinson.
- Melzer, F. (2010). *Metodologie nalézání práva: Úvod do právní argumentace [Methodology of finding law: an introduction to legal argumentation]*. Praha: C. H. Beck.
- Morlok, M. (2002). Leistungsgrenzen des Verfassungsrechts. Informalisierung und Entparlamentarisierung politischer Entscheidungen als Gefährdungen der Verfassung? [The limits of constitutional law. Informalisation and de-parliamentarisation of political decisions as threats to the constitution?] *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer*, 62(1), 37–84.

- Pavlíček, V. (2015). Kapitola XVII. Prezident republiky [Chapter XVII. The President of the Republic]. In: Pavlíček, V. (ed.), *Ústavní právo a státní věda. II. Díl. Ústavní právo České republiky [Constitutional Law and Constitutional Theory. Part II. Constitutional Law of the Czech Republic]* (pp. 832-882). Praha: Leges, 2015.
- Píša, R. (2014). Ústavní konvence komparativně [Constitutional conventions comparatively]. In: Wintz, J. and Antoš, M. (eds.), *Ústavní právo v mezinárodním kontextu [Constitutional Law in an International Context]* (pp. 17-26). Praha: Univerzita Karlova v Praze.
- Plaxton, M. (2016) The Caretaker Convention and Supreme Court Appointments. *Supreme Court Law Review*, 72(2d), 449–477, <http://dx.doi.org/10.2139/ssrn.2645025>
- Syllová, J. (2007). Čl. 9 (Změna Ústavy) [Article 9 (Amendment to the Constitution)] In: Sládeček, V., Mikule, V. and Syllová, J (eds.), *Ústava České republiky. Komentář [Constitution of the Czech Republic. Commentary]* (pp. 67-75). Praha: C. H. Beck.
- Tomuschat, C. (1972) *Verfassungsgewohnheitsrecht?: Eine Untersuchung zum Staatsrecht der Bundesrepublik Deutschland [Constitutional customary law?: An investigation into the constitutional law of the Federal Republic of Germany]*. Heidelberg: C. Winter.
- Twomey, A. (2011). Changing the Leader – the Constitutional Conventions concerning the Resignation of Prime Ministers and Premiers. *Federal Law Review*, 39(3), s. 329–360, <https://doi.org/10.22145/flr.39.3.1>
- Vermeule, A. (2013). Conventions in Court. *Harvard Public Law Working Paper 13-46*, 1-31, <http://dx.doi.org/10.2139/ssrn.2354491>

Act No. 6/1993 Coll. on the Czech National Bank (ČNB Act), Czech Republic.  
Act of Law No. 6/2002 Coll., on courts and judges, Czech Republic.  
Constitutional Act No. 1/1993 Coll., Constitution of the Czech Republic.  
Czech Republic, Constitutional Court, Pl. ÚS 87/06 (12 September 2007).  
Czech Republic, Constitutional Court, Pl. ÚS 33/97 (17 December 1997).  
Czech Republic, Constitutional Court, Pl. ÚS 14/01 (20 June 2001).  
Czech Republic, Constitutional Court, Pl. ÚS 19/93 (21 December 1993).  
Czech Republic, Constitutional Court, Pl. ÚS 34/16 (7 March 2017).  
Czech Republic, Czech Supreme Administrative Court, 4 Ans 9/2007 – 197 (21 May 2008).



## JUDICIAL ACTIVISM AS AN UNWRITTEN SOURCE OF LAW? A NORMATIVE APPROACH

Dr. hab. Arkadiusz Barut  
Akademia Humanitas  
Instytut Nauk Prawnych  
Jana Kilińskiego 43,  
Sosnowiec, Poland  
[abarut@wp.pl](mailto:abarut@wp.pl)  
ORCID: 0000-0002-9347-7072

**Abstract:** *The article examines the criteria for recognising judicial decisions as an unwritten source of law. These criteria are considered from a normative perspective, focusing on the question of legitimate judicial activism. The author identifies activism as a situation in which, for an individual familiar with the legal culture and engaged in good-faith interpretation, it becomes clear that the judge has exceeded the institutional role assigned to him or her within that culture. The article outlines types of activism that are not legitimate from the point of view of communicative ethics and established criteria of political legitimacy. It is argued that such illegitimate activism consists, in particular, of employing language that articulates fundamental rights in a sense divergent from that traditionally accepted, and in introducing changes to the institutional structure and symbolic identity of a given political community. By contrast, reliance on the moral values and established legal principles recognized within a given community is presented as a form of necessary activism, particularly in the face of contemporary hyperinflation and the internal contradictions of the discourse on fundamental rights discourse.*

**Key words:** *Judicial Activism; Rule of Law; Constitutionalism; Unwritten Sources of Law; Philosophy of Law*

**Suggested citation:**

Barut, A. (2025). Judicial Activism as an Unwritten Source of Law? A Normative Approach. *Bratislava Law Review*, 9(Spec), 31-46. <https://doi.org/10.46282/blr.2025.9.Spec.1032>

**Submitted:** 29 April 2025  
**Accepted:** 02 October 2025  
**Published:** 28 December 2025

### 1. INTRODUCTION

This article examines the criteria by which judicial decisions may be regarded as unwritten sources of law. These criteria are analysed from a normative perspective, with particular attention to the issue of justified judicial activism.<sup>1</sup> Although contemporary court rulings are invariably issued in written form, the essence of activism lies in moving beyond established interpretations of legal texts and articulating principles that, in the judge's view, are implicitly contained within them. Consequently, the issue of judicial activism falls within the broader question of the legitimacy of unwritten sources of law.

I adopt a methodological perspective informed by the philosophy of ordinary language, assuming that the established meanings of words, including those used in ordinary legal language, have normative significance as a condition for fulfilling the principles of communicative ethics. I combine this perspective with a hermeneutic approach, recognising that interpretative tradition shapes both the current meaning of a term and the permissible scope of deviation from it. This tradition also provides a criterion for selecting the appropriate meaning when a word is used with more than one possible interpretation. In this view, the established meanings of terms found in legal provisions constitute an important benchmark for evaluating judicial activism. Therefore, I argue

---

<sup>1</sup> On the differing identification of the subject matter of judicial activism, see Gromski (2009, pp. 11-23).

that judicial activism exceeds legitimate limits when it departs from established usage without communicating this departure to the addressee of the decision, thereby generating a form of error akin to *ignoratio elenchi* (Aristotle, 1955, pp. 37-43). However, the criteria for evaluating judicial activism are not limited to the domain of communicative ethics; they also include standards concerning the legitimacy of political and institutional change. On this basis, I maintain that such criteria exclude political or constitutional changes, whether formal, legal, or symbolic, that are enacted without explicit sovereign consent.<sup>2</sup>

The issue under consideration pertains both to legal systems rooted in the Continental European tradition, where judicial decisions are generally not regarded as sources of law, and to common law systems, where it arises in questions concerning judicial lawmaking as a source of law at the constitutional level. A further important dimension concerns the decisions of international and supranational courts, particularly where such rulings go beyond the express content of the legal instruments that serve as the basis for their authority or the object of their interpretation.

## 2. THE CONCEPT OF ACTIVISM

The term *judicial activism* is used either descriptively or—more commonly—in a normative sense. It is typically defined in contrast to judicial restraint. The expression first entered scholarly discourse in 1947 (Schlesinger, 1947, *passim*; Green, 2009, pp. 1201-1208; Kmiec, 2004, p. 1446). Activism may manifest itself at all stages of adjudication, that is, at the stage of interpretation, the evaluation of evidence, and the decision-making process. The adjudicative stage is, of course, of particular significance, for it is there that the judge may remain within the confines of law-application or move into the domain of judicial law-making. In delineating an activist orientation, scholars distinguish between ‘hard’ activism—where courts generate wholly novel legal rules—and ‘soft’ activism, characterised by doctrinally inventive interpretation, particularly by setting aside the rule of linguistic priority in statutory construction. (Morawski, 2006, pp. 9–10). However, given the significance of the issue, it must be acknowledged that activism cannot be reduced to a specific interpretative method (such as broad or pro-constitutional interpretation). Furthermore, if judicial lawmaking is broadly understood as occurring whenever a judge departs from the literal wording of a legal text, then activism cannot simply be identified with lawmaking thus defined. Departing from the text is, after all, an inherent part of adjudication in both Common law and Continental systems (Wróblewski, 1988, p. 403), especially in the current era of legislative hyperinflation and pronounced normative inconsistency.

The term *activism* connotes a mode of judicial reasoning that introduces a certain novelty. This raises the question of what constitutes the essence of that novelty: for example, is it defined by a departure from the legal text and the issuance of a decision not determined by the legislator (Morawski, 2014, p. 266), or by a break with prior interpretations of that text (Marmor, 2005, p. 168; Kmiec, 2004, pp. 1473-1475). This leads to the question what is the subject matter of activism (Sowell, 1989, pp. 1-2; Green, 2009, *passim*).

In analysing the concept of activism, it is useful to return to an account of judicial lawmaking that allows an interpretative process to be classified as non-lawmaking, provided that its outcome falls within the range of interpretations that an observer acting

---

<sup>2</sup> On the political significance of arbitrarily altering the meaning of words, see de Bonald (1875, p. 82 et seq.); de Maistre (1873, p. 77, 81 et seq.); Habermas (1976, p. 61).

in good faith, and guided by the interpretative canons of a given legal culture, could accept as an instance of legal application (Gizbert-Studnicki, 1998, p. 82). A similar criterion can be used to distinguish between judicial restraint and activism. In this view, activism occurs when it becomes clear to an interpreter acting in good faith that the judge has exceeded the constitutional role assigned to him or her. In Continental systems, this means going beyond the application of law in a way that inevitably entails a lawmaking function; in common law systems, it involves assuming the role of the constitutional legislator.

Judicial activism may be justified by the judge on legal, moral, or political grounds, but internal and external perspectives may lead to different assessments. From an external standpoint, activism may appear as an expression of judicial arbitrariness, or even of a kind of nonchalance. It is thus possible for a judge to overstep their role by employing forms of argument that are unorthodox within the framework of a particular legal culture; this gives rise to what may be called *argumentative activism* (Gromski, 2009, p. 19).

The following analysis focusses primarily on the negative consequences associated with all forms of judicial activism. The most pressing concern, however, is activism of a political nature, that is, cases in which judicial decisions have a direct impact on the political and economic system of the state, as well as on the cultural self-identification of the political community (Banaszak, 2009, p. 75).

### 3. JUSTIFICATIONS FOR JUDICIAL ACTIVISM AS A SOURCE OF LAW

Arguments presented in support of judicial activism can be categorised into moral-systemic and moral-political types. The former type of argument appeals to the condition of contemporary law—specifically to its inflation, internal contradictions, and domination by a managerial paradigm. One such argument is advanced by Adrian Vermeule, who contends that the early diagnoses by Roscoe Pound, as well as the concerns expressed by Carl Schmitt regarding the displacement of law by administrative governance, failed to materialise because administrative law has evolved to be deeply infused with principles, particularly in the context of judicial review of agency action (Vermeule, 2022, pp. 149–151). According to advocates for the expanded role of the judiciary, courts currently embody demands for transparency and for closing the gap between rulers and the ruled, thus fulfilling, at least in popular perception, the same societal function that universally elected parliaments performed in the nineteenth century (Raynaud, 2010, pp. 169–70). Even when subject to criticism, courts are said to benefit from a kind of minimal moral legitimacy. Habermas argues that judicial procedures serve to “relieve” social relations of the burden of ethical determinations grounded in comprehensive visions of the good life (Habermas, 1992, pp. 319–324). Also relevant is Artur Kozak’s view of law—and thus of the judiciary—as the last socially legitimised institution in a society perceived as inescapably particularised (Kozak, 2008, p. 5355). The legitimacy of judicial activism has also been linked to the repudiation of the myth of scientific objectivity (Sulikowski, 2008, pp. 81–87).

However, more significant for the issue of activist judicial decision-making as an unwritten source of law is the justification that views it as a vehicle for advancing political, cultural and constitutional transformations that have not yet secured broader institutional endorsement. This approach is grounded in the liberal idea of the court as a guardian of individual rights against the “majoritarian distortion” of democracy (Morawski, 2006, p. 16). However, in the present context, this idea functions less as a defence of specific subjective rights and more as an instrument for reshaping political

culture and constitutional order. The most prominent example is the support that parts of the American left have extended to judicial activism since the Warren Court's decisions in the 1950s (Herngren, 1997, pp. 111–114; Barut, 2010, pp. 267–284). According to Robert Bork, an activist court can claim legitimacy only insofar as it serves as an agent of political and cultural change—exemplified by its abandonment of constitutional text in favour of arbitrarily articulating principles said to be implicitly contained therein.<sup>3</sup> Critics of this aspect of judicial activism point to its consequences: the consolidation of arbitrariness in the interpretation of fundamental rights, institutional disorder, and the erosion of the stabilising role of legal culture. These consequences will be examined in turn.

#### 4. JUDICIAL ACTIVISM AS A DECONSTRUCTION OF FUNDAMENTAL RIGHTS

Undoubtedly, not every shift in the interpretation or scope of protection of fundamental rights should be regarded as an abuse. The extension of the application of norms articulating such rights may be justified by new empirical insights resulting from changes in natural or technological conditions—for example, the inclusion of newly threatened animal species<sup>4</sup> within the category of endangered species, or the interpretation of the Fourth Amendment to the U.S. Constitution (protecting the inviolability of the home) as prohibiting thermal imaging surveillance (Bork, 2003, p. 108). Changes in the understanding of fundamental rights may also arise from deeply rooted transformations in moral evaluations—transformations that, if one accepts that human beings are social creatures guided by practical reason, cannot be ignored. One such example is the now uncontested recognition of corporal punishment as a violation of human dignity. To reject these developments would entail the wholesale repudiation of the contemporary social imaginary—an act that would be utopian in character (Pokol, 2019; Stawecki, 2003, pp. 360–361).<sup>5</sup>

Nevertheless, certain judicially driven changes in the content of fundamental rights remain difficult to accept. The most common justification today for such changes is the claim to have discerned the true or, alternatively, the contemporary meaning of a given right—thus warranting a reformulation of its content.

This rationale is invoked to support the adoption of the principle of *evolutionary interpretation* (often termed *evolutive interpretation* in European jurisprudence). Problems arise, however, when this principle is used to discard previously accepted interpretative outcomes, regardless of whether those outcomes emerged from textual or functional interpretation. Evolutionary interpretation represents a dominant tendency in contemporary adjudication (Pokol, 2019; Stawecki, 2003, pp. 360–361), yet it is considered especially justified in the context of human rights instruments.<sup>6</sup> It is widely

---

<sup>3</sup> Bork argues that contemporary judges belong to the 'New Class', a group of people concerned with disseminating ideas (although not necessarily analysing them or even understanding their historically entrenched meaning) (Bork, 2003, p. 9). Members of the 'New Class' are naturally inclined towards adopting a left-wing stance, as it favours reliance on general ideas and rejects the conservative demand to consider the specificity of particular cases. Judges thereby remain in antagonism with the majority of society, and for this reason seek to achieve institutional power (Bork, 2003, pp. 2–8).

<sup>4</sup> As Antonin Scalia pointed out in response to Ronald Dworkin (Scalia, 1997, p. 146), who formulated an openly sophisticated argument in favour of judicial activism by appealing to changes in the scope of statutory language due to factual developments (Dworkin, 1997, p. 121).

<sup>5</sup> See Scalia (2017, pp. 213–214) on an evolutionary interpretation that does not have a political character, that is, one that does not alter relations of power.

<sup>6</sup> Evolutionary interpretation, insofar as it is adapted to the general character of the provisions of the ECHR, should not constitute a departure from its linguistic interpretation (Lizewski, 2011, p. 116).

employed in the jurisprudence of the U.S. Supreme Court (under the notion of a *living constitution*), the Supreme Court of Canada (the metaphor of the constitution as a *living tree*), and is explicitly recognised as a guiding interpretative principle by both the European Court of Human Rights.<sup>7</sup> The principal argument in support of evolutionary interpretation is the demand for the effective protection of human rights. It is grounded in the necessity of adapting jurisprudence to cultural change and evolving moral judgments, as well as in the conviction that the substantive protection of rights enshrined in human rights instruments would not be possible if interpretation were restricted to the text itself, the historical intent of its framers, or the prevailing views at the time of drafting.<sup>8</sup>

However, the question arises as to what might constitute an intersubjectively valid method for identifying cultural change. This issue is exemplified by the European Court of Human Rights' interpretation of the criterion of an "established international trend" as a justification for applying evolutive interpretation in the 2002 case of *Goodwin v. the United Kingdom*, where the Court arbitrarily asserted the existence of a public consensus recognising transsexualism, doing so in a manner almost entirely divorced from empirical evidence.<sup>9</sup> In response to such concerns, scholars and jurists have emphasised the role of cultural and institutional constraints (Jabłoński and Kaczmarek, 2019, p. 17-18, 19-20), reflected most notably in Dworkin's notion of coherence, captured by his metaphor of the "chain novel" (Dworkin, 1986, pp. 238–239). Yet, this raises a further question: which canon of culture is to serve as the standard for coherence? Should it be general legal culture of a society, the professional culture of the legal community, or the personal convictions of the judges themselves? Some responses to this dilemma propose decoupling judicial decision-making from prevailing social consciousness. In particular, it has been argued that entrenched conceptions of social institutions encode existing power relations and may therefore be legitimately reconfigured in pursuit of moral and political aims (e.g., Haslanger, 2012, pp. 190-198, Guala, 2016, p.187 et seq.).<sup>10</sup> Consequently, there arises the risk of concluding that such changes should encounter no limits, with resistance posed by existing legal frameworks regarded not so much as an obstacle to be overcome, but rather dismissed as irrelevant by activist judges.

There is no space here for a comprehensive inquiry into whether evolutionary interpretation strengthens or weakens the protection of fundamental rights—a question that ultimately hinges on determining which rights are more, and which less,

---

<sup>7</sup> The ECtHR first explicitly applied the principle of evolutionary interpretation (treating the Convention as a 'living instrument') in the case of *Tyrer v. the United Kingdom* (ECtHR, *Tyrer v. the United Kingdom*, app. no. 5856/72, 25 April 1978, para. 31).

<sup>8</sup> The case of *Goodwin*, as well as, for example, *Soering v. United Kingdom* (ECtHR, *Soering v. the United Kingdom*, app. no. 14038/88, 07 July 1989), see Lizewski (2011, pp. 121–122).

<sup>9</sup> See ECtHR, *Christine Goodwin v. the United Kingdom*, app. no. 28957/95, 11 July 2002, paras 84–85 (relying only subsidiarily on the position of a supporting NGO and the practice of courts in Australia and New Zealand, without citing specific judgments). In this case, the applicant was a person who had undergone gender reassignment surgery (to female). She claimed to suffer numerous difficulties because her biological sex remained recorded in the civil registry. Representatives of the United Kingdom argued, inter alia, that civil registry records in the United Kingdom serve primarily a historical function and are not necessary for ongoing legal transactions. They also warned that permitting amendments to these records would cause upheaval in the British legal system, including in the law of persons and inheritance law, potentially infringing the rights of third parties (Barut, 2018, pp. 314–15).

<sup>10</sup> It is argued, for instance, that the judge's role is not to determine what a given institution, such as marriage, is in a social sense, but rather what its name signifies in a legal sense, defined solely by the legal—indeed, moral-political—context (Guala, 2016, p. 200 et seq.).

fundamental, or even on distinguishing genuine rights from merely apparent ones. Yet it can scarcely be denied that evolutionary interpretation may diminish the protection of rights that have already been recognised (Scalia, 1997, p. 43 et seq.).<sup>11</sup> This is because the protection of rights often takes the form of a zero-sum game—affecting not only the balance between fundamental rights and public interest considerations, but also the relationship among rights themselves (Waldron, 2006, p. 1376). A case in point is the European Court of Human Rights' articulation of a purported right to abortion under the European Convention on Human Rights, which significantly curtailed the scope of the right to life (Banasiuk, 2013, pp. 84–86; Barber and Fleming, 2007, p. 155 et seq.). Thus, appeals to evolutionary interpretation may be used to legitimate shifts in the understanding of fundamental rights that appear to contravene both the ethics of public justification and the principles of political legitimacy.

This tension becomes particularly acute when a right that is less firmly grounded in legal culture and collective consciousness—that is, a right with weaker legitimating potential—is substituted for a right that enjoys broader cultural and institutional anchoring. A paradigmatic example is the landmark U.S. Supreme Court ruling in *Roe v. Wade* (1973), in which the Court grounded the right to abortion in a right to privacy not explicitly stated in the U.S. Constitution, invoking particularly the Fourteenth Amendment's due process clause.<sup>12</sup> Similarly illustrative is the aforementioned ECtHR judgment in *Goodwin*, where the Court construed Article 8(1) of the European Convention on Human Rights—"Everyone has the right to respect for his private and family life, his home and his correspondence"—as containing an implicit right to personal autonomy, which was then taken to justify institutional restructuring at the level of the state. A further example is *P. and S. v. POLAND* in which the ECtHR again inferred a putative right to abortion from the right to privacy, despite this right being neither articulated in the Convention nor, contrary to the Court's claims, recognised in Polish domestic law. In that case, judge de Gaetano submitted a dissenting opinion, emphasising that the Convention contains no right to abortion and that the majority's reasoning distorted the proper meaning of the right to privacy.<sup>13</sup>

In the judgments discussed above, the right to privacy—traditionally understood as protection against interference by the state or other individuals in matters of family life, intimacy, and personal preferences, and long regarded as a foundational principle of Western legal culture, enshrined in all major human rights instruments—was invoked to justify claims far less embedded in legal tradition or social consciousness. Specifically, these include claims to political and institutional recognition of intimate choices (*Goodwin*) and to largely unrestricted access to abortion (*Roe*). In this way, the courts effected a fundamental transformation of the prevailing conception of a basic right: the right to privacy, once seen as a paradigmatically protective right, came to be reinterpreted

---

<sup>11</sup> The fact that the protection of rights guaranteed by the European Convention on Human Rights may simultaneously violate the constitutional rights of another individual is noted by the German Federal Constitutional Court (see, e.g., Germany, Federal Constitutional Court, 2 BvR 1481/04 (14 October 2004), available at: [https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2004/10/rs20041014\\_2bvr148104.html](https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2004/10/rs20041014_2bvr148104.html) (accessed on 18.12.2025); and Germany, Federal Constitutional Court, 2 BvR 2365/09 (4 May 2011), available at: <https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/DE/2011/bvg11-031.html> (accessed on 18.12.2025).

<sup>12</sup> Legal Information Institute. (2025). *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992). In: Cornell Law School, Available at: <https://www.law.cornell.edu/supremecourt/text/505/833> (accessed on 27.04.2025).

<sup>13</sup> ECtHR, *P. and S. v. Poland*, app. no. 57375/08, 30 October 2012. On the fact that under Polish law there is no right to abortion, see the judgments of the Constitutional Tribunal of 28 May 1997 (K. 26/96), of 27 January 2004 (K 14/03), and of 22 October 2020 (K 1/20).

as encompassing activities with distinct public consequences. Furthermore, in the American context, the right to equal legal protection—historically associated with the fight against racial segregation and thus central to the constitutional identity forged by the Fourteenth Amendment, adopted after the Civil War to prevent the political disenfranchisement of formerly enslaved persons—was interpreted as encompassing a putative right to abortion, despite the deep and enduring divisions over this issue within American society. In judicial rulings, this practice of substituting, or more accurately, creating new rights is particularly problematic from the perspective of communicative ethics insofar as courts are still widely perceived as bodies that apply rather than generate law. Judicial activism, in this respect, transforms—and arguably deconstructs—the very notion of what a judicial ruling is.<sup>14</sup> As Judge Egbert Myjer observed in his dissenting opinion to the ECtHR's judgment in *Muñoz Díaz v. Spain* (8 December 2009), by engaging in the creation of new rights, the Court jeopardises its credibility among the States Parties to the Convention as a judicial, rather than a political, institution (Banasiuk, 2013, p. 66).

## 5. JUDICIAL ACTIVISM AS A DECONSTRUCTION OF THE INSTITUTIONAL AND POLITICAL ORDER

Regardless of the specific content of activist rulings or the constitutional politics deliberately pursued by courts, the mere fact of a court stepping beyond its designated role as the third branch of government can itself appear as a threat to constitutional order and to the status of law as an institutional form.

It is worth recalling here the concept of the “trashing” of law. Nicola Lacey uses this term to describe the practices of political actors she classifies as populists—practices which, while formally compliant with the letter of the law, disregard or directly contravene established political conventions and interpretative traditions that have hitherto expressed the spirit of legislation (Lacey, 2019, pp. 15-17). Yet the activist judgments discussed above, along with certain types of arguments offered in their support, may also be perceived as forms of “trashing” the constitutional order. A striking illustration is the identification of judicial constitutional law-making with popular rule, though exercised by means distinct from those of “ordinary” politics grounded in universal elections. This line of thinking informs such concepts as Charles Eisgruber's *constitutional self-government*, Bruce Ackerman's *popular constitutionalism*, Ronald Dworkin's *partnership democracy*, and, beyond the American context, Pierre Rosanvallon's idea of *counter-democracy*. Within such frameworks, society as a collective political subject is equated with the political process of advancing successive human rights claims; civic activism is identified with the activity of non-governmental organisations initiating constitutional processes; and political agency is tied to the belief that positive law is worthy of obedience—an idea particularly central to Dworkin's theory.

Nevertheless, the concept of democracy, at least in its legitimating function, continues to imply the political empowerment of broad social groups, understood as real

---

<sup>14</sup> The European Court of Human Rights, in the reasoning of its judgment in *Johnston and Others v. Ireland*, app. no. 9697/82, 18 December 1986, stated that the principle of evolutive interpretation of the Convention cannot justify introducing rights that were not originally articulated in it. In light of the rulings cited here, however, it appears that a different position has ultimately prevailed.

and effective influence on political processes.<sup>15</sup> Such empowerment cannot be reduced to judicial authority acting, as Habermas phrased it, as the “regent” of the people. Although it is certainly possible—and has been argued at various historical moments, from classical Athenian democracy to nineteenth-century liberalism and the present day—that citizen influence through parliamentary elections is often more illusory than real, such critiques do not negate the fact that the principle of national sovereignty, rather than the sovereignty of historical or procedural processes, remains a foundational element of the constitutional culture of any society that identifies itself as democratic. Thus, its deconstruction amounts to dismantling one of the most significant components of law as an institution.

An example of this problematic logic is found in Ronald Dworkin’s sophistical response to the charge that judicial activism violates the principle of separation of powers. Dworkin begins by noting, rather trivially, that the U.S. Constitution defines the operation of the central government, while fundamental rights are dealt with in the Bill of Rights, appended through constitutional amendments. Since the Bill does not specify who has the authority to interpret these rights, Dworkin concludes that such authority cannot be presumed to lie within the judiciary (Dworkin, 1997, p. 121). This conclusion may be coherent within Dworkin’s conception of rights as “trump cards”, overriding considerations of public utility and, potentially, constitutional identity. Nevertheless, this line of reasoning neglects the institutional and political reality of the United States, where the promotion of rights is not the sole constitutional value.<sup>16</sup> The separation of powers possesses an intrinsic value of its own, shaping the constitution both as a legal structure and as a symbolic-political institution.

Should this deconstructed understanding of democracy become firmly established, even while the criteria of popular sovereignty and the principle of the separation of powers are formally retained, judicial activism may lead to institutional anarchy.<sup>17</sup> Such anarchy can manifest itself in various ways: through the acceptance by certain citizens of departures from the constitutional foundations of the state in the name of higher political objectives; through the unreflective acceptance of shifts in the constitutional paradigm; or, finally, through a general institutional and political anomie, in which the concept of the constitutional identity of a political community loses its coherence. A likely casualty of these developments would be the certainty of law as an institution.

Critics of judicial activism also argue that legal institutions at the sub-constitutional level are placed at risk, regardless of whether their basis lies in legal texts or in the shared consciousness of the legal profession. Commentators writing within the American context, in particular, have observed that the content of fundamental rights allegedly promoted by the courts through constitutional law-making tends to become as simplistic as political slogans, and similarly volatile and ephemeral. In times of radical political change, such rights may be rejected as political slogans of a bygone regime. According to Robert Bork, once one of the most essential constitutional ideas—the

---

<sup>15</sup> This is expressed, for instance, in Article 4(2) of the Constitution of the Republic of Poland (of 02 April 1997, as published in *Dziennik Ustaw* No. 78, item 483), according to which “The Nation shall exercise such power directly or through their representatives.”

<sup>16</sup> In particular, understood in the way Dworkin conceives of them—namely, not as concretely defined rights, but as a single right to equal concern and respect from the government, with the pursuit of particular ways of life left to be specified by the authorities, and especially by the courts.

<sup>17</sup> It may, of course, occur that the idea of democracy is understood quite differently by institutional legal elites—who, for example, may regard the possibility of lodging a constitutional complaint as sufficient for the empowerment of society—than it is within other groups; however, such a situation in itself constitutes an expression of pathological phenomena.

conception of democracy as the will of the majority—is deconstructed, law loses its primary point of reference, which had been its expression in textual form. What is then recognised as law consists of arbitrary and unpredictable judicial decisions, no longer governed by the canons of legal reasoning. Moreover, professional legal conventions prove incapable of crystallising into stable institutional rules (Bork, 1997, pp. 188-199, 216-217). Bork further contends that when political disputes are reframed in the language of judicial contestation over fundamental rights—disputes that, by their nature, are structured as zero-sum games—and when the resulting judgments are endowed with the appearance of legal objectivity, conflicts are not resolved but rather transformed into entrenched societal antagonisms that are extremely difficult to remove (Bork, 2003, pp.108–109). Similar concerns have been articulated by Mary Ann Glendon. She argues that the ineffectiveness of rights asserted in judicial proceedings—including constitutional rights—as instruments for the protection of individuals stems from their removal from the mechanisms of the political sphere, understood as a rational space for discourse allowing compromise, and from legal traditions viewed as stabilising forces for such practices (Glendon, 1993, pp. 171-183).

Certain authors regard judicial activism as undermining the protective function of legal doctrine, an institution particularly characteristic of statute law systems. Bela Pokol's concept of "juristocracy" exemplifies this view Pokol highlights the significance of legal doctrine for the institutional character of law, especially within the Continental European legal tradition. He argues that, following the Second World War and particularly towards the end of the twentieth century, constitutional courts began to usurp legislative functions) Their decisions, according to him, increasingly relied on criteria derived from arbitrarily interpreted fundamental rights, rendering judicial reasoning unpredictable (Pokol, 2021, p.7-12, 46-53). Moreover, Pokol points to a dual development: not only the duplication of the constitutional-political system, exemplified by the emergence of various NGOs and semi-public, semi-private advisory and consultative bodies participating in constitutional processes, but also the duplication of the legal system itself. Courts, he argues, began to create a form of "constitutional law" addressing issues that had previously been considered non-political and regulated by the doctrines of particular fields of law. Pokol stresses that there are important differences between civil or criminal law and the distortions produced when constitutional law is applied to matters traditionally governed by private or criminal law. He thus highlights the distinctions between ordinary law and constitutional law applied to non-political issues. In the latter, the role of the text is reduced, there is no commonly accepted hierarchy of provisions within constitutional acts, and judges are free to base their decisions either on declaratory and programmatic provisions or on provisions articulating specific rights, or to assign such characteristics arbitrarily. There is also no binding framework regulating respect for jurisprudential precedent. In Pokol's view, constitutional legal doctrine based on activist judgments remains comparatively shallow and politically entangled when measured against the doctrines of non-political branches of law. Often, the role of doctrinal authorities is assumed by individuals affiliated with NGOs promoting particular judicial outcomes. He also highlights the extreme elitism of the decision-making bodies, which results in a lack of broader deliberation, even of the limited kind that typically occurs through appellate judicial procedures (Pokol, 2021, pp. 91-100). From an American perspective, Pokol's diagnosis is confirmed finds confirmation in the work of Mary Ann Glendon. Referring to American debates over originalism and textualism in legal interpretation, Glendon emphasises that the certainty of subjective rights depends not only on strict doctrinal frameworks but also on the consolidation of a stable legal culture (Glendon,1997, pp. 112–113).

## 6. THE POTENTIAL OF JUDICIAL ACTIVISM AS A SOURCE OF LAW

The question of whether legal texts, legal doctrine, professional legal culture, and broader societal legal culture genuinely ensure the stability of judicial decisions—and thus the legal security of individuals—or whether, as proponents of Critical Legal Studies suggest, they merely constitute a myth concealing judicial arbitrariness, cannot be definitively resolved here. The argument that constitutional adjudication necessarily involves a political dimension—understood as the endorsement of a particular vision of the socio-political order—appears relatively self-evident. When judicial decisions extend to matters previously deemed beyond political debate, political considerations inevitably enter the law and its various branches. Yet the political—understood as the choice of fundamental values that define a community<sup>18</sup>—does not necessarily entail instability (although there always remains the risk that procedural politics, in the sense of power struggles, may subsequently penetrate the law). In order to distinguish the legal from the political without lapsing into a pretence of apolitical neutrality, a judge must, however, exhibit humility toward constitutional and cultural realities.

A balanced position regarding judicial activism is offered by Lech Morawski. He argues that although any issue can potentially be regarded as political, it remains necessary to distinguish between systemic politics, concerned with finding comprehensive solutions to social, economic and political problems, and ad hoc politics, concerned with resolving specific issues. According to Morawski, courts should restrict themselves to the latter form of political engagement. Given that they lack direct democratic legitimacy, possess no autonomous means of enforcing their decisions, and bear neither political nor financial responsibility for them, courts are institutionally unsuited to systemic political decision-making. Morawski further contends that courts should observe the principle of subsidiarity, engaging in political activism only where other institutional mechanisms have failed (Morawski, 2006, pp. 19–21; Kavanagh, 2009, pp. 28–29). Based on such premises, a judge should act, where necessary, to constrain political power infringing upon fundamental rights, but should refrain from issuing judgments that transform the cultural identity of the political community, alter the constitutional structure of the state, or disrupt the prevailing balance of political forces.

A similar conviction, although expressed within a different conceptual framework, is evident in American legal discourse. Antonin Scalia, when addressing the problem of evolutionary interpretation, identifies common sense, respect for values that are self-evident within a given community, and fidelity to the essential constitutional order as fundamental principles of proper legal interpretation. He observes that the American constitutional system assigns distinct functions: textual interpretation is required for constitutional provisions, whereas statutes and judicial precedents permit functional methods of interpretation (Scalia, 1997, pp. 14-18, 37-41). According to Scalia, adherence to the original meaning of the constitutional text at the time of its adoption safeguards individual rights from the arbitrary will of the majority as well as from shifts in societal consciousness and cultural norms, within which the meaning of rights may otherwise be eroded or lost. As he notes with reference to the Eighth Amendment's prohibition of cruel punishments, it is by no means certain that the moral standards of subsequent generations will prove superior (Scalia, 1997, p. 145).<sup>19</sup> He maintains that defining the

---

<sup>18</sup> See, e.g., Lefort (1988, p. 9) and Ricoeur (1957, pp. 724-736).

<sup>19</sup> Referring to Dworkin's argument that we should distinguish the semantic intent of the historical legislator, that is, what abstract principles the legislator intended to express in the text, from the way the historical

scope and methods of protecting fundamental rights within a concrete historical context—taking into account specific threats and the available means of addressing them—is more effective than seeking to articulate allegedly abstract (but in fact historically contingent) and timeless standards (Scalia, 1997, p. 148).

A different but related solution is proposed by Adrian Vermeule, who advocates an orientation toward the common good as a stable foundation for judicial interpretation. He describes this approach as “Common Good Constitutionalism”. Vermeule opposes progressive judicial activism by endorsing what he terms “developing constitutionalism”, a properly understood form of dynamic interpretation. Although Common Good Constitutionalism is founded on principles,<sup>20</sup> its interpretation is intended to be politically and communicatively honest, avoiding the pursuit of political revolution under the guise of judicial reasoning. Vermeule illustrates the difference between progressivism and Common Good Constitutionalism by examining the reasoning behind the U.S. Supreme Court’s recognition of same-sex unions as marriages. The majority decision relied on an alleged analogy between the historical prohibition of interracial marriage and the refusal to recognise same-sex marriage. In doing so, it ignored the traditional understanding of marriage as a union between a man and a woman, whose essential function—the possibility of procreation—is not dependent on racial similarity between spouses. Although it is always possible to deconstruct the traditional concept of marriage, Vermeule argues that historical experience provides an essential guide that judges cannot disregard (Vermeule, 2022, pp. 131-133).

Thus, both Scalia and Vermeule reject mechanical solutions, whether through blind fidelity to textual literalism (Scalia) or blind trust in the Dworkinian figure of the judge as Hercules. In Scalia’s view, the protective function of constitutional interpretation is fulfilled through conceptual self-limitation, an approach that has certain affinities with legal positivism. In Vermeule’s approach, the same function is achieved through teleological reasoning in the Aristotelian sense.

## 7. CONCLUSION

The core issue concerning the limits of legitimate judicial activism as an unwritten source of law ultimately hinges on whether the authority exercised by activist judges is subject to institutional control. To provide an adequate response, it is necessary to combine an external perspective—evaluating the effects of judicial decisions according to the criterion of protecting fundamental values—with an internal perspective, assessing whether judges remain within the established canons of legal culture and professional legal norms. Such an assessment is only possible if society—or at least a segment broader than the narrow institutional legal elite—adopts a posture that, following Hart, can be described as critically reflective.

From this perspective, the first critical instrument is the conviction that legal provisions possess an established (though not necessarily correct) meaning. Although contemporary linguistics may argue for the inevitability of interpretation, it remains possible to distinguish a clear functional meaning of a provision. What may appear at a theoretical level as the historically contingent product of interpretation often presents itself at a practical level as an obvious meaning, even if not strictly derived from linguistic

---

legislator identified the consequences of their application at a given historical moment, it is pointed out that the textualism promoted by Scalia also seeks norms of an abstract nature, but according to evaluations from the given historical moment (Scalia, 1997, p. 144 et seq.).

<sup>20</sup> Vermeule accepts Dworkin’s position regarding their significance for the legal system.

analysis. What matters, therefore, is not whether such an established meaning can be identified with scientific precision, but whether belief in such meaning enables judicial decisions to be subjected to critical scrutiny. Thus, a precondition for legitimate judicial activism—and for recognising its outcomes as sources of law—is humility toward the legal text. This humility, clearly distinguished from mechanical adherence to a supposedly obvious meaning, entails a duty to interpret the law in good faith, with respect for the fundamental values that are self-evident within a given community. It also requires abstaining from constitutional-level legal subterfuge—made possible precisely by the absence of direct oversight over judges—or from advancing legal absurdities that would be apparent even to non-specialist observers. In this respect, the acculturation of judges should involve internalising the criterion of the relative objectivity of law: the conviction that even the criteria for resolving difficult cases must be sufficiently clear to allow for the scrutiny of judicial decisions.

Secondly, it is essential that judges respect the basic moral-political consensus prevailing within their society. While it may be argued that values such as liberty, dignity, and justice function as *floating signifiers* or even *empty signifiers*—terms that highlight their appropriation by various political doctrines in practice—the regulative principle governing judicial conduct should nonetheless presuppose that such values possess, at minimum, a socially objective character. Judges must recognise that, at the constitutional level, they are not selecting values but realising them.

Thirdly, judges should recognise as fundamental the existence of a specific political community and its constitutional identity. They must remain aware that the legitimacy of their activism—and the recognition of their judgments as sources of law—derives not from abstract principles of law but from a concrete institutional and symbolic order. Without such awareness, judges risk becoming political actors, and their authority would ultimately become subject to the contingencies of political fortune. In such a case, law itself would not escape a similar fate.

#### BIBLIOGRAPHY:

- Ackerman, B. (1993). *We the People: Foundations*. Cambridge: The Belknap Press of Harvard University Press.
- Aristotle (1955). *On Sophistical Refutations. On Coming-To-Be and Passing Away. On the Cosmos*. Translated by E. S. Forster and Furley, D. J. London: Heineman.
- Banasiuk, J. (2013). Czy europejska konwencja praw człowieka jako „żywy instrument” chroni lepiej ludzkie życie? [Does the European Convention on Human Rights as a “living instrument” better protect human life?]. *Zeszyty Prawnicze [Law Journals]*, 13(3), 65–87. <https://doi.org/10.21697/zp.2013.13.3.03>
- Banaszak, B. (2009). Aktywizm orzecznicy Trybunału Konstytucyjnego' [Judicial Activism of the Constitutional Tribunal]. *Przegląd Sejmowy [Sejm Review]*, 4(93), 75-92.
- Barber, S. and Fleming, J. (2007). *Constitutional Interpretation; The Basic Questions*. University Press, New York, Oxford.
- Barut, A. (2010). Skarga konstytucyjna jako sposób realizacji programów nowych ruchów społecznych. Przesłanki filozoficzne i inspiracje ideowe [Constitutional Complaint as a Means of Realising the Programs of New Social Movements. Philosophical Premises and Ideological Inspirations]. In: Szczęch, N., *Księga jubileuszowa z okazji 5-lecia Wydziału Prawa Wyższej Szkoły Menedżerskiej w Legnicy [Jubilee Book for the 5th Anniversary of the Faculty of Law, Higher School of Management in Legnica]*, vol. II, pp. (267-284). Legnica: Wyższa Szkoła Menedżerska.

- Barut, A. (2018). *Prawa człowieka jako dekonstrukcja symboliki prawno-politycznej społeczeństwa ponowoczesnego* [Human Rights as a Deconstruction of the Legal-Political Symbolism of Postmodern Society]. Warszawa: Wydawnictwo Naukowe PWN.
- Bork, R. (1997). *The Tempting of America: The Political Seduction of the Law*. New York: Touchstone.
- Bork, R. (2003). *Coercing Virtue: The Worldwide Rule of Judges*. Washington, D.C.: The AEI Press.
- de Bonald, L. (1875). *Recherches philosophiques sur les premiers objets des connaissances morales. Démonstration philosophique du principe constitutif de la Société. Méditations tirées de l'Écriture Sainte*. Paris.
- de Maistre, J. (1873). *Essai sur le principe générateur des constitutions politiques et des autres institutions humaines*. Lyon–Paris.
- Dworkin, R. (1978). *Taking Rights Seriously*. Cambridge: Harvard University Press.
- Dworkin, R. (1986). *Law's Empire*. Cambridge–London: Harvard University Press.
- Dworkin, R. (1996). *Freedom's Law: The Moral Reading of the American Constitution*. Cambridge: Harvard University Press.
- Dworkin, R. (1997). Comment. In: A. Scalia. *A Matter of Interpretation* (pp. 115-127). Princeton: Princeton University Press.
- Eisgruber, C. (2001). *Constitutional Self-Government*. Cambridge–London: Harvard University Press.
- Gizbert-Studnicki, T. (1998). Teoria wykładni Trybunału Konstytucyjnego [The Theory of Interpretation by the Constitutional Tribunal]. In: Kocoł, M., Lang, W. (eds.), *Teoria prawa, filozofia prawa, współczesne prawo i prawoznawstwo* [Theory of Law, Philosophy of Law, Contemporary Law and Jurisprudence] (pp. 75-85). Toruń: Uniwersytet Mikołaja Kopernika.
- Glendon, M. A. (1993). *Rights Talk: The Impoverishment of Political Discourse*. New York: The Free Press.
- Glendon, M. A. (1997). Comment. In: A. Scalia. *A Matter of Interpretation* (pp. 95-114). Princeton: Princeton University Press.
- Green, C. (2009). An Intellectual History of Judicial Activism. *Emory Law Journal*, 58(5), pp. 1195-1263.
- Gromski, W. (2009). Legitymizacja sądów konstytucyjnych wobec władzy ustawodawczej [The Legitimation of Constitutional Courts vis-à-vis the Legislative Power]. *Przegląd Sejmowy* [Sejm Review], 4(93), 11-23.
- Guala, F. (2016). *Understanding Institutions: The Science and Philosophy of Living Together*. Princeton–Oxford: Princeton University Press.
- Habermas, J. (1976). Was heist Universalpragmatik? In: Appel, K.-O. (eds.), *Sprachpragmatik und Philosophie* (pp. 174-272). Frankfurt am Main: Suhrkamp.
- Habermas, J. (1992). *Faktizität und Geltung : Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats* [Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy]. Frankfurt am Main: Suhrkamp.
- Haslanger, S. (2012). *Resisting Reality: Social Construction and Social Critique*. Oxford: Princeton University Press.
- Herngren, P. (1997). *Podstawy obywatelskiego nieposłuszeństwa* [Foundations of Civil Disobedience]. Translated by Borkowska-Stich, E. and Parzniewska, A. Kraków: Zielone Brygady.
- Jabłoński, P. and Kaczmarek, P. (2019). *The Limits of Juristic Power from the Perspective of the Polish Sociological Tradition*. Berlin: Peter Lang.

- Kavanagh, A. (2009). *Judicial Restraint in the Pursuit of Justice*. Oxford Legal Studies Research Paper No. 39/2009.
- Kmieć, K. D. (2004). The Origin and Current Meanings of "Judicial Activism". *California Law Review*, 92(5), 1441-1477. <https://doi.org/10.2307/3481421>
- Kozak, A. (2008). Kryzys podstawności prawa [The Crisis of the Foundations of Law]. In: Bogucki, O. and Czepita, S. (eds.), *System prawny a porządek prawny [The Legal System and the Legal Order]* (pp. 29-57). Szczecin: Wydawnictwo Naukowe Uniwersytetu Szczecińskiego.
- Lacey, N. (2019). Populism and the Rule of Law. *LSE International Inequalities Institute*, January 2019. Available at: [https://eprints.lse.ac.uk/101867/1/Lacey\\_populism\\_and\\_the\\_rule\\_of\\_law\\_wp28.pdf](https://eprints.lse.ac.uk/101867/1/Lacey_populism_and_the_rule_of_law_wp28.pdf) (accessed on 18.12.2025).
- Lefort, C. (1988). *Essais sur le politique*. Paris: Seuil.
- Legal Information Institute (2025). *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992). In: Cornell Law School, Available at: <https://www.law.cornell.edu/supremecourt/text/505/833> (accessed on 27.04.2025).
- Liżewski, B. (2011). Wykładnia Europejskiej Konwencji Praw Człowieka [Interpretation of the European Convention on Human Rights]. In: Kalisz, A., Leszczyński, L. and Liżewski, B. (eds.) *Wykładnia prawa. Model ogólny a perspektywa Europejskiej Konwencji Praw Człowieka i prawa Unii Europejskiej* [Interpretation of Law: General Model and the Perspective of the European Convention on Human Rights and European Union Law] (pp. 87-162). Lublin: Wydawnictwo UMCS.
- Marmor, A. (2005). *Interpretation and Legal Theory*. Portland: Bloomsbury Publishing.
- Morawski, L. (2006). Czy sądy mogą angażować się politycznie? [Can Courts Engage Politically?]. *Państwo i Prawo*, 61(3), 6-23.
- Morawski, L. (2014). *Podstawy filozofii prawa [Foundations of the Philosophy of Law]*. Toruń: Dom Organizatora.
- Pokol, B. (2019). Der juristokratische Staat: die Analyse seiner Aspekte. In: Pokol, B. and Téglási, A. (eds.), *Die Stufenweise Entstehung des Juristokratischen Staates* (pp. 9-46). Budapest: Dialóg Campus.
- Pokol, B. (2021). *Juristocracy: Trends and Versions*. Budapest: Századvég Foundation.
- Raynaud, P. (2010). *Le juge et le philosophe*. Paris: Armand Colin.
- Ricoeur, P. (1957). Le paradoxe politique. *Esprit Nouvelle série*, 25(5).
- Rosanvallon, P. (2006). *La Contre-Démocratie: La politique à l'âge de la défiance*. Paris: Seuil.
- Scalia, A. (1997). *A Matter of Interpretation*. Princeton: Princeton University Press.
- Scalia, A. (2017). Originalism: The Lesser Evil. In: O'Brien, D. M. (ed.) *Judges on Judging: Views from the Bench* (pp. 209-217). Washington: Sage Publications.
- Schlesinger Jr., A. M. (1947). The Supreme Court: 1947. *Fortune*, 35(1).
- Soloch, P. (2015). Wykładnia ewolucyjna Europejskiej Konwencji Praw Człowieka a zasada konsensusu. Próba analizy [The Evolutionary Interpretation of the European Convention on Human Rights and the Principle of Consensus: An Attempt at Analysis]. *Zeszyty Prawnicze*, 15(4), 117-145.
- Sowell, T. (1989). *Judicial Activism Reconsidered*. Stanford: Hoover Institution Press.
- Stawecki, T. (2003). Interpretacje prawa w orzecznictwie Sądu Najwyższego [Interpretations of Law in the Case Law of the Supreme Court] In: Stelmach, J. (ed.) *Filozofia prawa wobec globalizmu [Philosophy of Law in the Face of Globalism]* (pp. 91-106). Kraków: Wydawnictwo Uniwersytetu Jagiellońskiego.

- Sulikowski, A. (2008). *Współczesny paradygmat sądownictwa konstytucyjnego wobec kryzysu nowoczesności* [The Contemporary Paradigm of Constitutional Adjudication in the Face of the Crisis of Modernity]. Wrocław: Wydawnictwo Uniwersytetu Wrocławskiego.
- Vermeule, A. (2022). *Common Good Constitutionalism*. Cambridge–Medford: Polity Press.
- Waldron, J. (2006). The Core of the Case Against Judicial Review. *The Yale Law Journal*, 115, 1346–1406.
- Wróblewski, J. (1988). *Sądowe stosowanie prawa* [Judicial Application of Law]. Warszawa: PWN.
- ECtHR, Tyrer v. the United Kingdom, app. no. 5856/72, 25 April 1978.
- ECtHR, Johnston and Others v. Ireland, app. no. 9697/82, 18 December 1986.
- ECtHR, Soering v. the United Kingdom, app. no. 14038/88, 07 July 1989.
- ECtHR, Christine Goodwin v. the United Kingdom, app. no. 28957/95, 11 July 2002.
- ECtHR, P. and S. v. Poland, app. no. 57375/08, 30 October 2012.
- Germany, Federal Constitutional Court, 2 BvR 1481/04 (14 October 2004).
- Germany, Federal Constitutional Court, 2 BvR 2365/09 (4 May 2011).
- US Supreme Court, Roe v. Wade, 410 U.S. 113, 22 January 1973.
- Poland, Constitutional Tribunal, K 26/96 (28 May 1997).
- Poland, Constitutional Tribunal, K 14/03 (27 January 2004).
- Poland, Constitutional Tribunal, K 1/20 (22 October 2020).
- The Constitution of the Republic of Poland, of 02 April 1997 (K. 26/96), as published in Dziennik Ustaw No. 78, item 483.



# REBUS SIC STANTIBUS IN THE AGE OF ARTIFICIAL INTELLIGENCE: THE VITAL ROLE OF JUDICIAL DISCRETION IN CONTRACTUAL JUSTICE

Klemen Drnovšek  
Research and Teaching Assistant  
University of Maribor, Faculty of Law  
Department of Company Law  
Mladinska ulica 9  
2000 Maribor, Slovenia  
[klemen.drnovsek@um.si](mailto:klemen.drnovsek@um.si)  
ORCID: 0009-0002-6333-2689

Nataša Samec Berghaus  
Associate Professor  
University of Maribor, Faculty of Law  
Department of Company Law  
Mladinska ulica 9  
2000 Maribor, Slovenia  
[natasa.samecberghaus@um.si](mailto:natasa.samecberghaus@um.si)  
ORCID: 0009-0001-2634-8238

**Abstract:** *This article investigates how the principle of contractual justice - an unwritten yet fundamental source of private law - continues to operate in an era shaped by artificial intelligence (AI). Although pacta sunt servanda remains the cornerstone of contractual certainty, the doctrine of rebus sic stantibus functions as a corrective when radically changed circumstances would make strict performance inequitable. Recognised across all developed legal orders and recently codified in many, the authors analyse the doctrine in more than twenty European jurisdictions, with attention to convergences and doctrinal divergences. The study then turns to smart-contract technology and AI-driven automation, asking whether code-based execution can accommodate contractual justice or instead amplifies contractual rigidity. The authors conclude that automated decision-making can handle only quantifiable adjustments, whereas genuine fairness still requires case-sensitive judicial discretion grounded in unwritten principles. Even - and especially - in the age of AI, therefore, courts - and the normative resources of good faith, fairness and equity - remain indispensable safeguards of contractual balance.*

**Key words:** *Changed Circumstances; Rebus Sic Stantibus; Unwritten Law; Principle of Contractual Justice; Intelligent Contracts; Artificial Intelligence; Judicial Discretion; Contract Law*

## Suggested citation:

Drnovšek, K., Samec Berghaus, N. (2025). Rebus Sic Stantibus in the Age of Artificial Intelligence: The Vital Role of Judicial Discretion in Contractual Justice. *Bratislava Law Review*, 9(Spec), 47-62. <https://doi.org/10.46282/blr.2025.9.Spec.1033>

Submitted: 29 April 2025

Accepted: 15 October 2025

Published: 28 December 2025

## 1. INTRODUCTION

Historically, contract law is fundamentally anchored in the principle of *pacta sunt servanda*; yet strict adherence to the original agreement may be unjustified where it conflicts with principles of equivalence, good faith, honesty, and justice. When the nature of contractual performance changes substantially after the contract's conclusion, maintaining the original terms may become inequitable. Consequently, under the principle of contractual justice, the contract must be modified or terminated. This concept is known as the doctrine of *rebus sic stantibus*, recognised across all developed legal systems, albeit with varying approaches and terminologies.<sup>1</sup> Originally rooted in

---

<sup>1</sup> Different terms are used across legal systems to describe the impact of changed circumstances: *Störung der Geschäftsgrundlage* (Germany, § 313, Bürgerliches Gesetzbuch), *Wegfall der Geschäftsgrundlage* (The concept is not expressly codified in the Austrian Civil Code - Allgemeines Bürgerliches Gesetzbuch, ABGB, but has instead developed through judicial decisions and scholarly literature (Bollenberger in Koziol, Bydlinski and Bollenberger, 2007, p. 881), *spremenjene okoliščine* (Slovenia, Art. 112, Obligacijski zakonik), *promijenjene okolnosti* (Croatia Art. 369, Zakon o obveznim odnosima), *promjenjene okolnosti* (Serbia, Art. 133, Закон о

principles such as equivalence, good faith, honesty, and justice, the doctrine evolved through judicial practice and has recently been increasingly codified into statutory law.<sup>2</sup> Its historical relevance has fluctuated, aptly captured by Bernhard Windscheid's remark: "If you throw it out the door, it will always come back through the window."<sup>3</sup> This observation has proven particularly true in recent years. Although the doctrine was nearly forgotten at the beginning of the 21st century, the COVID-19 pandemic of 2020 triggered a global revival, soon followed by additional major disruptions, including surging material prices, energy costs increasing by several hundred percent, the full-scale invasion of Ukraine by the neighbouring country, Russia, high inflation, and the ongoing risk of a global trade war.<sup>4</sup>

Rapid technological advances over the past three decades have profoundly reshaped numerous economic sectors, and technological innovation increasingly influences contract law. In 2017, a real revolution anticipated, when blockchain technology gained widespread recognition. Providers of decentralised platforms highlighted the utility of so-called smart contracts, emphasising that performance no longer depended on the will of the parties but solely on the fulfilment of predefined conditions, given that smart contracts operate exclusively through pre-programmed code. Enthusiastic proponents even predicted the complete replacement of traditional contract law within a few years (Mik, 2017, p. 269); however, these expectations quickly proved exaggerated. More recently, growing attention has been devoted to integrating artificial intelligence (AI) models with blockchain technology, giving rise to the concept of Blockchain Intelligence (Li, Qin, Guan, Hou and Wang, 2024, p. 6634; Zheng and Dai, 2019; Zheng, Dai and Wu, 2021, p. 2). The incorporation of AI into smart contracts could enable automated task execution via machine learning, thereby enhancing their adaptability to changes in the business environment (Ouyang, Zhang and Wang, 2022, p. 1). This development inevitably raises the question of whether the role of the principle of contractual justice, as an unwritten source of contemporary contract law, is undergoing a transformation in the age of artificial intelligence.

The primary aim of this article is to critically examine the principle of contractual justice, as one of the most significant unwritten sources of contract law, continues to maintain its role in contemporary legal systems. Drawing on a comparative

---

*облигационим односима*), *zmena pomerov* (Slovakia, Art. 356, Obchodný Zákoník), *změny okolností* (Czech Republic, Art. 1764, Občanský zákoník) *imprévision* (France, Art. 1195, Code Civil), *excessiva onerosità sopravvenuta* (Italy, Art. 1467, Codice Civile), *alteración sobrevenida de las circunstancias* (Spain, the term originates from the proposed regulation, which has not yet been adopted, see Propuesta de modernización del Código Civil en materia de obligaciones y contratos, Ministerio de Justicia, Madrid, 2023, pp. 104-5), *frustration of purpose* (English law, *Krell v. Henry*), *hardship* (Arts. 6.2.1, 6.2.2, 6.2.3, Principles of International Commercial Contracts – PICC) and *changed circumstances* (Art. 6:111, Principles of European Contract Law – PECL).

<sup>2</sup> The doctrine was codified in Germany in 2002 (Rösler, 2007, p. 490), in the Czech Republic and Hungary in 2014 (Zákon č. 89/2012 Sb., Občanský zákoník; 2013. évi V. törvény a Polgári Törvénykönyvről), in France in 2016 (Pédamon, 2017), and in Belgium in 2023 (à loi du 28 avril 2022 portant le Livre V « Les obligations »); its regulation has also been announced in Spain (Propuesta de modernización del Código Civil en materia de obligaciones y contratos, Ministerio de Justicia, Madrid, 2023, pp. 104-105).

<sup>3</sup> »Wirf ihn durch die Tür, er wird immer wieder durch das Fenster hereinkommen.« [“Throw it out the door, and it will always come back through the window.”], Die Voraussetzung, 1892, 78, Archiv für die civilistische Praxis 197 (Zimmermann, 1996, p. 581).

<sup>4</sup> In April 2025, U.S. President Donald Trump introduced a general 10-percent global tariff on all countries on all imported goods into the United States and special "reciprocal" tariffs targeting 57 countries, which will be subject to increased reciprocal tariffs (instead of the 10-percent global tariff. Specifically for the EU, "reciprocal" tariffs include a 20-percent tariff on all imported goods and a 25-percent tariff on imported cars, steel, and aluminum (The White House, Available at: <https://shorturl.at/wJTzGhttps://www.whitehouse.gov/> (accessed on 2.4.2025).

analysis of the doctrine of *rebus sic stantibus* across more than twenty European jurisdictions, the authors explore the issue of equitable contractual adjustment in cases of changed circumstances and assess the challenges posed by automated decision-making processes and AI regarding smart contract adaptability. The research hypothesis advanced in this article is that the automated nature and algorithmic rigidity of smart contracts present challenges to justice and flexibility in contract law, underscoring the need - especially in the era of AI - to preserve judicial discretion and unwritten legal principles as essential corrective mechanisms for ensuring contractual fairness.

Methodologically, this article is positioned at the intersection of legal theory, contract law, and information technology. The research employs various scientific methods selected according to the specifics of the research problem and objectives. The descriptive method is used to define key research concepts, occasionally supported by the historical method for better contextual understanding. The comparative dimension is grounded in comparative law theory. The relevance of the principle of contractual justice in contemporary legal systems is examined using analytical, synthetic, inductive, and deductive methods. The study is structured into three thematic sections: (1) The Principle of Contractual Justice and the Doctrine of *Rebus Sic Stantibus*; (2) Smart Contracts and Artificial Intelligence; and (3) The Role of the Principle of Contractual Justice in the Context of Artificial Intelligence. The conclusion presents findings related to the research hypothesis.

## 2. THE PRINCIPLE OF CONTRACTUAL JUSTICE AND THE DOCTRINE OF *REBUS SIC STANTIBUS*

Although codified law has been the hallmark of continental legal systems, a broad range of unwritten sources - including trade customs, industry practices, usages, practices established between parties, unwritten agreements, unwritten principles, and business ethics - have played a vital role in contract law (Hellwege, 2014, p. 887; Oestmann, 2002, p. 409; Sachse, 1927, p. 290; Dedek, 2013, p. 9). Grounded in morality and customs, these sources are significant both in the creation and interpretation of positive law (Drnovšek, 2015, pp. 816-831). The principle of contractual justice, understood as a specific expression of broader concepts of justice, becomes crucial where rigid application of codified rules would lead to unfair outcomes. Legal theory conceptualises justice in contract law variously: some scholars emphasise relational justice (Dagan and Dorfman, 2021, pp. 4-5), proposing it as a new paradigm incorporating classical doctrines like the *rebus sic stantibus* clause into a broader concept of contractual justice (Caro Gándara, 2022, p. 275; Gordley, Jiang and von Mehren, 2021, p. 249; Campbell, Collins and Wightman, 2003, pp. 22-24). Others, in a similar vein, highlight justice achieved by focusing on the unique circumstances of individual cases (*Einzelfallgerechtigkeit*) - a more precise form compared to contractual justice, which ensures fairness within the contractual framework (*Vertragsgerechtigkeit*; Ince, 2015, pp. 73-75). As Dagan and Dorfman (2021, p. 5) explain, contractual justice is best seen as a form of relational justice, rooted in reciprocal respect for self-determination and substantive equality. Across legal systems, fairness is addressed differently: in German law, the general clause of good faith and fair dealing (*Treu und Glauben* in § 242 BGB) already operates as a corrective mechanism for abusive conduct or imbalance, supplemented by the specific rule on the collapse of the basis of the transaction (*Störung*

der Geschäftsgrundlage, §313 BGB).<sup>5</sup> Austrian law permits annulment of contracts violating public morals under § 879 ABGB.<sup>6</sup> In Slovenia, Article 112 of the Obligations Code<sup>7</sup> enables courts to terminate (but not adapt) contracts when radically changed circumstances make their performance contrary to generally accepted standards of fairness (*pravičnost*). As Ronald Dworkin observed, moral principles - such as fairness, good faith, and equity - are essential for resolving hard cases where outcomes cannot be determined solely by legal rules (Post, 1991, p. 45).<sup>8</sup> In such instances, courts may invoke the principle of contractual justice as an interpretive guide, not to override positive law, but to mitigate its excessive effects and restore balance between the parties (Tamaš, 2009, p. 3; Flume, 1992, p. 497). The debate concerns not the applicability of this principle, but how, when, and to what extent it should be applied (Bitrakov, 2025, p. 324; Strohsack, 1995, p. 57). This theoretical understanding of contractual justice shapes the interpretation of individual relationships and provides the normative foundation for doctrines such as *rebus sic stantibus*, enabling courts to address profound changes in circumstances and preserve contractual equilibrium in exceptional cases.

Although contract law is fundamentally based on the principle of *pacta sunt servanda*, strict enforcement of an agreement may, in certain cases, contradict the principle of contractual justice (Dagan and Dorfman, 2021, pp. 4-5; Caro Gándara, 2022, p. 275). These situations are addressed by the doctrine of *rebus sic stantibus*, which constitutes a key exception to the duty to perform contractual obligations. The doctrine applies where a subsequent change of circumstances alters one party's performance so significantly that maintaining the contract unchanged would be inequitable. It rests on the principle that a contract remains binding only as long as the circumstances substantially reflect those at the time of its conclusion and have not fundamentally changed (Karlović, 2011, pp. 17-18). Consequently, modification or adaptation of contractual terms may sometimes be necessary to avoid outcomes contrary to the principle of contractual justice and other core principles of contract law (Dolenc, 2003, pp. 594-611; Lando and Beale, 1995; Stone, 2002). Although the general principle of objectivity governs contract law, particularly commercial law, the doctrine of *rebus sic stantibus* can, based on the principle of contractual justice, also be invoked in cases involving subjective considerations. This was confirmed in research examining the invocation of the doctrine in cases where personal performance would breach human dignity in a contract between two entrepreneurs (Patakyová, Grambličková and Patakyová, 2017, pp. 64-73). Thus, *rebus sic stantibus* provides a general legal foundation for considering the principle of justice when assessing contractual relationships.

---

<sup>5</sup> Bürgerliches Gesetzbuch [BGB] [German Civil Code], promulgated on 18 August 1896 (RGBl. S. 195) as amended. The German legal concept of *Treu und Glauben*, embodies the idea that parties must act honestly, fairly, and with mutual consideration in the performance and enforcement of their contractual obligations.

<sup>6</sup> Allgemeines bürgerliches Gesetzbuch [ABGB] [Austrian Civil Code], promulgated on 1 June 1811 (JGS Nr. 946/1811) as amended. In Austrian law, the doctrine of the disappearance of the basis of the transaction (*Wegfall der Geschäftsgrundlage*) is recognised in case law through an analogical application of provisions concerning mistake and unforeseen circumstances (§§ 871, 872, and 914 ABGB), but remains uncodified in the ABGB itself (Moser, 2024).

<sup>7</sup> Obligacijski zakonik [Obligations Code], Uradni list RS, št. 83/2001, with subsequent amendments.

<sup>8</sup> The importance of moral principles in law was illustrated by the case of *Riggs v. Palmer*. In this case, a grandson, Elmer, murdered his grandfather in order to inherit under his will. Although the statute did not expressly prohibit inheritance in such a situation, the court ruled otherwise. It relied on the principle *nemo ex suo delicto meliorem suam conditionem facere potest* (no one may improve their position through their own wrongdoing), which represents one of the fundamental standards of justice. Through this example, Dworkin demonstrated that law is not merely a system of rules but also encompasses moral principles that enable judges to reach fairer decisions.

As the doctrine was initially not legally codified in most European countries, it primarily developed through case law. Its evolution was driven by concrete instances of disrupted contractual equilibrium that arise in different ways and for various reasons. Courts sought a legal basis for intervening in the contractual will of the parties by invoking the principles of contractual justice, "*good faith and fair dealing*" (*Treu und Glauben*). Intervention was justified where insistence on the original contract would have produced a "*result devoid of law and justice*" (Flume, 1992, p. 497). However, given the fundamental importance of the principle of *pacta sunt servanda* for legal certainty, the doctrine was permitted only in exceptional cases (Ridder and Weller, 2014, p. 384; Huguenin, 2019, pp. 102-104; Juhász, 2020, pp. 61-64).

Although the primary objective of courts across European countries was the same - to restore a fair balance between contractual obligations, the consequences of the case-by-case development of the doctrine are reflected in differing assumptions, outcomes, and terminologies. Due to its growing significance, the doctrine has, over the past thirty years, been incorporated as a general rule into the legislation of many European countries.<sup>9</sup>

As part of the research into the significance of the doctrine of *rebus sic stantibus* in the age of AI, an analysis of the legal frameworks of the following countries was conducted: Slovenia, Germany, France, Italy, Switzerland, Spain, Belgium, Estonia, Romania, Serbia, Croatia, Portugal, the Netherlands, Poland, the Czech Republic, Slovakia, Denmark, Sweden, and Hungary,<sup>10</sup> as well as the characteristics of English law. English law, unlike continental systems, still treats changed circumstances narrowly. After *Paradine v. Jane* (1647)<sup>11</sup> entrenched the doctrine of absolute contracts, only the frustration-of-purpose exception emerged, epitomised by *Krell v. Henry* (1903).<sup>12</sup> Modern

---

<sup>9</sup> Over the past 30 years the doctrine was codified in Lithuania in 2000 (Art. 6.204, Lietuvos Respublikos civilinio kodekso patvirtinimas, 2000 m. liepos 18 d., Nr. VIII-1864), in Estonia in 2001 (Art. 97, Võlaõigusseadus. Vastu võetud 26. september 2001, RT I 2001, 81, 487, jõustumine 1. juuli 2002) in Germany in 2002 (§ 313, Gesetz zur Modernisierung des Schuldrechts vom 26. November 2001 [BGBl. I S. 3138]; Rösler, 2007, p. 490), in Romania in 2011 (Art. 97, Codul civil; Hlušák, 2022, p. 364) in the Czech Republic (Art. 56, Zákon č. 89/2012 Sb., Občanský zákoník) and Hungary (Art. 6:60, 2013. évi V. törvény a Polgári Törvénykönyvről) in 2014, in France in 2016 (Art. 1195, Code Civil; Pédamon, 2017), and in Belgium in 2023 (Art. 5.74, Code Civil, à loi du 28 avril 2022 portant le Livre V « Les obligations »). The doctrine had already been codified more than 30 years ago and remains in force in: Italy in 1942 (Art. 1497, Codice Civile, Testo del Regio Decreto 16 marzo 1942). The same doctrine - already codified in the former Socialist Federal Republic of Yugoslavia in 1978 (Law on Obligations [Official Gazette SFRY No. 29/78]) - has been preserved, in substance, in the legislation of the successor states: Slovenia, Croatia, Serbia, Bosnia and Herzegovina, North Macedonia, Montenegro, and Kosovo. The currently applicable provisions are: Slovenia (Art. 112, Obligacijski zakonik), Croatia (Art. 369, Zakon o obveznim odnosima), Serbia (Art. 133, Zakon o obligacionim odnosima), Bosnia and Herzegovina (Art. 133, Zakon o obligacionim odnosima), North Macedonia (Art. 122, Zakon za obligacionite odnosi), Montenegro (Art. 128, Zakon o obligacionim odnosima), and Kosovo (Art. 116, Zakon o obligacionim odnosima), in the Netherlands in 1992 (Art. 6:258, Burgerlijk Wetboek; Schrage, 1992) and in Poland in 1996 (Art. 357.1, Kodeks Cywilny; Darowski, 2020). The need to codify the doctrine of *rebus sic stantibus* was also pointed out in Switzerland in 2013 (Huguenin and Hilty, 2020), but the 2020 reform ultimately did not enact such a clause; in Spain, proposals advanced in 2009 and again in 2023 (Fuster, 2021; Propuesta de modernización del Código Civil en materia de obligaciones y contratos [Ministerio de Justicia, 2023], pp. 104–105) have likewise not yet been incorporated into legislation.

<sup>10</sup> See, for example, Art. 1195 Code Civil (France); Arts. 1467-1469 Codice Civile (Italy); Art. 437 Código Civil (Portugal); Arts. 6:258 and 6:260 Burgerlijk Wetboek - BW (Netherlands); Art. 5.74 Code Civil (Belgium); Arts. 357.1 and 358.1 Kodeks Cywilny (Poland); Arts. 1764-1766 Občanský zákoník (Czech Republic); Art. 36 Aftaleloven (Denmark); Art. 36 AvtL (Sweden); Art. 97 Võlaõigusseadus - VÕS (Estonia); Art. 6.204 Lietuvos Respublikos civilinio kodekso patvirtinimas - LR CK (Lithuania); Art. 6:60 Polgári Törvénykönyvről - Ptk. (Hungary); and Art. 1271 Codul Civil (Romania).

<sup>11</sup> *Paradine v. Jane* (1647) *Aleyn* 26, 82 *E.R.* 897.

<sup>12</sup> *Krell v. Henry* [1903] 2 *K.B.* 740 (C.A.).

courts invoke it sparingly - e.g., *Canary Wharf v. EMA* (2019, Brexit lease)<sup>13</sup> and *Salam Air v. Latam* (2020, COVID-19 aircraft lease)<sup>14</sup> - and may merely terminate, never revise, a frustrated contract (Schramm, 2018, p. 31; Baranauskas and Zapolskis, 2009, p. 203).

By contrast, continental systems embrace a far broader response to changed circumstances. *Rebus sic stantibus* is acknowledged in every jurisdiction examined and is now codified in almost all of them. Only Switzerland, Austria, Spain, and Slovakia still rely mainly on case-law or sector-specific provisions. However, the reform projects in Switzerland and Spain indicate a growing need to adopt a general statutory clause.<sup>15</sup>

From the perspective of the application of the principle of contractual justice, it is particularly important to note that the vast majority of the analysed jurisdictions allow not only for the judicial termination of a contract but also for its judicial adaptation.<sup>16</sup> Among all the analysed systems, only Slovakia, Italy, Serbia, Slovenia and English law do not permit judicial modification of the contract.<sup>17</sup> Nevertheless, even in these countries, initiatives for change can be observed, expressed in various ways.<sup>18</sup> In Italy, a draft reform of the Civil Code (*legge delega no. 1151*)<sup>19</sup> was prepared in 2019, which included a proposal allowing courts to adapt contracts in order to reestablish a fair economic balance between the parties' obligations as originally agreed (Sirena and Patti, 2020, p. 14). The legal regimes of Serbia and Slovenia are substantively very similar, as both countries have preserved the rules from the former Yugoslav legal tradition. Although these systems currently permit only the judicial termination of contracts, there is an increasing movement toward reforms that would authorise courts to modify or adapt contractual terms. In Serbia, such a change was proposed in the draft Serbian Civil Code,<sup>20</sup> whereas in Slovenia, similar initiatives have been raised particularly in relation to lease agreements during the COVID-19 pandemic (Samec Berghaus and Drnovšek, 2020; Drnovšek, 2016, p. 496).

<sup>13</sup> *Canary Wharf (BP4) T1 Ltd v European Medicines Agency* [2019] EWHC 335 (Ch).

<sup>14</sup> *SAOC v Latam Airlines Group SA* [2020] EWHC 2414.

<sup>15</sup> In Spain, a general statutory clause was initially proposed in 2009, with an updated draft following in 2023. Under the new proposed amendment, the issue of changed circumstances would be addressed in Article 1238 of the Código Civil, with the proposal substantively following the arrangements in international legal acts (Propuesta de modernización del Código Civil en materia de obligaciones y contratos, Ministerio de Justicia, Madrid, 2023, pp. 104–105). In Switzerland, efforts to regulate the *rebus sic stantibus* clause emerged within the context of the extensive 2013 reform proposal of the Code of Obligations. The draft reform envisaged a new general rule entitled “change of circumstances” (Ger.: *Veränderung der Umstände*). The primary objective of the reform was to codify the foundational principles of the doctrine of changed circumstances, as developed in Swiss case law and legal scholarship, without altering their substance in any way (Huguenin and Hilty, 2013, p. 61).

<sup>16</sup> Judicial adaptation is, for example, allowed in the following analysed jurisdictions: Germany (§ 313, Bürgerliches Gesetzbuch), Austria (Bollenberger in Koziol et al., 2007, p. 881), Croatia (Art. 369, Zakon o obveznim odnosima), Czech Republic (Art. 1764, Občanský zákoník), France (Art. 1195, Code Civil), Spain (Juzgado de Primera Instancia No. 81 de Madrid, Auto 447/2020 of 25 Sept 2020, Proc. 473/2020), Switzerland (Schwenzer, 2016, pp. 449–505), Portugal (Art. 437, Código Civil), Netherlands (Art. 6:258, Burgerlijk Wetboek), Belgium (Art. 5:74, Code Civil), Poland (Art. 358.1, Kodeks Cywilny), Denmark (Art. 36, Aftaleloven), Estonia (Art. 97, Võlaõiguse seadus), Lithuania (Art. 6.204, Lietuvos Respublikos civilinio kodekso patvirtinimas), Hungary (Art. 6:60, Polgári Törvénykönyvről), and Romania (Art. 1271, Codul civil).

<sup>17</sup> Slovakia (Art. 356, Obchodný zákoník), Italy (Art. 1467, Codice Civile), Serbia (Art. 133, Закон о облигационим односима), Slovenia (Art. 112, Obligacijski zakonik), and English law (Schramm, 2018, p. 31).

<sup>18</sup> Based on the conducted research and the review of available literature, Slovakia was the only jurisdiction among those analyzed where no initiatives aimed at enabling judicial adaptation of contracts were identified.

<sup>19</sup> Disegno di legge (d.d.l.) delega n. 1151 del 2019, Delega al Governo per la revisione del codice civile.

<sup>20</sup> Преднарт Грађанског законика Републике Србије [Draft of the Civil Code of the Republic of Serbia], 28. 05. 2019. Available at: [https://www.paragraf.rs/nacrti\\_L\\_predlozi/280519-prednact-gradjanskog-zakonika-republike-srbije.html](https://www.paragraf.rs/nacrti_L_predlozi/280519-prednact-gradjanskog-zakonika-republike-srbije.html) (accessed on 8.11.2025).

The legal systems of all the other analysed countries (Germany, France, Switzerland, Spain, Belgium, Estonia, Romania, Croatia, Portugal, the Netherlands, Poland, the Czech Republic, Denmark, Sweden, and Hungary) allow for the possibility of a claim seeking judicial modification or adaptation of the contractual relationship, either based on statutory provisions or through case law.<sup>21</sup> The trend toward judicial flexibility in contractual relationships has become particularly evident in recent years, as the possibility of judicial adaptation has been incorporated into every legislative reform concerning changed circumstances adopted over the past thirty years.<sup>22</sup>

An analysis of more than twenty European jurisdictions shows that the doctrine of *rebus sic stantibus* is recognised across all examined systems, with judicial adaptation of contractual relationships either permitted or increasingly advocated in all but English and Slovak law. In many jurisdictions, adaptation takes precedence over termination, which is allowed only where adaptation is not possible. The resistance of English law to this trend is expected, given the strong attachment to the *principle of sanctity of contract* in common law systems (Beale, 2017, p. 23-007; MacMillan, 2014, p. 278).<sup>23</sup> Overall, judicial flexibility in adjusting contracts to changed circumstances has become a key feature of modern European contract law, reinforcing the role of unwritten legal principles. The full application of the principle of contractual justice requires that courts be able to intervene in contractual content and equitably redistribute risks. Where only termination is available, an “all-or-nothing” solution prevails, preventing a fair balance of the parties’ interests.

### 3. SMART CONTRACTS AND ARTIFICIAL INTELLIGENCE

While “smart” often connotes “intelligent”, a smart contract does not involve AI. The adjective merely signals greater functionality than traditional paper agreements - above all, automated execution. As Szabo (1996) put it, smart contracts are “*far more functional than their inanimate paper-based ancestors; no use of artificial intelligence is implied.*” Because smart contracts cannot think, learn, or decide, several authors regard the label as misleading (Samec Berghaus and Drnovšek, 2018a, p. 28; Surden, 2024, p. 37).

Although digital contracting has been possible for years, smart contracts attracted real interest only after the arrival of blockchain, whose architecture allows code-based agreements to self-execute once predefined conditions are met (Hsiao, 2017, p. 687; Mik, 2017, p. 270; Raskin, 2017, p. 315). In private-law terms, a smart contract is simply an agreement expressed in computer code that runs automatically when those conditions occur (Drnovšek, 2018, p. 730; Raskin, 2017, p. 310). Once written to a validated block, the code is time-stamped and immutable; any correction requires a new smart contract (Kiviat, 2015, p. 579). Because of this immutability, smart contracts are deployed on decentralised platforms that resist outside interference.<sup>24</sup> Interaction with

---

<sup>21</sup> For cited relevant statutory law, see footnote 16.

<sup>22</sup> The doctrine of changed circumstances was newly regulated in Lithuania and Estonia in 2001, in Germany in 2002, in Romania in 2011, in the Czech Republic and Hungary in 2014, in France in 2016, and in Belgium in 2023, see footnote 9 for cited relevant statutory law.

<sup>23</sup> In view of the courts’ restrictive approach to the doctrine of frustration, recent rulings have addressed the matter in the cases *Canary Wharf Group v. EMA* and *Salam Air SAOC v. Latam Airlines Group SA*. The former concerns the changed circumstance of the United Kingdom’s withdrawal from the European Union, while the latter relates to the COVID-19 pandemic.

<sup>24</sup> Among the leading platforms for the deployment and execution of smart contracts are Ethereum, Polkadot, Ripple, and Tron.

the off-chain world is mediated by oracles - software, hardware or human services that supply external data to the chain (Damjan, 2018, pp. 379-403; Beniiche, 2020, p. 1).

Smart contracts execute deterministically: once coded rules are met, performance is automatic. By contrast, AI works on live data, learning from past inputs and adapting its outputs. Although no single definition commands consensus, most describe AI as software that mimics human cognition - perception, reasoning, learning and adaptation (Häuselmann, 2022, p. 44). Machine-learning (ML) techniques give computers this "human-like" capacity. Rather than following step-by-step code, an ML model distils patterns from data and refines its predictions with every new cycle (Patel 2024, p. 3). In practice, AI ingests large data sets, extracts regularities and then applies them autonomously to concrete tasks (Virovets, Obushnyi, Zhurakovskiy, Skladanniy and Sokolov, 2024, p. 41). From a legal-theory standpoint, AI therefore approximates human intelligence - yet its decision making is statistical, not discretionary, a distinction that becomes critical when contracts call for value-based judgements.

Growing interest now centres on fusing AI models with blockchains, a convergence dubbed Blockchain Intelligence (Li et al., 2024, p. 6634; Zheng and Dai, 2019; Zheng et al., 2021, p. 2). Proponents argue that embedding AI engines in on-chain code would finally deliver truly smart contracts, able to learn and adapt on decentralised platforms (Ouyang et al., 2022, p. 1; Li et al., 2024, p. 6634). Because the term "smart contract" is already fixed in the literature for simple self-executing code, scholars label these AI-enabled versions "intelligent contracts" (Ouyang et al., 2022, p. 2; Stathis, Trantas, Biagioni, et al., 2024, p. 1; Patel, 2024, p. 1).

AI can make smart contracts more adaptive, user-friendly, and efficient (Li et al., 2024, p. 6634). Integration is either on-chain - the model is hard-coded into the contract - or off-chain, where an AI module feeds the contract through an intelligent oracle (Patel, 2024, p. 3; Ouyang et al., 2022, p. 5; Reshi, Khan, Shafi et al., 2023, p. 2).<sup>25</sup> In practice, only niche networks now use such "intelligent clauses" to automate narrow, repetitive tasks (Virovets et al., 2024, p. 42). Embedding AI, however, would in principle let a contract itself analyse data, learn, reason, and act autonomously.

Numerous legal scholars have identified the rigidity of ordinary smart contracts as a core weakness (Drnovšek, 2018, pp. 744-46; Samec Berghaus and Drnovšek, 2018b, pp. 52-54; Vasii and Vasii, 2024, p. 114; Sklaroff, 2017, pp. 263-303). Because an intelligent contract can examine vast data sets and take rule-based decisions that approximate human reasoning, the key question is whether these capabilities could enable true automatic contractual adaptation.

Based on the characteristics of AI outlined above, one could imagine that the parties to an intelligent contract might formulate a hardship clause in descriptive terms, for example, by stipulating that in the event of significant currency devaluation, the agreed payment amount should be appropriately adjusted. Such a clause would rely on the application of a simple legal standard, the specific content of which could be determined based on the concrete circumstances of each individual case.<sup>26</sup>

Given the ability of an intelligent contract to process and analyse large volumes of input data, it can be envisaged that the scope of autonomous adaptability might also extend to other instances of changed circumstances. As an illustrative example, one

---

<sup>25</sup> An example of an intelligent oracle is the Chainlink project. It is a decentralised blockchain-based oracle network built on the Ethereum platform. Each oracle in this system collects data from independent sources and cross-verifies the information to ensure its accuracy.

<sup>26</sup> In the case of a descriptive clause, it is not necessary to precisely define all the conditions and anticipated consequences in advance. The use of the legal standard "appropriately adjust" allows for various possibilities of adaptation depending on the different types of changes in circumstances.

might consider an intelligent lease agreement, connected to an intelligent oracle, that gathers data on various factors affecting lease relationships. Using such a contract could, for instance, autonomously adjust the amount of rent if, after the conclusion of the agreement, there were a (significant) change in the taxation rate applicable to rental income.<sup>27</sup> At least theoretically, by incorporating various AI modules, intelligent contracts could be capable of autonomously adjusting contractual content in response to different types of changed circumstances. Hypothetical examples of such autonomous adjustments might include: extending a delivery deadline due to a natural disaster, adjusting an insurance premium based on the frequency or probability of loss events, adjusting electricity prices based on real-time supply and demand on the market, or modifying hotel reservations due to flight delays or temporary suspensions of air traffic.

#### 4. THE ROLE OF THE PRINCIPLE OF CONTRACTUAL JUSTICE IN THE CONTEXT OF ARTIFICIAL INTELLIGENCE

Although intelligent contracts can enable the simulation of human reasoning and the automatic adaptability of contractual content, it is important to highlight numerous limitations that significantly affect their practical value. Challenges are also related to important legal and security requirements; therefore, the effective use of intelligent contracts depends on how well these issues are addressed (Vasiu and Vasiu, 2023, pp. 107-122).<sup>28</sup> First, it can be observed that many types of contractual relationships, due to the nature of performance obligations (e.g., obligations of effort, personal performance obligations, etc.), cannot be written in an algorithmic format (computer code). Moreover, the autonomous adaptability of intelligent contracts is generally limited to monetary obligations and certain ancillary elements of contracts (such as deadlines for performance). While transactions are anonymous (as wallet addresses do not reveal the identity of the owner), all transactions are linked to the same wallet address and remain permanently visible and publicly accessible, raising numerous privacy concerns (Taherdoost, 2023, pp. 12-13). Another critical issue in connection with intelligent contracts is the reliability and trustworthiness of the data obtained, since there is a risk of erroneous machine interpretation and other errors (Li et al., 2024, p. 6639). In addition, several general challenges can be identified, such as high programming costs, technical feasibility problems, the increasing need for storage space in blockchain networks, the difficulty of ensuring proper execution in the event of content modification, and energy consumption concerns.

From the perspective of legal science, it is also important to emphasise the issue of legal enforceability. No technological solution can replace the legal regulation of contractual relationships. To be legally enforceable, intelligent contracts must comply with the requirements of contract law (Vasiu and Vasiu, 2023, p. 113). Despite automated execution, the contractual will, necessary for the conclusion (and performance) of a legally binding transaction, can only be formed by human parties, not by machines.

---

<sup>27</sup> A change in the amount of tax impacts the position of the lessor, who receives a reduced counterperformance (rent) for the same contractual subject matter (the lease of real estate) compared to the time when the smart contract was concluded. Where the change is substantial, it results in a disruption of the contractual equilibrium between the parties.

<sup>28</sup> The most concerning vulnerabilities and risks associated with smart contracts include reentrancy, overflow, block randomness, call stack depth, timestamp dependency issues, transaction ordering dependency, data withholding, access control problems, unchecked request vulnerability, and denial of service (Vasiu and Vasiu, 2023, p. 116). Such vulnerabilities highlight the critical need for rigorous smart contract design, thorough auditing, and ongoing risk assessment.

Regardless of whether the parties conclude a contract entirely in the form of computer code or simply encode specific contractual provisions (e.g., payment execution), the assessment of the legal relationship is governed by classical rules of contract law (Drnovšek, 2018, p. 747; Maydanyk, 2024, pp. 18-20; Máté, 2023, p. 70). Consequently, this also raises questions regarding the admissibility of smart contracts as evidence and their qualification as a means of evidence in civil procedure (Kaczmarek-Templin, 2023, pp. 65-76).

A crucial feature of contractual relationships, often overlooked by non-lawyers, is their multi-layered and complex nature. Precisely because of this complexity, contract law relies on principles, customs, legal standards, indeterminate legal concepts, and other unwritten legal rules. Simple contractual relationships typically do not lead to disputes or require complex legal interpretation. Although the autonomous adaptation of simple agreements (e.g., the annual extension and adjustment of subscription fees for certain services) simplifies the processes of contract formation and execution, from a legal science perspective, it does not represent a major advancement, as it merely addresses practical issues rather than resolving deeper legal questions. Certain consequences that most frequently trigger legal disputes, such as the assertion of defects, warranty claims, and similar matters, cannot be fully encoded in computer code (compare Samec Berghaus and Drnovšek, 2018b, pp. 50-52). Moreover, there is even a likelihood that the automation of performance or even contractual adaptation could itself generate new legal issues (e.g., the automatic extension of a subscription despite the termination of the contractual cause or the death of the subscriber).

Precisely because of the complexity of legal relationships, AI will never be able to replace the judicial assessment of the specific circumstances of an individual case in the field of contract law, especially where such assessment also relies on unwritten sources of law. One such example is the equitable modification or adaptation of contractual content when circumstances fundamentally change after the conclusion of a contract (*doctrine of rebus sic stantibus*). In deciding such cases, courts must take into account a wide range of particular circumstances; general or statistical analysis alone (such as that provided by AI) is insufficient to achieve a truly fair decision.

This can be simply illustrated by a contemporary example: the completely unexpected imposition of tariffs on imported goods into the United States in 2025. If, practically overnight, tariffs of 30% or more are introduced for certain goods, this almost certainly constitutes a fundamental change of circumstances that disrupts the contractual equilibrium. Regardless of the volume of data processed by AI, it can consider only statistical information about expected tariff increases, average of traders' profit margins, or analyses of similar court cases from the past. It cannot, however, account for the particularities of the individual case, which are crucial for *de facto* fair redistribution of risk according to contractual justice. A 30% tariff surcharge may require entirely different redistributive outcomes even between cases that appear similar. Although a judge must not decide based on subjective feelings of fairness but rather in accordance with socially accepted standards of fairness prevailing at the relevant time and within the relevant environment (compare Bitrakov, 2025, p. 324; Tamaš, 2009, p. 5), the judge must also consider the specificities of each individual case to reach a fair outcome (*principle of contractual justice*). In deciding how to allocate the burden of the 30% tariff, the judge must take into account factors such as the economic position of the parties in the case at hand, the profit margins of each party, the volume and frequency of business transactions, the contractual distribution of risks, the impact of the increased burden on the financial situation of each party (so-called *Einzelfalgerechtigkeit*), etc. Only by considering these concrete circumstances - alongside general or statistical analyses that

artificial intelligence can provide - can a judge reach a decision that *de facto* reflects a just solution in the individual case.

## 5. CONCLUSION

Based on the research conducted, it can be concluded that AI can, to a certain extent, enable the automatic adaptability of contractual arrangements in cases of changed circumstances. Nevertheless, the autonomous adaptation of intelligent contracts is feasible only for simple contractual relationships and even then only within a very limited scope. In the context of contract law and the doctrine of *rebus sic stantibus*, it is particularly important to note that AI cannot replace judicial decision-making, as it cannot apply the *rebus sic stantibus* clause or other unwritten sources of law in the same manner as a judge. AI is capable only of providing general and statistical analyses, which are insufficient for the proper assessment of contractual relationships. Since contract law is fundamentally based on the free will of the contracting parties, any use or interpretation of legal rules must not disregard the human element. Every contract is the result of the specific circumstances, interests, negotiations, and expectations of particular individuals at a given time and place. The assessment of fair and proportionate contractual obligations, and any decision regarding the potential adaptation of contractual content, requires an individualised approach based on a detailed analysis of the particular circumstances of the case at hand. Such an evaluation can be ensured only by a judge, taking into account the principle of contractual justice and other unwritten legal sources. Consequently, the research hypothesis is confirmed: the automated nature of smart contracts, due to their algorithmic rigidity, poses a challenge to fairness and flexibility in contract law. Even - and especially - in the age of AI, it remains essential to preserve the role of judicial discretion and unwritten legal sources as fundamental corrective mechanisms for ensuring fairness in contractual relationships. Accordingly, even in the context of smart and intelligent contracts, the effective application of the *rebus sic stantibus* principle requires judicial oversight to ensure that contractual adaptations remain consistent with the principles of fairness and justice.

To preserve contractual justice in a digital environment, adjudication under the *rebus sic stantibus* principle must be coupled with enforceability pathways. *Ex ante*, the parties should assume a duty to renegotiate in hardship and specify a temporary standstill in automated execution. *Ex post*, where code cannot be altered, the law should oblige the parties to implement the court's decision by re-implementing a corrected on-chain agreement or by concluding a replacement contract that reflects the ordered adaptation, with appropriate remedies where implementation is withheld. By "*temporary standstill in automated execution*" we mean a contractually pre-agreed suspension of further automated performance (e.g., escrow releases, recurring transfers or milestone payments) once a dispute is raised or specified circumstances occur; it operates prospectively and does not undo transactions already finalised on the ledger.

Consequently, the integration of AI tools into contract law should serve solely as a supplementary instrument rather than as a substitute for human judgement. Future developments in AI-assisted contract law should focus on establishing hybrid frameworks that combine the technological capabilities of AI with human judgement, ensuring that innovation does not undermine legal certainty, fairness, or the adaptive mechanisms inherent in contract law. In this way, contract law can be optimised through the integration of AI without compromising its fundamental principles.

## BIBLIOGRAPHY:

- Baranauskas, E. and Zapolskis, P. (2009). The Effect of Change in Circumstances on the Performance of Contract. *Jurisprudencija: Mokslo darbu žurnalas*, 118(4), 197-216.
- Beale H. (ed.) (2017). *Chitty on Contracts*. Sweet & Maxwell.
- Beniiche, A. (2020). *A Study of Blockchain Oracles*. Montreal: Cornell University, arXiv:2004.07140v2. <https://doi.org/10.48550/arXiv.2004.07140>
- Bitrakov, A. (2025). Pravičnost v neposlovnem odškodninskem pravu [Justice in Non-Contractual Tort Law]. *Podjetje in delo*, 2025/2, 319-350.
- Campbell, D., Collins, H. and Wightman, J. (Eds.). (2003). *Implicit dimensions of contract: Discrete, relational and network contracts*. Portland: Hart Publishing.
- Caro Gándara, R. (2022). The relational justice of contracts. In A. Cosseddu (Ed.), *The role of fraternity in law: A comparative legal approach* (pp. 259–279). Routledge-Giappichelli.
- Dagan, H. and Dorfman, A. (2021). Justice in Contracts. *American Journal of Jurisprudence*, 67(1), 1-32. <https://doi.org/10.1093/ajj/auac001>
- Damjan, M. (2018). The interface between blockchain and the real world. *Ragion pratica*, 51(2), 379-403. DOI: 10.1415/91545
- Darowski, T. (2020). Rebus Sic Stantibus Clauses in Recent Polish Case Law, *Construction Law International*, 15(2), 50-54.
- Dedek, H. (2013). Not Merely Facts: Trade Usages in German Contract Law. In F. Gélinas (Ed.), *Trade Usages and Implied Terms in the Age of Arbitration* (forthcoming, Oxford University Press) (pp. 81–102).
- Dolenc, M. (2003). In M. Juhart N. and Plavšak (ed.), *Obligacijski zakonik s komentarjem splošni del, 1. knjiga [Obligations Code with Commentary – General Part, Book I]* (pp. 598-611). Ljubljana: GV Založba.
- Drnovšek, K. (2015). Vloga morale na področju pogodbenega prava [The Role of Morality in the field of Contract Law]. *Podjetje in delo*, 2015/5, 816-831.
- Drnovšek, K. (2016). Institut spremenjenih okoliščin v novejši sodni praksi [The Change of Circumstances Institution in the Recent Case Law]. *Podjetje in delo*, 2016/ 8, 1486-1503.
- Drnovšek, K. (2018). Tehnologija veriženja podatkovnih blokov in pravni vidiki sklepanja pametnih pogodb [Blockchain Technology and Legal Aspects of the Conclusion of Smart Contracts]. *Podjetje in delo*, 2018/5, 721-750.
- Flume, W. (1992). *Allgemeiner Teil des Bürgerlichen Rechts Bd. 2: Das Rechtsgeschäft*. Heidelberg: Springer-Berlin.
- Fuster J. M. (2021). La regulación de la cláusula rebus sic stantibus: ¿Una incorporación urgente y necesaria?. *Revista de Estudios Jurídicos y Criminológicos*, 3, 207–232. <https://doi.org/10.25267/REJUCRIM.2021.i3.8>
- Gordley, J., Jiang, H. and von Mehren, A. T. (2021). *An Introduction to the Comparative Study of Private Law: Readings, Cases, Materials (2nd ed.)*. Cambridge: Cambridge University Press.
- Häuselmann, A. (2022). Disciplines of AI: An Overview of Approaches and Techniques. In B. Custers and E. Fosch-Villaronga (ed.), *Law and Artificial Intelligence, Regulating AI and Applying AI in Legal Practice* (pp. 43–72). The Hague: AsserPress. <https://doi.org/10.1007/978-94-6265-523-2>
- Hellwege, P. (2014). Handelsbrauch und Verkehrssitte. *Archiv für die civilistische Praxis*, 214(6), 853-887.
- Hlušák, M. (2022). In E. Veress (ed.), *Legal Studies on Central Europe* (pp. 347-388). Budapest: Central Europe Academic Publishing.

- Hsiao, I-H. J. (2017). »Smart« Contract on the Blockchain-paradigm Shift for Contract Law?. *US-China Law Review*, 10, 685-694. DOI:10.17265/1548-6605/2017.10.002
- Huguenin, C. (2019). In E. Maissen, B., Meise and T. Huber-Purtschert (ed.), *Obligationenrecht, Allgemeiner und Besonderer Teil. 3* (pp. 100-105). Auflage, Schulthess Juristische Medien AG.
- Huguenin, C. and Hilty R. (2013). *Schweizer Obligationenrecht 2020*. Zürich: Schulthess Juristische Medien AG.
- Ince, N. (2015). *Der Wegfall der Geschäftsgrundlage nach deutschem und türkischem Recht (Schriften zum Internationalen Recht, Band 201)*. Berlin: Duncker & Humblot.
- Juhász, Á. (2020). *Significant Change of Circumstances and the Amendment of Contract in Modern Researches: Progress of the Legislation of Ukraine and Experience of the European Union* (pp. 56-76). Miskolc: Law Faculty of the University of Miskolc. DOI: 10.30525/978-9934-588-43-3/1.5
- Kaczmarek-Templin, B. (2023). The Smart Contract – Problems with Taking Evidence in Polish Civil Proceedings in the Light of European Regulations. *Bratislava Law Review*, 7(1), 65-76. DOI: 10.46282/blr.2023.7.1.308
- Karlović, T. (2011). *The Origins of clausula rebus sic stantibus, Institutions of Legal History with Special Regard to the Legal Culture and History* (pp. 15-25). Bratislava - Pécs. DOI:10.20935/AcadBiol6023
- Kiviat, T. I. (2015). Beyond Bitcoin: Issues In Regulating Blockchain Transactions. *Duke Law Journal*, 2015/56, 569-608.
- Koziol, H., Bydliński, P. and Bollenberger R. (2007). *ABGB: Allgemeines Bürgerliches Gesetzbuch*. Wien: Springer.
- Lando, O. and Beale, H. (1995). *The Principles of European contract law. Part 1, Performance, non-preference and remedies*. Dordrecht, Boston, London: M. Nijhoff.
- Li, J., Qin, R., Guan, S., Hou, J. and Wang F. -Y. (2024). Blockchain Intelligence: Intelligent Blockchains for Web 3.0 and Beyond. *IEEE Transactions on Systems, Man, and Cybernetics: Systems*, 54, 11, 6633-6642. DOI: 10.1109/TSMC.2023.3348449
- MacMillan, C. (2014). English Contract Law and the Great War: The Development of a Doctrine of Frustration. *Comparative Legal History*, 2(2), 278-302. <https://doi.org/10.5235/2049677X.2.2.278>
- Máté, F. (2023). Contractual Dilemmas of Smart Contracts Information Society Versus Contract Law. *Jog-Állam-Politika*, 2023/1. DOI: 10.58528/JAP.2023.15-1.63
- Maydanyk, R. (2024). Smart Contract on a Crypto Assets in the Civil Law and Common Law Jurisdictions: Implementation of Best Practices. *Open Journal for Legal Studies (OJLS)*, 7(2), 15-36. DOI: 10.32591/coas.ojls.0702.01015m
- Mik, E. (2017). Smart Contracts: Terminology, Technical Limitations and Real World Complexity. *Innovation and Technology*, 9(2), 269-300. DOI: 10.1080/17579961.2017.1378468
- Moser, L. S. (2024). *Wegfall der Geschäftsgrundlage (clausula rebus sic stantibus)*. Manz: RDB.
- Oestmann, P. (2002). Verkehrssitte, Privatautonomie und spontane Ordnung. *Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft*, 85(4), 409–437.
- Ouyang, L., Zhang, W. and Wang, F. (2022). Intelligent contracts: Making smart contracts smart for blockchain intelligence. *Computers and Electrical Engineering*, 104, Part B. <https://doi.org/10.1016/j.compeleceng.2022.108421>
- Patakyová, M., Grambličková, B., and Patakyová T., M. (2017). Human dignity under the 'Rebus Sic Stantibus' doctrine". *Bratislava Law Review*, 1(2), 64-73. DOI: 10.46282/blr.2017.1.2.85

- Patel, O. (2024). AI-Driven Smart Contracts. *Journal of Artificial Intelligence & Cloud Computing*, 3(4), 1-9. DOI: 10.47363/JAICC/2024(3)E120
- Pédamon, C. (2017). The Paradoxes of The Theory of Imprévision In The New French Law Of Contract: A Judicial Deterrent? *Amicus Curiae*, 2017(112), 10-17. <https://doi.org/10.14296/ac.v2017i112.5041>
- Post, R. (1991). *Law and the Order of Culture*. Berkeley: University of California Press.
- Raskin, M. (2017). The Law and Legality of Smart Contracts. *Georgetown Law Technology Review*, 2017(305), 305-341. <http://dx.doi.org/10.2139/ssrn.2842258>
- Reshi, I., Khan, M., Shafi S., et al. (2023). AI-Powered Smart Contracts: The Dawn of Web 4. *TechRxiv*. DOI: 10.36227/techrxiv.22189438
- Ridder, P. and Weller, M-P. (2014). Unforeseen Circumstances, Hardship, Impossibility and Force Majeure under German Contract Law. *European Review of Private Law*, 22(3), 371-392. <https://doi.org/10.54648/erpl2014034>
- Rösler, H. (2007). Hardship in German Codified Private Law - In Comparative Perspective to English, French and International Contract Law. *European Review of Private Law*, 15(4), 483-513.
- Sachse, F. (1927). Welche Bedeutung hat die Verkehrssitte für die Auslegung der Verträge? *Archiv für die civilistische Praxis*, 127(3), 288-317.
- Samec Berghaus, N. and Drnovšek, K. (2018a). Iluzija pojma pametne pogodbe. In M. Repas (Ed.), *Konferenčni zbornik X. posveta Pravo in ekonomija: Digitalno gospodarstvo [The Illusion of the Concept of Smart Contracts]* (pp. 19-30). Maribor: Univerzitetna založba Univerze v Mariboru. <https://doi.org/10.18690/978-961-286-169-8.2>
- Samec Berghaus, N. and Drnovšek, K. (2018b). Domet uporabne vrednosti pametnih pogodb na področju pogodbenega prava [The Scope of the Practical Value of Smart Contracts in Contract Law]. *Pravni letopis*, str. 41-57, 272-273.
- Samec Berghaus, N. and Drnovšek, K. (2020). Pandemija covid-19 in uporabnost instituta spremenjenih okoliščin [The COVID-19 Pandemic and the Applicability of the Institute of Changed Circumstances]. *Podjetje in delo*, 2020/3/4, 471-497.
- Schrage, E. (1992). The New Dutch Civil Code: Some Old, Some New. *Sri Lanka Journal of International Law*, 1992(4), 99-120.
- Schramm, A. (2018). The English and German Law on Change of Circumstances: An Examination of the English System and Potential Advantages of the German Model. *Anglo-German Law Journal*, 4, 25-55.
- Schwenzer, I. (2016). *Schweizerisches Obligationenrecht: Allgemeiner Teil, 7th ed.* Berne: Stämpfli.
- Sirena, P. and Patti, F.P. (2020). *Hardship and Renegotiation of Contracts in the Prospective Recodification of Italian Civil Law. Bocconi Legal Studies Research Paper No. 3706159*. Milano: Università Bocconi. DOI: 10.2139/ssrn.3706159
- Sklaroff, J. M. (2017). Smart Contracts and the Cost of Inflexibility. *University of Pennsylvania Law Review*, 166, 263-303.
- Stathis, G., Trantas, A., Biagioni, G. et al. (2024). Designing an Intelligent Contract with Communications and Risk Data. *SN Computer Science*, 5,709. DOI: 10.1007/s42979-024-03021-x
- Stone, R. (2002). *The Modern Law of Contract. Fifth edition*. Portland: Cavendish Publishing Limited.
- Strohsack, B. (1995). *Obligacijska razmerja I, 3., spremenjena in dopolnjena izdaja [Obligational Relationships I, 3rd Revised and Supplemented Edition]*. Ljubljana: Uradni list Republike Slovenije.

- Surden, H. (2024). Computable law and AI. In E. Lim & P. Morgan (Eds.), *The Cambridge Handbook of Private Law and Artificial Intelligence* (pp. 36-70). Cambridge University Press. <https://doi.org/10.1017/9781108980197>
- Szabo, N. (1996). *Smart Contracts: Building Blocks for Digital Market*. Available at: [https://www.fon.hum.uva.nl/rob/Courses/InformationInSpeech/CDROM/Literature/LOTwinterschool2006/szabo.best.vwh.net/smart\\_contracts\\_2.html](https://www.fon.hum.uva.nl/rob/Courses/InformationInSpeech/CDROM/Literature/LOTwinterschool2006/szabo.best.vwh.net/smart_contracts_2.html) (accessed on 14.12.2025).
- Taherdoost, H. (2023). Smart Contracts in Blockchain Technology: A Critical Review. *Information, 14*(2), 117. <https://doi.org/10.3390/info14020117>
- Tamaš, V. (2009). Primena načela pravičnosti u pravnim shvatanjima i odlukama Vrhovnog suda Srbije [The Application of the Principle of Justice in the Case Law of the Supreme Court of Serbia]. *Pravo – teorija in praksa, 11/12*, 3-14.
- Vasiu, I. and Vasiu, L. (2023). A Framework for Effective Smart Contracting. *Bratislava Law Review, 7*(2), 107-122. DOI: 10.46282/blr.2023.7.2.511
- Virovets, D., Obushnyi, S., Zhurakovskiy, B., Skladannyil, P. and Sokolov, V. (2024). Smart Contract on a Crypto Assets in the Civil Law and Common Law Jurisdictions: Implementation of Best Practices. *Open Journal for Legal Studies, 7*(2), 15-36. DOI: 10.32591/coas.ojls.0702.01015m
- Zheng, Z. and Dai, H. (2019). Blockchain Intelligence: When Blockchain Meets Artificial Intelligence. *ArXiv*. <https://doi.org/10.48550/arXiv.1912.06485>
- Zheng, Z., Dai, H-N. and Wu, J. (2021). Overview of Blockchain Intelligence. In Z. Zheng, H-N. Dai and J. Wu (ed.), *Blockchain Intelligence Methods. Applications and Challenges* (pp. 1-14). Singapore: Springer, <https://doi.org/10.1007/978-981-16-0127-9>
- Zimmermann, R. (1996). *The Law of Obligations. Roman Foundations of the Civilian Tradition*. Oxford: Oxford Academic. <https://doi.org/10.1093/acprof:oso/9780198764267.001.0001>
- The White House, Available at: <https://tinyurl.com/mnaftpd9> (accessed on 2.4.2025).
- Преднарт Грађанског законика Републике Србије [Draft of the Civil Code of the Republic of Serbia], 28. 5. 2019. Available at: [https://www.paragraf.rs/nacrti\\_i\\_predlozi/280519-prednacr-gradjanskog-zakonika-republike-srbije.html](https://www.paragraf.rs/nacrti_i_predlozi/280519-prednacr-gradjanskog-zakonika-republike-srbije.html) (accessed on 8.11.2025).



## KINSHIP CARE AS LIVING LAW - AN UNWRITTEN SOURCE OF CHILD PROTECTION LAW

doc. PhDr. JUDr. Lilla Garayová, PhD., LL.M.  
Associate Professor  
Pan-European University  
Faculty of Law  
Tomášikova 20  
Bratislava; Slovakia  
[lilla.garayova@paneurouni.com](mailto:lilla.garayova@paneurouni.com)  
ORCID: 0000-0002-7999-4823

**Abstract:** *This article explores the legal significance of kinship care as an unwritten source of child protection law across diverse legal and cultural contexts. While modern child welfare systems prioritise written statutes and formal procedures, millions of children globally are raised in informal caregiving arrangements by extended family members - grandparents, aunts, uncles, or siblings - based not on legal documentation but on social norms, customs, and moral obligations. Drawing on Eugen Ehrlich's concept of living law and John Eekelaar's analysis of normative family systems, the article conceptualises kinship care as a form of law-in-action, embedded in community practices, yet largely invisible to formal legal order. The study adopts a comparative methodology, focusing on Central and Eastern Europe (with attention to Slovakia and Hungary) and the Global South (specifically Sub-Saharan Africa and Latin America), where kinship care constitutes a primary mode of alternative care. It examines the legal invisibility of children in informal kinship care, assessing both the benefits - such as cultural legitimacy and continuity - and the challenges, including lack of oversight, gendered caregiving burdens, and weak legal protection. The article further critiques the limitations of international children's rights law, particularly the UN Convention on the Rights of the Child and General Comment No. 14, which recognise the role of extended family but provide little regulatory guidance. The concluding section proposes a model of legal pluralism and child-centred harmonisation that seeks to bridge unwritten caregiving norms with state law. The study calls for greater engagement with unwritten sources of law in order to develop a more just, inclusive, and context-responsive child protection framework.*

**Key words:** *Kinship Care; Child Protection; Unwritten Law; Living Law; Customary Norms; International Children's Rights; Convention on the Rights of the Child; Legal Pluralism; Informal Caregiving; Family Law; Comparative Law; Sociology of Law; International Human Rights Law*

### **Suggested citation:**

Garayová, L. (2025). Kinship Care as Living Law - an Unwritten Source of Child Protection Law. *Bratislava Law Review*, 9(Spec), 63-82. <https://doi.org/10.46282/blr.2025.9.Spec.1035>

Submitted: 30 April 2025

Accepted: 24 October 2025

Published: 28 December 2025

### 1. INTRODUCTION

In child protection regimes that prioritise codified statutes and formal procedures, a vast domain of caregiving remains invisibly outside the written law. Across the world, millions of children are raised not by their parents or state-sanctioned foster carers, but by grandparents, older siblings, aunts, uncles, and other relatives under informal arrangements. These kinship care arrangements are often legally invisible: they occur without court orders, foster care licences, or formal guardianship decrees. As a result, children in kinship care frequently fall through the cracks of official child welfare systems and data collection (Herczog, Koenderink, O'Donnell and Teltschik, 2021, p.7). Yet, these arrangements are nothing but lawless. On the contrary, they are governed by

deeply ingrained social norms, cultural expectations, and moral obligations – unwritten laws that operate as a *de facto* protective framework for children. This paradox – that the most common form of out-of-parental care is at once widely practiced and yet neglected by formal law – presents a critical challenge for legal systems (Delap and Mann, 2019, p.5).

This study examines kinship care as an unwritten source of law in child protection. It argues that informal caregiving by relatives constitutes a form of “*living law*” in the sense of Eugen Ehrlich’s sociological jurisprudence, operating parallel to (and sometimes in tension with) state law. Part I defines the concept of unwritten law – including custom, social norms, and moral duties – and situates kinship care within this tradition as living law. Part II provides comparative perspectives on kinship care in different cultural contexts, focusing on Central/Eastern Europe (with particular attention to Slovakia, Hungary, and Roma community practices) and the Global South (with examples from Sub-Saharan Africa and Latin America). These examples illustrate how kinship caregiving norms function as an informal legal order across diverse societies. Part III analyses the legal invisibility of children in kinship care and the consequences of operating outside formal frameworks – highlighting both positive aspects (cultural legitimacy, flexibility, continuity of care) and negative aspects (lack of oversight, gender disparities, weak legal protections for children and caregivers). Part IV considers international children’s rights law, especially the United Nations Convention on the Rights of the Child (CRC) and General Comment No. 14, which recognise the role of extended family care but struggle to regulate it adequately. Part V then examines the jurisprudence of the European Court of Human Rights (ECtHR), analysing the Court’s living-instrument doctrine in relation to children’s rights. Finally, the Conclusion offers normative proposals for better integrating these unwritten caregiving norms with state legal systems. The study advocates for a pluralistic and culturally sensitive approach. One that harmonises living law with formal law and ensures that kinship care is recognised and supported without undermining the fundamental rights and best interests of the child. Methodologically, the study employs a comparative socio-legal approach. It combines a doctrinal analysis of international and European case law with qualitative insights from child-protection practices in selected regions.

Throughout the paper, the discussion draws on Eugen Ehrlich’s theory of the “*living law*” and the scholarship of John Eekelaar to frame kinship care as part of the law in action – the normative order actually governing people’s lives – which often diverges from the black-letter law. The aim is to shed light on the invisible caregivers and children operating in the shadow of official legal systems, and to suggest pathways for making this living law of kinship care visible and accountable.

## 2. UNWRITTEN LAW AND KINSHIP CARE AS ‘*LIVING LAW*’

Unwritten law refers to norms, customs, and social practices that are not codified in official statutes or regulations but nonetheless guide behaviour and are treated by communities as binding. Classic jurisprudence has long recognised that alongside enacted positive law there exists a substratum of norms – whether custom (*consuetudo*), religious dictates, or societal morals – that constitute real sources of obligation. Customary law in many societies operates on this unwritten plane: it may never have been passed by a legislature, yet it is obeyed as law by those within its scope. Similarly, social conventions and ethical duties often function as normative frameworks that parallel or supplement formal law.

The sociologist of law Eugen Ehrlich captured this phenomenon with his famous concept of the living law – the law that “*dominates life itself even though it has not been posited in legal propositions*” (Ehrlich, 1913, preface). According to Ehrlich, every social association (from the family to the broader community) generates its own rules of conduct, which may or may not be recognised by state law. These living laws are essentially the norms of how things are done or what is generally accepted and approved in actual social life (Murphy, 2012, p. 177). They exist independently of state-sanctioned law and often enjoy greater obedience within their communities than official decrees. Modern legal pluralism builds on this insight, acknowledging that multiple normative orders (state law, customary law, religious law, etc.) can coexist and even compete within a given society. In the realm of family and child care, these unwritten norms can be especially powerful, given the intimate and culturally embedded nature of family life.

Kinship care – the informal care of children by their relatives or clan – is a paradigmatic example of living law in action. In societies around the world, there is a broadly shared customary expectation that when parents are unable to care for a child (due to death, illness, migration, poverty, or other crisis), the duty to raise the child flows to the extended family. This expectation constitutes an unwritten normative framework: family members feel obliged – morally, socially, and often spiritually – to step in and care for the child. For instance, in many cultures it would be unthinkable to leave an orphaned or abandoned child to be looked after by strangers or the state if a grandmother, older sibling, or uncle/aunt is available. The adage “*it takes a village to raise a child*” reflects a near-universal principle of communal childrearing responsibility. This principle may never be codified in legislation, but it is enforced by social pressure, honour, and reciprocity within the community.

From a jurisprudential perspective, kinship caregiving norms meet the criteria of unwritten law. They are normative (imposing a sense of ought: one ought to care for their kin), generalised (widely accepted in the community), and often of ancient pedigree (handed down through tradition). They can even be described as customary law in societies where extended family care has the sanction of long usage and communal recognition. John Eekelaar has observed that family structures across cultures are governed not just by formal legal rules, but by “*very different norm systems*” that reflect underlying values and customs (Banda and Eekelaar, 2017, p. 833). In other words, what counts as a family obligation or who is considered a rightful caregiver can vary dramatically depending on the unwritten normative order in play. Eekelaar’s socio-legal scholarship emphasises that the state’s family law often only partially captures the reality of family obligations; the lived experience of family life is shaped equally (if not more) by social norms and cultural practices. Kinship care, as an institution, exemplifies this: it is a form of caregiving that the written law may only weakly regulate, yet is firmly rooted in the law of the family as understood within the community.

Historically, kinship care long predates modern child protection legislation. Anthropological and historical records from every continent show that fostering of children by relatives was commonplace in pre-modern societies (Leinaweaver, 2014, p. 131). Indeed, for the majority of human history, kinship care was the default solution when parental care failed (Hrdy, 2007, p. 39). Fictive kinship arrangements (such as godparenthood or tribal kinship ties) also extended the web of potential caregivers beyond blood relatives. These arrangements were often cemented by ritual and custom – for example, the institution of *compadrazgo* (co-parenthood through godparents) in Latin America, or the clan-based fostering systems in many African societies – thereby creating a network of obligated caregivers through unwritten agreements (Mintz and Wolf, 1950, p. 347). As one U.S. federal definition puts it, kinship care is “*the full-time care,*

*nurturing, and protection of a child by relatives, members of their Tribe or clan, godparents, stepparents, or other adults who have a family relationship to the child,*<sup>1</sup> and crucially, the relationship is to be respected based on the family's cultural values and ties. In short, kinship care rests on family cultural values rather than on contractual or statutory authority.

It is important to note that some legal systems have gradually absorbed aspects of these norms into written law – for example, by creating formal avenues for kinship foster care or guardianship. But even where such laws exist, the vast majority of kinship care globally remains informal, happening outside of court involvement. Thus, the norms that govern it remain largely unwritten. Decisions regarding who will take in a child, how the child will be raised, and the scope of the caregiver's rights and duties *vis-à-vis* the child, are usually made within the family or community circle, according to custom and mutual understanding. Eugen Ehrlich would describe these as decisions governed by the living law of the family association, as opposed to the official law of the state. The concept of living law here helps us frame kinship care as law in the sociological sense: a normative order that regulates the care of children and is seen as binding by those within the group, even if not enforced by state coercion.

Kinship care norms also often carry moral authority. They are frequently buttressed by ethical or religious imperatives – for example, many religious traditions teach the duty to care for orphans as a spiritual obligation. In Islam, the concept of *kafala* (taking in an orphaned or abandoned child, without adopting them in the Western sense) is a duty enjoined by religious law, reflecting a clear instance of an unwritten (or rather, religiously codified but non-statutory) norm that family should care for the vulnerable child.<sup>2</sup> In African customary contexts, proverbs and sayings encapsulate the moral duty: *"a child belongs to not one person"*<sup>3</sup> meaning the whole kin group shares responsibility (Scannapieco and Jackson, 1996, p. 190). These moral-communal expectations function as unwritten legal rules insofar as failing to abide by them can result in community sanction or loss of honour.

Kinship care represents living law or law from below – an organic legal order that arises from social life itself. It sits in the penumbra of the formal legal system: sometimes cooperating with it, sometimes contradicting it, but always serving as a parallel framework that deeply affects children's lives. Understanding kinship care as unwritten law really shows us why purely state-centric analyses of child protection are incomplete. The next sections turn to comparative examples that showcase how this unwritten framework operates in different cultural and legal contexts, and what tensions or complementarities exist between kinship's living law and the official law.

### 3. COMPARATIVE PERSPECTIVES ON KINSHIP CARE NORMS

#### 3.1 Central and Eastern Europe - Kinship Care and Custom in the Shadow of the State

In Central and Eastern Europe, kinship care has long operated as a vital informal safety net for children, even as formal child protection systems in the region have

<sup>1</sup> Child Welfare Information Gateway. (n.d.). About kinship care. U.S. Department of Health and Human Services, Children's Bureau. Available at: <https://www.childwelfare.gov/topics/outofhome/kinship/about/> (accessed on 30.04.2025).

<sup>2</sup> UNICEF. (2023). An introduction to kafalah. Nairobi: UNICEF Eastern and Southern Africa Regional Office. Available at: <https://www.unicef.org/esa/media/12451/file/An-Introduction-to-Kafalah-2023.pdf> (accessed on 30.04.2025).

<sup>3</sup> From the Kihaya people: *Omwana taba womoi*.

historically been dominated by state institutions. Under socialist regimes of the 20th century, the response to children without parental care often emphasised institutionalisation (large orphanages and children's homes), with less reliance on foster care or adoption. Despite this statist approach, families frequently resorted to their own networks to care for children in need. Grandparents, in particular, played an essential role in raising grandchildren when parents were unable to do so – a practice deeply embedded in the region's social norms.

Take Slovakia as an example. Slovak family law today does provide for formal kinship foster care (the Family Act mandates that when a child is removed from parental care, priority should be given to placement with a relative).<sup>4</sup> In practice, courts often entrust children to grandparents or other relatives rather than unrelated foster families.<sup>5</sup> Recent statistics indicate that kinship placements far outnumber non-relative adoptions or foster placements – for instance, in 2023, Slovak courts placed 1084 children with kin (over 65% with grandparents) compared to only 60 children placed in non-kin foster care.<sup>6</sup> This demonstrates that even within the formal system, the preference for kin as caregivers is strong. However, those figures capture only the children who entered the child protection system. A much larger number of children are likely in informal kinship care that never comes before a court. For example, when parents migrate to work abroad (a common scenario in parts of Eastern Europe), it is customary for children to stay behind with grandparents or other extended family, often without any legal custody change. The law is effectively bypassed by a tacit family arrangement; yet socially, this is considered normal and even commendable (the family taking care of their own).

In Hungary and neighbouring countries, similar patterns exist. Informal grandparent care is widespread, driven by both cultural expectations and economic necessity. Post-communist economic hardships saw many parents unable to provide stable care, and grandparents (or aunts/uncles) stepping in (Barzó, 2023, p. 24). Roma communities, in particular, exemplify strong kinship caregiving traditions. The Roma (Gypsy) people, who live across Central and Eastern Europe, have rich traditions of family solidarity and child circulation within the extended family. In Roma culture, the family is a broad concept, often extending beyond the nuclear unit to include aunts, uncles, cousins, and community elders all living in close networks. Children in Roma families are often brought up not only by their parents, but with the support of the extended family; the wider community contributes to the child's upbringing by sharing in caregiving tasks and passing on cultural knowledge (Sweeney and Matthews, 2017, p. 14). As one guide for social workers notes, *“the family takes a place of central importance in Gypsy and Traveller culture and there is a strong emphasis on caring for the old and young. Members of the community...operate within the extended family system and use this system as an [ongoing source of] advice and assistance in childrearing”*.<sup>7</sup> This means that if a Roma mother or father is struggling (due to poverty or other issues), other family members will typically step in informally rather than involving outside authorities. Older siblings may care for younger ones, or an aunt may take a child into her household for a period of time. These

---

<sup>4</sup> Section 45 of Act No. 36/2005 Coll. on the Family and on Amendments and Supplements to Certain Acts, as amended.

<sup>5</sup> District Court Dunajská Streda, judgment of 21 March 2023, file no. 15P/102/2022, ECLI:SK:OSDS:2023:2222204061.2, paras 14 and 18.

<sup>6</sup> Ministry of Labour, Social Affairs and Family of the Slovak Republic. (2024). Report on the social situation of the population of the Slovak Republic for 2023. Bratislava: Ministry of Labour, Social Affairs and Family of the Slovak Republic. Available at: [https://www.employment.gov.sk/files/slovensky/ministerstvo/analytickecentrum/2024/sprava\\_sossr\\_2023\\_pub.pdf](https://www.employment.gov.sk/files/slovensky/ministerstvo/analytickecentrum/2024/sprava_sossr_2023_pub.pdf) (accessed on 30.04.2025).

<sup>7</sup> *Ibid.*

arrangements are governed by Romani customary norms of obligation and reciprocity – unwritten rules about honour, family duty, and community trust.

However, these kinship practices in Roma and other communities often clash with state child protection systems in Eastern Europe. In countries like Slovakia, the Czech Republic, Hungary, Bulgaria, and others, studies have found that Roma families are disproportionately subject to child protection intervention, with social services more readily removing Roma children into state care (foster care or institutions) than they would for majority families.<sup>8</sup> The reasons are complex – including poverty, discrimination, and cultural misunderstanding. One tragic statistic illustrates the gap between the community norm and the state response: in Bulgaria, Roma are under 10% of the population but over 60% of institutionalised children. In Slovakia this number is 80% (Rorke, 2021). These numbers suggest that the state system has often failed to integrate kinship care networks for marginalised communities. Instead of supporting extended families to care for children, authorities have tended to view those families with suspicion (sometimes due to prejudice or ignorance of Romani caregiving norms) and have removed children into formal care at alarming rates.

Recent advocacy by Roma support groups highlights that Roma kin are willing and able to care for their children, but face barriers in formal recognition – e.g., lack of information about kinship foster care processes, or failure to meet bureaucratic criteria leading to rejection of Roma kin carers by authorities. That is why the unwritten law of Roma kinship care often finds itself overridden by the written law's strictures, to the detriment of children's cultural continuity and familial bonds.

Outside of the Roma context, more generally in Eastern Europe there is a strong cultural norm (rooted in both tradition and the hardships of recent history) that family should raise the child. Even during the communist era, when the state proclaimed itself the ultimate guardian of all children, practical reality dictated that relatives frequently assumed care in crisis situations. For example, if parents were incarcerated or incapacitated, grandparents would quietly take in the children rather than send them to orphanages, often without any formal court order. In rural areas, it was common for large extended households to share childrearing duties. These practices persist today.

At the same time, the Eastern European experience shows some evolving *recognition* of kinship care in formal law, albeit incomplete. As mentioned, Slovakia's law favours court-ordered kin placements. Czechia and Poland have also expanded support for kinship foster carers in recent years. Yet, crucially, informal kinship care is not systematically tracked or supported. A recent UNICEF/Eurochild report found that only a couple of countries in Europe (such as Czechia and Romania) even attempt to gather data on children in informal kinship care and none treat those children as part of the alternative care system for official purposes (Herczog, Koenderink, O'Donnell and Teltschik, 2021, p. 26). In other words, if a child is living with an aunt without a court order, that child is statistically invisible – not counted as a child in care, and typically not eligible for the oversight or support services that a formally looked-after child would receive. This clearly shows that despite cultural acceptance of kin caregiving, the legal systems have not caught up to formally integrate this unwritten practice into the child protection framework. The kinship care is happening in the shadows of the law – effective as a social practice, but precarious in terms of legal rights and protections.

---

<sup>8</sup> Roma Support Group, & Law for Life. (2024). Written evidence submitted to the Education Committee: Children's social care (CSC 148). UK Parliament. Available at: <https://committees.parliament.uk/writtenevidence/133040/pdf/> (accessed on 30.04.2025).

Central/Eastern Europe illustrates a dual dynamic: strong unwritten norms of kinship care on the ground, contrasted with historically rigid state systems that often bypass those norms. Change is occurring, as states slowly realise the value of kinship placements, but there is still a large gap. The lesson from this region is that kinship care, as living law, will persist due to necessity and tradition – but its lack of formal recognition can lead to conflict and injustice.

### 3.2 *The Global South - Kinship Care as Customary Law and Social Necessity*

In the Global South – encompassing regions like Sub-Saharan Africa, Latin America, and parts of Asia – kinship care is not just common; it is in many places the predominant form of care for children outside the nuclear family. While circumstances vary by country and culture, a unifying theme is that extended family networks are the first resort for child care in any family crisis. The norms underpinning this are often explicitly rooted in customary law or longstanding social practice. Here, the unwritten law of kinship care often operates with even greater authority than in industrialised settings, sometimes filling in where state infrastructure is weak.

Sub-Saharan Africa provides perhaps the clearest case of kinship care as an unwritten legal institution. Across African societies, the extended family has traditionally been regarded as the fundamental social unit, such that children are considered to belong not solely to their biological parents, but to the larger kin group or clan (Scannapieco and Jackson, 1996, p. 190). In many African languages, the term orphan traditionally meant a child who has lost both parents and also lacks extended family – reflecting the assumption that if any relative is alive, the child is not without a family (Motha, 2018, p. 50). Indeed, *“orphanages are not part of African culture; orphans look to family members to take them in”*, as one commentator notes (Michel, Stuckelberger, Tediosi, Evans and van Eeuwijk, 2019, p. 5). When the devastating HIV/AIDS pandemic in the late 20th century left millions of children without parents, this cultural norm sprang into action: grandmothers in particular became the caregivers for an enormous number of orphans. It is estimated that in Africa, grandmothers (and other older relatives) care for 40% to 60% of all children who lost parents to AIDS (Michel, Stuckelberger, Tediosi, Evans and van Eeuwijk, 2019, p. 5). This response was largely automatic and informal – village communities and extended families absorbing children without any court orders. As a result, Africa now has the highest rate of kinship care in the world. By one global estimate, approximately one in three children in some Sub-Saharan African countries lives in a household with neither parent present, being cared for by relatives (Delap and Mann, 2019, p. 5). Even on a continent-wide scale, around one in ten African children (tens of millions in total) are in kinship care arrangements, this is very high compared to the one in seventy-four children that the UK reports for reference (Martin and Zulaika, 2016, p. 51).

These arrangements are governed by norms that can be considered customary law. In many African communities, there are unwritten rules about which relative should assume care of a child in different circumstances – often tied to lineage systems. For example, in patrilineal societies, if a father dies, the child’s paternal uncle or grandparents may have the customary right (and duty) to take the child, whereas in matrilineal cultures, the maternal uncle might be the designated guardian. Such norms, while unofficial, are well understood within the community. They may be ceremonially recognised (through a family meeting or blessings) even if not legally recorded. Importantly, these customary caregiving arrangements are often enforced by social expectations: a relative who refuses to care for an orphaned kin might face community disapproval or stigma.

Conversely, caregivers gain social esteem for fulfilling their family duty. This is the living law of kinship at work – a self-regulating system ensuring children are cared for.

However, the massive scale of kinship care in Africa also comes with modern strains. Poverty and disease (HIV, Ebola, etc.) have stretched the capacity of extended families. Grandmothers (often impoverished themselves) might struggle to provide for numerous grandchildren. The unwritten norm meets harsh economic reality, sometimes resulting in children facing hardship even while in family care. Here we see a positive/negative duality: on one hand, kinship care in Africa has prevented a humanitarian catastrophe (millions of orphans have homes thanks to relatives); on the other hand, the lack of formal support or oversight for these arrangements means children and elderly caregivers can be left very vulnerable. One comprehensive review noted that most kinship care in Africa is arranged informally and remains unregulated by authorities, with governments often taking for granted that families will cope on their own (Hallett, Garstang and Taylor, 2023, p. 632). Without legal recognition, kin caregivers may not receive any financial assistance, training, or monitoring from child welfare agencies, even in countries where formal foster care programmes exist. Reliance on unwritten law is a double-edged sword - it provides culturally legitimate care, but at the cost of children's and caregivers' access to state resources.

Another dimension in some African contexts is the interplay between customary law and state law. Many African countries have plural legal systems where customary law is recognized for family matters to varying degrees (Sippel, 2022). For instance, questions of guardianship or inheritance of children might be handled by customary courts or community authorities. In such cases, kinship care might actually have a quasi-legal status under customary law (even if not under statutory law). This can lead to conflicts – for example, a customary rule might dictate that a child be raised by the father's relatives, whereas statutory law might prioritise the mother or the child's own preference.

Turning to Latin America, kinship care is also deeply woven into social structures, though the context differs. Latin American societies have a strong cultural value known as *familismo* – an emphasis on the primacy of the family (including extended relatives) in individuals' lives. Within this ethos, it is expected that family members will support each other in times of need, and this includes caring for each other's children. Extended kin networks are especially important in many Latin countries and grandparents often retain significant authority within the family. In traditional communities, elder kin, especially grandparents, are vested with complete authority in family affairs; they sometimes take over primary care of grandchildren when parents falter. This might happen, for example, if a young single mother is struggling – her parents may effectively raise the child, with everyone understanding the arrangement even if nothing is written down. Similarly, if a parent migrates to seek work (a common scenario in Latin America), children are frequently left in the care of grandparents or aunts/uncles back home. Latin America also has the institution of *compadrazgo* (godparenthood) which, while primarily a ritual kinship tie, can translate into real caregiving obligations; a *compadre* or *comadre* (godfather or godmother) may take a child in if the biological parents cannot care for them, fulfilling a social promise made at the child's baptism (Mintz and Wolf, 1950, p. 342). This is an example of fictive kinship creating an unwritten duty to act as a second parent.

Historically, many Latin American countries have not had extensive formal foster care systems – the family was assumed to absorb children in need. In recent decades, child protection reforms (often influenced by international standards) have tried to formalize alternative care, but kinship care remains largely informal (Leinaweaver, 2014, p. 131). Countries like Brazil, Mexico, and others have begun to recognise kinship

caregivers in law (through guardian statuses or kinship foster care programmes), yet a significant proportion of caregiving by relatives still happens outside the purview of authorities. For instance, in rural indigenous communities, customary law may govern child custody and placement. Indigenous traditions in parts of Latin America (and similarly in parts of South Asia and Oceania) sometimes involve child circulation: children might be sent to live with wealthier relatives for better opportunities or among indigenous groups, to cement alliances between families. Such practices are governed by traditional norms of reciprocity. While they can be positive, they also carry risks if abused (at the extreme, outsiders might label it child trafficking or exploitation if the line between customary fosterage and labour becomes blurred).

Despite these risks, it remains true that in the Global South, informal kinship care is the backbone of child welfare. Studies indicate that globally, of all children not living with their parents, the vast majority are with relatives rather than in any formal foster or residential care. For example, one global study found that children are up to 20 times more likely to be in kinship care than in institutional care in countries as diverse as Rwanda and Indonesia (Delap and Mann, 2019, p.5). This truly shows that unwritten caregiving norms are not a marginal phenomenon but the default in many societies.

This comparative section has revealed that whether in Eastern Europe's Roma settlements or in the villages of Africa and Latin America, kinship care serves as a form of "living law" – a customary framework that steps in where formal law either hesitates or cannot reach. It is respected due to cultural legitimacy and often yields nurturing environments anchored in the child's community and identity. Yet, precisely because it lies outside the formal system, it also introduces challenges. The next part will delve into these challenges: the legal invisibility of children in kinship care and the mixed consequences of operating under unwritten norms rather than written rules.

#### 4. LEGAL INVISIBILITY AND CONSEQUENCES OF UNWRITTEN KINSHIP CARE

Children being cared for under informal kinship arrangements exist in a kind of legal limbo. They are not under the custody of their parents (at least in practice), and yet they are not under the custody or supervision of the state either. The unwritten nature of these caregiving arrangements means they often go unrecorded in any official registry. This legal invisibility has significant consequences – some advantageous, others problematic.

On the positive side, the unwritten kinship care system offers children a degree of normalcy, continuity, and cultural belonging that formal alternatives often struggle to provide. Studies consistently show that children generally prefer to be with relatives rather than with unrelated foster carers or in institutions (Delap and Mann, 2019, p. 6). The reasons are intuitive: with kin, children remain connected to their extended family, language, culture, and possibly their home community. There is often less disruption – a child might stay in the same school, maintain contact with siblings and family events, and avoid the trauma of being placed with strangers. In terms of child welfare, kinship care can provide greater stability and permanence. Placements with kin tend to be more enduring than non-kin foster placements, which are at higher risk of breakdown. Relatives are also more likely to keep siblings together and to allow continued contact with the child's parents (when appropriate), which means preserving family relationships.

Children in kinship care also tend to have equal or better outcomes on various measures (education, mental health) compared to children in non-kin foster care, and significantly better outcomes than children in institutional care. For example, the incidence of physical and sexual abuse has been found to be lower in kinship care than

in other out-of-home care settings (likely due to the presence of trusted family), and while neglect can be an issue, many children report feeling loved and well cared for by their relatives (Hallett, Garstang and Taylor, 2023).

Culturally, kinship care carries a legitimacy that written law cannot easily replicate. In communities where family duty is strong, a child raised by relatives is seen as properly within the fold, whereas a child in an orphanage or with an unrelated foster family might be viewed as unfortunate or even stigmatised. The flexibility of unwritten arrangements also means they can be tailored to the child's needs in ways legal orders might not allow. For instance, a child might move fluidly between households – spending weekdays with an uncle in town to attend school and weekends in their home village with grandparents. Such fluid arrangements would be difficult under formal foster care (which expects a single primary placement). The living law of kin care is adaptable: families can change arrangements as the child grows or as circumstances shift, without court proceedings.

There is also an element of empowerment and ownership: communities feel that they are caring for their own according to their values, rather than handing children over to state authorities. Especially for indigenous or minority communities with histories of oppressive child removal by governments, maintaining control over child upbringing through kin networks is a way to resist assimilation and preserve cultural continuity.

Despite its strengths, the invisibility of kinship care in formal law also brings serious drawbacks. The foremost concern is the lack of oversight and support. When a child enters the formal foster care system, ideally there are background checks on caregivers, home assessments, training, periodic social worker visits, and legal accountability for the child's well-being. By contrast, an informal kinship care arrangement might bypass all such safeguards. This means that potential risks to the child might go unnoticed. While most kin caregivers are loving and committed, there are cases of abuse or exploitation within families too – and without external eyes, these children could be more isolated in the event of maltreatment. Empirical studies have produced mixed findings: some suggest kinship placements are safer overall than stranger foster placements (as noted, lower rates of certain abuses), but also that neglect can be more common in kinship settings (Hallett, Garstang, and Taylor, 2023, p. 637). Neglect here often stems from poverty or the advanced age of caregivers – for example, an elderly grandparent may struggle to keep up with a teenager's needs, or may not have the energy to supervise and stimulate a young child.

The unwritten nature also means no formal accountability. If a kin caregiver is not meeting a child's needs, there is often no clear mechanism for intervention short of a crisis. Other relatives or community members might step in informally if they observe problems, but this depends on family dynamics. The state will typically not know of the child's situation unless a report of abuse or neglect is made. This lack of monitoring can also enable subtle issues to persist, such as a child being kept out of school to help with household chores or a bias in caregiving (e.g., treating the kin-child less favourably than biological children in the same home, the "*Cinderella effect*") (Kiraly, 2015, p. 26). In formal foster care, there would be at least a theoretical periodic review of the child's welfare; in informal care, the only law is the family's conscience and customs.

Another significant issue is legal and procedural difficulties that arise from the caregiver's lack of legal status. In informal kinship care, the biological parents often retain legal custody (on paper), even though they are not in practice caring for the child. The kin caregiver, having no legal custody, may face obstacles in doing basic things for the child: enrolling them in school, consenting to medical treatment, obtaining identity documents or travelling with the child, accessing health insurance or government benefits for the

child, etc. For instance, if a grandparent is not the legal guardian, a hospital might refuse to perform a non-emergency procedure on the child without parental consent, which can be hard to obtain if the parent is absent. Similarly, many jurisdictions tie certain benefits (like child allowances, health coverage, or educational aid) to formal guardianship status. The lack of legal recognition for the kinship caregiver's role can make it difficult to access services and benefits for the child. This bureaucratic marginalisation means that children in kinship care might miss out on resources available to foster children or even to other children with active parents.

Gender inequality is another concern operating within these unwritten arrangements. The burden of kinship care falls disproportionately on women – grandmothers, aunts, older sisters. While this reflects traditional gender roles in caregiving, it raises questions of fairness and support. These women may sacrifice their own health and economic security to fulfil the caregiving norm. Unwritten law expects them to do so out of love and duty, but neither the state nor often the absent parents provide adequate support. There is also potential for intra-familial power imbalances: in patriarchal cultures, decision-making about the child might exclude the mother or maternal relatives.

Finally, children in informal kinship care can face issues of unclear legal identity and future uncertainty. Because nothing is formally decided, questions about the child's long-term permanency remain open. Will the child stay with Aunt X until 18? Might they return to a parent if circumstances change? Who has the authority to make important decisions in the interim? The lack of a legal framework means these questions are answered (if at all) by family consensus, which can be fragile. There are cases where an informal caregiver raises a child for years, only for a biological parent to reappear and reclaim the child, leading to traumatic disruptions with little legal remedy for the caregiver or child's attachment.

The legal invisibility of kinship care cuts both ways. It shields the arrangement from unnecessary intrusion, allowing culturally appropriate care to flourish, but it also withholds the protections and benefits that formal recognition could confer. Children in such care enjoy the love and continuity of family, yet risk lacking voice and safeguards that the law could ensure. These trade-offs pose a question: how can we preserve the strengths of kinship living law – its humanity, flexibility, and cultural resonance – while mitigating its weaknesses? International children's rights law grapples with this question, as we explore next.

## 5. INTERNATIONAL CHILDREN'S RIGHTS LAW - RECOGNITION WITHOUT REGULATION

International law, particularly human rights law on the rights of the child, acknowledges the critical role of the extended family and community in children's lives. The U.N. Convention on the Rights of the Child (CRC),<sup>9</sup> adopted in 1989 and now nearly universally ratified, was drafted with awareness of global diversity in child-rearing arrangements. The CRC's text deliberately moves beyond a narrow nuclear family model. For instance, Article 5 of the CRC requires States Parties to respect the responsibilities, rights, and duties of parents and, where applicable, members of the extended family or community as provided for by local custom, legal guardians, or other persons legally responsible for the child, to provide appropriate direction and guidance in the exercise of

---

<sup>9</sup> United Nations Convention on the Rights of the Child, 20 November 1989, 1577 U.N.T.S. 3.

the child's rights. This provision explicitly brings local custom and extended family into the framework of who has child-rearing responsibilities. In effect, the CRC recognises that in many cultures, childrearing is a shared enterprise and that the law should respect those traditional structures.

Further, Article 20 of the CRC, which deals with children deprived of their family environment, implicitly includes kinship care. It provides that a child who cannot be raised by his/her parents is entitled to alternative care and that such care may include, *inter alia*, foster placement, kafala of Islamic law, adoption, or placement in suitable institutions. The mention of *kafala* (an Islamic law institution akin to guardianship by kin or others) was a nod to non-western forms of care. It also says due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural, and linguistic background when arranging alternative care. Placing a child with relatives is often the most direct way to ensure continuity and respect cultural background, which means kinship care is aligned with the spirit of Article 20.

The Committee on the Rights of the Child, which monitors the CRC, has reinforced these points in its guidance. Notably, General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration<sup>10</sup> provides a broad understanding of family for the purpose of assessing a child's best interests. GC 14 states: "*The term family must be interpreted in a broad sense to include biological, adoptive or foster parents, or, where applicable, members of the extended family or community as provided for by local custom.*"<sup>11</sup> By this definition, a child's family could be a grandparent caregiver or a clan, depending on cultural context – a clear affirmation that extended family care is family care.

International soft-law guidelines also speak to kinship care. The Guidelines for the Alternative Care of Children (a U.N. General Assembly-endorsed instrument from 2009)<sup>12</sup> emphasise that, when a child must be removed from parental care, priority should be given to family-based solutions. They explicitly state that care by the extended family or others with a kinship bond "*should be pursued as a priority*" over more distant forms of care. The philosophy is that the family is the fundamental group of society and the natural environment for the growth and well-being of children, and thus efforts should be made to keep the child within his/her family environment (including the wider family) whenever safe and possible. These Guidelines, while not legally binding, carry moral and practical authority and have influenced national policies.

Despite these acknowledgments, there is a consensus that international law's treatment of kinship care is largely aspirational and under-specified. The CRC and related documents encourage respect and support for extended family caretakers, but they do not provide a clear regulatory framework for states on how to engage with informal kinship care. The CRC imposes on states a duty to protect children's rights in all settings, but exactly how to monitor or support a child living informally with relatives is left to state discretion. Consequently, states vary widely – some have enacted kinship care policies (providing subsidies to kin caregivers, simplifying guardianship, etc.), whereas others do little, effectively treating kin-care as a private family matter.

It is our conclusion that international law fails to adequately regulate kinship caregiving because it stops at recognition and does not mandate concrete measures. For

---

<sup>10</sup> UN Committee on the Rights of the Child, General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration, 29 May 2013, CRC/C/GC/14. Art. 3, para. 1.

<sup>11</sup> Para. 59. UN Committee on the Rights of the Child, General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration, 29 May 2013, CRC/C/GC/14.

<sup>12</sup> United Nations General Assembly, Guidelines for the Alternative Care of Children, 24 February 2010, A/RES/64/142.

example, the CRC's Article 18(2) says states shall assist parents and legal guardians in child-rearing – it does not explicitly say assist grandparents or kin in child-rearing (though arguably they could be seen as *de facto* guardians). The African Charter on the Rights and Welfare of the Child goes slightly further in recognising the role of the extended family in African contexts, but enforcement is minimal.<sup>13</sup>

It's worth noting that international child protection policy in recent years is increasingly attuned to kinship care's prevalence. International children's rights law recognises extended family care as legitimate and even desirable – the unwritten law of kinship is given a nod of approval within international law. However, the translation of that recognition into effective regulation and support is lagging behind. The CRC's framework was visionary in embracing diverse family forms, but its implementation depends on national systems that often have not caught up. As a result, kinship care remains a largely ungoverned space in many countries. While international law recognises extended family care as legitimate, its provisions remain largely aspirational. The European Court of Human Rights, however, has gradually transformed such principles into enforceable obligations under Article 8 of the Convention. The following section examines the pathway through which living law becomes formal law.

## 6. ECTHR'S LIVING INSTRUMENT DOCTRINE AND EVOLVING CHILD-FAMILY RIGHTS

The European Court of Human Rights regards the Convention as a "*living instrument*" that must be interpreted in light of present-day conditions and changing societal norms.<sup>14</sup> This is a dynamic approach, which means that Article 8 (right to respect for private and family life) is not read in isolation or frozen to 1950, but harmonised with current international human-rights standards.<sup>15</sup> In *Al-Adsani v. United Kingdom* (2001), for example, the Grand Chamber confirmed that "*the Convention cannot be interpreted in a vacuum*" and that it should be construed in harmony with general principles of international law, taking into account treaties to which all Contracting States are party.<sup>16</sup> The same was stated in the case of *Demir and Baykara v. Turkey* (2008).<sup>17</sup> The Court stated that "*the Convention is a living instrument which must be interpreted in the light of present-day conditions, and in accordance with developments in international law, so as to reflect the increasingly high standard being required in the area of the protection of human rights.*"<sup>18</sup> All Council of Europe members have ratified the UN Convention on the Rights of the Child, so the ECtHR has explicitly acknowledged that the European Convention on Human Rights (ECHR) "*must be interpreted in light of the CRC*" in children's rights cases.<sup>19</sup> This means that widely accepted international norms - even if not binding under the ECHR

<sup>13</sup> African Charter on the Rights and Welfare of the Child, adopted 11 July 1990, entered into force 29 November 1999, OAU Doc. CAB/LEG/24.9/49 (1990).

<sup>14</sup> Equinet. (2020). Compendium: Article 14 – Cases from the European Court of Human Rights. Brussels: Equinet Secretariat. Available at: [https://equineteurope.org/wp-content/uploads/2020/09/Compendium\\_Art.14-Cases-from-the-European-Court-of-Human-Rights.pdf](https://equineteurope.org/wp-content/uploads/2020/09/Compendium_Art.14-Cases-from-the-European-Court-of-Human-Rights.pdf) (accessed on 5.11.2025), p. 36.

<sup>15</sup> European Union Agency for Fundamental Rights & Council of Europe, Handbook on European Law Relating to the Rights of the Child (2015). Available at: [https://fra.europa.eu/sites/default/files/fra\\_uploads/fra-ecthr-2015-handbook-european-law-rights-of-the-child\\_en.pdf](https://fra.europa.eu/sites/default/files/fra_uploads/fra-ecthr-2015-handbook-european-law-rights-of-the-child_en.pdf) (accessed on 5.11.2025).

<sup>16</sup> ECtHR, *Al-Adsani v. United Kingdom*, app. no. 35763/97, 21 November 2001, para. 55.

<sup>17</sup> ECtHR, *Demir and Baykara v. Turkey*, app. no. 34503/97, 12 November 2008.

<sup>18</sup> *Demir and Baykara v. Turkey*, app. no. 34503/97, 12 November 2008, para. 146.

<sup>19</sup> ECtHR, *Harroudj v. France*, app. no. 43631/09, 4 October 2012, para. 42.

- inform the Court's understanding of evolving European public order in family-life matters.

The CRC has increasingly been treated by the ECtHR as an authoritative reference point. It is often viewed by the Court as a form of living law that guides the interpretation of Article 8 in cases involving children. The Court, for example, often invokes the CRC's principles (e.g., the child's best interests, the child's right to maintain contact with parents) to update and enrich the meaning of family life under the Convention. In *X v. Latvia*, the Court held that Article 8 ECHR must be applied in a manner "*combined and harmonious*" with both the 1980 Hague Abduction Convention and the 1989 CRC.<sup>20</sup> The Grand Chamber emphasised that in deciding on a child's return in abduction cases, domestic authorities had to make the child's best interests a primary consideration, consistent with Article 3(1) CRC. It explicitly stated that Article 8 "*is to be interpreted in the light of ... the Convention on the Rights of the Child*".<sup>21</sup> This integration of the CRC ensured that evolving child-protection standards (like hearing the child's views and avoiding automatic returns if the child's welfare is at risk) inform the analysis under Article 8. This case shows the living-instrument doctrine in action. It is also worth mentioning *Neulinger and Shuruk v. Switzerland*<sup>22</sup> which was decided before *X v. Latvia* and presaged the CRC's influence. The Court stated that enforcement of a return order should not disregard the passage of time and the child's integration. In its reasoning, it used the best interest principle, rooted in Article 3 of the CRC. The judgement itself references international instruments and the separate opinions explicitly cite the CRC's best interests of the child principle as a part of the contemporary legal framework. This case shows a shift in the Court's understanding and prioritising the child's welfare over formalistic reliance on parental rights.

*Harroudj v. France* (2012) involved a French woman's inability to adopt a child under kafala (guardianship) from Algeria. In this case the Court acknowledged that all Member States are parties to the CRC and thus signalled that "*the interpretation of the Convention [Article 8] should be done in harmony with the CRC*".<sup>23</sup> In paragraph 42 of the judgment the Court stated that the ECHR cannot be interpreted in isolation from developments in international law on children's rights. Although the ECtHR did not find a violation (reasoning that France's respect for Islamic-law guardianship fell within its margin of appreciation), it took guidance from the CRC's provisions on adoption and alternative care. The CRC's Article 20 (which urges states to consider "*the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background*") was treated as an interpretive aid in evaluating whether France struck a fair balance.

In several custody and child-protection judgements, the CRC norms were echoed to support the living instrument doctrine. In *Zhou v. Italy* (2014), a single mother's newborn was removed and fast-tracked for adoption. The Court found a violation of Article 8, criticising the authorities for not seriously examining placement with the child's grandmother or providing the mother with adequate support. The need to preserve the family ties had not been considered.<sup>24</sup> In *Strand Lobben and Others v. Norway* (2019, Grand Chamber),<sup>25</sup> involving a foster-to-adoption decision, the ECtHR Grand Chamber stated that states had a "*positive duty to take measures to facilitate family reunification as*

<sup>20</sup> ECtHR, *X v. Latvia*, app. no. 27853/09, 26 November 2013, para. 94.

<sup>21</sup> *X v. Latvia*, 2013, para. 93.

<sup>22</sup> ECtHR, *Neulinger and Shuruk v. Switzerland*, app. no. 41615/07, 6 July 2010.

<sup>23</sup> *Harroudj v. France*, 2012, para. 42.

<sup>24</sup> ECtHR, *Zhou v. Italy*, app. no. 33773/11, 21 January 2014.

<sup>25</sup> ECtHR, *Strand Lobben and Others v. Norway*, app. no. 37283/13, 10 September 2019.

soon as reasonably feasible<sup>26</sup>, and that complete severance of parent-child ties is an *ultima ratio* measure. This reflects the CRC's spirit (e.g., Article 9<sup>27</sup> and General Comment No. 14 (2013)<sup>28</sup> on the right of the child to have his or her best interests taken as a primary consideration and its paragraph 60 on the right not to be separated from parents unless necessary). This case very clearly shows the Court's willingness to let CRC-informed concepts (e.g., necessity of preserving biological family links) guide the evolution of Article 8 doctrine.

Overall, all of the above mentioned cases show that the ECtHR increasingly uses the CRC as a yardstick for European public order in family-life matters. The CRC's core principles - the primacy of the child's best interests, the child's right to be heard (Article 12), the right to preservation of identity and family relations (Articles 7-9), and protection from discrimination (Article 2) - have seeped into the Court's Article 8 case law. While the Court stops short of treating the CRC as directly binding (it remains formally persuasive, not determinative), its norms are often cited as evidence of evolving consensus or requirements to be taken into account. This is the way CRC-based norms crystallise into *de facto* legal standards in Strasbourg jurisprudence. A closely related development is the ECtHR's treatment of the UN Convention on the Rights of Persons with Disabilities (CRPD)<sup>29</sup> as a living source of law in interpreting Convention rights. We can easily draw a parallel on how supranational courts can elevate soft or external norms into practical legal benchmarks. The Court has been clear that it takes into account the CRPD when interpreting the ECHR (Lemmens, 2024, para 103). Disability rights cases offer some of the clearest illustrations of the living instrument doctrine in action.<sup>30</sup> So just as the CRPD has been used by the ECtHR to dynamically reinterpret the scope of rights for persons with disabilities, the CRC is being used to shape the law on children's and family rights under Article 8. In both instances, the Court treats UN human rights conventions as living sources of external norms. The living instrument doctrine is used to elevate the level of protection within the ECHR system. This trend confirms that the ECtHR perceives instruments like the CRC and CRPD as part of the present-day conditions that inform Convention interpretation - effectively, as living law.

CRC based norms gradually harden into enforceable Article 8 standards. This has concrete implications for areas like kinship care, family preservation, and other child-protective practices. While they may not be explicitly named in the Convention, they derive from evolving international consensus and gradually mature into *de facto* binding requirements under Article 8.

## 7. CONCLUSION

Kinship care – the age-old practice of relatives raising children when parents cannot – exemplifies how unwritten norms function as a source of law in child protection. It is law in the sociological sense: a body of customary rules and expectations (rooted in

---

<sup>26</sup> Strand Lobben and Others v. Norway, 2019, para. 208.

<sup>27</sup> United Nations. (1989). Convention on the Rights of the Child, Article 9. United Nations Treaty Series, vol. 1577, p. 3.

<sup>28</sup> UN Committee on the Rights of the Child, General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration, 29 May 2013, CRC/C/GC/14.

<sup>29</sup> Convention on the Rights of Persons with Disabilities (CRPD) (2006). United Nations Treaty Series, vol. 2515, p. 3.

<sup>30</sup> For example: ECtHR, Stanev v. Bulgaria (Grand Chamber), app. no. 36760/06, 17 January 2012; ECtHR, Guberina v. Croatia, app. no. 23682/13, 22 March 2016, final 12 September 2016; ECtHR, Kocherov and Sergeeva v. Russia, app. no. 16899/13, 29 March 2016, final 12 September 2016.

kinship obligations, communal values, and affection) that governs conduct and provides order without ever being inscribed in a statute book. This living law of kinship operates in every region, from Slovak villages to African townships, often providing more effective protection and sense of belonging to children than formal institutions could. It carries the imprimatur of cultural legitimacy and usually aligns with the child's best interests in maintaining family ties and identity (Csemáné Váradi and Dancsy, 2024, p. 144). International law, through the CRC and guidance like General Comment No. 14, has come to recognise these realities – acknowledging that family includes the extended family and that the best interests of the child often favour kinship placement.

Yet, as this article has shown, the lack of formal recognition and regulation of kinship care also places children at potential peril: unmonitored situations, unsupported caregivers, and unresolved legal statuses. The central thesis we return to is that *informal kinship care is a de facto legal framework in its own right* – one that modern legal systems need to interface with rather than ignore. The unwritten norms of kinship care should neither be romanticised as infallible nor undermined by rigid state intervention. Instead, a harmonious integration is required, whereby state law pluralistically accommodates kinship arrangements, lending them support and legal backbone, and in return benefits from the strengths of family-based care.

In practical terms, this means building legal bridges: embedding customary caregiving duties within statutory schemes (through guardianship, kinship foster care programmes, etc.) and infusing customary care with human-rights standards (ensuring that no child in kinship care is denied education, protection, or a say in their life). It means pursuing legal pluralism not as a slogan but as a governance strategy – accepting that in matters of child welfare, state law is not the sole source of normative order. Customary and moral norms, the unwritten sources of law, have much to contribute. Courts and legislatures should recognise Ehrlich's living law at work in kinship care and validate it, while also being ready to step in where that living law fails a child.

To align child protection systems with the realities of kinship care, legal frameworks must evolve in ways that acknowledge and integrate the unwritten caregiving norms that shape children's daily lives. Rather than supplanting these deeply rooted systems of family solidarity, the law should formally recognise kinship care as a legitimate and valuable form of alternative care. This involves creating clear and accessible pathways for kin to obtain legal status - whether through guardianship or tailored custodial models - without imposing the full burdens of formal foster care. At the same time, support mechanisms such as financial assistance, respite care, and legal aid must be extended to informal kin caregivers, many of whom operate in silence and without institutional support despite fulfilling parental functions.

Such a reform must proceed with cultural sensitivity. Child protection assessments should reflect diverse family norms and structures. At the same time, unwritten norms must be held to the standard of the child's best interests. Legal pluralism cannot be a shield from discriminatory or harmful customs. Children's voices must be heard in determining their care, and their rights must remain the guiding framework even within culturally governed kinship systems. A harmonised model is needed: one that protects the integrity and flexibility of kinship caregiving while anchoring it in the safeguards, visibility, and enforceability of law. In this way, the living law of kinship can be brought into constructive dialogue with the formal legal order, producing a child protection regime that is not only lawful, but just.

In conclusion, kinship care as an unwritten source of law teaches an important lesson: law is not only what is written in codes and cases, but also what lives in the hearts, minds, and habits of people. Legislators should therefore broaden their field of vision to

see these invisible laws. Doing so is not just an academic exercise; it has concrete implications for justice and child wellbeing. It means a reimagining of child protection that is more community-grounded and culturally respectful, without sacrificing accountability and rights. The recommendations offered – from formal recognition to support mechanisms – chart a path toward that reimagined system. If implemented, they would help transform invisible caregivers from unsung, unsupported heroes into acknowledged partners in the legal protection of the child. A reform like this would embody the best of both worlds: the compassion and authenticity of kinship care, and the protective guarantees of the rule of law.

#### BIBLIOGRAPHY:

- Banda, F. and Eekelaar, J. (2017). International conceptions of the family. *International and Comparative Law Quarterly*, 66(3), 557–584. <https://doi.org/10.1017/S0020589317000163>
- Barzó, T. (2023). A demográfiai kihívásokra adott családpolitikai válasz hazánkban [The family policy response to demographic challenges in Hungary]. *Miskolci Jogi Szemle*, 18(2), 23–41. <https://doi.org/10.32980/MJSz.2023.2.23>
- Child Welfare Information Gateway (n.d.). About kinship care. U.S. Department of Health and Human Services, Children's Bureau. Available at: <https://www.childwelfare.gov/topics/outofhome/kinship/about/> (accessed on 30.04.2025).
- Csemáné Váradi, E. and Dancsy, A. K. (2024). A gyermek mindenek felett álló érdeke?! [The best interests of the child above all else?!]. *Diáktudomány: A Miskolci Egyetem Tudományos Diákköri Munkáiból*, 17, 144–149. Miskolci Egyetem.
- Delap, E. and Mann, G. (2019). The paradox of kinship care: The most valued but least resourced care option – A global study. *Better Care Network*. Available at: <https://bettercarenetwork.org/sites/default/files/2020-02/Kinship-Care-Global-Review-Final.pdf> (accessed on 30.04.2025).
- Ehrlich, E. (1913). *Grundlegung der Soziologie des Rechts*. München: Duncker & Humblot. ISBN: 978-3-428-18443-9.
- Equinet (2020). Compendium: Article 14 – Cases from the European Court of Human Rights. Brussels: Equinet Secretariat. Available at: [https://equineteurope.org/wp-content/uploads/2020/09/Compendium\\_Art.14-Cases-from-the-European-Court-of-Human-Rights.pdf](https://equineteurope.org/wp-content/uploads/2020/09/Compendium_Art.14-Cases-from-the-European-Court-of-Human-Rights.pdf) (accessed on 5.11.2025).
- European Union Agency for Fundamental Rights & Council of Europe, Handbook on European Law Relating to the Rights of the Child (2015). Available at: [https://fra.europa.eu/sites/default/files/fra\\_uploads/fra-ecthr-2015-handbook-european-law-rights-of-the-child\\_en.pdf](https://fra.europa.eu/sites/default/files/fra_uploads/fra-ecthr-2015-handbook-european-law-rights-of-the-child_en.pdf) (accessed on 5.11.2025).
- Hallett, N., Garstang, J. and Taylor, J. (2023). Kinship care and child protection in high-income countries: A scoping review. *Trauma, Violence, & Abuse*, 24(2), 632–645. <https://doi.org/10.1177/15248380211036073>
- Herczog, M., Koenderink, F., O'Donnell, C. and Teltchik, A. (2021). Better data for better child protection systems in Europe: Mapping how data on children in alternative care are collected, analysed and published across 28 European countries. Geneva: UNICEF Europe and Central Asia Regional Office (ECARO) & Eurochild. Available at: <https://eurochild.org/uploads/2022/02/UNICEF-DataCare-Technical-Report-Final-1.pdf> (accessed on 30.04.2025).

- Hrdy, S. B. (2007). Evolutionary context of human development: The cooperative breeding model. In C. Salmon and T. K. Shackelford (Eds.), *Family relationships: An evolutionary perspective* (pp. 39–68). Oxford: Oxford University Press. ISBN: 978-0-19-532051-0.
- Kiraly, M. (2015). A review of kinship carer surveys: The “Cinderella” of the care system? Child Family Community Australia Paper No. 31. *Australian Institute of Family Studies*. Available at: <https://bettercarenetwork.org/sites/default/files/A%20Review%20of%20Kinship%20Carer%20Surveys%20-%20The%20Cinderella%20of%20the%20Care%20System.pdf> (accessed on 30.04.2025).
- Leinaweaver, J. (2014). Informal kinship-based fostering around the world: Anthropological findings. *Child Development Perspectives*, 8(3), 131–136. <https://doi.org/10.1111/cdep.12075>
- Lemmens, P. (2024). The European Convention on Human Rights. *Alter*, 18(2). <https://doi.org/10.4000/11sl8>
- Lewis Kulzer, J., Penner, J. A., Marima, R., Oyaro, P., Oyanga, A. O., Shade, S. B. et al. (2012). A group of grandparents reaches out to help alleviate an HIV/AIDS epidemic. *Journal of the International AIDS Society*, 15(1), 8. <https://doi.org/10.1186/1758-2652-15-8>
- Martin, F. S. and Zulaika, G. (2016). Who cares for children? A descriptive study of care-related data available through global household surveys and how these could be better mined to inform policies and services to strengthen family care. *Global Social Welfare*, 3(2), 51–74. <https://doi.org/10.1007/s40609-016-0060-6>
- Michel, J., Stuckelberger, A., Tediosi, F., Evans, D. and van Eeuwijk, P. (2019). The roles of a grandmother in African societies – please do not send them to old people’s homes. *Journal of Global Health*, 9(1), 010306. <https://doi.org/10.7189/jogh.09.010306>
- Mintz, S. W., Wolf, E. R. (1950). An analysis of ritual co-parenthood (compadrazgo). *Southwestern Journal of Anthropology*, 6, 341–368.
- Motha, K. (2018). Educational support for orphaned children: What can we learn from the African extended family structure? *Children & Society*, 32(1), 50–60. <https://doi.org/10.1111/chso.12232>
- Murphy, T. (2012). Living law, normative pluralism, and analytic jurisprudence. *Jurisprudence*, 3(1), 177–210. <https://doi.org/10.5235/204033212800606965>
- Roma Support Group, & Law for Life. (2024). Written evidence submitted to the Education Committee: Children’s social care (CSC 148). *UK Parliament*. Available at: <https://committees.parliament.uk/writtenevidence/133040/pdf/>(accessed on 30.04.2025).
- Rorke, B. (2021, January). Blighted lives: Romani children in state care. *European Roma Rights Centre*. Available at: [http://www.errc.org/uploads/upload\\_en/file/5284\\_file1\\_blighted-lives-romani-children-in-state-care.pdf](http://www.errc.org/uploads/upload_en/file/5284_file1_blighted-lives-romani-children-in-state-care.pdf) (accessed on 30.04.2025).
- Scannapieco, M. and Jackson, S. (1996). Kinship care: The African American response to family preservation. *Social Work*, 41(2), 190–196. <https://doi.org/10.1093/sw/41.2.190>
- Sippel, H. (2022, March 23). Customary law in colonial East Africa. *Oxford Research Encyclopedia of African History*. Available at: <https://oxfordre.com/africanhistory/view/10.1093/acrefore/9780190277734.001.0001/acrefore-9780190277734-e-1033> (accessed on 30.04.2025).
- Sweeney, S. and Matthews, Z. (2017). A guide for professionals working with Gypsies and Travellers in the public care system. *Friends, Families and Travellers*. Available at: <https://www.gypsy-traveller.org/wp-content/uploads/2017/03/A-guide-for-professionals-working-with-Gypsies-and-Travellers-in-the-public-care-system.pdf> (accessed on 30.04.2025).

- African Charter on the Rights and Welfare of the Child, 11 July 1990, OAU Doc. CAB/LEG/24.9/49 (1990).
- Convention on the Rights of Persons with Disabilities (CRPD) (2006). United Nations Treaty Series, vol. 2515, p. 3.
- District Court Dunajská Streda, judgment of 21 March 2023, file no. 15P/102/2022, ECLI:SK:OSDS:2023:222204061.2.
- ECtHR, Al-Adsani v. United Kingdom, app. no. 35763/97, 21 November 2001.
- ECtHR, Demir and Baykara v. Turkey, app. no. 34503/97, 12 November 2008.
- ECtHR, Neulinger and Shuruk v. Switzerland, app. no. 41615/07, 6 July 2010.
- ECtHR, Harroudj v. France, app. no. 43631/09, 4 October 2012.
- ECtHR, Zhou v. Italy, app. no. 33773/11, 21 January 2014.
- ECtHR, X. v. Latvia, app. no. 27853/09, 26 November 2013.
- ECtHR, Strand Lobben and Others v. Norway, app. no. 37283/13, 10 September 2019.
- ECtHR, Stanev v. Bulgaria (Grand Chamber), app. no. 36760/06, 17 January 2012.
- ECtHR, Guberina v. Croatia, app. no. 23682/13, 22 March 2016, final 12 September 2016.
- ECtHR, Kocherov and Sergejeva v. Russia, app. no. 16899/13, 29 March 2016, final 12 September 2016.
- Ministry of Labour, Social Affairs and Family of the Slovak Republic. (2024). Report on the social situation of the population of the Slovak Republic for 2023. Bratislava: Ministry of Labour, Social Affairs and Family of the Slovak Republic. Available at: [https://www.employment.gov.sk/files/slovensky/ministerstvo/analyticke-centrum/2024/sprava\\_sossr\\_2023\\_pub.pdf](https://www.employment.gov.sk/files/slovensky/ministerstvo/analyticke-centrum/2024/sprava_sossr_2023_pub.pdf) (accessed on 30.04.2025).
- Section 45 of Act No. 36/2005 Coll. on the Family and on Amendments and Supplements to Certain Acts, as amended.
- UN Committee on the Rights of the Child, General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration, 29 May 2013, CRC/C/GC/14.
- UNICEF. (2023). An introduction to kafalah. Nairobi: UNICEF Eastern and Southern Africa Regional Office. Available at: <https://www.unicef.org/esa/media/12451/file/An-Introduction-to-Kafalah-2023.pdf> (accessed on 30.04.2025).
- United Nations Convention on the Rights of the Child, 20 November 1989, 1577 U.N.T.S. 3.
- United Nations General Assembly, Guidelines for the Alternative Care of Children, 24 February 2010, A/RES/64/142.



## THE PROBLEM OF THE DEFINITION AND APPLICATION OF UNWRITTEN SOURCES OF CONSTITUTIONAL NORMS IN THE SLOVAK CONSTITUTIONAL SYSTEM

Prof. JUDr. Marián Giba, PhD.  
Professor  
Comenius University Bratislava  
Faculty of Law  
Department of Constitutional Law  
Šafárikovo nám. 6  
810 00 Bratislava, Slovakia  
[marian.giba@flaw.uniba.sk](mailto:marian.giba@flaw.uniba.sk)  
ORCID: 0009-0006-5415-4656

JUDr. František Pažitný, PhD.  
Researcher  
Slovak Academy of Sciences  
Institute of State and Law  
Klemensova 19  
813 64 Bratislava, Slovakia  
[frantisek.pazitny@savba.sk](mailto:frantisek.pazitny@savba.sk)  
ORCID: 0000-0001-6976-551X

**Abstract:** *The article deals with a specific part of the Slovak constitutional system, namely the unwritten sources of constitutional norms. The authors set two scientific objectives in the article. The first one is to present in more detail the problems related to the definition of individual unwritten sources of constitutional norms. The essence of the problem of defining unwritten sources of constitutional norms is the unclear use of terms as well as the ambiguous determination of the boundaries between them. A part of this objective is to solve this problem. This means establishing clearer criteria for defining unwritten sources of constitutional norms and delineating their scope. In the paper, the authors focus not only on theoretical issues related to unwritten sources of constitutional norms, but also on the specific practice of constitutional actors – constitutional bodies. The second objective is the use and application of the developed theoretical foundations in specific constitutional situations, which are presented and analysed.*

**Key words:** *Unwritten Sources of Constitutional Norms; Unwritten Constitutional Law; Constitutional Custom; Constitutional Convention; Constitutional Consuetude; Constitutional Bodies; Social Norms; Political Norms*

### **Suggested citation:**

Giba, M., Pažitný F. (2025). The Problem of the Definition and Application of Unwritten Sources of Constitutional Norms in the Slovak Constitutional System. *Bratislava Law Review*, 9(Spec), 83-102. <https://doi.org/10.46282/blr.2025.9.Spec.1068>

**Submitted:** 30 May 2025

**Accepted:** 27 October 2025

**Published:** 28 December 2025

### 1. INTRODUCTION

In the works of contemporary representatives of Slovak constitutionalism, it is possible to identify a consensus that the Slovak constitutional system, while essentially based on a written constitution, is not formed exclusively by written sources; rather, the formation of unwritten constitutional sources is not excluded (Orosz, Svák et al., 2021, p. 45; Káčer, 2022, p. 1; Giba, 2020, p. 342; Drgonec, 2018, pp. 147-148; Neumann, 2019, pp. 481-482). The significance of this consensus is increased by the fact that it can also be observed beyond the Slovak constitutional system. This is not an isolated view, as authors from other states with constitutional systems based on a written constitution likewise acknowledge the existence of components other than written ones. These authors come from countries such as France or the Netherlands, which are part of the continental legal system of which the Slovak legal system is also a part (Vetzö, 2018, p. 143; or Avril, 1997, pp. 1-7). It is therefore irrelevant whether a constitutional system is founded by a written or unwritten constitution. Both written and unwritten components will be present in both systems. The difference lies in the predominance of one over the other. In this regard, Denis Levy's observation may be recalled, according to which there

are no exclusively unwritten constitutional systems, only systems that are less written (Levy, 1975, pp. 81-90).

However, this is where a problem arises that has not yet attracted deeper scholarly attention in the field of Slovak constitutionalism. This problem concerns the ambiguous use of terms and concepts that together form the group of unwritten sources of constitutional norms. It is closely related to another issue, namely the vague classification or categorisation of these concepts. The first objective of our article is based precisely on these problems and aims to identify and define the individual categories of unwritten sources of constitutional norms.

From our perspective, defining the concept of unwritten sources of constitutional norms is the most straightforward step. The basis for the definition of unwritten sources of constitutional norms can be grounded in the approaches formulated by two English legal scholars - A. Dicey and I. Jennings. The first perceived the constitution through two parts. He called the first part the *Law of the Constitution* and the second the *Convention of the Constitution* (Dicey, 1982, pp. CXL-CXLVI). However, he did not consider this division to be a division between written and unwritten sources of constitutional law. The essence of this division is rather the definition of the sources of constitutional norms into those that are law and those that are merely other social norms. In other words, he perceived the constitution in two meanings: legal and political. The second author, Jennings, also wrote about two meanings of the constitution. The first meaning is a formal document called a constitution that contains rules governing form of government, the powers and procedures of constitutional bodies and the general principles of their functioning in relation to citizens. The second meaning is a constitution understood as a set of these rules (Jennings, 1959, pp. 33-38). The term constitution in the second meaning describes rules that normally can be found in a document called a constitution. The subject matter of regulation of these rules is therefore essential. In simplified terms, a constitution consists of all the rules that regulate constitutional relations.

A legitimate question is whether the theories of these authors can be used in Slovak context. It must be acknowledged that the Slovak context is different. The Slovak Republic is a relatively young state whose constitutional or political development took place turbulently especially in the 19th and 20th centuries. On the other hand, the United Kingdom has had a relatively more gradual and quite clearly longer constitutional development. Nevertheless, we think that the concepts of these authors can be used in the basic framework also in creation of our concept for the Slovak constitutional system. First, some Slovak constitutional lawyers use the term - political culture, which can be likened to Dicey's political morality, synonymously. This term can therefore be perceived similarly as a set of rules that are not law, but which political actors are supposed to follow. It should be emphasised that the totalitarian regime in the years 1948-1989 forms a significant part of Slovak constitutional development. This totalitarian regime distorted not only the view of law but also of the ways of exercising political power. During this period the ways of exercising power did not have to follow higher principles such as morality or justice; at most, adherence to formal procedures was observed. This is precisely why some representatives of Slovak constitutional scholarship emphasise the concept of political culture – as something higher, which goes beyond the constitutional text, is not law as such, yet has „a decisive influence on the process of implementing the Constitution in both a positive and a negative sense“ (Cibulka, 2004, p. 155). In other words, such rules will be present in Slovak constitutional system, and their existence is mentioned in contrast to the totalitarian regime (Giba, 2020, p. 338). In addition, the

concept of political culture is mentioned by the constitutional actors themselves.<sup>1</sup> However, it may be agreed that the qualitative level of political culture is lower than in the United Kingdom. This fact alone does not justify the conclusion that such rules are absent from the Slovak constitutional system or entirely unknown within it.

If we look at Jennings's perception of the constitution in the formal and material sense, a similar categorisation is also used by representatives of Slovak constitutional law. If we look at the work *Štátoveda* [Theory of the State] from Prof. Cibulka, then the constitution cannot be perceived only in the formal sense, because this cannot be enough to sufficiently capture its content, which is the organisation of public power and the protection of fundamental rights (Cibulka et. al., 2017, p. 101). That said, it should be emphasised that, although inspired by the above-mentioned English authors, this analysis remains grounded in the Slovak constitutional context, where the written constitution retains a central position. Consequently, these theoretical approaches are not adopted uncritically but are adapted to the specific features of the Slovak constitutional system.

Following the views of both scholars, the unwritten sources of constitutional norms are those that have an unwritten character and regulate constitutional relations (the form of government, the powers and procedures of constitutional bodies, and the general principles of their functioning *vis-à-vis* citizens), regardless of whether they take the form of law or another type of social norm.

This is where the problem of defining the components or parts of the unwritten sources of constitutional norms begins. This problem has two main aspects. The first concerns the distinction between individual categories of unwritten sources of constitutional norms. What are the boundaries or defining lines between the categories that cover specific unwritten sources of constitutional norms? The second concerns the nature of unwritten sources of constitutional norms – which unwritten sources of constitutional norms are also sources of law? Which, on the contrary, are merely political norms? We will seek solutions to these issues and answers to the questions raised in the first part of the paper, *Scope and nature of unwritten sources of constitutional norms*. In the second part, *Unwritten sources of constitutional norms in the practice of constitutional actors*, we will analyse specific unwritten sources in practice and try to illustrate the consequences of theoretical problems in the practice of constitutional actors.

## 2. SCOPE AND NATURE OF UNWRITTEN SOURCES OF CONSTITUTIONAL NORMS

In the Slovak constitutional system, we can encounter various types of unwritten sources of constitutional norms. If we look at the decisions of the Slovak Constitutional Court, doctrine, but also publicly available statements of constitutional actors, we can most often find three designations or constructs of unwritten sources of constitutional norms. These are constitutional custom (*ústavná obyčaj*), constitutional consuetude (*ústavná zvyklosť*) and constitutional convention (*ústavná konvencia*).<sup>2</sup> It is precisely in distinguishing these types of unwritten sources that we may encounter significant problems of definition and nature from a legal point of view.

---

<sup>1</sup> To give an example, the term political culture was used in public speeches by current President Pellegrini (SME, 2019) and former President Čaputová (Pravda, 2019).

<sup>2</sup> Sporadically, it is also possible to encounter the term political or constitutional usage - *uzancia* (Krošlák, 2016, p. 61). From the authors' point of view, the term overlaps with the term constitutional convention and its use is infrequent. For this reason, the authors only use a triad of terms.

### 2.1 Constitutional Custom, Constitutional Consuetude and Constitutional Convention

Constitutional custom is the first type of unwritten sources of constitutional norms. In Slovak legal doctrine, it is possible to encounter the claim that constitutional custom is a type of legal custom which governs constitutional relevant relations (Drgonec, 2018, p. 148). It's defining features, which Slovak legal scholars consistently used to identify it in the constitutional system (Káčer, 2018, p. 555 and Neumann, 2019, pp. 472-475). These features are *usus longaevus* and *opinio necessitatis*.<sup>3</sup> The first feature is the material component of constitutional custom. It is the unwritten practice itself, which must be long-term, permanent and uniform. The second feature is the psychological component of constitutional custom. In the case of the psychological component, we speak of the existence of a belief in legal bindingness. Both features must be met cumulatively, otherwise there will be no constitutional custom (Giba, 2020, p. 321). In addition to the two features of a constitutional custom mentioned above, the third feature is also forgotten. The third feature is relevance or reasoning for the constitutional system what distinguishes constitutional customs from other legal customs or social norms. Czech doctrine also works with this third feature (Antoš and Horák, 2024, p. 124) but its original author is I. Jennings who states that every constitutional rule must have its reasoning (Jennings, 1959, p. 136).

Another unwritten source of constitutional norms is constitutional consuetude. There are often claims that some constitutional consuetudes are also legal customs but this is not the case for all of them (Káčer, 2018, p. 564). In addition, we can also encounter the fact that the defining features of constitutional consuetude are essentially identical to the features of constitutional (or legal) custom and the authors themselves claim that constitutional consuetude is the closest to legal custom among the available sources of law (Orosz and Volčko, 2013, p. 116). So, is this a misnomer or an incorrect use of synonymous terms? This raises two problems. If we accept the claim that some constitutional consuetudes are also legal customs, how do they differ from constitutional customs? On the other hand, for the reasons we will discuss below, the question of the uselessness of this differentiation may arise.

The last unwritten source of constitutional norms that we come across in Slovak literature, albeit only sporadically, are constitutional conventions (Orosz, Svák et al., 2022, p. 211). There is no exact definition of a constitutional convention in Slovak literature. However, is it possible to transfer a definition from foreign authors, e.g., the one provided by Dicey? In this case, we dare to say that it is quite difficult for two reasons. The first has to do with the theory itself which Dicey himself developed and the second has to do with the Slovak authors' understanding of constitutional consuetude.

Dicey himself states that in countries with a written constitution it is possible to identify so-called *stringent conventional rules* that stand alongside the constitutional text and have almost the nature of law (Dicey, 1982, p. CXLIV). This means that Dicey recognises that in a system with a written constitution there will be another construct that is not entirely identical to what he calls a constitutional convention. We think that this construct may be the constitutional consuetude that some Slovak authors use in this sense. However, this probably does not mean that systems with a written constitution will not have constitutional conventions but rather that several levels of categories of unwritten sources of constitutional norms will be created that will need to be distinguished.

---

<sup>3</sup> In the literature, we can also encounter the terms *corpus* and *animus*, which, however, coincide in meaning with the terms *usus longaevus* and *opinio necessitatis* (Giba, 2020, p. 321).

On the other hand, some of Slovak legal scholars use constitutional consuetude as a concept that also includes norms that Dicey would rather call constitutional conventions. He understands constitutional convention - *The convention of the constitution* as the morality of the constitution which consists of rules contained in conventions, understandings, habits, or practices that regulates the conduct of constitutional actors, but are not enforceable by courts (Dicey, 1982, p. CXLI). Unenforceability by the courts is the most important part of the definition as it is intended to emphasise its non-legal or social nature. On the other hand, as already noted, it is also possible to encounter the opinion that a certain part of constitutional consuetudes are legal customs or that there is a direct meaningful connection between constitutional consuetudes and customs. This contrasts with how Dicey understands constitutional conventions. For this reason, it is possible to apply Dicey's understanding of constitutional convention but only to those unwritten sources of constitutional norms that do not have the nature of law, bearing in mind that some Slovak authors refer to these unwritten sources as constitutional consuetudes.

If we look more closely at the characteristics of a constitutional convention in the English environment, it is also necessary in their case to satisfy the material and psychological aspects associated with constitutional relevance. Jennings writes that a constitutional convention must have a precedent or series of precedents (material component), a belief in its binding effect (psychological component) and a reasoning (Jennings, 1959, p. 136). Jennings understands the aspect of binding effect like most English authors as not legally binding. Given the above-mentioned Slovak context, the authors of this article will understand the aspect of binding more broadly. Therefore, if in the following article we write about binding aspect as part of the psychological component, it is binding effect in the broader sense, which can be legal or just social or political. It will depend on the specific norm of the unwritten constitutional source.

All three unwritten sources of constitutional norms thus share the same defining features. Moreover, each of the sources is, of course, unwritten. All three unwritten sources of constitutional norms share problematic issues within the material and psychological components. These questions are the following ones: How long does the practice have to be implemented for the material aspect to be fulfilled? When can it be said that there is a belief in obligation and will it be possible to say that the psychological aspect is fulfilled? Where and on what subjects should we test this belief?<sup>4</sup>

However, it is not clear where the dividing line between constitutional custom, constitutional consuetude and constitutional convention will exist. The question of constitutional consuetude also remains open. In view of the above, it seems that the Slovak constitutional system could be satisfied with constitutional customs and constitutional conventions as legal and social or political norms. It seems that all the issues raised can be addressed within the framework of identifying the dividing line that should exist between constitutional norms of a legal nature and those of a social or political nature. This dividing line should also determine the conceptual scope between the individual constructs of the unwritten sources of constitutional norms.

## 2.2 Law or Another Social Norm?

In English literature, it is possible to identify a certain dualism in which two categories of unwritten sources of constitutional norms are created. The first is unwritten

---

<sup>4</sup> The resolution of these issues is not the subject of this article. However, there are other articles in Slovak doctrine that address these issues (Neumann, 2019).

constitutional law and the second is constitutional conventions. The legal nature of these sources is therefore said to be what distinguishes them from each other. But how do authors approach the line that is supposed to divide unwritten sources of constitutional norms into legal and social?

There are different views in the literature on what constitutes the dividing line between constitutional norms that have the character of a legal norm and those that are merely social or political norms. First of all, this dividing line is created by judicial enforceability (Dicey, 1982, p. CXL – CXLVI). If a norm can be enforced by the courts, then it can be considered a legal norm. For this reason, most English authors do not consider constitutional conventions as a source of legal norms, but rather as a political or social norm. On the other hand, there is a minority view that constitutional conventions express important constitutional values and constitute the political morality of the constitution. Therefore, judges consider constitutional conventions to be rules based on this constitutional morality and since the constitutional system also contains legal principles at the constitutional level and legal and political principles are closely intertwined, they can be granted a legal nature (Allan, 1993, pp. 240-253). Others respond to these premises by saying that judges recognise in their decisions various rules that are not commonly regarded as law (Barber, 2009, p. 297). Some articles also reflect on whether it is useful to look for a dividing line between unwritten constitutional law and constitutional conventions (Vetzö, 2018, p. 150).

The Czech authors Antoš and Horák defined dividing lines in the unwritten sources of constitutional norms. These dividing lines are intended to bridge conceptual uncertainties and resolve the issue of legal normativity. They use three constructs - constitutional custom, established constitutional practice and constitutional convention. They use a functional analysis from which they conclude that each of these constructs plays a role in the Czech constitutional system from which its characteristic features emerge. They express these characteristics in terms of three variables: normative force, substantive breadth and applicability before the court (Antoš and Horák, 2024, pp. 134-135).

In their article, they conclude that *„constitutional customs have a normative function, because through them new or existing constitutional norms are created or changed. Their existence is therefore problematic in the system of written constitutional law from the point of view of the clarity of constitutional law, the separation of powers and the democratic deficit. For this reason, their strong characteristics (great normative force and direct applicability before the court) should be compensated by a very narrow content breadth. Established constitutional practice for the interpretation of the constitution has an interpretative and argumentative function because it serves as a tool for the interpretation and possibly the completion of written constitutional law. The balance of this construct results primarily from the fact that all three of its characteristics can be considered moderately strong. Finally, constitutional convention has a preventive and moderating function because of their ability to support the smooth and efficient functioning of constitutional processes and to facilitate the resolution of conflict situations that might otherwise threaten to bring the constitutional system to a standstill. Their strong feature is their breadth of content as they can be applied to a wide range of constitutional situations without having to rely in any way on specific provisions of written constitutional law. However, this strong feature is offset by little or no normative force and applicability before the court.“* (Antoš and Horák, 2024, p. 135). From their conclusion it can be deduced that only constitutional customs are unwritten sources of constitutional law and established constitutional practice and constitutional convention are outside this framework. The

dividing lines between these sources of unwritten constitutional norms should be their characteristic features which arise from their role in the constitutional system.

There is an argument that would prove the usefulness of using the approach of Antoš and Horák in the Slovak constitutional system. This argument refers to a certain connection between the Slovak and Czech legal cultures as both states were previously part of one state - Czechoslovakia. There is a certain continuity in scientific cooperation in the field of legal science even after the dissolution of Czechoslovakia. However, it is not entirely possible to use the mentioned approach. Firstly, it must be said that our and Antoš and Horák approach work with three conceptual constructs that still respect the dualism of the division of the sources of constitutional norms into legal and social. However, there does not appear to be a complete conceptual overlap between the designations of sources of unwritten constitutional norms. A bigger problem is the functional definition which underlies the Antoš and Horák approach and which needs to be perceived differently in the Slovak context.

Our approach which we will try to define in the next few lines is based on different assumptions and tries to maintain a certain continuity in the classification of unwritten sources of constitutional norms. Constitutional custom, constitutional consuetude or constitutional convention share identical defining features in general. Similarly to the Antoš and Horák approach, they have a different function for the constitutional system. Unlike Antoš and Horák approach, we draw attention and examine how individual defining features can develop for each unwritten source of constitutional norms.

If we take constitutional custom, it is a source that undoubtedly has a legal nature. However, this is given precisely by the high relevance for the constitutional system. Its relevance is defined precisely by the long-term operation of a certain practice which preserves the very belief in its binding nature. In the case of constitutional consuetude which we also perceive as a legal source of constitutional norms, a high relevance for the constitutional system is already present at the beginning of the formation of an unwritten constitutional norm.

It might seem that constitutional custom and constitutional consuetude are essentially two identical sources of unwritten constitutional norms. However, in the case of constitutional custom, the long-term temporal element ensures that the unwritten constitutional rule becomes established to such an extent that it is in the eyes of constitutional actors an inherent part of the functioning of the constitutional system. Its failure to comply will mean the paralysis of the constitutional body which will result in the emergence of questions related to the very application of the written constitution. On the contrary, in the case of constitutional consuetude, establishment is not the result of long time, but of necessity for the proper functioning of the constitution at the very beginning of the formation of practice. In other words, large period is not necessary for the very belief in binding nature to arise.

High relevance for the constitutional system also influences the formation of the belief in binding nature. This relevance is based on the most important constitutional principles and creates a motivational element for the constitutional actor to implement the given practice. The fact that the most important constitutional principles are the basis for relevance does not mean that we identify these two categories or that we perceive constitutional principles as unwritten constitutional norms. However, relevance is already

a concrete connection between a specific unwritten constitutional norm and a constitutional principle.<sup>5</sup>

It could certainly be said that the perception of relevance as a certain motivational element determines it to be part of the psychological component. However, as we will explain in more detail below, relevance is not something that operates only in the mind of the constitutional actor, but it is an aspect that follows the very consequence for the application of the written constitution. In other words, it follows a more objective factor than just whether the constitutional actor has a belief in the binding nature of the rule he implements.

The constitutional convention is a source of constitutional norms of a social or political nature in the Slovak constitutional system. It is therefore not a source of legal norms but only of social or political ones. For this reason, a constitutional convention has a lower level of relevance for the constitutional system. The combination of a lower level of relevance and the social nature of the norms resulting from a constitutional convention creates the basis for a relatively shorter time required for its formation. At the same time, it is true that over a long period of time constitutional actors may begin to perceive the constitutional norms resulting from a constitutional convention differently. It is precisely because of their long-term effect and continuity that they may perceive these norms as highly constitutionally relevant. In such a case a constitutional convention may transform into a constitutional custom.

We can trace the connection between the individual defining features, with one influencing the other. As Jennings wrote in his work, a good reason (understood by us as a constitutionally relevant reason) significantly reduces the time needed to establish an unwritten constitutional rule (Jennings, 1959, p. 136). We think that this theory can be taken even further and we can adapt it to the environment of the Slovak written constitution. Based on the relationship between the defining features, we can determine which unwritten source of the constitutional norm is involved. The key to the determination is the defining feature - constitutionally relevant reason that establishes relevance to the constitutional system. The degree of relevance then determines whether the source of constitutional norms is legal or social in nature.

At this point, we will try to explain the very concept of a constitutionally relevant reason in more detail and why the inclusion of this concept in our theory is important. We understand a constitutionally relevant reason as the purpose for which a constitutional norm is implemented and determines the objective connection between the belief in binding (psychological component) and written constitution. It should be noted that constitutional actors in the system of a written constitution act primarily in the space framed by its text. When examining their belief in the binding of a particular rule, it is necessary to examine the purpose that relates to the very functioning of the constitutional system. Every unwritten constitutional rule will have a purpose, but its relevance for the constitutional system may be different. What exactly is the relevance? We understand relevance as the degree of justification of an unwritten constitutional norm for the constitutional and political system. Through the degree of justification in our approach, we examine whether a possible deviation from an unwritten constitutional norm will have serious consequences for the constitutional and political system, which is framed by a written constitution. Of course, every unwritten constitutional norm will be

---

<sup>5</sup> A good example would be the assignment to form a government. The basis of relevance is the principle of parliamentary republicanism, which is framed by the Slovak Constitution. However, relevance is specifically manifested in the fact that the assignment to form a government creates a specific functional mechanism for the better functioning or fulfilment of the general principle.

relevant, but its violation or non-compliance will not always have the same serious consequences, e.g., on the creation of the government or responsibility relations between constitutional bodies.

Why is all this important? If we were to examine only two features – the material and psychological component, it is possible to state that the result would be largely subjective. The fact that the consequence of proceeding in violation of an unwritten constitutional norm can be the paralysis of a constitutional body and thus of the constitutional system is a state that we can assess more objectively than just the conviction of a constitutional actor or the relatively long duration of a period of time. The consequence of non-compliance is manifested in the specific problematic application of the written constitution. We have stated that relevance affects both the psychological and the material component and is interconnected with them. The material one in that it shortens the time aspect for forming an unwritten rule, and the psychological one in that it creates a motivational element for complying with an unwritten norm.

Here it is possible to return to constitutional consuetude and the reasons for using this term in the Slovak constitutional system. In the Slovak constitutional system, perhaps not with the intention of individual authors, the term constitutional consuetude has proved itself although in some places its use is not entirely correct according to the authors of this article. Constitutional consuetude fills a certain grey area that naturally arises between constitutional custom and constitutional convention in Slovak constitutional system. This grey area is created by an overly rigid approach to individual defining features that does not consider their interdependence. This is manifested in an overly vague approach to examining the fulfilment of long-term or belief in binding nature. Constitutional consuetude is a construct in the Slovak constitutional system that is intended to bridge the strict and relatively vague framing of the norms of unwritten constitutional law. We have pointed out that Dicey also identified so-called strict or stringent conventional rules in written constitutions which exist side by side the constitutional text and cannot be fully summarised in the concept of a constitutional convention. This description fits on term constitutional consuetude in Slovak constitutional system. It is a construct that is not entirely peculiar to an unwritten constitution, but is, on the other hand, natural in a written constitution. Moreover, its legal nature distinguishes it from constitutional conventions filling the space between customs and conventions.

Our approach provides the same answer to the question of what constitutes the dividing line between the constructs we classify as unwritten sources of constitutional norms and what constitutes the dividing line between unwritten constitutional law and social or political constitutional norms. From our perspective, this dividing line is the intensity of relevance for the constitutional system. In our view, the way in which relevance to the constitutional system manifests itself is the key to identifying whether there is a constitutional custom, a constitutional consuetude or a constitutional convention but also whether there is a constitutional norm or simply a social or political norm.

We assume that legal norms are norms that the state not only creates but also enforces their observance through the judiciary which uses them as the basis for its legal argumentation (Procházka and Káčer, 2019, p. 152). If we look at the individual unwritten sources of constitutional norms, then the criterion for their enforcement by the judiciary must be based on the importance or relevance for the constitutional system. Here, we partially reach the dividing line that Dicey already wrote about - enforceability by the court. However, from our point of view, this is only an external or formal indicator that occurs only after the formation of the unwritten constitutional norm, or rather, only after a certain

time interval from when the unwritten constitutional norm arose. The relevance for the constitutional system remains essential and determines the dividing line between constitutional legal and constitutional social norms from a material point of view.

However, is it possible to measure the intensity of relevance for the constitutional system? Slovak constitutional law literature characterises constitutional relations not only as legal relations but also as political relations (Orosz, Svák and Balog, 2012, pp. 67-69). Constitutional relations are therefore a combination of legal and political relations. In some cases, the legal aspect of constitutional relations dominates over the political aspect and vice versa. Unwritten constitutional norms serve their purpose in both situations mentioned. The dominance of the legal aspect means higher constitutional relevance for the functioning of the constitutional legal system. In other words, normative legal effect is required to fulfil the purpose of such an unwritten constitutional norm. These are cases when a norm regulates a relationship that is important in the creation of a constitutional body or resolves the issue of its powers. Alternatively, it is a relation that defines the position of one constitutional body to another. This is where the legal unwritten sources of constitutional norms come into play – constitutional customs and constitutional consuetude. On the contrary, where the political aspect prevails and the purpose of the norm's existence is primarily the functioning of the political system, it is a constitutional convention. The more the norms touch the essence of the functioning of the constitutional system - the creation of constitutional institutions, the relations between them, or the division of powers itself - the greater the intensity of their relevance for the constitutional system is.

Why is our approach important? The Slovak Constitutional Court has mentioned in its decision-making practice the norms that can be classified as unwritten constitutional norms [e.g., Slovakia, Constitutional Court of the Slovak Republic, PL. ÚS 4/2012 (24 October 2012); I. ÚS 397/2014 (4 December 2014); I. ÚS 575/2016 (6 December 2017)]. However, the use of terminology by the Constitutional Court is not clear and there is no specific methodology by which the Constitutional Court justified the formation of a specific unwritten constitutional norm, or source.<sup>6</sup> Therefore, we have created a certain prescriptive approach that determines the basic rules according to which it would be possible to proceed. This is an approach as if the Constitutional Court should decide. The approach created by the authors and the formation of terms such as relevance or constitutionally relevant reason are not far from the methodology that the Slovak Constitutional Court generally applies in other cases. The Slovak Constitutional Court considers the impacts on the constitutional system through an evaluation of the constitutional intensity (relevance) of the violation of constitutional norms in its argumentation. These considerations form the basis of the Constitutional Court's conclusions.<sup>7</sup> Our approach follows this trend. For this reason, we have formulated a third element – the element of relevance, which is the determining distinction between law and political norm.

---

<sup>6</sup> A detailed analysis of the Constitutional Court's decisions related to unwritten constitutional norms was prepared by Marek Káčer (2022, pp. 8-10).

<sup>7</sup> This includes, for example, evaluating the non-compliance of an act of parliament that was adopted in violation of the rules of the legislative process [Slovakia, Constitutional Court of the Slovak Republic, PL. ÚS 13/2020 (11 May 2022)] or considering the options for deciding on the compliance of a Constitutional Act with the Constitution [Slovakia, Constitutional Court of the Slovak Republic, PL. ÚS 8/2022 (12 October 2022)].

### 3. UNWRITTEN SOURCES OF CONSTITUTIONAL NORMS IN THE PRACTICE OF CONSTITUTIONAL ACTORS

As part of a practical illustration of the functioning of the unwritten components of the Slovak constitutional system, we will focus on several specific procedures. We will also demonstrate the connections that lead to greater or lesser differences in their legal nature. We will gradually address the assignment to form a government (2.1), the method of appointing the government (2.2), the order in which the assignment to form a government is granted (2.3) and the presidency and vice-presidency of the Slovak Parliament (2.4).

#### 3.1 *Assignment to Form a Government*

The first example where we can speak of a constitutional custom in the Slovak constitutional system is the so-called "assignment to form a government". The emergence of this constitutional custom indirectly resulted from the proportional electoral system that is applied in Slovakia in parliamentary elections. In practice, this electoral system means that no political party alone gains a majority in parliament. From the perspective of governance, after each parliamentary election, the question is which parties together will form a parliamentary majority. The custom is that the Prime Minister is always proposed by the strongest of them. The government is subsequently appointed by the president. The constitutional custom, for which the term "assignment to form a government" has already become a well-established expression, is related to the processes that take place before the appointment of the government itself.

Before the appointment of the government, the President of the Republic entrusts one person, the presumed Prime Minister, with the formation of the government. However, this type of assignment is not supported by any text: the Constitution only establishes that the President of the Republic shall appoint the Prime Minister and, on his proposal, the other members of the Government, and shall dismiss them [Art. 102, paragraph 1, letter g), Art. 110, paragraph 1 and Art. 111]. Since the proportional nature of the Slovak electoral system requires the formation of coalitions, the practice of assignment emerged as early as 1994, after the first elections under the current Constitution. This practice has not only been preserved since then but has also developed without the Constitution even mentioning it.

In Slovakia, the appointment of a government has always been preceded by an assignment to form a government, which was previously granted by each President (including the sitting President). The act of assignment was even used in 2023 when appointing the caretaker government of Ľudovít Ódor, which from the beginning did not have the conditions of gaining confidence in parliament. It has also been the case so far that when a government was formed immediately after elections, the president always first assigned the formation of the government to the representative of the party that came first in the elections. He did so even when it was clear that, despite the first place, this party had lost the elections and would not form a government, because the parliamentary majority led by the second strongest party had in fact already been formed (1998, 2002, 2010). If the first assigned leader formed the government, the President appointed him as the prime minister and immediately appointed the other ministers on his proposal. If he did not form it, he returned the assignment to the President, who immediately assigned the representative of the second party in the order. So far, the second attempt has always led to forming a government, and it has subsequently been

appointed. A representative of the third or next most successful party has never received the assignment.

Looking at this summary of the procedures that have been followed without exception so far, it is not easy to conclude that they have nothing to do with the law.<sup>8</sup> The assignment is given in written form, publicly and with a certain ceremony. The assignment has never been given to more than one person at a time, and another person has not received it before its first holder has formally returned it to the President of the Republic in the event of failure of negotiations. The act of returning the assignment only emphasises that this is more than just a factual procedure that may or may not be carried out. From a material point of view, there are clear, constant procedures repeated after each parliamentary election. More than three decades of existence, the execution of the act of assignment by five different Presidents (and two acting presidents), nine parliamentary elections and one caretaker government in the meantime, already make it possible to establish relatively reliably also the fulfilment of the time condition. The past is already deep and varied enough to say that the "phase of uncertainty" is behind us, which inevitably precedes the definitive emergence of each constitutional custom and during which a way back is still possible. This phase of uncertainty was declared by legal science a few years ago (Giba, 2020, p. 341), but we believe that the very little that this constitutional custom may have lacked for completion until recently has already been acquired.

At the very beginning of the formation of this practice into an unwritten source of constitutional law, it was not possible to speak with certainty of anything constitutionally binding. However, the very long duration of implementation has established this practice, and from the perspective of constitutional actors, it is undoubtedly perceived as constitutionally relevant. Retrospectively, we can state that the constitutional actors have very soon recognised the relevance of this practice. The constitutional relevance or justification for this practice has been solidified by the long-term operation, which created the prerequisites for the confirmation of the given rule by constitutional actors as legally binding. By the way in which constitutional actors approached the assignment over time (the aforementioned return of assignments, the assignment granted when forming a caretaker government), they demonstrated the constitutional relevance of the practice and the justification for its implementation. This fact is crucial in identifying it as a constitutional custom.

Today, we can state that, by virtue of constitutional custom, the formation of every government in Slovakia must be preceded by an act of assignment to form a government. In the period from the assignment to form a government to the appointment of the government, two things are expected of the assigned person: first, declaring the existence of a parliamentary majority (this requirement may very exceptionally not apply, e.g., in the situation of appointing a caretaker government in the clear absence of any parliamentary majority); second, delivering personnel proposals for each ministerial position in the future government.

### *3.2 Method of Appointing the Government*

In connection with the creation of the government, there is another essential (and sometimes overlooked) issue, which is practically very significant and not addressed in

---

<sup>8</sup> However, in connection with the assignment to form a government, some authors state that this practice is not part of the constitutional legal system. One of these authors is Ján Drgonec. He claims that the relations prior to the appointment of the Prime Minister of the Slovak Republic is not of a legal nature (see Drgonec, 2006, p. 763).

the constitutional text. The point is whether 1) the act of appointing the Prime Minister and the act of appointing the other members on his proposal should (can) take place with a time gap (days to weeks) or 2) should take place in immediate succession, i.e., *de facto* at the same time. In other words, whether the parliamentary majority should be sought by a person already in the position of Prime Minister, or only by an "assigned person", who will become Prime Minister only on condition that he finds a parliamentary majority. Both are conceivable: it does not follow from Art. 110 and Art. 111 of the Constitution that the appointment of the Prime Minister and other government members must take place within a matter of minutes. A procedure would also be permissible where the President would first appoint the Prime Minister, who would submit proposals for ministers to him a few days later, and their appointment would take place subsequently. The choice between two aforementioned options belongs to the President as the presumed Prime minister has no means to impose one of the possible options upon the President. Unlike the Czech Republic, which followed the first possible path, the Slovak Presidents have adopted the practice of appointing the Prime Minister and the other members of the government immediately one after the other. The assigned leader must therefore find a parliamentary majority (and submit proposals for other members of the government to the President) not only before appointing ministers, but also before appointing himself as Prime Minister. This is precisely why there was space for an "assignment to form a government", which the constitutional text does not mention. In fact, the assignment serves to ensure that the President can proceed to appoint the Prime Minister only on the assumption that the government would gain the confidence of the parliament.

The appointment of the Prime Minister and members of the Government at one point in time means that until the Prime Minister receives his own appointment decree from the President and takes the oath, he is not the Prime Minister. He is still only a person "assigned to form a government" in compliance with the constitutional custom. Therefore, the regime that applies to the relationship between the President and the Prime Minister cannot yet be applied to the relations between the assigned leader and the President. First, the question of whether the President is obliged to accept the personnel proposals of the "Prime Minister" is not relevant, because at the time when they are actually submitted to him, they are not yet submitted by a person in the position of Prime Minister. At the moment when these proposals are submitted to the President *de iure*, i.e., immediately after the Prime Minister has received his own appointment decree and taken the oath, they are already proposals with which the Head of State is familiar.

This nuance implies that if the President were fundamentally against a certain ministerial nomination or nominations, he has the possibility of "threatening" the person in charge of forming the government that he will not appoint him as Prime Minister if he intends to submit such personnel proposals to him after his appointment. Even the possible opinion that the President is always bound by the proposals of the Prime Minister for the appointment of ministers could not resolve such a conflict to the detriment of the Head of State, since this is not yet a relationship between the President and the Prime Minister. The threat of not appointing the Prime Minister is politically extreme, but legally Article 110 of the Constitution leaves no doubt that the President appoints the Prime Minister without a proposal, that is, officially at his own discretion. Although at this stage of government creation the constitutional quality of the relationship between the President and his "partner" is different, let us add that, in general, the President should be very restrained in rejecting proposals.

All governments that were formed during the era of the current Constitution were appointed according to the procedure described, i.e., in such a way that the appointment of the Prime Minister and other members of the government took place at the same time.

There has never been any consideration or suggestion that this should happen with a time gap. Therefore, we can quite reliably describe this procedure as a constitutional consuetude, which also correlates with the constitutional custom of the assignment to form a government, with which it forms a logical and meaningful whole. The assignment to form a government would not make much sense if only the Prime Minister (without the other members) were to be appointed subsequently, about whom it would not yet be known whether he formed a parliamentary majority. Conversely, when it is already clear from the assignment to form a government that the designated leader has formed a majority, there is no point in separating the appointment of the Prime Minister and the appointment of the other members in time.

This constitutional consuetude undoubtedly strengthens the President in the process of creating a government. For this reason alone, it is unlikely that a President would one day consider appointing a Prime Minister without the other members. However, if he did so, he would create a situation that is not yet known for the constitutional system, which would raise quite a few constitutional questions. The incumbent government always ends its term only when the (entire) new government is appointed, not just its Prime Minister. The simultaneous appointment of the Prime Minister and the other members therefore makes it possible to avoid a situation where *de iure* two Prime Ministers are acting in the Republic at the same time, one at the head of the old government, the other for the time being without a government. This would legitimately raise the question of whether both (or which one of them and to what extent) can perform the acts that the Constitution associates with the function of Prime Minister.

Another practical problem that would arise from such a situation would be the question of what to do with a Prime Minister, who, although he does not form a parliamentary majority, nevertheless submits to the President, pursuant to Article 111 of the Constitution, personnel proposals for the appointment of other members of the Government and insists on their appointment, stating that he wants to try to gain confidence in parliament. If we were to accept that the President is obliged to comply with him, then this could lead to the appointment of governments for which it would be clear from the beginning that they would not gain confidence. The operation of such governments would not be beneficial to the proper functioning of the constitutional bodies, which the President is obliged to ensure under Art. 102 para. 1 of the Constitution. If the President were not willing to comply, the question would arise of how to remove such a Prime Minister from office. Could the President simply dismiss him? On what basis? Could the Parliament vote no-confidence in him? Theoretically, yes, but what if there were not sufficient majority in parliament for such a step?

In view of the above context and considering the long-term, clear, established, repeated practice, and especially taking into account the high relevance for the constitutional system, we state that the Slovak constitutional system, based on constitutional consuetude, requires that the appointment of the Prime Minister and other members of the new government must always take place in immediate succession. Otherwise, serious constitutional questions would arise, which could, in the extreme case, result in a constitutional-political crisis. If the President were to appoint only the Prime Minister himself, he would violate this binding constitutional consuetude in conjunction with Art. 102 para. 1 of the Constitution, which obliges him to ensure the proper functioning of constitutional bodies.

As we mentioned above, we understand this practice as a constitutional consuetude. This is because at the very beginning of the given practice there was a certain constitutional relevance and a constitutionally relevant reason for its implementation. This is represented by the above-mentioned issues related to the

appointment of the government itself, but also the ensuring of the proper functioning of constitutional bodies.

### 3.3 *The Order of Granting the Assignment to Form a Government*

The very fact that the appointment of a government in Slovakia is to be preceded by an act of assignment to form a government can, based on the above, be considered a legally binding unwritten constitutional norm. However, another sub-question is related to this, which represents a separate problem, potentially another unwritten constitutional norm. The issue is whether the assignment, which as such must precede the appointment of a government: (alternative 1) must first be granted by the President to the representative of the strongest parliamentary party, or (alternative 2) the President may grant it at his discretion to the person he considers to have the best chance of forming a government, or (alternative 3) whether the President has complete freedom and can grant the assignment to whoever he wants, according to his subjective (political) preferences.

The alternative 3) can be rejected outright on the grounds that no President has ever even hinted that he would feel entitled to such discretion regarding the granting of an assignment, which would depend only on his subjective preferences. Nor has legal science ever presented such an opinion, which, after all, would lack a legitimate reason. Let us therefore consider it certain that the President's discretion in granting an assignment to form a government is limited. The only question is to what extent.

In legal science, the opinion has long emerged (Orosz and Volčko, 2013, pp. 121-122) that there are no prerequisites for the emergence of a constitutional custom in Slovakia, according to which the first assignment to form a government should be given to the leader of the party that received the most votes in the elections. This opinion is based on the constitutionally enshrined obligation of the President to ensure the proper functioning of constitutional bodies through his decisions (Art. 101, para. 1). This obligation, *in principle 'orients' the President to assign the formation of the government to a person who, given the election results, has real prospects of 'forming' a government that will have an effective parliamentary majority, i.e., in the interest of constituting a new government as quickly as possible (and thus ensuring the proper functioning of constitutional bodies), to give preference to the leader (or other member) of a political party that has sufficient coalition potential (i.e. is capable of forming a government coalition with other parliamentary political parties that has the required majority in parliament) over the leader of the strongest parliamentary political party. The opposite procedure could, under certain circumstances, be assessed as an 'unnecessary waste of time', which obviously prolongs the process of transferring power into the hands of the 'real' winner of the elections.*" (Orosz and Volčko, 2013, pp. 121-122). This opinion therefore represents quite a clear inclination towards the alternative 2). To some extent, it is weakened by two reasons. Firstly, this opinion was expressed more than a decade ago, thus without the possibility of taking into account later developments, during which three parliamentary elections took place and six new governments were formed. Secondly, in the application practice, it has never happened that the strongest party in the order was omitted, and the second one was assigned (in this case, we cannot count the caretaker government of

Ludovít Ódor, which was formed under specific circumstances and, by the nature of the matter, unrelated to the situation in parliament).<sup>9</sup>

We can find several authors in the Slovak theory categorically endorsed the alternative 1. One of them is Jakub Neumann (Neumann, 2021, pp. 386-392). In short, he claims that after the elections, the President must always first assign the formation of the government to the representative of the first party in line (whom he automatically designates as the "*absolute winner of the elections*", which is incorrect in our opinion and logically untenable given the proportional electoral system). If the first person assigned does not form the government, according to Neumann, the President can grant the next assignment to the person he assumes has the best chance of forming the government. This view was directly and in detail opposed by one of the authors of this article (Giba, 2021). We fully subscribe to the detailed argumentation presented in the mentioned work and do not consider it necessary or even possible to reproduce them in detail in this paper. Therefore, we briefly summarise this counter-opinion as follows: the President should, in principle, grant the first assignment to the representative of the strongest parliamentary party, and the President's different political conviction is not a reason not to do so. However, an exception to this principle can be made if it is justified by truly extreme circumstances. The common denominator of these circumstances could be, in short, that the fundamental values of our democratic constitutional order are already being questioned (Giba, 2021, p. 406). There could be a reason for such a step, for example, if, with a large fragmentation of votes, an extremist political party ended up in first place, for which it would also be obvious that it has no chance of forming a coalition.

We conclude this issue by saying that the rule according to which, after elections, the President must mechanically, without thinking and without taking into account anything other than the order of the parties, grant the first assignment to form a government to the leader of the party with the highest number of votes cannot be recognised as a constitutional custom or consuetude. If, for the needs of the Slovak constitutional system, we accept the threefold division into constitutional custom, constitutional consuetude and constitutional convention, then the fact that the first assignment is *in principle* given to the leader of the first party in order is a relatively clear case of constitutional convention. This assignment is generally expected, the President is naturally inclined to do so, but if this was not to happen exceptionally and the first assignment was given to the leader of a party other than the strongest one, it would not be an objectionable procedure or a violation of the established mechanisms associated with the constitutional custom of the assignment to form a government.

In other words, in this case there is a constitutional rule that can be argued to be most likely a constitutional convention. This is because, despite its relatively long implementation, it cannot be noted that this practice has a high degree of constitutional relevance and reasoning from the perspective of constitutional actors. However, it is not impossible that it will gradually transform into a constitutional custom over time.

---

<sup>9</sup> It might seem that this happened after the parliamentary elections in 2002, but this is not true. At that time, President Schuster gave a written assignment to the leader of the second strongest party (Mikuláš Dzurinda). However, he did so only six days after the elections, after giving the leader of the first party in line (Vladimír Mečiar) a five-day deadline to form a government coalition and after Mečiar informed him that he had failed to form a government. Dzurinda highlighted this action of the President as an intention to shape the political culture in Slovakia. See also Hospodárske noviny (2002); SME (2002).

### 3.4 *Presidency and Vice-Presidency of the Slovak Parliament*

Over the years, certain practical procedures have developed in Slovakia related to how the positions of the President and Vice-Presidents of the National Council are filled. These positions are strongly political and, by their nature, can only be occupied by someone from among the deputies (it is interesting that this elementary self-evident fact is not enshrined anywhere in the Constitution or in the law, but this is not our intention to discuss now). It follows from Articles 89 and 90 of the Constitution that the President and Vice-Presidents are elected by the Parliament in a secret ballot and an absolute majority of the votes of all deputies is required for election. They can be dismissed at any time by the same procedure. The political nature and the process of creation of a certain position do not in themselves exclude the gradual emergence of unwritten rules that can be applied in these processes and could progressively acquire the nature of a legal norm.

As for the position of the President of the National Council, in coalition governments there is a tendency to give this post to the second strongest coalition party, or to a different coalition party than the one that nominates the Prime Minister. It might therefore seem that an unwritten rule excludes the cumulation of the positions of Prime Minister and President of the National Council in the hands of the same political party. However, this practice is not followed absolutely, since in the years 1994–1998 and 2006–2010, despite the coalition nature of the governments, the presidency of the Parliament belonged to the strongest government party, together with the position of Prime Minister. A closer look shows that the more balanced the positions (number of mandates) of the government parties are, the more certain it becomes that the presidency of the National Council will not belong to the party that wins the position of Prime Minister. However, this may not be the case in coalitions where one party is significantly dominant in relation to the others.

It is clear that when it comes to the processes of electing the President of the National Council, it is not possible to speak of a stable or long-standing practice and probably not of a high constitutional relevance or reasoning for the constitutional rule in question. For this reason, it is not possible to observe a constitutional custom or constitutional consuetude.

It is even questionable whether one can even speak of a constitutional convention, since the practice of dividing the functions of the President of the National Council and the Prime Minister between different coalition parties lacks not only the presumption of bindingness and any judicial enforceability, but also apparently stability, because contradictory procedures have occurred, even repeatedly.

However, it is more interesting to look at certain practices associated with filling the positions of vice-presidents of the Parliament. Since 1998, a practice has been carried out according to which one of the four positions of vice-presidents of the Parliament was given to a representative of the opposition (during the “monochrome” – non-coalition government in 2012–2016, the opposition received up to two positions of this kind in the National Council). This practice could be understood as a certain gesture of the ruling majority towards the opposition and its voters, as a certain contribution to a higher political culture in Slovakia. It would be difficult to view it as a constitutional custom or consuetude: from the overall behaviour of the actors, it never seemed that they perceived it as their duty, and therefore a constitutional norm.<sup>10</sup> Likewise, it cannot be said that filling one position of vice-president of the Parliament is a procedure that has high relevance for the constitutional system. However, this practice quickly became accepted as

---

<sup>10</sup> Similar opinion can also be found in articles by other authors. See Ruňanin (2024, pp. 117-118).

something that is expected of the governing majority and that is "due". From this perspective, it could be a relatively good example of constitutional convention.

This procedure has been practiced continuously across election periods for over 25 years and has always been generally expected. Even after the election of the current National Council in 2023, one position of vice-president was occupied by an opposition representative, who was also the leader of the strongest opposition party (Michal Šimečka). Nevertheless, about a year after the elections, in September 2024, this vice-president of parliament was removed from office by votes of coalition deputies. This was an unprecedented step, as it had never happened before that the Parliament had removed an "opposition" vice-president. This did not happen even when the vice-president left the party that nominated him for this position during the election period.

The dismissal of Michal Šimečka in 2024 caused a great political turmoil, but no doubts about the constitutionality of this step. At the same time, however, the post has remained vacant for almost a year, it has not been filled by a nominee of the coalition, which verbally proclaims that this post "belongs" to the opposition. Therefore, certain inhibitions can be seen here, which indicate that despite the unprecedented intervention in the form of the removal of the opposition vice-president of the Parliament from office, there is no clear intention to deny the constitutional convention as such. The relevance of this hypothesis will be tested mainly by developments after the next parliamentary elections.

#### 4. CONCLUSION

The topic of unwritten sources of constitutional norms is challenging both theoretically and practically. In the article, we demonstrated that distinguishing between the various categories of unwritten constitutional norms is challenging and problematic. Theoretically, there is no consensus on which criteria should be applied to this distinction, or which terms are most appropriate for capturing the essence of the issue. First, our ambition and aim were to demonstrate, at a theoretical level, the suitability of using the terms "constitutional custom", "constitutional consuetude", and "constitutional convention" for procedures occurring in Slovak constitutional law. Secondly, we defined a classification criterion distinguishing between legal and social unwritten constitutional norms or sources. This criterion is constitutional relevance, which may vary in intensity in its relation to the constitutional system. All unwritten sources of constitutional norms are, of course, constitutionally relevant. However, some are more important in relation to the constitutional legal system (e.g., the separation of powers, the creation of the government, the powers of constitutional bodies), while others are more significant in political relations (e.g., agreements between parliamentary political parties on filling positions). We included constitutional custom and consuetude in the first group and constitutional conventions in the second.

We applied this theory to specific examples from the practise of the constitutional bodies and demonstrated that this theoretical framework enables us to adequately cover Slovak constitutional practice. Applying the above theory to specific examples also demonstrated its functionality in the context of the Slovak constitutional system.

By their very nature, unwritten sources of constitutional norms are necessarily largely amorphous. Therefore, it is impossible to frame them with the same exactitude as statutory texts or court decisions. Nevertheless, this does not alter the fact that categories of unwritten sources of constitutional norms exist in principle in every constitutional system, and conversely, that no functioning constitutional system can

exist without them in the long term. It remains the responsibility of specific constitutional actors to apply unwritten norms in good faith and with due awareness of the impact of their actions on the continued functioning of the constitutional and political system.

To enhance the clarity of our analysis, we conclude by presenting a table that summarises the arguments set out above.

<b>Category of unwritten constitutional source</b>	<b>Time factor for forming</b>	<b>Binding</b>	<b>Relevance</b>	<b>The example from constitutional practice</b>
Constitutional custom	Long-time period	Legally Binding	High - determined by long-term practice	Assignment to form a government
Constitutional consuetude	Relative short-time period	Legally Binding	High and present from the beginning of the practice	Method of appointing the government
Constitutional convention	Relative short-time period	Social – political binding	Low	Presidency and vice-presidency of the Slovak Parliament

#### BIBLIOGRAPHY:

- Avril, P. (1997). *Les conventions de la Constitution*. Paris: PUF.
- Antoš, M. and Horák, F. (2024). Nepísaná pravidla v ústavní systéme: Ústavní obyčej, ustálená ústavní praxe a ústavní zvyklost [Unwritten Rules in Constitutional System: Constitutional Custom, Established Constitutional Practice and Constitutional Convention]. *Právnik*, 163(2), 120-136.
- Allan, T. R. S. (1993). *Law, Liberty, and Justice: The Legal Foundation of British Constitutionalism*. Oxford: Clarendon press.
- Barber, N. W. (2009). Laws and constitutional conventions. *Law Quarterly Review*, 125, 294–309.
- Cibulka, L. (2004). Druhé decénium Ústavy Slovenskej republiky [The second decade of the Constitution of the Slovak Republic]. In *Desať rokov slovenskej štátnosti, zákonodarstva a jeho perspektívy: 2. Právnické dni Karola Planka* (pp. 153–161). Bratislava: Nadácia profesora Karola Planka.
- Cibulka, L. et al. (2017). *Štátoveda* [Theory of the State]. Bratislava: Wolters Kluwer.
- Dicey, A. V. (1982). *Introduction to the study of the law of the constitution* (8th ed., reprint of 1915 edition). Indianapolis: Liberty Fund.
- Drgonec, J. (2006). *Ústava Slovenskej republiky. Komentár* [Constitution of the Slovak Republic. Commentary] (2nd ed.). Šamorín: Heuréka.
- Drgonec, J. (2018). Nepísané ústavné právo [Unwritten Constitutional Law]. *Zo súdnej praxe*, 22(4), 146–153.
- Giba, M. (2020). Nepísané ústavné právo [Unwritten Constitutional Law]. *Právny obzor*, 103(5), 319–342.

- Giba, M. (2021). Povinnosti a možnosti prezidenta Slovenskej republiky v procese zostavovania vlády [Duties and Options of President of the Slovak Republic in The Process of Forming a Government]. *Justičná revue*, 73(3), 395–407.
- Hospodárske noviny. (2002, September 30). *Dzurinda má poverenie zostaviť vládu*. Available at: <https://hnonline.sk/dennik/2453-m-dzurinda-ma-poverenie-zostavit-vladu> (accessed on 30.05.2025).
- Jennings, I. (1959). *The Law and the Constitution*. London: University of London Press.
- Káčer, M. (2018). Ústavné zvyklosti a moc prezidenta v SR [Constitutional Conventions and The Power of President in the Slovak Republic]. *Právny obzor*, 101(6), 554–565.
- Káčer, M. (2022). Shaping the appointment powers of the Slovak president under constitutional conventions. *Acta Politologica*, 14(1), 1–16.
- Krošlák, D. et al. (2016). *Ústavné právo* [Constitutional Law]. Bratislava: Wolters Kluwer.
- Levy, D. (1975). De l'idée de coutume constitutionnelle a l'esquisse d'une théorie des sources du droit constitutionnel et de leur sanction. *Mélanges Charles Eisenmann*. Paris: Éditions Cujas, 81-90.
- Neumann, J. (2019). Ústavné zvyklosti – kritika, kontext, reflexie [Constitutional Traditions – Review, Context, Reflections]. *Právny obzor*, 102(6), 470–482.
- Neumann, J. (2021). Limity prezidenta Slovenskej republiky pri udeľovaní poverenia na zostavenie vlády [Discretion Limits of President of The Slovak Republic in Granting the Mandate for Government Formation]. *Justičná revue*, 73(3), 382–394.
- Orosz, L., Svák, J., et al. (2021). *Ústava Slovenskej republiky. Komentár. Zväzok I* [Constitution of the Slovak Republic. Commentary. Volume I]. Bratislava: Wolters Kluwer SR s.r.o.
- Orosz, L., Svák, J., et al. (2022). *Ústava Slovenskej republiky. Komentár. Zväzok II* [Constitution of the Slovak Republic. Commentary. Volume II]. Bratislava: Wolters Kluwer SR s.r.o.
- Orosz, L., Svák, J. and Balog, B. (2012). *Základy teórie konštitucionalizmu* [The Foundations of Constitutional Theory] (2nd ed.). Bratislava: Eurokódex, s.r.o.
- Orosz, L. and Volčko, V. (2013). Ústavné zvyklosti a ich vplyv na interpretáciu, aplikáciu a zmenu práva. [Constitutional Conventions and Their Influence on The Interpretation, Application and Change of Law] In E. Barány (Ed.), *Zmena práva* (pp. 114–126). Bratislava: SAP.
- Pravda. (2019, August 10). *Čaputová: Politická kultúra potrebuje menej marketingu a viac autenticity*. Available at: <https://spravy.pravda.sk/domace/clanok/522136-caputova-politicka-kultura-potrebuje-menej-marketingu-a-viac-autenticity/> (accessed on 30.05.2025).
- Procházka, R. and Káčer, M. (2019). *Teória práva* [Theory of Law] (2nd ed.). Bratislava: C. H. Beck.
- Ruňanin, M. (2024). Odvolávanie podpredsedu parlamentu a ochrana parlamentnej menšiny [Dismissal of The Deputy Speaker and Protection of The Parliamentary Minority] In Kluknavská, A. and Cibik, S. (ed.), *Dvadsať rokov dialógu medzi Ústavou a právom Európskej únie* (pp. 108-123). Praha: Wolters Kluwer ČR.
- SME. (2002, September 26). *Schuster poverí v piatok Dzurindu zostavením vlády*. Available at: <https://domov.sme.sk/c/676748/schuster-poveri-v-piatok-dzurindu-zostavenim-vlady.html> (accessed on 30.05.2025).
- SME. (2019, November 17). *Pellegrini: Nie je správne, ak občania rezignujú*. Available at: <https://domov.sme.sk/c/22262104/pellegrini-nie-je-spravne-ak-obcania-rezignuju.html> (accessed on 30.05.2025).
- Vetzö, M. (2018). The Legal relevance of constitutional conventions in the United Kingdom and Netherlands. *Utrecht Law Review*, 1, 143–156.

## MOVIES AS AN EPISTEMIC SOURCE OF LAW AND ITS INFLUENCE ON LAWMAKING PROCESS

doc. JUDr. Rudolf Kasinec, PhD.  
Associate Professor  
Comenius University Bratislava  
Faculty of Law  
Department of Theory of Law  
and Philosophy of Law  
Safárikovo námestie č. 6  
P. O. BOX 313  
810 00 Bratislava, Slovakia  
[rudolf.kasinec@flaw.uniba.sk](mailto:rudolf.kasinec@flaw.uniba.sk)  
ORCID: 0000-0003-2145-993X

This paper is part of the research task and output of the VEGA project No. 1/0579/23 - Legal and Ethical Aspects of Disciplinary Responsibility in the Rule of Law.

**Abstract:** *Law and art are concepts intrinsically linked to culture and human society. Both can shape human communities in spiritual and material ways. This paper focuses on a relatively modern form of artistic expression – film – which emerged in the late 19th century. Despite its relatively short history, film has become an integral part of everyday culture on a global scale. The combination of moving images and sound possesses a unique informative and educational potential, which can be employed constructively but also misused to influence public opinion. This paper explores the distinctive power of film to shape legal consciousness and, in some cases, to directly or indirectly has influence on lawmaking process. The paper is structured into four parts. The first part outlines the theoretical relationship between film and law within the academic discourse. The remaining three parts present specific instances where films have influenced legislative changes. In each of these sections, we analyse two examples from the major legal systems around the world. For each selected film, we briefly summarise its essential content and the social issue it addresses. Then we examine what role film played in the process of lawmaking in six selected jurisdictions. Finally, we identify common factors shared by these films that led legislative action and legal reform.*

**Key words:** *Law; Movie; Source of Law; Legal Change; Society; Legal Systems; Written Law; Legislature; Culture; Social Pressure; Morality; Death Penalty; Abortion Policy; Female Genital Mutilation; Labour Strike; Globalisation*

### Suggested citation:

Kasinec, R. (2025). Movies as an Epistemic Source of Law and Its Influence on Lawmaking Process. *Bratislava Law Review*, 9(Spec), 103-118. <https://doi.org/10.46282/blr.2025.9.Spec.1048>

Submitted: 07 May 2025

Accepted: 24 October 2025

Published: 28 December 2025

### 1. INTRODUCTION

In its relatively short history, film has risen from a novelty attraction to one of the most popular and influential forms of mass media. It first attracted scholarly attention within the framework of the law and literature movement and later developed into an independent legal-theoretical field known as law and film. The primary strengths of film as an art form lie in its universality, accessibility, mass appeal, and its capacity to shape public opinion. It is therefore not surprising that film has gradually emerged as a significant epistemic<sup>1</sup> source of law – one capable of conveying complex legal ideas to broad audiences within a relatively short time frame. Precisely because of this capacity, film has also become a powerful and effective tool of propaganda, capable of influencing public perception and societal attitudes on a large scale.

---

<sup>1</sup> The term gnoseological (which contain information about the law) has become established in the Slovak and Czech legal tradition. Others kind of sources of law are material (circumstances leading to a change in the law) and formal (as legal acts, precedent, legal custom and others).

But do films have a potential beyond merely informing or serving propagandistic purposes in the field of law? During our research, we have encountered the rather unconventional role of film as a medium that has contributed to changes in existing legislation or even to the creation of new laws. This paper therefore sets out to test the following hypothesis: *"Films, as an epistemic source of law, have the ability to directly or indirectly influence various stages of the lawmaking process when certain conditions are met."* To verify this hypothesis, we will employ established scholarly methods to analyse selected films and their influence on lawmaking. From their position as unwritten sources of law, films in these cases have subsequently resonated throughout society. A second method employed in this research is comparative analysis. We will examine examples from all the major legal systems, focusing on case studies from the United States, the United Kingdom, Belgium, Poland, Pakistan, and the Kurdistan region in northern Iraq. In addition, we will refer to further examples from other parts of the world, to which we will dedicate more detailed attention. The aim is to emphasise the global relevance of this phenomenon and to demonstrate its potential for universal applicability.

It must be noted that it is not common that films directly or indirectly influence lawmaking process. We have been addressing the issue of the relationship between law and film in its various forms for many years. In examining the issue of film as an epistemic source of law, we have discovered several examples where films have deviated from this set and have been able to influence lawmaking to varying degrees. Film was the trigger for legislative changes, influenced voting in the legislature, or contributed to informing the public about the adoption and content of a new source of law during the process of its publication. We used information from scientific papers, journal article (legal, sociological, cinematic) and few periodical,<sup>2</sup> which were most often available in English. The information was fragmented, and our goal was to consolidate and compare it and find similar features in different legal systems that would prove that this was not just a random phenomenon. Our ambition was to highlight the global and universal nature of film as a means of influencing lawmaking, so we decided to give examples from three major legal systems:<sup>3</sup> Anglo-American; Continental; and Religious and Traditional.

As far as the selection of the films themselves is concerned, the deciding factor was not the time of their creation (the oldest one was made in 1966 and the newest one in 2011), but rather their social and global significance. The selected films have also been acclaimed beyond the borders of their country of origin, which has contributed to their popularity and importance. In this article, we also provide other examples of films that have influenced norm-setting, but we will not go into detail about them here. As far as the selection of countries is concerned, we methodologically chose two films from a major legal system and two films from a concrete legal order. The quality of the film was the primary deciding factor, with the countries being the secondary one. We chose globally known films so that readers could find them more easily and form their own opinions about their content, quality and their influence on the law-making process. As for the selection of two films, we felt that this was a sufficient sample to confirm that this was not a purely random event, and the reasons for selecting a different legal system from

---

<sup>2</sup> It was huge event when film had influence on lawmaking process. As example is article from Guardian about female genital mutilation: Maggie O'Kane - Patrick Farrelly FGM: 'It's like neutering animals' – the film that is changing Kurdistan. Available at: <https://www.theguardian.com/society/2013/oct/24/female-genital-mutilation-film-changing-kurdistan-law> (accessed on 10.10.2025).

<sup>3</sup> There are several concepts for dividing legal systems or legal families. We have opted for the Eurocentric theory of approach to major legal systems, which was also developed by the most prominent Czechoslovak legal theorist, Viktor Knapp.

each of the three major legal systems pointed to the global nature of the phenomenon. All these factors influenced the final selection of the analysed films.

As famous American film critic, author, publisher, and educator Monaco observed, film is an integral part of our culture. It represents an expansive and far-reaching network of interconnected opposites: between filmmaker and subject, film and viewer, establishment and avant-garde, conservative and progressive aims, psychology and politics, image and sound, dialogue and music, genre and auteur, literary and cinematic perception, signs and meanings, culture and society, form and function, stigmas and paradigms, image and event, realism and expressionism, language and phenomenology (Monaco, 2006, pp. 430-431). Film, he writes, is "a never-ending set of codes and sub-codes that raises fundamental questions in the relation of life to art and reality to language" (Monaco, 2006, p. 431). The combination of law and film therefore appears to be an ideal way to educate the public about the most fundamental aspects of law—an area that is often extremely complex and difficult for laypersons to fully understand.

Films can be classified as an epistemic source of law that inform viewers about a wide range of legal concepts, including legal facts, legal institutions, the practice of the legal profession, the course of legal proceedings, sources of law, legal subjects, and numerous other phenomena associated with the legal system. At the same time, films are non-legal sources of law and must therefore be approached with critical caution. In a few exceptional cases, films have successfully exposed the existence of serious social issues and became an instrument that can activate society, which can subsequently influence lawmaking. We agree with the observation made by D. H. J. Hermann, who noted that "... we live in a visual age. Films capture our interest and imagination. The viewing of films about lawyers, the legal system, law cases or legal issues provide valuable insight into the way these matters are understood in contemporary society." (Hermann, 1998, p. 330).

## 2. RELATION BETWEEN MOVIE AND LAW – DIMENSIONS OF THE RELATIONSHIP

The connection between law and film unfolds on multiple levels that often intersect and influence each other. According to O. Kamir - "*This framework defines three distinct perspectives on law-and-film that, I believe, capture much of the law-and-film enterprise. These perspectives rely on three fundamental premises: that some films' modes of social operation parallel those of the law and legal system; that some films enact viewer-engaging judgment; and that some films elicit popular jurisprudence.*" (Kamir, 2005, p. 255). On the basis of this, three dimensions of the relationship between law and film can be identified:

1. **Film as a Component of the Social Order.** Film as part of the social order that influences the development of the legal system. This relationship will be discussed in detail in the subsequent sections of this paper.
2. **Film as a tool for shaping audience perceptions.** Viewers' opinions may be influenced deliberately through propaganda or censorship, in which the state plays an active role. Alternatively, opinions may be shaped through the creative expression of individual filmmakers without direct state intervention.
3. **Film as a source of legal information, a subject of scholarly inquiry, and an educational tool.** Some scholars refer to this area of study as the "*Law and Cinema*" movement.

From the perspective of the **first dimension** of the relationship between film and law, the two concepts interact as integral parts of broader social dynamics. *"The law and cinema discourse rests on the observation that both the law and the cinema reside in the same social domain—culture—and therefore each practice influences (and is influenced by) the other."* (Reichman, 2008, p. 460). Through the narratives presented in films, society articulates its responses to a wide range of issues—both within the state or even outside its borders. Law, in turn, interacts with film in various ways: through the production of educational or promotional material, the censorship of inappropriate content (a practice particularly characteristic of totalitarian regimes), or through legislative responses to social problems highlighted by film. *"Today cinema focuses on realistic issues and matters rather than depicting impractical and unrealistic stories and it plays a major role in portraying certain fundamental social and political issues which not only entertains the masses but also educates them."* (Mukherjee, 2014, p. 229). In this way, the movies become a strong agent of social change and, under specific conditions, instruments capable of contributing to legal reform.

There are several pathways through which the interaction between law and film occurs. *"Films have a unique way of touching people's hearts and allowing them to employ their emotions in the processes of seeing, listening, understanding, discussing and analysing. Analysis of film from a new perspective is an exciting, intriguing and challenging experience for students, who take it home with them and share it with families and friends, thereby continuing its work. The intersection of law and film adds a personal aspect to professional legal training, making it more human, specific and meaningful."* (Kamir, 2005, p. 275). The legal ideas presented in a film often begin to circulate within close social circles—among family members, colleagues, and acquaintances—and subsequently expand through media coverage, eventually engaging a broader segment of society. *"Film and law are compared as epistemic systems, formidable social practices that, when combined, are exceptionally effective in defining what audiences think they know, what they believe they should expect, and what they hope for in a society that promises ordered liberty."* (Silbey, 2017, p. 16). The cultural phenomenon and the legal system coexist and, in many respects, complement perfectly one another. Law serves as a compelling subject matter; the courtroom provides a dramatic and lucrative setting; and legal professionals frequently appear as central figures in popular films and television series.

The interconnection between film, law and social reality can, in certain cases, be intentional and strategically directed. One such example is the 2016 Netflix documentary *13<sup>th</sup>*. *"In this thought-provoking documentary, scholars, activists and politicians analyze the criminalization of African Americans and the U.S. prison boom."* (Netflix, 2016) The authors of this film had a clear goal from the beginning. *"As didactic, documentaristic, and to a certain extent, "imperative" aim of 13<sup>th</sup>, reflects America's urgent need to raise public awareness, which is exactly what its mainstream director, whose films go beyond militant cinema, does."* (Festa, 2016, p. 242). The movie became a tool to provoke a social discourse that has the potential to initiate a process of social and, consequently, legal reform.

From the perspective of the **second dimension** of the law–film relationship, the focus lies on influencing the views of the audience. As V. Piturro wrote: *"The films make a difference because of the film itself, the promotion of the film, the film festivals in which it is shown, the online campaign surrounding the film, and the activism which follows. It is what Henry Jenkins calls the "convergence culture," where old and new media intersect in ways that make active participants out of the consumers. The result is a more socially active consumer who engages with other consumers to produce a final product – real social action through the formulation of a new public sphere."* (Piturro, 2014, p. 28). This type of social

activation is often initiated by cinematic works. In such cases, we refer to the indirect influence of film on the transformation of legal norms. This approach is considerably more common than direct influence. First, it is necessary to draw public attention to serious social problems through the film. As public debate intensifies, pressure on legislators increases, ultimately leading to the desired legal change.

Sherwin also marked movies as "cultural sources also may be mined for their pedagogic and prescriptive content, whether as sites of popular resistance to legal authority, mass cultural manipulation, or as exemplars of new forms of affirmation and utopian striving." (Sherwin, 2009, p. 256). The combination of moving image and possesses enormous potential. In a short amount of time, it is possible to effectively inform and influence an almost unlimited number of viewers and at the same time influence their opinion. Given the influence that film has on the formation of legal culture and individuals' views, it can be argued that "film, as a semiotic system, creates meanings and simultaneously teaches viewers to understand these meanings, we can conclude that a film conceived in the spirit of the doctrine of legal realism provides its recipients with the opportunity to reconsider their view of the law and redefine its meaning." (Mészáros, 2018, p. 285). In this way, film not only reflects the law but also has the potential to actively reshape how law is perceived and interpreted by society.

From the perspective of the **third dimension** of the law–film relationship, the scientific and educational potential of film comes to the fore. A distinct category within this context is represented by so-called legal films or courtroom dramas, which offer insight into the inner functioning of the judiciary. "Law and legal film have both good and bad effects on each other. There have been instances when legal cinema has persuaded decision-makers and policymakers to evaluate the need of enforcing laws based on the topic depicted in the film. Other times, lawful film may face harsh criticism for deviating from the country's overall legal framework and exercising too much artistic freedom. It is essential to create a balance between the two, allowing cinema to promote constructive debates and the revision of societal rules." (Batar, 2021, p. 366). Law is a complex system composed of diverse sources, situated within different legal orders that often come into contact—and sometimes conflict—at the international level. Films allow us to explore different legal cultures and help us grasp at least the basic and fundamental differences between them [*The Ballad of the White Cow* (2020, Iran/France) offers a glimpse of the judicial process in Iran, *25 Years of Innocence* (2020, Poland) reveals the background of one of the significant miscarriages of justice in Poland, *The Life of David Gale* (2003, USA/Germany/UK) gives us a hint of the struggle for the abolition of the death penalty in the state of Texas in the USA...].

As Sherwin wrote: "Films not apparently about law may provide insights into analytical methods, social values, and community aspirations that lie at the heart of the legal mind and culture. The quest for justice, and how it goes astray, the clash between vengeance and mercy or between the formality of rules and the free play of equity, the struggle to solve a mystery amid the infinite complexities of human motivation and the recursive contingencies of time and circumstance – each of these themes has a place in the legal process." (Sherwin, 2009, p. 241). Law, in its complexity and intricacy, is often far removed from the common man, despite the enduring old legal principle that "ignorance of the law is no excuse." However, through films, the law is humanised and brought closer to the public. Insights into the "merry-go-round" legal process provide a valuable addition to any film or television series.

### 3. WHEN MOVIES "SAVE LIVES AND ARGUE FOR FAIR WORKING CONDITIONS": A CONTINENTAL LAW PERSPECTIVE

In this section of the paper, we have selected two films from different parts of Europe that represent integral elements of the continental legal system. The first is the Polish film *A Short Film About Killing* (1987), directed by the renowned Krzysztof Kieślowski, and the second is *Rosetta* (1999), a Belgian-French co-production by the Dardenne brothers.

There are two versions of *A Short Film About Killing*: a shorter version (57 minutes, 1990) produced as part of the television series *Decalogue*, and a longer version (84 minutes, 1987) released as a regular feature film. As Dorota Ostrowska notes: "*The film focused on a young man, Jacek (Miroslaw Baka), who brutally murders a taxi driver Gan Tesarz at the outskirts of Warsaw. He is caught, sentenced to death and executed. The triangle made up of the perpetrator of crime and the victim is completed by a figure of a young lawyer (Krzysztof Globisz) whose first ever professional job is to defend the killer.*" (Ostrowska, 2010, p. 305). Both versions of the movie had a major impact in Poland and significantly influenced public and governmental opinions towards the death penalty.

As director of this movie Krzysztof Kieslowski said: "*I think I wanted to make this film precisely because all this takes place in my name, because I'm a member of this society, I'm a citizen of this country, Poland, and if someone, in this country, puts a noose around someone else's neck and kicks the stool from under his feet, he's doing it in my name. And I don't wish it. I don't want them to do it. I think this film isn't really about capital punishment but about killing in general. It's wrong no matter why you kill, no matter whom you kill and no matter who does the killing.*" (Stok, 1993, p. 160). As it turned out later, the voice of the director and his movie briefly became the voice of the entire Polish society.

It's safe to say that this film struck a precise and sensitive nerve. It appealed to the Christian morality deeply rooted in Polish society and directly referenced one of the Ten Commandments: "Thou shalt not kill". "*State is represented here as a rational machine, very able and competent, which kills in the name of the society and supposedly in order to protect it. It is only the young lawyer who disagrees with the ruling of the court but even he cooperates with the penal system.*" (Ostrowska, 2010, p. 318). The viewers were thus placed in the position of direct participants in the act of death penalty - not as detached uninvolved subjects, but as moral agents. Responsibility for the death of the executed no longer rested solely within the abstract apparatus of state power or its representatives but extended to every citizen who had legitimised those state authorities through democratic elections. Suddenly, the citizen's sense of individual accountability for each death sentence became far closer and more personal and alarming. This fundamental contradiction created a tension with Christian values that hold a strong tradition in Poland.

The film premiered in Poland at the time of totalitarianism, when the state power was already gradually weakening. The death penalty is a powerful and popular tool in totalitarian state regimes to deal with opponents of the regime, while spreading fear among ordinary citizens. "*Film was released at a time of change across Eastern Europe and at that time debate had arisen in Poland about the death penalty. The film secured a place in the public discourse supporting the abolitionist perspective. A year later, a five year moratorium on capital punishment was introduced, which later became a permanent abolition. This film is therefore an example of how film can play an important role in public debate and reform.*" (Bennett, 2012, p.15-16). In this context, it can be argued that the film contributed to saving lives from a cruel death by firing squad and ultimately played a role in the complete abolition of the death penalty in Poland.

The next film and its impact on the change of written law that we have chosen to look at is set in Western Europe in Belgium and addresses the issue of labour law, specifically the working conditions of underage workers. The film *Rosetta*, which premiered in 1999, won the prestigious Palme d'Or for Best Film at the Cannes Film Festival that same year, while Emilie Dequenne received the award for "Best Actress". This recognition gave the film resonance far beyond Belgium's borders. *"The film centers on Rosetta's urgent desire – and need – to find paid work so that she can support her mother and herself. ...She works at a minimum wage in precarious jobs that do not even afford unemployment benefits because she is fired when her probation period comes up, and yet she cannot not accept these jobs, because she needs her wages to care for her mother, whose alcoholism puts not just economic, but also emotional stress on the young woman."* (Knauss, 2016, p. 53-54). At just 17 years old, Rosetta must face the harsh reality of life in an unfairly set coercive environment that undoubtedly discriminates against juvenile employees. The film serves as a social probe, a critique of an unfair system and a socio-cultural appeal to correct a serious legal and ethical issue.

The movie addressed the real problem of discrimination against underage workers in Belgium. At the time of its premiere, the issue was already under debate in the local parliament. It can be argued that the film significantly contributed both to raising public awareness and accelerating the legislative process. According to Elsaesser: *"Film that raises the issue of the boundary between thought experiments and social reality: how are the consequences of a thought experiment carried over into social reality? For Rosetta gave rise to the Plan Rosetta, a law adopted by the Belgian legislature to help just-out-of-school teenagers their first employment, which suggests that a film can cross the boundary and produce real social consequences."* (Elsaesser, 2019, p. 79). Shortly after the release of the film, the Belgian Parliament enacted significant legislative changes regarding the employment of minors. In his book, Elsaesser adores the film and perhaps gives it too much credit. Legislative changes in Belgium had already begun before the film was released, but the publication is also part of the legislative process. The film *Rosetta* contributed to the huge promotion of the new law, and, thanks to the film, many Belgian citizens learned about its existence, so its influence on the law-making process cannot be overlooked.

#### **Influence on lawmaking process in Continental legal system (short summary):**

- 1. *A Short Film About Killing* (1987, Poland, winner of Prix du Jury- Cannes Film Festival)** - significant impact on the public opinion about immorality of the death penalty and indirect impact on the subsequent legislative change approved by the Polish parliament - A moratorium on executions was put in place in December 1989. Capital punishment was officially abolished in Poland in 1997.
- 2. *Rosetta* (1999, Belgium, winner of Golden Palm- Cannes Film Festival)** - the film facilitated the adoption of legislative changes and promoting them to the public - the framework for a "youth employment plan" in Belgium. It was introduced by the Belgian Minister for Employment, Laurette Onkelinx in November 1999 with the aim of promoting the employment of young people under the age of 25 in Belgium.

#### 4. WHEN MOVIES "FIGHT FOR MORAL VALUES": THE PERSPECTIVE OF THE ANGLO-AMERICAN LEGAL SYSTEM

One of the first film to have a major impact on changing the prevailing law in the Anglo-American legal system is the controversial British movie *Alfie* (1966). The British Board of Film Classification provides a detailed report<sup>4</sup> on the 1965 film, including a statement by then-Director John Trevelyan, who described it "as a picture of an immoral and amoral young man but we all felt it was very moral in its message and would show young people that 'sleeping around' produces nothing of permanent value." (British Board of Film Classification, 1965). Public reaction to the film followed quickly, prompted by its striking depiction of British society at the time. The film sparked a nationwide debate about the need to ease the UK's overly restrictive abortion laws. This culminated a year after the film's premiere in the passage of the Abortion Act 1967<sup>5</sup> (Meteňkanyč, 2020, p. 210). In the 1960s, it was unusual for a Conservative-led British parliament to take such a bold and progressive step as enacting the Abortion Act. The film started extreme social pressure, which is why we included it here as a clear example of the indirect influence of cinema on lawmaking process.

Nearly 60 years since the release of the film *Alfie*, the issue of abortion remains ever-present, with the on-going clash between the pro-life and pro-choice camps continuing to unfold across legal, political and cinematic arenas. "While conservative proponents of the fetus' right to life fight against abortions at any (or almost any) circumstances, and while liberal proponents of the women's freedom of choice fights for her right to freely decide over her body, evictionists offer a solution which, as they say gives the woman considerable freedom over her body and the same time respects the principal value of the life of fetus." (Turčan, 2020, p. 184). And this debate is still alive and well at the academic, social, film and legal levels. Evidence of this is recent films that have processed the issues of abortion as *Right to Choose* (Czech Republic, 2024), *April* (Italy, France, Georgia, 2024), *In the Company of Women* (Spain, 2023), *Ninjababy* (Norway, 2021), *Happening* (France, 2021), *Never Rarely Sometimes Always* (USA, UK, 2020) and many others.

The plot of the second film from this the Anglo-American legal system is set in the USA, specifically in Harlan County, a region in southeastern Kentucky. The film, directed by Barbara Kopple, is aptly titled Harlan County U.S.A. Movie "HARLAN COUNTY, USA is about the strike. We don't learn much about what it feels like to work beneath the earth or get much sense of the texture of daily life lived in the shadow of the mine. The film is not an ethnographic study of a quaint community of mining folk. What we do get are images of struggle: picket lines, meetings, face-to-face interviews with UMW militants—which is just about everybody." (Biskind, 1977). Impact of the movie and other important events (Bahr, 2024):

1. "The Brookside mine strike and the events depicted in Harlan County, USA had a lasting impact on the labor movement in the United States.
2. The documentary helped to raise awareness about the struggles of working-class Americans and the importance of labor activism in securing fair treatment and better conditions.

<sup>4</sup> Report about movie *Alfie* is available at: <https://www.bbfc.co.uk/education/case-studies/alfie> (accessed on 10.4.2025).

<sup>5</sup> The original text of the Abortion Act 1967 is available at: <https://www.legislation.gov.uk/ukpga/1967/87/contents/enacted> (accessed on 27.11.2025).

3. *The miners' victory at Brookside served as an inspiration to other workers and activists, demonstrating the power of solidarity and collective action in the face of corporate opposition.*"

The film transcended the Harlan County in southeastern Kentucky and had a broader impact on the improvement of the working conditions in various industries throughout the United States. Notably, the miners' strike itself, which lasted 13 months during 1973-1974, was significant in labour history. The film *Harlan County U.S.A.*, which captured this struggle, received in 1976 the most important film prize, the Academy Award (Oscar) for Best Documentary, a recognition that significantly contributed to its widespread popularity. There was a huge wave of activism for improved working conditions, which resulted to several major legislative changes. "*The year 1976 was marked by a sharp upturn in the activity and consciousness of the workers' movement. The year saw many long and militant strikes, including more than 3,000 in the first half of the year alone.*" (Saba, 1977). Subsequently, major legislative changes<sup>6</sup> were introduced across the United States next years.

In both the UK and the US, there are several similar cases where film had influence on lawmaking process or on individual cases, when the failure of the judicial system occurred. One of the most prominent examples is the film *Let Him Have It* (GB, 1991), which deals with one of the most infamous miscarriages of justice in British history. The film depicts the story of Derek Bentley, a 19-years old who was executed back in 1953. Upon its release in 1991 film sparked a huge social controversy, leading to the case being reopened and Bentley's posthumous rehabilitation 2 years after the film's release. Interestingly, the inscription on his tombstone reads, "*Here lies Derek William Bentley A victim of British justice.*" From the USA comes a powerful contribution in the form a documentary on the reconstruction of the investigation into the murder of a police officer, which highlights a fatal failure of justice so skilfully that it resulted in the acquittal of a man unjustly sentenced to death. The movie *The Thin Blue Line* (USA, 1988) by Errol Morris had a direct impact on the re-opening of the case of Randall Dale Adams, who had been sentenced to death in 1976 for shooting of Dallas police officer Robert W. Wood. As a result of movie, Adams was subsequently ordered to be released following a habeas corpus hearing in 1989. Although neither case resulted in changes to legal norms, we can conclude that identifying and addressing miscarriages of justice always affects the legal system. It also shapes the perception of the judicial system as a fallible mechanism, which, in turn, prompts measures to prevent similar cases from occurring in the future.

#### **Influence on lawmaking process in Anglo-american legal system (short summary):**

1. ***Alfie* (1966, the United Kingdom, winner of Prix du Jury- Cannes Film Festival)**- had great impact on the public opinion and started social debate about abortion in the UK. After huge social pressure, Abortion Act of 1967 was subsequently adopted by the British Parliament.
2. ***Harlan County U.S.A.* (1976, USA, Academy Award winner)** – film was part of labour conflict, strike events and mine-safety failures, which led legislators at the federal level to adopt several labour regulations and improvement of the working conditions over the next few years.

---

<sup>6</sup> About significant changes in year 1977 in the USA see Bond (1977).

## 5. WHEN MOVIES SAVE 'WOMEN'S FACES AND BODIES': THE PERSPECTIVE OF RELIGIOUS AND TRADITIONAL LEGAL SYSTEMS

From the perspective of Religious and Traditional legal systems, we have chosen two documentaries that have played a crucial role in influencing legal change. In both cases, these documentaries depict significant human rights interventions. *"Documentary film has the power to both inform and induce social action in a globalized society, using the very tools of globalization to formulate public spheres among disconnected publics."* (Piturro, 2014, p. 25). Documentaries captures reality in its raw, unchanged form, documenting real situations and outlining social problems that must be addressed. They are often used as propaganda tool to influence public opinion, such as the 1940 movie *The Eternal Jew* created in Nazi Germany. In some cases, documentaries can even go beyond national borders and influence the law in an entire region.

The first chosen movie from religious and traditional legal system is called *Saving face* (2011) played a significant role in promoting the adopted law and in providing assistance to victims of these heinous acts. *"Saving Face chronicles the lives of two acid-attack survivors in Pakistan, Zakia and Rukhsana, as they attempt to bring their assailants to justice and move on with their lives. The women are supported by NGOs, skilled doctors, and empathetic policymakers such as the Acid Survivors Foundation-Pakistan, plastic surgeon Dr. Mohammad Jawad who returns to his home country to assist them, attorney Ms. Sarkar Abbass who fights Zakia's case, and female politician Marvi Memon who advocates for new legislation."* (Sterling, 2019, p. 2). The film sparked global interest in the victims of so-called acid violence in Pakistan after it received the Oscar for Best Short Documentary in 2012.

Acid violence is the deliberate use of acid to attack another human being. It is estimated that roughly 80 % of victims are women, with nearly 40 % being under the age of 18. *"The Pakistani Parliament passed a landmark law – to give life sentences to those found guilty of acid throwing. The film shows clips of the arguments being made in the Parliament and the victorious sponsor of the bill after it is passed. Zakia then begins working with a lawyer, an activist for women's causes, and they bring Zakia's husband to court. It would be the first test of the new law in all of Pakistan. After many delays and court maneuvering, they finally get a verdict. The court rules in favor of Zakia, and her husband receives two life sentences."* (Piturro, 2014, p. 32). In this instance, the film was able to contribute to achieving individual justice for one of the documentary's protagonists. Through its mere existence, it has directly or indirectly influenced the fate of many women in Pakistan who have been, or potentially could have been, victims of horrific acid attacks.

The second film we've focused on addresses the widespread problem of female genital mutilation (FGM), which *"is primarily practised in about 30 countries in Africa and the Middle East. It is also practiced in some countries in Asia and Latin America and among communities coming from these regions. Although it is illegal in the EU and some member states prosecute even when it performed outside the country, it is estimated that about 600,000 women living in Europe have been subjected to FGM and a further 180,000 girls are at a high risk in 13 European countries alone."* (European Parliament, 2020). The film that aimed to change this situation is called *Handful of Ash*.<sup>7</sup> It focuses on female genital mutilation in the Kurdish area of Garmian in northern Iraq, where research from 2005 indicated that around 60% of women and girls have been subjected to genital mutilation.

*"A Handful of Ash documents the stories of women and female genital mutilation in Kurdish northern Iraq. The movie evolved from the work of the relief organization WADI,*

<sup>7</sup> The film is available at: <https://www.womensvoicesnow.org/films/handful-of-ash>.

which combats female genital mutilation in northern Iraq. To raise awareness in European publics to the problem of FGM in Iraqi-Kurdistan, filmmaker Nabaz Ahmad created a documentary, in which Kurdish women vividly describe their experiences. The movie approaches the subject respectfully and carefully, with expressive pictures of a simple life in a remote landscape." (Women's Voices Now. *Handful of Ash* Synopsis). The filmmakers spent almost a decade interviewing women and men about this horrible practice carried out in this region. The film was screened directly for members of the Kurdish parliament, who responded by declaring female genital cutting illegal. However, despite legislative changes, it has become apparent that many tribes in this geographic region still practice this inhumane interference with women's bodies.

**Influence on lawmaking process in Religious and Traditional legal system (short summary):**

1. ***Saving Face* (2011, Pakistan, Academy Award winner)** - The film won Academy Award shortly after the change in legislation, specifically after the adoption of Section 336A and Section 336B in the Pakistan Penal Code.<sup>8</sup> Film helped with implementation of these legislative changes, informed citizens and helped victims of acid attacks seek help.
2. ***Handful of Ash* (2005, Kurdistan region in northern Iraq, an official selection of the 2014 WVN Online Film Festival)** - initiation of legislative changes after and direct impact on lawmaking process. Members of the initiative promoting the ban on FGM through film wrote: "In 2010 with the support of Human Rights Watch we presented joint findings on FGM which put a lot of pressure on the Kurdish Regional Government" (Wadi, 2022). After the film presentation "was shown in the Kurdish parliament, it had a profound effect on the lawmakers." (O'Kane and Farrelly, 2013) The Iraqi Kurdistan parliament passed by a large majority legislation banning the practice of FGM in June 2011 through Law No. 8 of 2011 the Act of Combating Domestic Violence. Following this success, the film *Handful of Ash* became a global phenomenon and serves in the fight against FGM around the globe.

## 6. CONCLUSION

Movies are a global sensation that can shape public opinion with their content and, in some cases, even influence lawmaking. We have attempted to demonstrate this global influence through a comparative method, selecting two cases from each of the major legal systems. While many more examples could be cited, we have selected two films to discuss in more detail for the sake of comparison. We also sought to showcase the diversity of themes explored in these films. In *Harlan County, U.S.A.*, the focus was on the right to strike and the terrible working conditions of the miners; in *Alfie*, it centred the woman's right to freely choose to terminate a pregnancy; in *Rosetta*, the issue was equal conditions for underage workers; the movie *A Short Film About Killing* highlighted the immorality of the death penalty; *Saving face* addressed the problem of revenge through acid attacks on woman's face and *A Handful of Ash* addressed the practice of female genital mutilation in the Kurdish part of northern Iraq. All the themes touch on important fundamental rights and freedoms, which are most often guaranteed by constitutions,

---

<sup>8</sup> For more details, see changes in Pakistan Penal Code: [https://www.na.gov.pk/uploads/documents/1306730721\\_572.pdf](https://www.na.gov.pk/uploads/documents/1306730721_572.pdf) (accessed on 27.11.2025).

international treaties and, not least, domestic legal norms, whether in the form of normative legal acts, precedents or legal customs.

In this article we have provided several examples of when movies had impact on lawmaking. It must be noted that this is not a common and frequent phenomenon. In fact, in our view, there must be a specific set of circumstances that make such a situation possible:

1. The theme addressed in the film is relevant and up to date, dealing with a social problem that persists and causes negative phenomena in society.
2. The topic has the potential to provoke a strong social reaction, or the film is specifically created for the presentation to representatives of the legislative power.
3. The events depicted in the movie align with reality. While it's not necessary for a film to be exclusively documentary (*Harlan County, U.S.A., Saving face...*), fiction stories can also strongly influence the public opinion (*Alfie, Rosetta, Short Film about Killing...*).
4. The film offers a genuine solution to a social problem and leads to open public debate, raises awareness of key issues, or contributes to increasing the legitimacy or social acceptance of changes in existing law, either directly or indirectly. Direct influence is very rare and much more often film is just one of the social attributes that lead to changes in the law.
5. The film itself is crafted at an excellent artistic level, as evidenced by its international success and numerous prestigious film awards. This brings it to the attention of a broader audience both at home and abroad.

In the Slovak Republic, an interesting example of a film influencing legal change is the 2017 film *Kidnapping* (Slovakia, 2017), directed by Mariana Čengel Solčanská. In this case, the film was one of the factors that contributed to the abolition of the controversial Mečiar's amnesties. As a result of the social and media pressure, which was triggered by the film, the abolition of the "Mečiar's amnesties" was constitutionally enshrined, and the Constitutional Court of the Slovak Republic took a position on it. This film was intended to address the injustices of the past and to shed light on the events of the politics of the 1990s for the current generation. In this case, there was an indirect effect on changing legal norms.

The main goal of this paper was to verify the hypothesis: "*Films, as an epistemic source of law, have the ability to directly or indirectly influence various stages of the lawmaking process when certain conditions are met.*" Given the relevant examples we successfully identified and justified within the paper, we conclude that the hypothesis has been confirmed. Considering the chosen scientific methods, it became clear that this is not just a regional anomaly, but that films can influence on the law-making process in each of the major legal systems. We have also identified five specific circumstances that enable films to have potential to impact on lawmaking process. It is important to note that films act as a trigger, activating societal debate, and only the subsequent public and media discourse leads to real changes in lawmaking process.

Each of the selected films had an impact on the law-making process at various stages. In some cases, the film was the catalyst for legislative changes (*Handful of Ash*). In others, it premiered during the ongoing legislative process and contributed to its successful completion (*Rosetta, Alfie*). The film also premiered shortly after the adoption of legislative changes, which were reflected in its content. In this way, it contributed to the popularisation of the law and subsequently facilitated the application of legal norms (*Saving Face*). Sometimes it was part of larger social events that led lawmakers to adopt several legislative changes over a longer period (*Harlan County, U.S.A., Short Film about*

Killing). In some cases, films have been able to influence specific cases, reopening legally terminated cases and saving a person from the death penalty (*Thin Blue Line*) or at least securing the rehabilitation of a victim of a miscarriage of justice (*Let Him Have It*), although we did not discuss this effect in more detail in the article. The range of their effects is truly diverse, and they have entered various stages of the law-making process, from the preparation of the legislative proposal, through the procedure on the approval itself, the popularisation of legal norms during the publication, the facilitation of the application of these norms, to the redress of damages committed in the past.

#### BIBLIOGRAPHY:

- Bahr, B. (2024). *Harlan County, USA – Narrative Documentary Production*. Available at: <https://library.fiveable.me/narrative-documentary-production/unit-10/harlan-county-usa/study-guide/t4Hjqfoaq8BgLS5> (accessed on 20.4.2025).
- Batar, S. (2021). The Impact of Legal Cinema on Ancient Law Reform. *Asian Journal of Research in Social Sciences and Humanities*, 11(10), 366-371. DOI: 10.5958/2249-7315.2021.00117.9
- Bennett, J. (2012). A Short Film About Killing (1988). *Prison Service Journal*, 199, 13-16.
- Biskind, P. (1977). "Harlan County, USA: The miners' struggle." In *Jump Cut*, 14, 3-4. Available at: <https://www.ejumpcut.org/archive/onlinessays/JC14folder/HarlanCty.html> (accessed on 20.4.2025).
- Bond, D. T. (1977). State labor legislation enacted in 1976. *Monthly Labor Review*, 100(2), 25-38. Available at: <https://www.jstor.org/stable/41842043> (accessed on 25.11.2025).
- Elsaesser, T. (2019). *European cinema and continental philosophy: Film as thought experiment*. New York – London: Bloomsbury Publishing Inc.
- European Parliament (2020). *Female genital mutilation: where, why and consequences*. Available at: <https://www.europarl.europa.eu/topics/en/article/20200206STO72031/female-genital-mutilation-where-why-and-consequences> (accessed on 23.4.2025).
- Festa, B. M. (2016). Netflix and the American Prison Film: Depictions of Incarceration and the New Prison Narrative in Ava DuVernay's 13<sup>th</sup>. *Hungarian Journal of English and American Studies*, 28(1), 221-249, <https://doi.org/10.30608/HJEAS/2022/28/1/9>
- Hermann, D. H. J. (1998). The Law in Cinema: An Emerging Field of Study. *NYLS Law Review*, 42(1), 305-330.
- Kamir, O. (2005). Why 'Law-and-Film' and What Does it Actually Mean? A Perspective. *Journal of Media & Cultural Studies*, 19(2), 255–278.
- Knauss, S. (2016). Visionary Critique: Gender, Self and Relationship in Rosetta and Two days, one night. *Journal for Religion. Film and Media*, 2(2), 45-66, <https://doi.org/10.25364/05.2:2016.2.4>
- Mészáros, T. (2018). Právna realita na filmovom plátnu [Legal reality on the silver screen]. *Kino-Ikon*, 22(2), 272-286.
- Meteňkanyč, O. M. (2020). Právo na život a ochranu nenarodených detí verzus právo na súkromie a slobodné rozhodnutie ženy vo veci prerušenia tehotenstva [The right to life and protection of unborn children versus a woman's right to privacy and free choice in matters of termination of pregnancy]. In Mészáros, T. and Meteňkanyč, O. M (eds.), *Právo vo filmovom umení. Osobitná časť [Law in film art. Special section]* (pp. 186-217). Šamorín: Heuréka.

- Monaco, J. (2006). *Jak číst film: Svět filmů, médií a multimédií [How to Read a Film: Movie, Media, Multimedia]*. Praha: Albatros nakladatelství. New York: Oxford University Press.
- Mukherjee, T. (2014). Emergence of Cinema as a strong Tool of Social Change. *Global Journal for Research Analysis*, 3(4), 229-233.
- O'Kane, M. and Farrelly, P. (2013). FGM: 'It's like neutering animals' – the film that is changing Kurdistan. Available at: <https://www.theguardian.com/society/2013/oct/24/female-genital-mutilation-film-changing-kurdistan-law> (accessed on 10.10.2025).
- Ostrowska, D. (2010). A Short Film About Killing: Debates on Death Penalty in Socialist Poland. In Riber Christensen, J. and Toft Hansen, K. (eds.), *Fingeraftryk: studier i krimi og det kriminelle (Festskrift til Gunhild Agger)* (pp. 305-321). Aalborg: Aalborg University Press.
- Piturro, V. (2014). Documentary Film Rhetoric: Saving Face and the Public Sphere. *Journal of Media, Communication and Film*, 2(1), 25-37, Available at: <https://iafor.org/archives/journals/iafor-journal-of-media-communication-and-film/10.22492.ijmcf.2.1.03.pdf> (accessed on 25.11.2025).
- Reichman, A. (2008). The Production of Law (and Cinema): Preliminary Comments on an Emerging Discourse. *Interdisciplinary Law Journal*, 17, 457-506. Available at: <https://ssrn.com/abstract=3561586> (accessed on 25.11.2025).
- Saba, P. (1977). 1976 in the Labor Movement: A Year of Activity and Growing Consciousness. *The Call*, 6(1). Available at: <https://www.marxists.org/history/erol/ncm-3/ol-76-labor.htm> (accessed on 20.4.2025).
- Sherwin, R. K. (2009). Imagining Law as Film (Representation without Reference?). In Sarat, A., Anderson, M. and Frank, C. O. (eds.), *Law and the Humanities: An Introduction* (pp. 241-268). New York: Cambridge University Press.
- Silbey, J. (2017). American Trial Films and the Popular Culture of Law. In *Northeastern Public Law and Theory Faculty Research Papers Series No. 321*. Available at: [https://scholarship.law.bu.edu/faculty\\_scholarship/1385/](https://scholarship.law.bu.edu/faculty_scholarship/1385/) (accessed on 25.11.2025).
- Sterling, F. (2019). Saving face Viewer's Guide. Available at: [https://www.wmm.com/uploads/2019/02/savface\\_guide.pdf](https://www.wmm.com/uploads/2019/02/savface_guide.pdf) (accessed on 23.4.2025).
- Stok, D. (1993). *Kieslowski on Kieslowski*. London – Boston: Faber and Faber.
- Turčan, M. (2020). Right to life and freedom of choice according to evictionism: Christian critique. *Communio Viatorum*, 62(2), 184-207.
- Wadi (2022). A Handful of Ash: The Campaign to eliminate Female Genital Mutilation in Iraqi Kurdistan. Available at: [https://wadi-online.org/wp-content/uploads/2022/02/fgm-brochure\\_05.pdf](https://wadi-online.org/wp-content/uploads/2022/02/fgm-brochure_05.pdf) (accessed on 10.10.2025).
- British Board of Film Classification (1965). *Alfie rating*. Available at: <https://www.bbfc.co.uk/education/case-studies/alfie> (accessed on 12.4.2025).
- Netflix (2016). *13<sup>th</sup>*. Available at: <https://www.netflix.com/sk-cs/title/80091741> (accessed on 10.4.2025).
- Section 336A and Section 336B in Pakistan Penal Code. Available at: [https://www.na.gov.pk/uploads/documents/1306730721\\_572.pdf](https://www.na.gov.pk/uploads/documents/1306730721_572.pdf) (accessed on 10.10.2025).
- The UK Parliament (1967). *UK Public General Act 1967 chapter 87 (Abortion Act 1967)*. Available at: <https://www.legislation.gov.uk/ukpga/1967/87/contents/enacted> (20.4.2025).

Women's Voices Now. *Handful of Ash* Synopsis Available at:  
<https://www.womensvoicesnow.org/films/handful-of-ash> (accessed on  
23.4.2025).

**FILMOGRAPHY:**

- 13th* (Dir. A. DuVernay, 2016).  
*25 Years of Innocence* (Dir. J. Holoubek, 2020).  
*A Short Film About Killing* (Dir. K. Kiesłowski, 1987).  
*Alfie* (Dir. L. Gilbert, 1966).  
*April* (Dir. D. Kulumbegašvili, 2024).  
*Handful of Ash* (Dir. N. Ahmad, 2005).  
*Happening* (Dir. A. Diwan, 2021).  
*Harlan County, U.S.A.* (Dir. B. Kopple, 1976).  
*In the Company of Women* (Dir. S. Munt, 2023).  
*Kidnapping* (Dir. M. G. Solčanská, 2017).  
*Let Him Have It* (Dir. P. Medak, 1991).  
*Never Rarely Sometimes Always* (Dir. E. Hittman, 2020).  
*Ninjababy* (Dir. Y. S. Flikke, 2021).  
*Right to Choose* (Dir. R. Lipo, 2024).  
*Rosetta* (Dir. J-P. Dardenne - L. Dardenne, 1999).  
*Saving Face* (Dir. S. Obaid-Chinoy – D. Junge, 2011).  
*The Ballad of the White Cow* (Dir. B. Sanaehea – M. Moghadam, 2020).  
*The Eternal Jew* (Dir. F. Hippler, 1940).  
*The Life of David Gale* (Dir. A. Parker, 2003).  
*The Thin Blue Line* (Dir. E. Morris, 1988).



# THE ROLE OF THE INTERNATIONAL COURT OF JUSTICE IN SHAPING CUSTOMARY INTERNATIONAL LAW

Dr. Adnan Mahmutovic, PhD., LL.M.  
University of Al Yamamah,  
College of Law,  
King Fahad Branch Rd  
Al Qirawan, Riyadh 13451  
Kingdom of Saudi Arabia  
[a\\_mahmutovic@yu.edu.sa](mailto:a_mahmutovic@yu.edu.sa)  
ORCID: 0000-0002-3553-2870

**Abstract:** Customary international law (CIL) stands as a cornerstone of the international legal order. Historically rooted in state practices, CIL has evolved from organic norm development to a dynamic force shaped by multilateral frameworks, reflecting the international community's evolving consensus. This paper examines CIL's primacy, aiming to elucidate its theoretical underpinnings, historical precedence, and transformative influence through the International Court of Justice (ICJ). Employing doctrinal and historical analysis of judicial decisions, state practices, and legal frameworks, it traces CIL's trajectory from early state consent to modern collective commitments, highlighting the ICJ's pivotal role in norm crystallisation. The study explores how CIL's dual-track approach, balancing rapid norm formation with practice-based stability, addresses global challenges like decolonisation and cyber warfare. By affirming universal standards while exercising strategic restraint, the ICJ ensures CIL's adaptability and coherence. Structured across four thematic sections, this analysis illuminates the ICJ's nuanced engagement with CIL, offering insights into its enduring contribution to a responsive international legal system, while advocating for clearer judicial standards to sustain its relevance.

**Key words:** Customary International Law; International Court of Justice; Dual-Track Approach; State Practice; *Opinio Juris*

## Suggested citation:

Mahmutovic, A. (2025). The Role of the International Court of Justice in Shaping Customary International Law. *Bratislava Law Review*, 9(Spec), 119-136. <https://doi.org/10.46282/blr.2025.9.Spec.1022>

Submitted: 22 April 2025  
Accepted: 04 September 2025  
Published: 28 December 2025

## 1. INTRODUCTION

Customary international law (CIL) occupies a position of equal, if not superior, significance to treaties within the architecture of the international legal order.<sup>1</sup> Legal historians have long debated its relative stature, with some asserting that custom historically preceded treaties as the dominant source of the *jus gentium* (Nussbaum, 1954, p. 201). This perspective finds robust support in the works of foundational theorists. Hugo Grotius, in his seminal *De Jure Belli ac Pacis* (1625), conceptualised the law of nations as emerging from the collective will of states, manifested through sustained customs and consistent state practice, which supplemented the universal precepts of natural law (Grotius, 1964, p. 44). Similarly, Francisco Suárez, in *De Legibus ac Deo Legislatore* (1612), argued that customary rules, established through the habitual conduct of nations, filled lacunae left by natural reason, paralleling the role of custom in municipal legal systems (Nussbaum, 1954, pp. 87-88). These early natural law approaches emphasised the organic development of legal norms through state behaviour, a process distinct from the deliberate codification of treaties.

---

<sup>1</sup> Article 38 (1) b, Statute of the International Court of Justice (1945).

In contrast, the positivist shift of the eighteenth and nineteenth centuries, epitomised by Richard Zouche's *Juris et Judicii Feccialis* (1650), reframed international law (*jus inter gentes*) as a product of rational customs and explicit agreements, sidelining natural law in favour of state consent (Nussbaum, 1954, p.167). This doctrinal evolution entrenched the principle that only norms expressly or implicitly accepted by states, whether through treaties or customary practice, possess binding force. The positivist paradigm, which dominates modern legal thought, underscores the consensual basis of international obligations, a principle that Article 38(1)(b)<sup>2</sup> implicitly reflects in its requirement of "acceptance as law." While Article 38(1)(b) is, *stricto sensu*, binding only in proceedings before the ICJ, its widespread recognition as a codification of pre-existing legal principles has elevated it to the status of customary international law itself. This dual character, as both a procedural directive and a substantive norm, renders it a critical point of departure for legal analysis.

Nevertheless, as Sir Robert Jennings astutely observed, the formulation in Article 38(1)(b), rooted in a 1920 draft by the League of Nations' Committee of Jurists, serves merely as a foundational reference rather than an exhaustive exposition of customary international law (Rubin, 1993, p. 226-230). Its brevity and historical context may limit its capacity to address the complexities of contemporary international legal practice, necessitating a broader exploration of the concept.

The unwritten nature of CIL, however, poses challenges to its clarity and certainty. The drafters of the Statute of the International Court of Justice (ICJ) admitted to an unclear understanding of what constitutes international custom, highlighting its definitional ambiguity.<sup>3</sup> Some scholars note that the absence of an authoritative text means that there is no inherent "thereness" to be extracted, rendering CIL's content inherently insecure (Kammerhofer, 2004, p. 524). As a result, international law relies heavily on the ICJ's interpretation of Article 38(1)(b), which defines custom as "evidence of a general practice accepted as law." Given the "rudimentary" nature of international law, and the absence of a centralised law-making body or compulsory judicial authority, the ICJ's role in clarifying customary norms is critical but raises questions about its legitimacy (Cassese, 2005, pp. 194-195). This approach, where custom and treaties coexist, ensures that international law remains dynamic, balancing the organic evolution of state practice with the deliberate codification of treaties.

The enduring primacy of customary international law is further illuminated by Hans Kelsen's pure theory of law, which posits custom as the *Grundnorm* (basic norm) of the international legal system. Kelsen argued that all legal rules, including the binding nature of treaties encapsulated in the customary maxim *pacta sunt servanda* ("agreements must be kept"), derive their validity from this foundational norm (Kelsen, 1945, p. 369). This theoretical framework aligns with the practice of the ICJ, which has consistently recognised treaty-related rules,<sup>4</sup> such as those governing formation, interpretation, and termination, as having crystallised into customary international law.

---

<sup>2</sup> United Nations. (1946). Statute of the International Court of Justice.

<sup>3</sup> International Law Commission (1950). Yearbook of the International Law Commission, volume I, p. 6, para. 45. Available at: [https://legal.un.org/ilc/publications/yearbooks/english/ilc\\_1950\\_v1.pdf](https://legal.un.org/ilc/publications/yearbooks/english/ilc_1950_v1.pdf) (accessed on 18.04.2025).

<sup>4</sup> ICJ, Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening) in Judgment of 10 October 2002, 2002 ICJ Rep. 303, 429–430, paras. 263– 264; ICJ, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, in Advisory Opinion, I.C.J. Reports 2004, 94; ICJ, Gabčíkovo-Nagymaros Project (Hungary v. Slovakia), in Judgment, I.C.J. Reports 1997, 46.

For instance, in the *North Sea Continental Shelf Cases*,<sup>5</sup> the ICJ emphasised that customary norms emerge from a general and consistent state practice accompanied by *opinio juris* (the belief that such practice is legally obligatory), a standard that treaty rules often meet over time.

This judicial practice underscores a critical insight: treaties, while authoritative expressions of state consent, derive their legitimacy from pre-existing customary norms. The customary principle of *pacta sunt servanda*, for example, predates and enables the enforceability of treaty obligations, positioning custom as the bedrock of the international legal hierarchy.<sup>6</sup> The ICJ's affirmation of this interplay in cases such as *Nicaragua v. United States* reinforces the notion that customary international law not only complements but also sustains the treaty-based system.<sup>7</sup>

The British historian Niall Ferguson once remarked, "Sometimes the most important historical events are the non-events: the things that did not occur" (Ferguson, 2009, p. 165) This evocative insight finds a compelling echo in the jurisprudence of the ICJ, where the significance of customary international law often lies as much in what the Court declines to affirm as in the norms it explicitly upholds. The ICJ's jurisprudence reveals a dual role: it actively shapes custom through affirmative rulings while preserving its evolution through strategic restraint. The Court's significance lies not only in the norms it upholds, such as state sovereignty,<sup>8</sup> resource rights,<sup>9</sup> or sovereign immunity,<sup>10</sup> but also in its silences. This dual role underscores the Court's profound influence, where its silences echo with the same authority as its declarations, mirroring Ferguson's insight into the potency of the unspoken. By affirming customary norms, the ICJ enhances legal certainty, providing states with predictable standards.<sup>11</sup> By exercising restraint, it avoids pre-empting the organic development of custom through state practice, a balance critical in emerging fields like environmental obligations or cyber warfare.

Historically, CIL preceded treaties as the primary source of international legal norms, rooted in the collective will of states to establish binding rules through habitual conduct. Early legal thought viewed these customs as complementing universal principles, filling gaps with norms derived from state practice. This organic process, distinct from the deliberate drafting of treaties, underscored CIL's adaptability and resilience. A doctrinal shift in later centuries reframed international law as a product of rational customs and explicit agreements, emphasising state consent as the cornerstone of legal obligations. This modern paradigm recognises CIL as a consensual framework, requiring both consistent state actions and a belief in their legal necessity, a principle codified in foundational international legal texts. This dual requirement positions CIL as a vital norm-creating mechanism, capable of evolving with the international community's needs while maintaining stability through time-tested practices.

---

<sup>5</sup> ICJ, *North Sea Continental Shelf* (Germany v. Denmark; Germany v. Netherlands), Judgment, I.C.J. Reports 1969.

<sup>6</sup> "Pacta Sunt Servanda" in United Nations. (1969). Vienna Convention on the Law of Treaties, 331.

<sup>7</sup> ICJ, *Military and Paramilitary Activities in and Against Nicaragua* (Nicaragua v. United States), in Judgment, I.C.J. Reports 1986, 14, paras. 188–192.

<sup>8</sup> Permanent Court of International Justice, *Case of the S.S. 'Lotus'* (France v. Turkey), in Judgment of 7 September 1927, PCIJ Series A, No. 10, 18.

<sup>9</sup> ICJ, *Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v. Uganda), in Judgment of 19 December 2005, ICJ Rep. 168, 251–252. para. 244.

<sup>10</sup> ICJ, *Jurisdictional Immunities of the State* (Germany v. Italy: Greece intervening), in Judgment of 3 February 2012, 2012 ICJ Rep. 99, 123. para. 56.

<sup>11</sup> ICJ, *United States Diplomatic and Consular Staff in Tehran* (United States of America v. Iran), in Judgment of 24 May 1980, 1980 ICJ Rep. 3, 30–31.

This study explores the ICJ's nuanced engagement with CIL, examining how its judicial authority transforms state conduct into binding norms while navigating the tension between innovation and tradition. It aims to assess the ICJ's contribution to CIL's coherence and responsiveness, advocating for refined judicial standards to address challenges in norm application. The research objectives include analysing CIL's historical precedence over treaties, evaluating its theoretical role as the foundational norm of the international legal system, and tracing its evolution through the ICJ's methodological shifts. By employing a doctrinal analysis of ICJ rulings and legal principles, alongside a historical examination of state practices and evolving legal frameworks, the study provides a comprehensive lens into CIL's enduring significance. Structured across three thematic sections, the analysis explores the development of CIL within the ICJ jurisprudence, the influence of technological and institutional advancements, and contemporary applications alongside the persistence of traditional customs through a dual-track approach. The first track focuses on the swift formation of customary norms via international resolutions, which demonstrate *opinio juris* and embody collective state intent. The second track, grounded in traditional customary law formation, depends on the gradual buildup of consistent state practice over time, supported by *opinio juris*. This paper illuminates the ICJ's crucial role in sustaining a coherent and adaptable international legal order, offering insights into how CIL continues to shape global governance in an ever-changing world.

## 2. THE EVOLUTION OF CIL IN THE JURISPRUDENCE OF THE ICJ

The lack of certainty in the formation of CIL has amplified the ICJ's influence in shaping its development, prompting scrutiny of the Court's role and legitimacy. Article 38(1)(d) of the ICJ Statute designates judicial decisions as a "subsidiary means for the determination of rules of law," implying a restricted role in law creation.<sup>12</sup> Yet, the ICJ's jurisprudence suggests it often exceeds this mandate, engaging in the creation of customary norms by asserting their existence without thoroughly evidencing consistent state practice and *opinio juris*.<sup>13</sup> This tendency, as critics observe, risks undermining the legitimacy of CIL, which depends on the consensual practices of states. Absent a robust foundation in state practice, the credibility and compliance of customary norms are compromised, threatening their role within the international legal order (Chan, 2016, pp. 44-71).

The ICJ's approach to CIL has evolved in response to changes in the global legal landscape. Before 1969, the Court prioritised prolonged state practice, ensuring legal certainty but marginalising newly independent states with limited historical participation. After 1969, the ICJ embraced a more dynamic approach, recognising collective expressions of legal obligation, such as multilateral resolutions, as evidence of custom. This shift aligns with the argument that modern CIL formation integrates traditional state practice with norms emerging from globalised frameworks, promoting inclusivity. Similarly, the ICJ's strategic rulings enable rapid norm creation while preserving coherence with state-driven processes, ensuring CIL's adaptability to global challenges like human rights and environmental protection. By balancing practice-based stability with innovative norm development, the ICJ's dual-track approach enhances CIL's

---

<sup>12</sup> Article 38 (1)(d), ICJ Statute.

<sup>13</sup> Second report on formation and evidence of customary international law, by Sir Michael Wood, Special Rapporteur, International Law Commission, Sixty-sixth session, A/CN.4/672, May 2014, pp. 171-172.

responsiveness and inclusivity, maintaining its foundation in state consent through affirmative rulings and calculated restraint.

### 2.1 *The Court's pre-1969 Methodology*

The Court's pre-1969 methodology for identifying customary international law was anchored in two core principles: sustained and uniform state practice over a prolonged period, and the volitional element of state consent through *opinio juris*. This approach sought to balance historical continuity with state sovereignty, as demonstrated in pivotal cases such as *Right of Passage over Indian Territory* (1960)<sup>14</sup> and *The Lotus* (1927).<sup>15</sup>

The first principle required that state practice be consistent and endure over an extended duration to establish a customary norm. In *Right of Passage over Indian Territory*, Portugal asserted a right of passage through Indian territory to access its enclaves, Dadra and Nagar-Aveli. The ICJ determined that a "constant and uniform practice" of free passage for private persons, civil officials, and goods had persisted for over 125 years, spanning British colonial and post-independence periods. This practice, unaffected by India's independence, led the Court to recognise a bilateral customary right specific to Portugal.<sup>16</sup> The emphasis on temporal depth underscored legal stability. Some authors contend that such prolonged practice was essential in an era of limited state interaction, ensuring norms reflected a shared legal order (Dinstein, 2004, p. 197). Conversely, others criticise this focus as overly restrictive, arguing it disadvantaged emerging states, particularly those post-decolonisation, which lacked historical practice to demonstrate compliance (Cassese, 2005, pp. 26-28). This critique reveals the methodology's limitations in accommodating new states amid a changing international landscape.

The second principle mandated that states undertake a practice with the belief that it is legally binding (*opinio juris*), positioning customary law as an expression of their free will. In *The Lotus*, a collision on the high seas between a French vessel (*Lotus*) and a Turkish vessel (*Boz-Kourt*) prompted Turkey to prosecute the French officer. France contested Turkey's jurisdiction, but the PCIJ upheld Turkey's actions, stating: "The rules of law binding upon States... emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law".<sup>17</sup> This consensualist perspective reinforced state sovereignty, enabling states to exempt themselves from emerging norms via dissent, thus establishing the persistent objector doctrine. Dinstein underscores *opinio juris* as critical, distinguishing legal obligation from mere habit (Dinstein, 2004, p. 197). Cassese, while not explicitly critiquing this element pre-1969, advocates for flexibility, suggesting strict *opinio juris* requirements could marginalise newer states without established legal traditions (Cassese, 2005, pp. 26-28).

The pre-1969 methodology ensured legal certainty through prolonged practice and consensual legitimacy, but its rigidity posed challenges with the rise of new states post-decolonisation. Dinstein defends the historical necessity of duration for stability, while Cassese's critique highlights the need for inclusivity, reflecting ongoing debates about adapting customary international law to a more diverse state system.

---

<sup>14</sup> ICJ, *Right of Passage over Indian Territory* (Portugal v. India), Merits, Judgment, I.C.J. Reports 1960.

<sup>15</sup> Permanent Court of International Justice, *Case of the S.S. 'Lotus' (France v. Turkey)*, Judgment, PCIJ Series A, No. 10, 1927.

<sup>16</sup> ICJ, *Right of Passage over Indian Territory* (Portugal v. India), Merits, Judgment, I.C.J. Reports 1960, 6–73.

<sup>17</sup> Permanent Court of International Justice, *Case of the S.S. 'Lotus' (France v. Turkey)*, in Judgment of 7 September 1927, PCIJ Series A, No. 10, 4–33.

In the *Asylum Case*, the ICJ recognised the theoretical possibility of regional customs, distinct from general customary international law, which requires widespread state practice and *opinio juris* as articulated in Article 38(1)(b) of the ICJ Statute.<sup>18</sup> The Court assessed whether a regional custom of diplomatic asylum existed among Latin American states, capable of binding Peru. It concluded that no such custom had been sufficiently proven, particularly in a manner enforceable against Peru. This ruling implicitly acknowledged that regional customs could exist, but emphasised the evidentiary burden of establishing their existence through consistent practice and acceptance within the region. However, the Court left a critical question unresolved: what constitutes sufficient proof of a regional custom? Must all states in the region actively participate in or acquiesce to the practice, including the state sought to be bound? Alternatively, does a state's persistent objection, akin to the persistent objector rule in general customary law, exempt it from being bound? Peru's consistent dissent, evidenced by its non-participation in the 1933 and 1939 Montevideo Conventions, suggested the latter. The ICJ noted in obiter dicta that even if a Latin American custom of diplomatic asylum existed, Peru's rejection precluded its application. This aligns with the principle that customary norms, even regional ones, do not bind states that persistently object during their formation (*North Sea Continental Shelf Cases*, 1969). Yet, the Court's failure to explicitly clarify whether universal regional consent or mere dissent sufficed weakened the doctrinal coherence of its reasoning. The *North Sea Continental Shelf Cases* offered another opportunity to refine the concept of regional custom. The suggestion arose that a custom governing continental shelf delimitation existed among North Sea riparian states. The ICJ, however, declined to recognise such a custom, emphasising instead the primacy of general equitable principles over localised practices. This decision underscored the judicial preference for universal norms unless regional customs are unequivocally established, a high threshold that reflects the Court's cautious approach to particular law. The ruling implicitly rejected the notion that geographic proximity alone could substantiate a regional custom, instead demanding rigorous evidence of practice and *opinio juris* specific to the region.

In the *Frontier Dispute*, a Chamber of the ICJ addressed the principle of *uti possidetis juris*, the doctrine that colonial boundaries remain intact post-independence.<sup>19</sup> Rather than confining it to a regional norm of Spanish American or African law, the Chamber characterised *uti possidetis* as a principle of general international law. This expansive interpretation diverged from a strict regional custom framework, suggesting that practices rooted in specific regions could transcend their origins to acquire a broader normative force. The Chamber's reasoning rested on the principle's widespread acceptance in decolonisation contexts globally, supported by state practice and resolutions like the 1964 Cairo Declaration of the Organisation of African Unity.<sup>20</sup> This approach, however, obscured the potential for *uti possidetis* to operate as a regional custom with distinct applications, diluting its particularity. Contrastingly, in the *Land, Island and Maritime Frontier Dispute*,<sup>21</sup> a differently constituted Chamber treated *uti possidetis* as a norm specific to former Spanish American colonies, accepted by the parties without probing its wider applicability. This narrower construction avoided the universalising tendency of the *Frontier Dispute* ruling, grounding the principle in the

---

<sup>18</sup> ICJ, *Asylum (Colombia/Peru)*, Judgment, I.C.J. Reports 1950, 277-278.

<sup>19</sup> ICJ, *Frontier Dispute (Burkina Faso v. Mali)*, in Judgment, 1986 I.C.J. Reports 554.

<sup>20</sup> Organisation of African Unity, *Cairo Declaration on Border Disputes Among African States*, in *Cairo Declaration on Border Disputes Among African States*, AHG/Res. 16(I).

<sup>21</sup> ICJ, *Land, Island and Maritime Frontier Dispute (El Salvador v. Honduras; Nicaragua intervening)*, in Judgment, 1992 I.C.J. Reports 351.

historical and legal context of the disputants' shared colonial heritage. The Chamber's reluctance to extrapolate beyond the case's regional scope reinforced the idea that regional customs derive legitimacy from the consent or practice of the affected states, consistent with the voluntary nature of international legal obligations.

## 2.2 *The Court's post-1969 Methodology*

The *North Sea Continental Shelf* judgment marked a turning point, as the Court began to prioritise evidence of general acceptance over strict historical practice, a shift lauded by Shaw for its adaptability (Shaw, 2021, p. 85). This evolution reflects a broader scholarly debate on reconciling custom's traditional roots with contemporary realities. The following analysis will explore this transition, situating the Court's interpretative shift within the broader context of international law's development.

The ICJ's traditional approach to customary international law was deeply rooted in the realities of the nineteenth-century international society, a period marked by nascent multilateralism, the absence of recognised legal personality for international organisations, and significant barriers to accessing evidence of state practice due to geographical and technological constraints. This context shaped a methodology that prioritised prolonged and consistent state practice as the bedrock of customary norms. However, the global landscape had transformed dramatically by the time the ICJ delivered its seminal 1969 judgment in the *North Sea Continental Shelf* cases. This decision emerged two decades after the Court's recognition of the international legal personality of organisations in the *Reparation for Injuries* advisory opinion,<sup>22</sup> and roughly a decade following the wave of decolonisation that brought newly independent African and Asian states into the international community. The post-World War II era, catalysed by the 1945 *United Nations Charter*, also witnessed the proliferation of multilateral treaties, reflecting a surge in multilateralism. These developments, legal personality for organisations, a broadened state membership, and treaty-based codification, fundamentally altered the Court's approach to identifying customary norms, culminating in the innovative framework articulated in *North Sea Continental Shelf*, which has proven enduring.

In the *North Sea Continental Shelf* cases, the ICJ was tasked with resolving disputes concerning the delimitation of the continental shelf between the Federal Republic of Germany and Denmark, and between Germany and the Netherlands. These cases provided a pivotal opportunity for the ICJ to articulate the criteria for identifying customary international law, a foundational concept in international legal practice. The Court established that customary law emerges from the convergence of two essential elements: a widespread and consistent state practice and a subjective belief, known as *opinio juris sive necessitatis*, that such practice is legally obligatory.<sup>23</sup> Specifically, the Court held that "*not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it.*" This formulation underscores that state practice must be both consistent and motivated by a sense of legal obligation, rather than driven by considerations of courtesy, neighbourliness, or political expediency.

---

<sup>22</sup> ICJ, *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, I.C.J. Reports 1949, 184-185.

<sup>23</sup> ICJ, *North Sea Continental Shelf* (Germany v. Denmark; Germany v. Netherlands), in Judgment, I.C.J. Reports 1969, para. 77.

The ICJ's delineation of these two elements, settled state practice and *opinio juris*, has been repeatedly affirmed as the cornerstone of customary international law. For instance, in the *Asylum case*<sup>24</sup> and the *Jurisdictional Immunities of the State case*,<sup>25</sup> the Court emphasised the necessity of both components for the formation of an international custom. This formulation marked a significant departure from the Court's earlier methodology, distinguishable in three key respects, which reflect both practical adaptations and theoretical advancements in international law.

First, the *North Sea Continental Shelf* judgment marked a transformative shift in the ICJ approach to customary international law, departing from its historical reliance on prolonged state practice as the primary indicator of custom.<sup>26</sup> Instead, the Court emphasised *opinio juris*, the belief that a practice is legally obligatory, asserting that "*the frequency, or even habitual character of the acts, is not in itself enough*" to establish a norm absent this conviction.<sup>27</sup> Routine acts, such as ceremonial gestures, may reflect courtesy rather than duty, the ICJ noted, underscoring that practice and *opinio juris* are interdependent. A single act, if imbued with legal intent, might suffice to evidence both elements, suggesting that *opinio juris* can, at times, drive the emergence of practice, a significant break from the traditional temporal focus.

This evolution resonates with scholarly analyses of customary law's adaptation to a post-colonial, multilateral era where some states are more powerful than the others. (Shaw, 2021, p. 79). The ICJ's focus on *opinio juris* addresses the exclusionary nature of prolonged practice, which, some authors argue, disadvantaged newly independent states lacking historical records (Cassese, 2005, p. 158). This shift aligns with the accelerated norm-formation enabled by treaties and international organisations, reflecting a more inclusive legal order. Theoretically, it bridges the positivist and naturalist perspectives. While early ICJ jurisprudence, rooted in positivism, viewed custom as an empirical accumulation of acts over time, the *North Sea* approach introduces a normative lens, where *opinio juris* shapes custom proactively, a stance akin to naturalist emphasis on shared legal consciousness.

The second notable shift in the ICJ approach in the *North Sea Continental Shelf* judgment concerns the composition of state practice, expanding its scope beyond traditional usages to encompass *consuetudo scripta*, customary norms crystallised in multilateral conventions. Departing from its earlier stance in the *Asylum case*, where consent to a treaty was conflated with a customary obligation, the Court delineated a clear distinction between consent to a treaty norm and *opinio juris*, the subjective belief in a practice's legal necessity. The ICJ emphasised that while states may opt out of treaty obligations through reservations, customary international law norms, by their universal nature, bind all members of the international community without unilateral exclusion. As the Court articulated, such rules "*must have equal force for all*" and cannot be subject to a state's discretionary opt-out.<sup>28</sup> This distinction underscores a pivotal recognition: treaties can serve as evidence of custom without requiring universal ratification, broadening the sources from which customary norms may be derived.

This finding reflects a profound transformation in international relations over the twentieth century: the proliferation of multilateral conventions. In fields such as human

---

<sup>24</sup> ICJ, *Asylum (Colombia/Peru)*, I.C.J. Reports 1950, p. 266, at paras. 285-286.

<sup>25</sup> ICJ, *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment, I.C.J. Reports 2012, p. 99, 122, at para. 55.

<sup>26</sup> ICJ, *North Sea Continental Shelf (Germany v. Denmark; Germany v. Netherlands)*, in Judgment, I.C.J. Reports 1969, para 77.

<sup>27</sup> *Ibid.*, para 77.

<sup>28</sup> *Ibid.*, 38-39, para. 63.

rights, the law of the sea, treaty law, international humanitarian law, and diplomatic relations, these instruments have codified and modernised international law, accommodating the diverse membership, interests, and legal traditions of an expanded global community. Concepts like *jus cogens*, the common heritage of mankind, and the exclusive economic zone, introduced through treaties, exemplify this dual role as both conventional and customary norms. The ICJ affirmed this duality in the *Military and Paramilitary Activities* case, recognising that treaty provisions can parallel customary rules.<sup>29</sup> This approach highlights the Court's willingness to leverage treaties as a dynamic source of custom, responsive to contemporary state practice.

Finally, the *North Sea* judgment diminished the traditional emphasis on time as a determinant of customary law. The Court held that "even without the passage of any considerable period of time," widespread and representative participation in a multilateral convention could suffice to establish a customary rule, provided it includes states with specially affected interests.<sup>30</sup> This temporal flexibility marks a significant departure from earlier jurisprudence, which often required prolonged practice, as seen in cases like *Right of Passage*. By prioritising the quality and representativeness of participation over duration, the ICJ adapted custom formation to the accelerated pace of modern international law-making.

Theoretically, this evolution mediates formalism and dynamism. The traditional formalism, rooted in positivism, emphasised observable practice over time. The *North Sea* ruling, however, adopts a dynamic view, treating treaties as both evidence and drivers of custom. This raises a legitimate concern: rapid norm formation via treaties may reflect only treaty-drafting states' consent, not the broader international community's. Nevertheless, by balancing adaptability with inclusivity, the *North Sea* judgment underscores the ICJ's pivotal role in shaping a responsive and coherent customary legal order, a contribution enriched by scholarly and theoretical discourse.

Hence, the ICJ influences customary international law through two primary mechanisms. First, it declares treaty provisions as reflective of customary norms, extending their reach to non-party states. In *Military and Paramilitary Activities in and against Nicaragua*, the ICJ, unable to rely on the UN Charter due to a U.S. reservation, ruled that common Articles 1 and 3 of the Geneva Conventions embodied customary law, prompting even non-parties to accept these obligations.<sup>31</sup> Meron highlights how such declarations solidify customary status, enhancing norm universality (Meron, 2000, p. 361-389). Second, other international courts rely on ICJ rulings to affirm customary rules without independent analysis. For example, the European Court of Justice in *Opel Austria GmbH v Council* and the International Tribunal for the Law of the Sea in *M/V Saiga (No. 2)* drew on ICJ decisions to uphold principles like good faith and necessity.<sup>32</sup> The *Gabčíkovo-Nagymaros Project* ruling confirmed the customary status of necessity, sparking debate in investment arbitration over necessity clauses, illustrating the ICJ's cross-domain impact.<sup>33</sup>

---

<sup>29</sup> ICJ, *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States)*, in Judgment, I.C.J. Reports 1986, p. 95, para. 177.

<sup>30</sup> ICJ, *North Sea Continental Shelf (Germany v. Denmark; Germany v. Netherlands)*, in Judgment, I.C.J. Reports 1969, p. 42, para. 73.

<sup>31</sup> ICJ, *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States)*, in Merits, Judgment, I.C.J. Reports 1986, 14–150.

<sup>32</sup> International Tribunal for the Law of the Sea, *M/V Saiga (No. 2) (Saint Vincent and the Grenadines v. Guinea)*, in Judgment, ITLOS Reports 1999, 10–78.

<sup>33</sup> ICJ, *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, in Judgment, I.C.J. Reports 1997, 7–84.

However, the ICJ's influence has limits. Its jurisdiction, dependent on state consent, leaves many customary law areas untouched, and states, as primary creators of custom, may diverge from ICJ positions. D'Amato argues that customary rules persist only when they align with states' mutual self-interest, a dynamic the ICJ cannot override (D'Amato, 1987, pp. 34-67). For instance, U.S. non-compliance in *Nicaragua* underscores state resistance. Despite these constraints, the ICJ's authoritative voice profoundly shapes customary international law when it engages, making its methods for identifying norms critical to their recognition and evolution.

### 3. THE IMPACT OF TECHNOLOGICAL AND INSTITUTIONAL DEVELOPMENTS

The formation of CIL has historically been constrained by its reliance on consistent state practice and *opinio juris*, the subjective belief in a legal obligation, as outlined in Article 38(1)(b) of the ICJ Statute. Traditional custom struggles to adapt to the demands of a progressive legal order, particularly in addressing issues like sustainable development. Despite the proliferation of international instruments articulating environmental protection principles, these norms often fail to meet the orthodox requirements of consistent state practice, rendering them unable to crystallise into customary law (Hunter et al., 2007, p. 316). This rigidity has led scholars to describe traditional custom as stagnant, incapable of reflecting the growing international consensus on norm-creating principles (Reisman, 1987, p. 133; Kolb, 2003, p. 128). In contrast, deriving custom from treaties and declarations offers a more democratic approach, engaging a broader range of states and capturing collective intent more effectively (Roberts, 2001, p. 768).

The limitations of traditional custom are particularly pronounced in its inability to keep pace with the rapid evolution of international relations, a process historically slowed by logistical barriers, geographic isolation, and limited diplomatic interactions (De Visscher, 1956, p. 471). Cases like *Right of Passage* demonstrate the traditional requirement of prolonged practice, often spanning decades or centuries. However, technological advancements in transportation and telecommunications have compressed time and space, enabling states to engage more frequently and transparently. The United Nations General Assembly has further accelerated this process by providing a forum for states to articulate their positions and gauge immediate reactions, fostering a dynamic interplay between state practice and *opinio juris*.<sup>34</sup>

This transformation is reflected in the ICJ evolving approach to custom formation, particularly in the *North Sea Continental Shelf* judgment. The Court emphasised that customary norms could emerge rapidly through widespread and representative participation, prioritising the quality of state engagement over its duration. This opened the door for General Assembly resolutions to serve as a source of customary international law, despite their non-binding nature under Article 10 of the UN Charter.<sup>35</sup> The 1970 Declaration on Principles of International Law Concerning Friendly Relations exemplifies this shift.<sup>36</sup> Adopted by near-unanimous consensus, it codified principles such as the prohibition of the use of force and non-intervention, which the ICJ later

---

<sup>34</sup> ICJ, *South West Africa Cases* (Ethiopia v. South Africa; Liberia v. South Africa), Second Phase, Judgment, I.C.J. Reports 1966, 248, paras. 291–293.

<sup>35</sup> United Nations. (1945). Charter of the United Nations, XVI.

<sup>36</sup> United Nations General Assembly. (1970). Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, UNGA Res. 2625 (XXV).

recognised as customary in *Nicaragua v. United States*.<sup>37</sup> The Court's reliance on the *Declaration*, alongside state practice and *opinio juris*, demonstrated that a single, representative act could crystallise custom, bypassing the need for decades of consistent practice.

The *North Sea* framework reshaped custom formation in three critical ways. First, it recognised that a single act, such as a resolution, could embody both state practice and *opinio juris* if accompanied by a sense of legal duty.<sup>38</sup> In this context, the "sense of legal duty" bridges the *North Sea* judgment to the *Declaration* by enabling a single, representative act to crystallise custom, accelerating the process beyond traditional timelines. It reflects the ICJ's adaptation to a post-decolonial, interconnected world, where legal norms emerge from collective expressions rather than prolonged bilateral acts. Traditionally, custom required repeated practice over time, e.g., the 125-year practice in *Right of Passage*, with *opinio juris* inferred from its consistency. The *North Sea* Court, however, emphasised quality over quantity, stating that "*the frequency, or even habitual character of the acts, is not in itself enough*" without legal conviction. This opened a pathway for General Assembly resolutions, like the *Declaration on Friendly Relations*, to serve as a "single act." Adopted by consensus in 1970, the *Declaration* reflects state conduct (voting or acquiescence) and *opinio juris* (its normative language, e.g., "*States shall refrain... from the threat or use of force*"), potentially evidencing custom in one stroke. Legally, this hinges on the resolution's representativeness, near-universal support from 108 states at the time, aligning with *North Sea's* focus on "*widespread and representative participation*." However, the original text's assertion lacks specificity on how voting translates to practice, a gap in legal reasoning.

Second, by dispensing with the requirement of long-term practice, it enabled a single resolution, or a series adopted over a short period, to contribute to custom formation, provided they reflected widespread consensus. Specifically, in paragraph 73, the Court assessed whether the 1958 Geneva Convention on the Continental Shelf had crystallised into custom, focusing on the quality and breadth of state engagement rather than its duration. While the Court ultimately found insufficient evidence in that instance (due to limited ratifications and practice), it established a principle: time is not an absolute requirement if the practice is sufficiently robust and representative. This shifted the focus from longitudinal repetition to a snapshot of collective state action, provided it demonstrated both practice and *opinio juris*.

Third, the Court's elevation of *opinio juris* allowed resolutions to express a legal conviction pre-emptively, potentially catalysing practice rather than merely reflecting it. To express a legal conviction pre-emptively means, a resolution could serve as an initial declaration of *opinio juris*, potentially sparking state practice to align with it, rather than waiting for practice to mature first. The 1970 *Declaration on Friendly Relations* exemplifies this. Adopted by consensus, it articulated principles like the prohibition of the use of force with normative language ("*States shall refrain*"), signalling a collective belief in their legal obligation.<sup>6</sup> Under *North Sea's* logic, this pre-emptive expression of *opinio juris*, if sufficiently representative, could contribute to custom by encouraging states to conform their conduct to these norms post-adoption, rather than merely codifying pre-existing practice.

---

<sup>37</sup> ICJ, *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States)*, in Judgment, I.C.J. Reports 1986, 14.

<sup>38</sup> ICJ, *North Sea Continental Shelf (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands)*, in Judgment, I.C.J. Reports 1969, 3, paras. 73, 77.

This catalytic role is evident in *Nicaragua v. United States*, where the ICJ relied on the *Declaration* to affirm customary prohibitions on force and non-intervention. The Court noted that the *Declaration's* principles, supported by state acquiescence and subsequent behaviour (e.g., diplomatic protests against violations), reflected *opinio juris* that shaped practice after 1970, not just mirrored it.<sup>38</sup> For instance, states invoking the *Declaration* in UN debates or bilateral disputes post-1970 reinforced its norms, suggesting that the resolution's legal conviction drove compliance, aligning with North Sea's forward-looking approach. Unlike *Right of Passage*, where practice preceded belief, here *opinio juris*, expressed in 1970, pre-emptively guided practice within a decade. The ICJ first applied this understanding in the *Namibia* advisory opinion, where it identified General Assembly Resolution 1514 (XV), the *Declaration on the Granting of Independence to Colonial Countries and Peoples*, as "an important stage" in the development of the customary principle of self-determination. The Court linked this resolution to the United Nations Charter, asserting its applicability to all non-self-governing territories.<sup>39</sup> Subsequently, in the *Nicaragua* case, the Court elaborated that *opinio juris* could be inferred, with caution, from states' attitudes toward certain resolutions, interpreting consent to their text as acceptance of the declared rules.<sup>40</sup> This reasoning was refined in the *Nuclear Weapons* opinion, where the Court clarified that while resolutions lack formal binding force, they may evidence an existing rule or emerging *opinio juris*, contingent on their content, adoption conditions, and perceived normative character.<sup>41</sup>

#### 4. CONTEMPORARY APPLICATIONS AND THE PERSISTENCE OF TRADITIONAL CUSTOM: THE DUAL-TRACK APPROACH

Recent scholarship and jurisprudence highlight a dual-track approach to the formation of CIL: rapid norm creation through international resolutions, particularly those of the United Nations General Assembly (UNGA), and gradual norm development through sustained state practice. This duality, exemplified in cases such as the *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*<sup>42</sup> and *Dispute Regarding Navigational and Related Rights*,<sup>43</sup> has sparked significant debate among scholars. While some praise its flexibility in addressing contemporary global challenges, others caution against potential inconsistencies arising from subjective judicial criteria. This brief analysis explores the dual-track approach through key cases, scholarly perspectives, and theoretical implications, arguing that it balances progressive innovation with conservative stability in customary law formation.

The first track involves the rapid establishment of customary norms through international resolutions, which serve as evidence of *opinio juris* and reflect collective state intent. Resolutions of the General Assembly of the United Nations (hereinafter as "UNGA"), though not legally binding, can consolidate customary norms by articulating principles widely accepted by states. This approach is particularly effective in addressing urgent or emerging issues, such as decolonisation or human rights, where prolonged

---

<sup>39</sup> ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia*, in *Advisory Opinion*, I.C.J. Reports 1971, 31, para. 52.

<sup>40</sup> ICJ, *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States)*, in *Merits*, Judgment, I.C.J. Reports 1986, 100, para. 188.

<sup>41</sup> ICJ, *Legality of the Threat or Use of Nuclear Weapons*, in *Advisory Opinion*, I.C.J. Reports 1996, 254–255., para. 70.

<sup>42</sup> ICJ, *Legal Consequences of the Separation of the Chagos Archipelago*, in *Advisory Opinion*, I.C.J. Reports 2019 (International Court of Justice, 2019), 37.

<sup>43</sup> ICJ, *Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, in *Judgment*, I.C.J. Reports 2009.

state practice may be impractical. A high volume of UN resolutions can operate as political acts that impose new obligations (Deplano, 2017, p. 249). In 2019, the ICJ issued an advisory opinion on the separation of the Chagos Archipelago from Mauritius by the United Kingdom in 1965, prior to Mauritius' independence. The Court ruled that the detachment violated Mauritius' right to self-determination, a norm crystallised through UNGA resolutions, notably Resolution 1514 (XV) of 1960.<sup>44</sup> The ICJ emphasised that these resolutions evidenced CIL, requiring minimal state practice to establish the norm's universal applicability.<sup>45</sup> This reliance on resolutions underscores the rapid norm formation track, enabling the Court to address historical injustices swiftly. Hence, resolutions contribute to CIL by evidencing or developing the two elements through normative content, state involvement, and systemic influence, as per the ILC framework, but they cannot create it instantly.

The second track, rooted in traditional customary law formation, relies on the gradual accumulation of consistent state practice over time, accompanied by *opinio juris*. This approach ensures that norms are grounded in observable state practice, providing legal stability and predictability. It is particularly relevant in disputes involving localised or technical issues, where historical practice is well-documented. The 2009 ICJ case concerning Costa Rica's navigational rights on the San Juan River illustrates this slow accretion track. The Court examined historical state practice, including Costa Rica's navigation for commerce and subsistence fishing, to affirm customary rights under an 1858 treaty.<sup>46</sup> By prioritising long-term behaviour over resolutions, the ICJ ensured that the customary norm was firmly rooted in empirical evidence, highlighting the conservative nature of this approach. Similarly, the 1969 *North Sea Continental Shelf* cases further illustrate the emphasis on state practice. The ICJ rejected the equidistance principle as a mandatory customary norm for continental shelf delimitation, requiring both widespread state practice and *opinio juris*.<sup>47</sup> The Court acknowledged that resolutions and treaties could contribute to custom but only if supported by consistent practice, as noted in paragraphs 73 and 77. This case bridges the dual tracks, recognising resolutions' potential while prioritising traditional practice.

The dual-track approach has elicited diverse scholarly commentary reflecting differing views on the balance between resolutions and state practice. Shaw praises the ICJ's use of resolutions in the *Chagos* opinion, arguing that they effectively consolidate customary norms. He views this approach as responsive to the legal legacy of decolonisation, enabling swift recognition of principles like self-determination (Shaw, 2021, p. 92). Similarly, Crawford commends the Court's reliance on UNGA Resolution 2625 (XXV) of 1970, which articulates fundamental principles of international law. Crawford sees resolutions as a bridge between treaty-like declarations and universal custom, facilitating rapid norm formation in contexts with broad state consensus (Crawford, 2019, p. 30). In contrast, Cassese expresses scepticism about over-reliance on resolutions. He argues that cases like *Navigational Rights* underscore the necessity of practice-based custom to maintain legal rigor and predictability (Cassese, 2005, p. 164).

---

<sup>44</sup> ICJ, Legal Consequences of the Separation of the Chagos Archipelago, in Advisory Opinion, I.C.J. Reports 2019, 37., para. 155.

<sup>45</sup> *Ibid.*

<sup>46</sup> ICJ, Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicaragua), in Judgment, I.C.J. Reports 2009, 265–266.

<sup>47</sup> ICJ, North Sea Continental Shelf (Germany v. Denmark; Germany v. Netherlands), Judgment, I.C.J. Reports 1969.

Cassese contends that resolutions alone may lack the empirical grounding required for robust customary norms, advocating for the traditional track to ensure legal stability.

Some scholars reconcile these perspectives, positing that the ICJ's flexibility allows it to toggle between instant custom via resolutions and classical custom via state practice based on context (Roberts, 2001, p. 761). Higgins aligns with the resolution-based approach through her process-oriented theory, where law evolves through collective deliberation. Higgins views resolutions as reflective of a progressive, communitarian ethos, as seen in the *North Sea cases*' acknowledgment of treaty contributions (Higgins, 1994, p. 26). However, Higgins also recognises the value of practice in grounding norms, bridging the two tracks. Thirlway, however, cautions that the dual-track approach risks inconsistency due to subjective judicial criteria for determining instant versus classical custom. Thirlway argues that the lack of clear guidelines may undermine the predictability of customary law, particularly when courts oscillate between tracks without explicit justification (Thirlway, 2019, p. 103). Thirlway's critique highlights the need for a more coherent framework to govern the application of the dual-track approach.

The dual-track approach engages a fundamental tension between progressive and conservative impulses in customary international law. The use of resolutions enables rapid norm formation, addressing emerging global issues such as decolonisation, human rights, or environmental protection. This aligns with Higgins' process-oriented theory, where law evolves through collective state deliberation, reflecting a communitarian ethos. The *Chagos* opinion exemplifies this, using resolutions to affirm self-determination as a universal norm, addressing historical inequities promptly. Conversely, the reliance on state practice ensures that norms are grounded in observable, historical behaviour, providing stability and legitimacy. Cassese's emphasis on practice, as seen in *Navigational Rights*, adheres to a positivist framework, prioritising empirical evidence to maintain legal predictability. This coexistence is often viewed as a strength, allowing customary law to balance innovation with tradition. Resolutions facilitate the swift adoption of global norms, while state practice accommodates localised practices, ensuring flexibility across contexts. However, critics warn that the absence of clear criteria for selecting between tracks may lead to judicial subjectivity, potentially eroding the coherence of customary law (Thirlway, 2019, p. 103).

## 5. CONCLUSION

The ICJ is central to the development of CIL, serving as a cornerstone of the international legal order by balancing traditional and progressive approaches to norm creation. However, when the Court derives custom without adequately considering state practice, it risks crafting a legal fiction. Successful legal interpretation must fit and justify the practice it addresses, ensuring descriptive accuracy and legitimacy. The evolution of CIL reflects a dynamic dual-track approach. The traditional track, rooted in the gradual accumulation of state practice, ensures stability and empirical rigor, while the modern track, accelerated by collective legal commitments such as international resolutions, enables rapid norm formation to address contemporary challenges, from decolonisation to cyber warfare. This duality equips CIL to remain adaptable and inclusive across diverse states, harmonising regional practices while fostering global norms. The ICJ's strategic restraint and interpretive role are crucial in crystallising these norms, yet its overly flexible application of modern custom risks undermining the coherence of CIL, rendering it a "nebulous fiction" if not tethered to state practice. To maintain CIL's relevance and authority in modern public international law, the Court must consistently refer to state

practice and *opinio juris*, ensuring interpretations are justifiable and reflective of legal history. Moral considerations may inform state practice, but they should not supplant it. As law is inherently dynamic, the status of customary norms must be regularly reassessed in light of evolving state practice and *opinio juris*. By refining judicial standards to balance innovative norm creation with empirical grounding, the ICJ can strengthen CIL's framework, ensuring its enduring vitality and coherence in a rapidly evolving global legal landscape. To ensure coherence, the ICJ must establish clearer criteria for applying each track, safeguarding CIL's legitimacy and adaptability in a dynamic global legal landscape.

#### BIBLIOGRAPHY:

- Cassese, A. (2005). *International Law* (2nd ed.). New York: Oxford University Press.
- Chan, L. (2016). The Dominance of the International Court of Justice in the Creation of Customary International Law. *Southampton Student Law Review*, 6, 44-71.
- Crawford, J. (2019). *Brownlie's Principles of Public International Law*, 9th ed. Oxford: Oxford University Press.
- D'Amato, A. (1987). *The Concept of Custom in International Law*. New York: Cornell University Press.
- Deplano, R. (2017). Assessing the Role of Resolutions in the ILC Draft Conclusions on Identification of Customary International Law: Substantive and Methodological Issues. *international organizations law review*, 14(2), 227-253.
- De Visscher, C. (1956). Reflections on the Present Prospects of International Adjudication. *American Journal of International Law*, 50(3), 467-472.
- Dinstein, Y. (2004). *The Conduct of Hostilities under the Law of International Armed Conflict*. Cambridge: Cambridge University Press.
- Ferguson, N. (2009). *The Ascent of Money: A Financial History of the World*. London: Allen Lane.
- Grotius, H. (1964). *De Jure Belli ac Pacis Libri Tres*. Translated by Francis W. Kelsey. New York - London: Oceana - Wildy & Sons.
- Higgins, R. (1994). *Problems and Process: International Law and How We Use It*. Oxford: Oxford University Press.
- Hunter, D., Salzman, J. and Zaelke, D. (2007). *International Environmental Law and Policy* (3rd ed.). Goleta: Foundation Press.
- Kammerhofer, J. (2004). Uncertainty in the Formal Sources of International Law: Customary International Law and Some of Its Problems. *European Journal of International Law*, 15(3), 523-553. <https://doi.org/10.1093/ejil/15.3.523>
- Kelsen, H. (1945). *General Theory of Law and State*. Translated by Anders Wedberg. Cambridge: Harvard University Press.
- Kolb, R. (2003). Selected Problems in the Theory of Customary International Law. *Netherlands International Law Review*, 50(2), 119-150. <https://doi.org/10.1017/S0165070X03001190>
- Meron, T. (2000). The Geneva Conventions as Customary Law. *American Journal of International Law*, 81(2), 348-370. <https://doi.org/10.2307/2202407>
- Nussbaum, A. (1964). *A Concise History of the Law of Nations*, rev. ed. New York: Macmillan Company.
- Reisman, W. M. (1987). The Cult of Custom in the Late 20th Century. *California Western International Law Journal*, 17(1), 133-145.

- Roberts, A. (2001). Traditional and modern approaches to customary international law: A reconciliation. *American Journal of International Law*, 95(4), 757–791. <https://doi.org/10.2307/2674625>
- Rubin, A. P. (1993). Review of Oppenheim's International Law, Ninth Edition, Volume I, Peace. *The Fletcher Forum of World Affairs*, 17(1), 226-230. Medford: Fletcher School of Law and Diplomacy. <http://www.jstor.org/stable/45288840>
- Second report on formation and evidence of customary international law, by Sir Michael Wood, Special Rapporteur, International Law Commission, Sixty-sixth session, A/CN.4/672, May 2014. Available at: [https://legal.un.org/ilc/documentation/english/a\\_cn4\\_672.pdf](https://legal.un.org/ilc/documentation/english/a_cn4_672.pdf) (Accessed 17.04.2025).
- Shaw, M. N. (2021). *International Law*, 9th ed. Cambridge: Cambridge University Press.
- Thirlway, H. (2019). *The Sources of International Law*, 2nd Edition. Oxford: Oxford University Press. <https://doi.org/10.1093/law/9780198841814.001.0001>
- ICJ, Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment, I.C.J. Reports 2005.
- ICJ, Asylum (Colombia/Peru), Judgment, I.C.J. Reports 1950.
- ICJ, Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicaragua), Judgment, I.C.J. Reports 2009.
- ICJ, Frontier Dispute (Burkina Faso v. Mali), Judgment, I.C.J. Reports 1986.
- ICJ, Gabčíkovo-Nagymaros Project (Hungary v. Slovakia), Judgment, I.C.J. Reports 1997.
- ICJ, Jurisdictional Immunities of the State (Germany v. Italy; Greece intervening), Judgment, I.C.J. Reports 2012.
- ICJ, Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nigeria; Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002.
- ICJ, Land, Island and Maritime Frontier Dispute (El Salvador v. Honduras; Nicaragua intervening), Judgment, I.C.J. Reports 1992.
- ICJ, Legal Consequences for States of the Continued Presence of South Africa in Namibia, Advisory Opinion, I.C.J. Reports 1971.
- ICJ, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004.
- ICJ, Legal Consequences of the Separation of the Chagos Archipelago, Advisory Opinion, I.C.J. Reports 2019.
- ICJ, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996.
- ICJ, Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States), Judgment, I.C.J. Reports 1986.
- ICJ, North Sea Continental Shelf (Germany v. Denmark; Germany v. Netherlands), Judgment, I.C.J. Reports 1969.
- ICJ, Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports 1949.
- ICJ, Right of Passage over Indian Territory (Portugal v. India), Merits, Judgment, I.C.J. Reports 1960.
- ICJ, South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa), Second Phase, Judgment, I.C.J. Reports 1966, 248.
- ICJ, United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran), Judgment, I.C.J. Reports 1980.
- International Law Commission (1950). Yearbook of the International Law Commission, Volume I. Available at:

[https://legal.un.org/ilc/publications/yearbooks/english/ilc\\_1950\\_v1.pdf](https://legal.un.org/ilc/publications/yearbooks/english/ilc_1950_v1.pdf)  
(accessed on 18.04.2025).

International Tribunal for the Law of the Sea. *M/V Saiga (No. 2) (Saint Vincent and the Grenadines v. Guinea)*, Judgment, ITLOS Reports 1999.

Permanent Court of International Justice. *Case of the S.S. 'Lotus' (France v. Turkey)*, Judgment, PCIJ Series A, No. 10, 1927.

Organisation of African Unity, *Cairo Declaration on Border Disputes Among African States*, AHG/Res. 16(I).

United Nations General Assembly. (1970). *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations*, UNGA Res. 2625 (XXV).

United Nations. (1945). *Charter of the United Nations*, XVI.

United Nations. (1969). *Vienna Convention on the Law of Treaties*.

United Nations. (1946). *Statute of the International Court of Justice*.



## THREE AXIOMS ON UNWRITTEN (SOURCES OF) LAW

Dr. Marco Mazzocca, Ph.D.  
Recognized Researcher (R2)  
P.I. COIN Project  
Pavol Jozef Šafárik University in Košice  
Faculty of Law  
Gustav Radbruch Institute of Theory  
of Law  
Kováčska 26  
040 75 Košice; Slovakia  
[marco.mazzocca@upjs.sk](mailto:marco.mazzocca@upjs.sk)  
ORCID: 0000-0001-7395-1331

This research was funded by the EU NextGenerationEU through the Recovery and Resilience Plan for Slovakia, under project No. 09I03-03-V04-00261 titled "The Emergence of Collective Intentionality in Participatory Decision-Making Processes of the Courts" (COIN).

**Submitted:** 30 April 2025  
**Accepted:** 02 October 2025  
**Published:** 28 December 2025

**Abstract:** *This essay proposes three axioms to clarify the status of unwritten law and unwritten sources of law. The first axiom asserts that written and unwritten norms share the same ontological status as abstract institutional entities, differing only in their modes of inscription and accessibility. The second axiom argues that their epistemological distinction is weak: both statutes and customs rely on overlapping forms of documentary and testimonial justification, despite following divergent procedural paths. The third axiom contends that laws and sources of law are not categorically distinct, but functionally interwoven, often reinforcing each other within the normative fabric of legal systems. Rather than offering final answers, these axioms serve as conceptual instruments – provisional yet clarifying tools for navigating the complex relations between codified rules and evolving practices. By foregrounding this triadic framework, the essay invites a renewed philosophical inquiry into the fluid architecture of normative authority.*

**Key words:** *Legal Philosophy; Legal Ontology; Legal Epistemology; Unwritten Law; Unwritten Source of Law*

**Suggested citation:**

Mazzocca, M. (2025). Three Axioms on Unwritten (Sources of) Law. *Bratislava Law Review*, 9(Spec), 137-146. <https://doi.org/10.46282/blr.2025.9.Spec.1041>

## 1. INTRODUCTION

This brief essay proposes three axioms,<sup>1</sup> with the aim of structuring a discourse on unwritten law and unwritten sources of law that avoids both legalistic rigidity and philosophical extravagance. To borrow a metaphor – one that may resonate with those who view philosophy as a form of cartography – this essay does not claim to chart a definitive map of unwritten laws, but rather to sketch the contours of their conceptual terrain. In doing so, it will identify impassable regions, conceptual mirages, and misleading shortcuts, while marking possible paths for further exploration.

The three axioms here proposed, indeed, are not intended as final answers, but as points of departure: signposts that may assist legal scholars in navigating this intricate domain with greater clarity, if not certainty. Each axiom addresses a different dimension of the problem. The first axiom asserts the ontological equivalence of written and unwritten laws, framing both as abstract institutional entities whose distinction lies not in their mode of being, but in their inscription and epistemic accessibility. It suggests that

---

<sup>1</sup> In this text, the term "axiom" is not employed in its strict technical sense, as used in mathematics or philosophy – where it denotes a proposition accepted as true, indemonstrable within the system, and foundational to its logical structure. A way, in other words, "to concentrate the understanding of a field in a few statements" (Béziau, 2021, p. 104). Here, I use the term in a more functional and conventional sense: the three "axioms" presented are better understood as foundational principles which, although not strictly demonstrated, are justified within the framework of the argument. They serve as operational starting points for constructing a coherent discourse, both philosophical and legal.

the existence of law does not depend on its material manifestation, but rather on its institutional recognition and normative force.

The second axiom addresses the epistemological nature of unwritten laws, examining how they are known, transmitted, and validated within a legal system. It stresses the continuity between written and unwritten laws, acknowledging that while they share common modes of justification – both relying on documentary and testimonial practices – their forms of inscription and procedural pathways remain distinct.

Finally, the third axiom introduces a functional distinction, emphasizing the fluid roles that legal norms – whether written or unwritten – play within the legal system. While both laws and their sources are ontologically and epistemologically interconnected, this third axiom underscores how the functional dimension of unwritten laws reveals their generative power within the legal order, without reducing them to mere historical antecedents or symbolic references. It invites reflection on the ways unwritten norms actively shape, rather than merely precede, the development and evolution of legal systems.

By positing these three axioms, this essay does not aim to distill the complexities of unwritten law into reductive definitions or confine the topic within rigid conceptual boundaries. On the contrary, it seeks to offer a shared conceptual framework – a language through which scholars can engage with unwritten laws and the unwritten sources of law – enhancing clarity, precision, and mutual intelligibility. These axioms, should they prove effective, do not offer definitive answers. Rather, they sketch the contours of a problem that, much like an incomplete map, becomes more intelligible and, consequently, more amenable to systematic, rigorous inquiry. Their true contribution lies not in resolving the debate but in sharpening its course, providing conceptual tools that sustain ongoing theoretical reflection, adapting as thought evolves. In this way, they do not close the discourse but open it to further developments, for like any good map, they show not only where one has been, but also where one could go.

## 2. FIRST AXIOM: ONTOLOGICAL EQUIVALENCE

The question of what entities exist in the world is a central concern of ontology. As the etymology of the term suggests [from the ancient Greek “ὄντος” (being)], ontology addresses the nature of existence – more specifically, the categories of things that populate our ordinary world (Grossmann, 1992; Varzi, 2005). Engaging with ontology, then, means grappling with fundamental questions about the nature of existence. For example: ‘What is there?’ (Quine, 1948, p. 21) If we were to compile a “universal catalogue”<sup>2</sup> of all that exists, what entities would it include? Would this catalogue be confined to concrete, tangible objects – such as trees, rocks, and chairs – or must it also account for abstract entities like laws, rights, and moral concepts, which, despite lacking physical form, exert a concrete influence and shape our social world?

At first glance, it may seem that unwritten laws differ ontologically from written ones, especially when viewed through a materialist lens. Unwritten laws appear abstract, while written laws seem concrete. However, consider the example of a written law, such as the Slovak Constitution. Its legal and historical features are well-documented – we know when it was drafted, enacted, amended, and how many articles it contains. If I were

---

<sup>2</sup> The term “universal catalogue” refers to a list of what is around us and to which we usually refer when we speak or when we plan our actions. It is, in other words, a catalogue of everything that exists, has existed, and perhaps may exist in the future. For a detailed account of the universal catalogue, see Varzi (2001, pp. 13–19).

to ask my Slovak students to show me their Constitution, they would likely present the physical volume of the Slovak Constitution: a book with mass, form, and spatiotemporal presence, akin to a chair or a table. Yet, when I state, “The Slovak Constitution grants Slovak citizens the right to vote”, I am not referring to the physical object itself. This statement remains true even if every physical copy of the Constitution were destroyed. Rights, such as the right to vote, do not depend on the persistence of paper or ink. If new copies were printed or the text transcribed by hand, we would not create a new Constitution but merely reproduce the same legal entity. The Slovak Constitution, along with the rights it enshrines, exists independently of any particular physical instantiation. It is not a concrete object, but rather a conventional, abstract entity.

Similarly, when we refer to unwritten laws – such as customs, general principles of law, or institutional practices – we are not pointing to material entities. By definition, these are non-physical and often not captured in textual form. Therefore, if both written and unwritten laws are abstract entities, the ontological distinction between them is not substantive. From an ontological perspective, both are abstract institutional entities whose existence depends on social recognition, not on physical manifestation.

At this stage, however, a jurist could object that everything depends on what we mean by existence. Kelsen (1945, p. 30), for instance, equated the existence of a law with its validity, and vice versa. But this move merely shifts the question: it replaces the problem of existence with that of validity. And validity, as some have observed (cf. von der Pfordten, 2018, p. 4), is itself a questionable concept – an invention of philosophy, adopted and perhaps overvalued by certain legal theorists, often to the detriment of conceptual clarity.

Yet the issue cannot be dismissed. Concepts such as validity, effectiveness, bindingness, or applicability presuppose that we know what it means for a law to exist<sup>3</sup>. In this sense, once we recognize that both written and unwritten laws ontologically exist in the same way, our focus must shift to what truly distinguishes them: not their existence, but whether or not they are inscribed. The term ‘unwritten’ may misleadingly suggest a lack of form or definition, as though these norms were somehow more ephemeral or ontologically weaker than their codified counterparts. However, abstraction does not entail vagueness, nor does the absence of inscription imply non-existence.

The lack of a written form does not diminish the “deontic power” (Searle, 2010, p. 8) that unwritten laws also embody<sup>4</sup>. Consider, for example, *kaitiakitanga* (guardianship) in Māori culture – a customary norm governing environmental stewardship through oral tradition (Kawharu, 2000) – or the *Ofo* customary system, a pre-colonial legal institution in Igbo culture (Ikegwu, 2018). These practices are neither hallucinated nor idiosyncratic: they are recognized unwritten laws, often enforceable, and – critically – repeatable over time and within their context.

---

<sup>3</sup> These issues have been widely discussed in legal theory. For an initial overview, see Krešić (2022). For a more detailed analysis of the relationship between validity, effectiveness, and existence of laws, see Mazzocca (2022).

<sup>4</sup> The term deontic power designates the normative force or binding authority that a norm exercises – its capacity to impose obligations, confer rights, or authorize actions. The notion originates in deontic logic, a subfield of modal logic concerned with normative modalities such as obligation (ought), permission (may), and prohibition (must not) (von Wright, 1951). Within legal theory, deontic power is not contingent upon the specific form a norm assumes – whether written or unwritten – but rather derives from its institutional recognition, systemic acceptance, and practical efficacy within a normative order (MacCormick and Weinberger, 1986; Raz, 2009). As Searle (2010) has emphasized, deontic powers are generated through collective intentionality and the assignment of status functions; that is, they emerge when a community collectively acknowledges that a particular act, rule, or entity counts as fulfilling a specific institutional role or authority.

Intelligible to members of the community, they generate expectations, obligations, and legal consequences. What they lack is not structure or normative density, but fixed material inscription.

Unwritten laws, then, inhabit the same ontological domain as written ones: they are abstract institutional entities, dependent on a network of collective recognition, embedded practices, and interpretive traditions. They exist by virtue of what John Searle has called "collective intentionality" (Searle, 1995, p. 23), and they are sustained by ongoing social validation. But this is not a mark of incompleteness: it is a condition shared by all legal norms, whether codified or not.

In this sense, the distinction between written and unwritten laws is not ontological, but epistemological. It concerns how we access, identify, and justify such norms – not whether they exist. Their abstract status does not make them any less real than the institutional facts that rely on them, and it is precisely this shared ontological basis that allows us to focus on their inscription as the meaningful differentiating factor.

### 3. SECOND AXIOM: WEAK EPISTEMOLOGICAL DISTINCTIONS

Distinguishing between ontology and epistemology is not always straightforward. In theory, the difference appears clear-cut: ontology investigates what exists – asking "What is there?" – while epistemology concerns how we come to know that something exists, addressing the question "How do we know that something is there?". In practice, however, these two dimensions are often conflated.

A notable casualty of this confusion is arguably H.L.A. Hart. In his account of the rule of recognition, he famously asserted that it "exists only as a complex, but normally concordant, practice of the courts, officials, and private persons in identifying the law by reference to certain criteria. Its existence is a matter of fact" (Hart, 1994, p. 101). In doing so, however, Hart appears to conflate the ontological status of a legal rule with the epistemic practices by which legal actors come to apprehend it. Therefore, unless we read the rule of recognition as a "blanket term" encompassing a set of cognitive procedures for acquiring legal knowledge, that term seems to blur the crucial line between the existence of a legal entity and how we come to know about its existence.

Thus, when we shift our focus from the existence of legal norms to the ways in which they are epistemically accessed, the distinction between written and unwritten law takes on renewed significance. From this epistemological perspective, what is at stake is not the being of norms, but the regimes of knowledge through which they are apprehended. Put differently, depending on whether the law is written or unwritten, legal actors – jurists, judges, or citizens – must rely on distinct forms of epistemic justification to determine the norm's validity, applicability, and its very existence.

In the case of written law, epistemic access is typically documentary and mediated by officially sanctioned texts. Legal knowledge in this context tends to conform to the classical model of propositional knowledge, often framed as "justified true belief" (Gettier, 1963). An agent can be said to know that "P is a legal norm" if and only if: (1) P is indeed a valid norm (truth), (2) the agent believes that P is a norm (belief), and (3) the agent has good reasons for this belief, grounded in reliable institutional sources such as statutory texts or official gazettes (justification). In this configuration, the epistemic source is public and accessible, and the justification relies on textual evidence and the principle of legal publicity.

By contrast, unwritten law presents greater epistemic complexity. Legal knowledge in this context relies on indirect sources: consolidated practices (*usus*), widespread normative convictions (*opinio juris ac necessitatis*) (Wagner, 2012), and the

emergence of general principles of law.<sup>5</sup> These norms are typically not directly accessible through reading authoritative texts.<sup>6</sup> Instead, they require inferential strategies, often involving systematic, analogical, or evolutionary interpretations.

In these cases, social epistemology provides indispensable conceptual tools for understanding how legal knowledge is generated and justified in the absence of direct textual references. Scholars such as Alvin Goldman (1999) argue that knowledge is not merely the result of individual reasoning but often arises from collective mechanisms of epistemic reliability. Within the legal domain, this implies that the validity of unwritten norms is frequently established through intersubjective convergence among institutional actors – judges, scholars, administrators – who, as epistemic authorities, contribute to the construction and legitimization of such norms (Zagzebski, 2012).

Importantly, however, the epistemic complexity of unwritten law does not imply that written law is epistemically straightforward or free of mediation. Even in the case of codified norms, interpretation plays a central role. Legal texts do not speak for themselves; they are interpreted, contextualized, and validated by institutional authorities. Thus, legal knowledge – whether of written or unwritten norms – is never the result of a purely individual or direct encounter with normative content. It is always mediated by systems of authority, modes of reasoning, and culturally embedded practices of interpretation.

In this light, written and unwritten law may be said to differ not in kind, but in degree: the former offers a seemingly more direct form of epistemic access, grounded in the materiality of the text, whereas the latter requires more overtly inferential and testimonial mechanisms of justification. Both, however, are subject to the same underlying epistemic conditions: institutional recognition, interpretive coherence, and social validation.

Ultimately, then, written and unwritten laws are structured by distinct yet overlapping epistemic regimes. The former is anchored in textual traceability and documentary transparency; the latter relies more explicitly on institutional testimony, systemic coherence, and the interpretive competence of legal agents. This distinction suggests that any viable theory of legal knowledge must operate on at least two levels: one concerned with the materiality and visibility of legal sources, and another focused on the social and interpretive dynamics through which normative recognition takes place. In both cases, however, it is crucial to note that law does not emerge as a brute fact, but as an institutional reality whose accessibility is mediated through complex and socially situated epistemic practices. Therefore, upon closer inspection, the epistemological distinction itself may turn out to be considerably weaker than it first appears.

#### 4. THIRD AXIOM: FUNCTIONAL DISTINCTION

Up to this point, the analysis has focused on written and unwritten law, establishing their ontological equivalence – as instances of the same class of abstract institutional entities – and their modest epistemological divergence, rooted in differing degrees of accessibility and interpretability for epistemic agents. Yet in articulating these

---

<sup>5</sup> In this sense, consider, for instance, Article 12 of the Preliminary Provisions to the Italian Civil Code, which expressly authorizes, in cases of extreme doubt, the application of the general principles of the State's legal system. This, incidentally, also illustrates how even written law can sometimes explicitly refer to unwritten law to guide judicial reasoning.

<sup>6</sup> Although today there are examples of written compilations of norms that were originally unwritten, such as the Restatements of the Law produced by the American Law Institute or the identification of customary international law carried out by the United Nations International Law Commission.

two axioms, a further conceptual assumption appears to have been tacitly accepted: namely, the distinction between law and sources of law.

This distinction becomes particularly salient in the case of unwritten law. In such contexts, reference is often made to customs, usages, or institutional practices not as laws *stricto sensu*, but as sources of law. The analytical focus thereby shifts, often implicitly, from the ontology of norms to that of their generative foundations. Yet the very notion of a “source of law” remains conceptually opaque. As Roscoe Pound lucidly observed, the term “source of law” is indeed inherently polysemic, resisting straightforward definition and encompassing at least five distinct meanings:

First, it has been used to mean what might be called from the analytical standpoint (re-membering the phrase that the King is the fountain of justice) the fountain of law, that is, the immediate practical source of the authority of legal precepts. In other words, the state. Austin so uses it. Second, it is often used to mean the authoritative texts which are the basis of juristic and doctrinal development of the traditional element of a legal system. In the civil law the term *fontes iuris* is used in this sense. The German jurists speak of *Rechtsquellen*. For the Continental jurists, the sources in this sense are the Roman texts. For us, they would be the authoritative reports. Third, Gray uses “source” to mean the raw material, as it were, both statutory and traditional, from which the judges derive the grounds of deciding the cases brought before them. Fourth, the term is used to mean the formulating agencies by which rules or principles or conceptions are shaped so that legislation and judicial decision may give them authority. Fifth, the term is used to mean the literary shapes, as it were, in which legal precepts are found; the forms in which we find them expressed (Pound, 1946, pp. 247-248).

It is not surprising, then, that given this semantic richness, any attempt to fix the meaning of the term “source of law” runs the risk of either oversimplification or excessive vagueness. Nonetheless, the concept retains a strong intuitive appeal, as evidenced by the enduring influence of Savigny’s nineteenth-century formulation. According to Savigny, the *Entstehungsgründe* – that is, the “conditions of emergence” of law – should be regarded as its true sources (von Savigny, 1840, pp. 11–13). In this view, the source is not the law itself, but rather that which gives rise to it: a genealogical account, rather than a classificatory one. From this perspective, customs, shared convictions, or institutional practices do not merely contain law but generate it through historical and social sedimentation.

This may also explain why, in contemporary discourse, a more functionalist conception tends to prevail – one that defines sources as the acts and facts suitable for producing law (Anelli, Granelli, Schlesinger, and Torrente, 2023, p. 22). A conception that, incidentally, seems to be nothing more than a restatement of the classical realist formulation, according to which sources of law are merely “factors in the motivation process of the judicial decision” (Ross, 1946, p. 144), and thus legal materials picked up by judges to resolve disputes. While more pragmatic, this formulation nonetheless preserves the core intuition of Savigny’s view: that sources are not themselves laws, but rather the enabling conditions under which legal norms – general as particular, abstract as concrete – come into being. Yet, as John Bell (2018, p. 42) aptly observes, these two dimensions – the generative and the normative – often go hand in hand. So closely, in fact, that they are frequently indistinguishable in practice. Consider any constitutional provision governing legislative procedures: no one would seriously deny that such a provision is both a law and a source of law. Indeed, legal textbooks routinely list constitutions, international norms, customs, and similar entities as sources of law – without thereby implying that they are not also laws themselves. The overlap is not only conceptually tolerable, but rather obvious.

Therefore, if law and sources of law – whether written or unwritten – are overlapping concepts, it follows that, from both an ontological and an epistemological standpoint, they are governed by the same axioms outlined above. Unless one maintains that sources of law are not law – or, more radically, that they lie outside the domain of law altogether – there appears to be no compelling reason to treat them as ontologically distinct from law. At most, one might argue that a particular legal provision functions at times as law and at other times as a source of law.

Of course, adherents of a certain strand of legal positivism might object that this conflation of law and sources of law is ill-suited to account for foundational constructs such as Kelsen's basic norm (*Grundnorm*) (Kelsen, 1967), Hart's rule of recognition (Hart, 1994), or Schmitt's concept of constitution-making power (Schmitt, 2008). These foundational norms, they could argue, are neither posited nor derived from enacted sources – whether written or unwritten. Instead, they are presupposed as necessary conditions for the validity of the entire legal system. From this perspective, therefore, there would be no source of law for the basic norm, the rule of recognition, or the constituent power; these are not products of law, but rather the preconditions for its very existence.

In other words, the three axioms proposed here – the ontological, the epistemological, and the functional – are either incapable of accounting for, or simply inapplicable to, constructs such as the Kelsenian basic norm, Hart's rule of recognition, or Schmitt's concept of constituent power, ideas frequently invoked by constitutional law scholars. And this is the case: these axioms fail to apply to the aforementioned concepts for at least two reasons. First, they represent exceptions to the conventional distinction between law and sources of law. According to the definition of source of law adopted here, indeed, it is not even clear whether entities such as the basic norm, the rule of recognition, or the constituent power can be properly classified as genuine sources of law. Second – and though this extends beyond the immediate scope of the present inquiry – it is important to acknowledge that, at least *prima facie*, these three legal positivist constructs seem fundamentally external to legal systems, whereas the axioms here discussed are designed to operate strictly within the confines of those systems<sup>7</sup>. In fact, one might say that the very difficulty of fitting these positivistic constructs within the category of 'sources of law' illustrates the limits of the positivist paradigm rather than of the functional axiom itself. Their ambiguous status only confirms that the notion of source is better understood as a practical-analytical tool, not as an ontological category.

Having thus clarified that the axioms proposed in this paper apply primarily within the internal logic of legal systems, it is worth reiterating that the observed overlap between laws and their sources is not a flaw in the conceptual framework but rather a reflection of the dynamic nature of legal systems themselves. Norms routinely shift roles: functioning as binding rules, as generative structures, and as interpretive anchors. While the functional distinction between laws and sources of law proves porous in practice – with many legal norms simultaneously operating as both – this very fluidity reinforces the ontological and epistemological unity posited by the first two axioms.

---

<sup>7</sup> The "externality" of these foundational constructs can be understood in at least three distinct senses. In the transcendental sense, as in Kelsen's theory, the *Grundnorm* is not part of the legal system but a presupposed logical condition for the system's intelligibility and normative unity (Kelsen, 1967). In the meta-legal sense, as Hart suggests, the rule of recognition is a social rule that describes the criteria of legal validity, yet it is not itself subject to legal validation (Hart, 1994). Finally, in the political-existential sense, the constituent power (also called Constitution-Making power) represents a founding moment that precedes, enables, and is not constrained by the legal order it establishes (Schmitt, 2008; Negri, 1999).

This third axiom, then, does not posit a new ontological or epistemological distinction, but rather highlights the functional role of the concept of “source of law.” Whereas the first axiom establishes the ontological equivalence of written and unwritten law, and the second clarifies their modest epistemological divergence, the third adds a different layer: it shows that the category of source of law operates primarily as a heuristic and practical device. In other words, the language of “sources” does not refer to entities that are ontologically distinct from law, but instead organizes how law is generated, identified, and applied within legal systems. The very persistence of this category, despite its semantic ambiguities, reflects its usefulness in structuring legal discourse and guiding institutional practices, rather than its descriptive accuracy about the existence of legal norms.

This functional axiom, therefore, is not intended to rigidly demarcate laws from their sources, but to underscore their mutual interdependence. Just as unwritten laws derive their authority from patterns of institutional recognition, written laws presuppose unwritten frameworks of meaning and validation. The dichotomy collapses, revealing law as a unified field of normative forces – accessible through diverse epistemic pathways yet ontologically coherent. This, ultimately, is the contribution of the three axioms: they dissolve artificial hierarchies, offering a conceptual lens through which the living law – both inscribed and emergent – may be studied in its full normative, institutional, and interpretive complexity.

## 5. CONCLUSION: THE BIG ABSENTEE

From the outset of this work, I have maintained that the three axioms proposed here – the ontological equivalence between written and unwritten law, the weak epistemological distinction between them, and the functional differentiation between laws and sources of law – are intended merely as a starting point. These axioms do not aim to provide definitive answers to the complex questions surrounding the nature of law, but rather to offer scholars a clearer conceptual framework for addressing the intricate issues raised by the notion of unwritten (sources of) law. They are designed to provide a foundation for further exploration, acknowledging that the very nature of unwritten law remains a relatively underexplored area within contemporary legal and philosophical discourse.

In this sense, the acceptance of these axioms is not necessary to achieve the primary goal of this essay. Simply bringing to light the challenges they raise may already constitute a significant contribution to future legal and philosophical inquiry into the nature of unwritten (source of) law. The identification of these issues can stimulate fresh perspectives and encourage a deeper understanding of how we conceptualize and engage with various forms of law. For instance, consider a scholar who rejects the third axiom – the one that emphasizes the functional distinction between laws and sources of law. This axiom may seem particularly fragile, as it partly rests on an arguably arbitrary choice regarding the meaning of the term “source of law.” Yet, even in such a case, the first two axioms would retain their validity and effectiveness: from an ontological perspective, written and unwritten law would continue to exist as abstract entities, only weakly distinguished from one another epistemologically, with the understanding that our knowledge of them may vary in its depth and scope.

In this way, therefore, even applying only the first two axioms, we would come to consider written constitutions as not so dissimilar to unwritten ones, just as unwritten customary law is not so dissimilar from written law. In this sense, for example, it matters little whether principles such as the well-known principle of international law, the Principle

of Non-Intervention, are customary (unwritten) in nature, or are now based primarily on what is stated, for example, in Article 2, paragraph 7 of the United Nations Charter or in the 1970 Declaration of Fundamental Principles of International Law. Given the axioms presented here, what matters is not so much the classificatory label we attach to such principles, but what they establish within the legal order.

Throughout this essay, however, a significant omission has loomed in the background without ever being fully addressed: the metaphysics of (the source of) law has remained largely untouched. Indeed, while the existence of certain entities has been affirmed within the framework of the axioms, their precise nature and identity have not been fully explored. As Bianchi and Bottani (2003, p. 15) aptly suggest, affirming the existence of entities is one thing; characterizing their precise nature is quite another. This latter task, they argue, belongs more properly to the metaphysical domain than to the ontological one. In other words, whereas ontology is concerned with what exists, metaphysics is concerned with what those things are in their full essence.

This distinction, though philosophically significant, is not always easy to maintain. One often cannot affirm the existence of an entity without offering at least a preliminary account of its nature. Just as it would be problematic to assert the existence of the Higgs boson without describing its properties, so too would it be insufficient to posit the existence of unwritten law without some specification of its character.

From this perspective, the first axiom could be regarded not only as ontological, but also – at least in part – as metaphysical. The claim of equivalence between written and unwritten law involves not only the affirmation of their existence, but also an implicit assertion of their shared characteristics, their internal structure, and their role within the broader architecture of legal systems. Even once the distinction between ontology and metaphysics is made explicit, the first axiom retains its full force. It offers scholars a sharper awareness of the philosophical depth of concepts such as law and source of law, helping them avoid superficial reductions or philosophical reifications born of conceptual imprecision.

In doing so, it provides an invaluable instrument for a more nuanced understanding of the legal landscape. Moreover, it may open the way to new lines of inquiry within legal philosophy – particularly those that explore the still underdeveloped distinction between the ontology and metaphysics of legal phenomena. The future of legal scholarship, in this sense, may well be shaped by such refined perspectives, paving the way for more sophisticated analyses of legal systems and their sources.

#### BIBLIOGRAPHY:

- Anelli, C., Granelli, C., Schlesinger, R. and Torrente, A. (2023). *Manuale di diritto privato (27<sup>a</sup> ed.) [Handbook of Private Law]*. Milano: Giuffrè Francis Lefebvre.
- Bell, J. (2018). Sources of Law. *The Cambridge Law Journal*, 77(1), 40–71, <https://doi.org/10.1017/S0008197318000053>
- Béziau, J. Y. (2021). Is there an Axiom for Everything? In: Passon, O. and Benz Müller, C. (eds), *Wider den Reduktionismus* (pp. 103–117). Berlin, Heidelberg: Springer Spektrum.
- Bianchi, C. and Bottani, A. (2003). Introduzione: metafisica, ontologia e significato [Introduction: Metaphysics, Ontology, and Meaning]. In: C. Bianchi and A. Bottani (Eds.), *Significato e ontologia [Meaning and Ontology]* (pp. 7–23). Milano: Franco Angeli.
- Gettier, E. L. (1963). Is justified true belief knowledge? *Analysis*, 23(6), 121–123.

- Goldman, A. I. (1999). *Knowledge in a social world*. Oxford: Oxford University Press.
- Grossmann, R. (1992). *The existence of the world: an introduction to ontology*. London, Routledge.
- Hart, H. L. A. (1994). *The Concept of Law* (2nd ed., with a postscript by J. Raz). Oxford: Oxford University Press.
- Ikegwu, J. U. (2018). Ofo as a Global Cultural Resource and Its Significance in Igbo Culture Area. *Ikenga: International Journal of Institute of African Studies*, 14(1), 19-34.
- Kawharu, M. (2000). Kaitiakitanga: A Māori anthropological perspective of the Māori socio-ethnic of resource management. *Journal of the Polynesian Society*, 109(4), 349-370.
- Kelsen, H. (1945). *General Theory of Law and State*. Cambridge: Harvard University Press.
- Kelsen, H. (1967). *Pure Theory of Law*. Berkeley: University of California Press.
- Krešić, M. (2022). Compulsory adjudication: an emerging principle of European Law and the Western Balkans' accession to the European Union?. In: M. Krešić, D. Banović, A. Carrio Sampedro and J. Pleps (eds.), *Ethnic Diversity, Plural Democracy and Human Dignity* (pp. 41–48). Cham: Springer.
- MacCormick, N. and Weinberger, O. (1986). *An Institutional Theory of Law: New Approaches to Legal Positivism*. Dordrecht; Boston: D. Reidel Publishing Company.
- Mazzocca, M. (2022). The Modes of Existence of the Law. A preliminary study on the possible existence of abstract legal entities. In: A. Brösl and M. Breichová Lapčáková (Eds.), *Spravodlivosť, spoločnosť, sloboda: Zborník zo Zasadnutia slovenskej sekcie IVR pred 30 svetovým kongresom [Justice, Community, Freedom: Proceedings from the Meeting of the Slovak Section of the IVR prior to the 30th World Congress]* (pp. 73–88). Košice: ŠafárikPres.
- Negri, A. (1999). *Insurgencies: Constituent Power and the Modern State*. Minneapolis: University of Minnesota Press.
- Pound, R. (1946). Sources and Forms of Law. *Notre Dame Law Review*, 21(4), 247-314.
- Quine, W. V. O. (1948). On what there is. *Review of Metaphysics*, 2(5), 21-38.
- Raz, J. (2009). *The Authority of Law: Essays on Law and Morality* (2nd ed.). Oxford; New York: Oxford University Press.
- Ross, A. (1946). *Towards a realistic jurisprudence*. Copenhagen: Munksgaard.
- Schmitt, C. (2008). *Constitutional Theory*. Durham and London: Duke University Press.
- Searle, J. R. (1995). *The Construction of Social Reality*. New York: Free Press.
- Searle, J. R. (2010). *Making the Social World: The Structure of Human Civilization*. New York; Oxford: Oxford University Press.
- Varzi, A. C. (2001). *Parole, oggetti, eventi e altri argomenti di metafisica [Words, Objects, Events, and Other Metaphysical Issues]*. Roma: Carocci.
- Varzi, A. C. (2005). *Ontologia [Ontology]*. Roma: Laterza.
- von der Pfordten, D. (2018). Validity in Positive Law: A Mere Summary Concept. In: P. Westerman, J. Hage, S. Kirste and A. R. Mackor (Eds.), *Legal Validity and Soft Law* (pp. 1–18). Cham: Springer.
- von Savigny, F. C. (1840). *System des heutigen Römischen Rechts* (Vol. 6). Berlin: Veit und comp.
- von Wright, G. H. (1951). Deontic Logic. *Mind*, 60(237), 1–15, <https://doi.org/10.1093/mind/LX.237.1>
- Wagner, A. (2012) *Opinio Juris and Theorizing Law*. SSRN. <https://doi.org/10.2139/ssrn.2083132>
- Zagzebski, L. (2012). *Epistemic authority: A theory of trust, authority, and autonomy in belief*. Oxford: Oxford University Press.

# NATIONALITY IN INTERNATIONAL PRIVATE LAW: RELIC OR RELEVANCE

JUDr. Ing. Dominika Moravcová, PhD.  
LL.M., MBA  
Assistant Professor  
Trnava University, Faculty of Law  
Department of Civil  
and Commercial Law  
Kollárova 545/10  
917 01 Trnava, Slovakia  
[dominika.moravcova@truni.sk](mailto:dominika.moravcova@truni.sk)  
ORCID: 0000-0003-0936-6749

**Abstract:** *Nationality, lex patriae, continues to play a significant role as a connecting factor in resolving private-law relationships involving a foreign element, both in the context of conflict-of-law rules and in determining international jurisdiction. Although EU regulations and multilateral instruments adopted under the auspices of the Hague Conference on Private International Law have tended to move away from this criterion in favour of more factual connecting factors, its relevance remains preserved through its continued presence in domestic legislation and bilateral treaties. This article addresses the issue of nationality as a legal connecting factor and explores the question of whether the assumption, that an individual should, for the purposes of international private and procedural law, be considered exclusively a national of a single state, can be regarded as a generally applicable rule across the entire field and all norms of international private and procedural law.*

**Key words:** *Nationality; Lex Patriae; International Private and Procedural Law*

## Suggested citation:

Moravcová, D. (2025). Nationality in International Private Law: Relic or Relevance. *Bratislava Law Review*, 9(Spec), 147-160. <https://doi.org/10.46282/blr.2025.9.Spec.1052>

Submitted: 17 May 2025

Accepted: 11 December 2025

Published: 28 December 2025

## 1. INTRODUCTION

Disputes arising from private law relationships involving a foreign element are increasingly being brought before the courts of the Slovak Republic, as well as before the courts of Member States of the European union (hereinafter referred to as the "EU") more generally. A significant portion of these intra-EU relationships is governed, from the perspective of international private and procedural law, by EU regulations adopted within the framework of judicial cooperation in civil and commercial matters. However, there is a growing number of private-law relationships involving a foreign element linked to third (non-EU) countries. This development is driven by various external factors, such as the war in Ukraine, ongoing migration flows from third countries into Europe, and others. While EU legal instruments seldom rely on nationality as a connecting factor and multilateral conventions similarly tend to move away from it, nationality continues to appear as a relevant criterion in bilateral treaties on legal assistance, as well as in domestic legislation, such as the Slovak Act on International Private and Procedural Law.<sup>1</sup>

The main objective of this article is to examine whether the assumption that, for the purposes of private international law, an individual must possess exclusive nationality of a single state should be regarded as an unwritten rule, or whether this assumption merely reflects the legacy of an outdated and inflexible legal framework, notably, though not exclusively, in Slovak private international law. A partial objective is to assess the current role of nationality as a connecting factor in international private and procedural law in general, and to evaluate whether the prevailing presumption, that the mere fact of

---

<sup>1</sup> Act No. 97/1963 Coll, on International Private and Procedural Law (hereinafter referred to as the "Act on PIL").

an individual not being a Slovak national, automatically triggers the application of private international law rules, remains valid. In this regard, the article also seeks to explore whether it may be time to shift from a formalistic emphasis on registrability toward a more fact-based approach.

In pursuit of these objectives, the article employs a combination of scientific and theoretical legal methods. Following an initial descriptive overview of relevant characteristics, the paper proceeds with an analysis of selected provisions of the legal framework, supplemented by a comparative study of the national regulations of Slovakia and Czech Republic, relevant international treaties, and EU law. Deductive reasoning is applied to allow the formulation of final conclusions, based on the analysis of the aforementioned sources and the accompanying case law.

## 2. NATIONALITY AS A CONNECTING FACTOR IN PRIVATE INTERNATIONAL LAW

The concept of nationality, *lex patriae*, serves as a criterion in both the realm of conflict of laws rules and the determination of jurisdiction in cross-border disputes. This is particularly evident in the context of so-called personal status issues, which experts in the field refer to as “personal law”. This concept permeates several legal areas, including family law and succession law. For centuries, legal doctrine has debated the appropriate personal connecting factor in private international law, with nationality (*lex patriae*) and domicile (*lex domicilii*) emerging as the principal contenders. In Continental European systems, nationality traditionally prevailed. However, evolving legal and societal paradigms, particularly the influence of multiculturalism and globalisation, have led to a paradigm shift toward habitual residence as the preferred connecting factor. This evolution is also reflected in the progressive harmonisation of conflict-of-law rules, extending even to legally sensitive domains such as family and succession law (Davrados, 2017). While nationality and domicile are legal criteria, habitual residence is a factual one (Davrados, 2017). The term “domicile” is employed in the field of jurisdiction, particularly within the context of the EU’s key regulation, Brussels I bis.<sup>2</sup> This regulation offers an interpretation of the concept exclusively for legal persons.<sup>3</sup> For natural persons, the term refers to the determination of their domicile within a specific country in accordance with the *lex fori* rules. As experts in the field have repeatedly emphasised, nationality carries no relevance in this regard unless a person is domiciled outside the EU (Magnus and Mankowski, 2007, p. 73). Despite its legal character, the concept of domicile marks a departure from the rigidly formal nature of nationality, introducing a more fact-oriented connecting factor. This evolution is particularly welcomed. Even further along this factual continuum lies habitual residence, a notion which, though not entirely devoid of legal definition, primarily reflects where a person resides as a matter of habit (iFLG, 2023). It is the centre of an individual’s interests and life, a place where residence shows a certain stability or regularity and must reflect a certain degree of integration into social and family life.<sup>4</sup>

---

<sup>2</sup> Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 351, 20.12.2012, 1–32 (hereinafter referred to as the “Brussels I bis”).

<sup>3</sup> Art. 60 of the Brussels I bis.

<sup>4</sup> Interpreted by the Court of Justice of the European Union (hereinafter referred to as the “CJEU”) in particular in relation to family matters and the Brussels II ter Regulation - e.g.: CJEU, judgment of 22 December 2010, Mercredi, C-497/10, ECLI:EU:C:2010:829, paras 41-56.

Although habitual residence and domicile are frequently linked to a person's nationality, this is not an absolute rule. Nationality is defined as a bond between a state and an individual, which is typically established based on the individual's connection to the state. Although nationality also carries a political and symbolic meaning for the legislature, reflecting identity, sovereignty, and political belonging, this dimension should not affect its function as a connecting factor in private international law. The International Court of Justice has stated in the *Nottebohm* case, that nationality "is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties." States, as original subjects of public international law, retain exclusive sovereign authority to determine the criteria for the acquisition of their nationality. In this context, two primary principles govern the attribution of nationality at birth: *ius soli* and *ius sanguinis* (Malcolm, 2014). Under the *ius sanguinis* model, a child born to nationals residing abroad acquires the nationality of the parents' state, even in the absence of any actual residence or connection to that state. Consequently, individuals may also acquire dual nationality or, conversely, remain stateless from birth. With regard to naturalisation and nationality acquired by law, significant divergences persist across jurisdictions. In general, however, an individual's legal nationality does not necessarily reflect the state in which they reside, work, or maintain substantial personal or economic ties. Despite this, nationality is generally understood to be based on a genuine connection between the individual and the state.<sup>5</sup> For this reason, conflict-of-law rules and jurisdictional norms in international private and procedural law have often relied on nationality as a connecting factor, a practice that persists primarily in domestic legislation, such as the Slovak Act on PIL. This criterion remains particularly relevant in matters concerning the personal status of individuals, including certain aspects of family and succession law. It also appears in some procedural law provisions, where nationality determines the Slovak court's jurisdiction to adjudicate.<sup>6</sup>

In the not-so-distant past, national legal systems sought to avoid the occurrence of dual nationality (Raiteri, 2014), *inter alia* through bilateral regimes aimed at the prevention of multiple or concurrent citizenship. This approach was likewise reflected in the Council of Europe Convention on the Reduction of Cases of Multiple Nationality and on Military Obligations in Cases of Multiple Nationality of 1963. The Convention was grounded in the then-prevailing view, shared by many Western European states, that multiple nationality was undesirable (Achiron, 2005). From the perspective of international private and procedural law, it may be observed that the application of conflict-of-law norms relying on nationality as a connecting factor is considerably simpler where an individual holds only a single nationality, as this avoids potential overlaps or conflicts between competing legal orders. The 1997 European Convention on Nationality, adopted under the auspices of the Council of Europe, introduced a modern framework governing nationality, including the recognition of multiple citizenship. It reflected a clear shift from the earlier restrictive approach of the 1963 Convention, acknowledging the growing acceptance of plural nationality within European legal systems. The Convention sought to consolidate developments in both domestic and international law since the

---

<sup>5</sup> See in this regard CJEU, judgment of 29 April 2025, *Commission v Malta* (Citoyenneté par investissement), C-181/23, ECLI:EU:C:2025:283. And for comparison CJEU, judgment of 7 July 1992, *Micheletti and Others v Delegación del Gobierno en Cantabria*, C-369/90, ECLI:EU:C:1992:295.

<sup>6</sup> E.g. Section 38(1) of the Act on IPL: "In matters of marriage (proceedings for dissolution of marriage by divorce, annulment of marriage, or determination as to whether a marriage exists or not), the jurisdiction of Slovak courts is established if at least one of the spouses is a Slovak citizen."

1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws, thereby providing a coherent and up-to-date legal basis for addressing nationality conflicts (Achiron, 2005). At present, there is a strong global trend toward the toleration of dual citizenship (Bauböck, 2021), which in turn reinforces the relevance of nationality within the framework of private international law and procedural law.<sup>7</sup> As will be demonstrated in this article, remnants of the earlier restrictive approach continue to surface primarily in older bilateral treaties on legal assistance, which fail to adequately address the issue of dual nationality.

Although EU regulations and Hague Conference multilateral conventions have largely moved away from nationality as a connecting factor, references to it persist in certain contexts, notably also in bilateral international legal assistance treaties, which receive comparatively limited attention in international private and procedural law doctrine. However, from the perspective of the analysed area, they occupy a significant position, since in general, the areas excluded from the EU's regulations *ratione materiae* are those where the criteria of nationality prevail at the level of a national rule or a bilateral treaty. Not only in these areas but throughout all fields covered by bilateral treaties between EU Member States and third countries, treaties which continue to apply in relations with third states, Member States are obliged to give these treaties precedence over domestic law, and, in the case of third countries, also over EU regulations, pursuant to the rules contained therein. For Slovakia, the relevance of the bilateral regime has notably increased in relation to Ukraine, as Ukrainian nationals frequently seek refuge from the ongoing conflict in neighbouring Member States, including Slovakia. In principle, all private-law relations involving these persons on Slovak territory fall within the scope of international private and procedural law, often intersecting with the bilateral legal assistance treaty concluded with Ukraine. Although such bilateral treaties do not explicitly define their personal scope, their provisions imply application to nationals of the contracting parties, thus nationality remains indispensable for activating the treaty's application. Consequently, even in the event of a Slovak national seeking a divorce from a Ukrainian national, the treaty is invoked. However, in the event that an individual is domiciled in Ukraine but holds Albanian nationality, it would be reasonable to assume that the court would invoke the legal assistance treaty concluded with Albania.

In this particular instance, the Brussels II Ter Regulation is applicable in terms of jurisdiction. However, in instances where an active treaty exists with a third country, the provisions of the treaty take application precedence. As is evident, outside the regime of multilateral conventions and the sources of the EU *acquis* in the field of private international law, the criterion of nationality still has an integral role. The central question in this case pertains to the validity of the principle that, from the perspective of international private and procedural law, an individual should be the bearer of only one nationality.

### 3. SOLE NATIONALITY AS A NECESSARY CONDITION FOR THE CONFLICT-OF-LAW CRITERION *LEX PATRIAE*?

The Slovak Act on PIL contains provision addressing the issue of dual nationality and statelessness within its scope. Naturally, the applicable law governing a private-law relationship with a foreign element should be the legal system of a single state, therefore, when the Act refers to the criterion of nationality, the determination of the applicable law

---

<sup>7</sup> As Drgonec notes, the Constitution of the Slovak Republic likewise remains silent on the issue of bipolism (Drgonec, 2018).

should result in the identification of one governing legal system. Likewise, in the procedural dimension, nationality may serve as the basis upon which Slovak courts assert extra-orbitant jurisdiction over a dispute. This may occur, for instance, in divorce proceedings, where spouses of a common foreign nationality, if the state is not an EU Member State, reside in the state of that nationality, yet the mere fact that one spouse also possesses Slovak nationality confers jurisdiction upon Slovak courts, even in the absence of any other connecting link to Slovakia.<sup>8</sup> In this respect, however, we are referring exclusively to the regime laid down in the Slovak Act on PIL, the practical applicability of which is significantly narrowed by the relevant EU regulations, as the criterion of nationality is employed therein only in exceptional circumstances.

For this purpose, section 33(1) of the Act on PIL provides: "If a person is, at the relevant time, a Slovak national and is also considered a national by another state, the decisive nationality shall be Slovak." This can also be supported by the internationally recognised principle that "person having two or more nationalities may be regarded as its national by each of the States whose nationality he possesses."<sup>9</sup> Multiple nationality in the absence of Slovak nationality is addressed by the second paragraph: "If a person is, at the relevant time, simultaneously a national of multiple foreign states, the nationality most recently acquired shall prevail." The third paragraph of the aforementioned section contains the so-called nationality fiction applicable to stateless persons. "A person who, at the relevant time, is not a national of any state, or whose most recently acquired nationality cannot be determined or ascertained, shall be considered a national of the state in whose territory they had their domicile at the relevant time, and if domicile cannot be determined, then of the state in whose territory they had their residence; if neither can be established, they shall be treated as a Slovak national."<sup>10</sup> From the wording of the section, it can be concluded that the legislator's aim in the regime of the Act was to ensure that a person is considered to be a national of one State, and the law of that State will be applicable in the event of conflict of laws with the *lex patriae* criterion. The authors of the commentary state that the relevant time for establishing nationality is the status at the time of adjudication (Lysina, Štefanková, Ďuriš and Števček, 2012, p. 166), which lacks explicit articulation. In this particular instance, closer alignment may be observed with the interpretation proposed by the authors of the Czech commentary, who state that the decisive moment is the moment to which the boundary determinant is anchored in time. Consequently, in the context of the conflict-of-law rule pertaining to divorce, it is the initiation of the legal proceedings that is signified, whereas in the context of the conflict-of-law rule concerning the capacity to marry, it is the moment of the marriage itself that is denoted (Bříza et al., 2014, p. 173).

Section 33 of the Act on PIL does not account for factual circumstances, nor does it refer to habitual residence or domicile. Consequently, a person subject to the jurisdiction of Slovak courts may be governed by the legal system of a state of their nationality, even if they have never set foot in that country. For instance, consider a Hungarian national residing permanently in a Slovak border village who marries a national of State X, also long-term resident in Slovakia, and thereby acquires nationality of State X. Under the Act on PIL, legal matters tied to nationality would then fall under the law of State X, despite the individual having no actual link to it. A limited acknowledgment of factual elements appears only in paragraph 3 which refers to domicile or, where

---

<sup>8</sup> See section 38(1) of the Act on PIL. The question of the subsequent recognition of the decision should always be taken into consideration.

<sup>9</sup> Art. 3 of the Convention on Certain Questions Relating to the Conflict of Nationality Law.

<sup>10</sup> Section 33 of the Act on PIL.

appropriate, residence in cases involving stateless persons or those of undetermined nationality. Where neither can be established, a legal fiction of nationality applies. It is submitted that a failure to adjudicate a dispute solely due to the court's inability to determine the applicable law could amount to a denial of justice and a breach of the principle of *denegatio iustitiae*. In this context, the significance of the relevant provision of the Act on PIL, which is designed to preclude such situations, cannot be overstated.

A closely analogous provision is found in the Czech Act on Private International Law,<sup>11</sup> where Section 28(1) substantially corresponds to the Slovak equivalent. However, Section 28(2) represents a welcome deviation by incorporating a factual element in cases of multiple nationality. While it generally prioritises the most recently acquired nationality, it further provides: "unless, in view of the person's life circumstances, their connection to another foreign state of which they are a national significantly prevails; in such case, the nationality of that state shall be decisive."<sup>12</sup> This addition allows for a more fact-sensitive determination of the applicable law, based on the individual's real and substantial ties. It is submitted that Slovak legislation should evolve toward a more reality-based approach, aligning with frameworks that prioritise factual connections. Notably, in cases of indeterminate nationality, Czech law refers to the individual's habitual residence before applying a fiction of Czech nationality, an approach worthy of emulation. The concept of habitual residence is a prevailing standard in modern private international law, both at the EU level and within instruments of the Hague Conference. It is therefore time for the Slovak Act on PIL to formally embrace it.

As noted by Lysina et al., the purpose of the provision in section 33 of the Act on PIL is to determine, for the purposes of this Act, which nationality shall be regarded as decisive. The authors correctly emphasise that the provision applies solely within the framework of the Act on PIL and therefore does not operate universally. Its scope is triggered exclusively upon the application of this Act, and it cannot, under any circumstances, affect the existence or acquisition of nationality itself (Lysina, Štefanková, Ďuriš and Števíček, 2012, pp. 166-167). Accordingly, the provision should have no legal effect beyond the material scope of the Act (Bříza et al., 2014, p. 172).

A very similar formulation of a corresponding provision was contained in the former Hungarian private international law legislation. The preferential treatment of Hungarian nationality in cases of multiple citizenship proved problematic in practice and led to a number of anomalies, particularly in inheritance proceedings involving individuals residing abroad on a long-term basis who had no genuine connection with their "home" country, yet remained subject to Hungarian law (Nagy, 2012). The new Hungarian codification revised this principle. While it maintains a presumption in favour of Hungarian law, this presumption is expressly rebuttable (Nagy, 2024).

The legal framework under the German Introductory Act to the Civil Code (Einführungsgesetz zum Bürgerlichen Gesetzbuche - hereinafter referred to as the „EGBGB“) appears to be formulated in a very similar manner. Article 5, entitled Personal Statute, provides in its first paragraph the following rule: "If referral is made to the law of a State of which a person is a national and where this person is a bi- or multinational, the law applicable shall be that of the State with which the person has the closest connection, especially through his or her habitual residence or through the course of his or her life. If such person is also a German national, that legal status shall prevail."<sup>13</sup> Later in this article, it will be indicated that the approach to the applicability of this provision beyond

---

<sup>11</sup> Czech Act No. 91/2012 Coll. on Private International Law (hereinafter referred to as the "Czech Act on PIL").

<sup>12</sup> Section 28(2) of the Czech Act on PIL.

<sup>13</sup> Art. 5 of the EGBGB.

the confines of the statute in which it is contained is conceptually distinct under German law.

As previously noted, the norms of international private and procedural law at the EU level rarely refer to nationality as a connecting factor. When they do, it is typically in the context of a so-called composite connecting factor. A pertinent example can be found in Article 22(1) of the Succession Regulation: "(...) A person possessing multiple nationalities may choose the law of any of the States whose nationality he possesses at the time of making the choice or at the time of death."<sup>14</sup> Another example may be found in Article 8(1)(a) of the Hague Protocol on the Law Applicable to Maintenance Obligations, concluded *per se* by the EU, which provides that "(...) the maintenance creditor and debtor may at any time designate one of the following laws as applicable to a maintenance obligation - a) the law of any State of which either party is a national at the time of the designation; (...)"<sup>15</sup> The cited provision of the Succession Regulation deals directly with the issue of multiple nationality, which makes it a rather unique provision in EU law. May the same approach be adopted for all Union regulations? The answer is given by the Rome III Regulation, which was adopted in the form of enhanced cooperation, in which the Slovak Republic does not participate, but which can be used to demonstrate that the way in which the Succession Regulation deals with multiple nationality cannot be extended beyond the scope of the Regulation. The preambular part of the Rome III, which, although legally non-binding,<sup>16</sup> is highly relevant from the point of view of interpretation, states that "Where this Regulation refers to nationality as a connecting factor for the application of the law of a State, the question of how to deal with cases of multiple nationality should be left to national law, in full observance of the general principles of the European Union."<sup>17</sup> Consequently, in the event that a Member State is bound by the Rome III, it is permitted to utilise the national rules to address this issue. Within the context of the Slovak Republic, in the event of being bound by the Rome III, this would be the aforementioned Section 33 of the Act on IPL. A case falling within the scope of the Rome III Regulation was also examined by the German Federal Court of Justice (hereinafter referred to as the "BGH"), which addressed the issue of dual nationality through the application of Article 5 of the EGBGB. The case concerned individuals holding both German and Syrian nationality, and the Court, quite correctly, in our view, refrained from applying the reasoning developed in Micheletti, as the situation did not involve the nationality of another Member State. From our point of view, it was likewise well-founded that the German BGH did not extend the reasoning developed in Hadadi case. In Hadadi, which concerned international jurisdiction under the Brussels IIa Regulation, the Court of Justice held that, in cases of dual nationality, the reference to nationality as a jurisdictional connecting factor must be interpreted in such a way that, where both spouses possess the same dual nationality, the courts of both Member States have jurisdiction.<sup>18</sup> In the context of the Rome III, however, where the task is to determine the applicable law, these conclusions cannot be transposed to the interpretation of

---

<sup>14</sup> Article 22(1) of the Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession, OJ L 201, 27.7.2012, 107–134 (hereinafter referred to as the "Succession Regulation").

<sup>15</sup> Article 8(1)(a) of the Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations.

<sup>16</sup> CJEU, judgment of 19 November 1998, Nilsson and Others, C-162/97, ECLI:EU:C:1998:554, para. 54.

<sup>17</sup> Recital 22 of the preamble to the Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, OJ L 343, 29.12.2010, 10-16 (hereinafter referred to as the "Rome III").

<sup>18</sup> CJEU, judgment of 16 July 2009, Hadadi, C-168/08, ECLI:EU:C:2009:474, see p. 8.

nationality as a conflict-of-laws connecting factor. Rome III expressly refers to the subsidiary application of national law, thereby allowing recourse to domestic conflict-of-laws rules such as Article 5 EGBGB.<sup>19</sup> The analogous use of an interpretative approach developed for a procedural norm therefore cannot, in this respect, be extended to the interpretation of the nationality connecting factor contained in a conflict-of-laws rule governing the determination of the applicable law under the Rome III Regulation.

Thus, the choice of law regime in the Union regulations should be discussed, as it employs the nationality criterion in the composite connecting factor, but do not address the issue of multiple nationality or even statelessness. Let us consider, as a model example, Art. 7(3)(c) of the Rome I, which provides the parties with the option to choose the applicable law, as follows: „in the case of life assurance, the law of the Member State of which the policy holder is a national.”<sup>20</sup> Rome I does not address the issue of multiple nationality. Accordingly, one may either adopt the approach of Rome III and interpret the matter through the lens of Act on PIL, or consider that the cited provision affords parties greater flexibility in the choice of applicable law. On the one hand, it must be acknowledged that the Act on PIL applies within the scope of its application. Its scope is generally fulfilled even in situations governed by EU regulations; however, such regulations take application precedence over the national law. In this context, the issue at hand is not regulated by any EU provision, thus logically requiring recourse to a lower level in the hierarchy of sources, namely the Act on PIL. Similarly, where, for example, Rome I does not address questions of property rights in movable property, it may be assumed that, even when applying Rome I, subsidiary issues relating to these rights would be resolved under the Act on PIL, as Rome I offers no guidance in this regard. From this logical sequence, it follows that questions concerning multiple or indeterminate nationality should be addressed through the provisions of Section 33 of the Act on PIL. On the other hand, the purpose of the aforementioned provision of Rome I is precisely to delineate the parties' options in selecting the applicable law. Were one to determine nationality pursuant to Section 33 of the Act on PIL it would lead to the conclusion that this provision affords the parties only a single option, namely that prescribed by the Act on PIL. For instance, if an individual holds both Hungarian and Spanish nationality, with the latter being the most recently acquired, Article 7(3)(c) of Rome I would permit the parties to choose Spanish law. However, if the adjudicating court were Czech and, under its Section 28 of the Czech Act on PIL, the same individual was considered Hungarian based on a genuine connection, would such a scenario ensure legal predictability? Should the parties be expected to anticipate which court may have jurisdiction and, consequently, which national rules on nationality would be applied? We submit that they should not. Therefore, we advocate the view that where an EU instrument is silent on multiple or indeterminate nationality, provisions generally referring alternatively to nationality should be interpreted such that in cases of multiple nationality, the choice extends to all states of which the person is a national, conversely, in cases of statelessness, the provision should be deemed inapplicable and not expand the options for choice of law. Such a teleological interpretation, we contend, best secures the objective of legal certainty and predictability in these relations. Similarly, P. Wautelet points out in this respect that there is no reason, in the case of multiple nationality, to apply the classic rules on multiple nationality to these conflict-of-law rules (Wautelet, 2012).

---

<sup>19</sup> Bundesgerichtshof, BGH, XII ZB 158/18, 26. August 2020.

<sup>20</sup> Art. 7(3)(c) of the Rome I Regulation.

Moving on to the question of jurisdiction, here again the Union rules refer sporadically to the application of this criterion. As an example, Article 2(b) of the Brussels IIter Regulation gives jurisdiction in the event of divorce also to the courts „of the nationality of both spouses.“<sup>21</sup> In *Hadadi*, the Court of Justice interpreted the provision in question as meaning that if the spouses have the nationality of two identical Member States, they may choose the courts of both States within the meaning of that provision.<sup>22</sup> The Court of Justice could have referred to the application of domestic rules in this regard but refrained from doing so, notably in the interest of ensuring legal certainty.<sup>23</sup> However, it is important to emphasise that the present interpretation proceeds from the premise that the purpose of the provisions is to afford parties a choice, whether concerning jurisdiction or applicable law. In determining the applicable law, only a single governing law should be established, therefore, if in the future an EU regulation were to designate *lex patriae* as the sole connecting factor in a conflict-of-law norm, such regulation ought to address the issue of multiple nationality, or alternatively, like Rome III, refer to domestic law. However, such a development is not anticipated, as the criterion of nationality is increasingly being supplanted by factors reflecting factual circumstances.

In addition to the EU regulations national legislation, international private and procedural law also incorporates the application of bilateral and multilateral treaties. In practice, multilateral treaties are principally conventions adopted at the Hague Conference, which only rarely address the criterion of nationality. However, the same cannot be said of bilateral legal assistance treaties, which, on the contrary, also derive their personal scope from the nationality of the person concerned, as was previously mentioned. In the event of cumulative fulfilment of the scope, the treaties take precedence over the national legislation contained in the Act in PIL,<sup>24</sup> but they do not always take precedence over EU regulations. The relationship between EU regulations and international treaties is usually addressed in the concluding articles of each regulation. However, for the purposes of the present article, it can be generalised and simplified to state that in the case of cumulative scope fulfilment, bilateral treaties with a third state take precedence, and between two Member States, the regulation takes precedence. In matters not covered by EU regulations, their scope is not triggered, and the applicable bilateral treaty, if one exists, takes precedence. For instance, in assessing personal status, unregulated at the EU level, a Slovak court would apply the bilateral treaty with Poland when evaluating a Polish national. This treaty provides: “The legal capacity of a natural person to have rights and perform legal acts shall be governed by the legal order of the contracting party of which that person is a national.”<sup>25</sup> In this case, it is essential to determine the person’s nationality. Where a person holds both Slovak and Polish nationality, we consider the activation of international private law *per se* to be questionable (an issue addressed in the final part of this article). Let us therefore assume

---

<sup>21</sup> Article 2(b) of the Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction, OJ L 178, 2.7.2019, 1–115 (hereinafter referred to as the “Brussels IIter”).

<sup>22</sup> CJEU, judgment of 16 July 2009, *Hadadi*, C-168/08, ECLI:EU:C:2009:474, para 58.

<sup>23</sup> In light of the *Micheletti* judgment, in which the Court of Justice excluded the possibility for a Member State to call into question the existence of the nationality of another Member State, the outcome in the *Hadadi* case could indeed have been anticipated (CJEU, judgment of 7 July 1992, *Micheletti and Others v Delegación del Gobierno en Cantabria*, C-369/90, ECLI:EU:C:1992:295).

<sup>24</sup> Section 2 of the Act on IPL. Stemming also from the Section 7 of No. 460/1992 Coll. Constitution of the Slovak Republic.

<sup>25</sup> Art. 20(1) of the Treaty between the Slovak Republic and the Czech Republic on Legal Assistance Provided by Judicial Authorities and on the Regulation of Certain Legal Relations in Civil and Criminal Matters, 193/1993 Coll.

a scenario involving dual Hungarian and Polish nationality. In such a case, we are of the opinion that the correct approach must proceed in reverse order: first, the matter should be assessed under the Slovak Act on PIL, as the applicable bilateral treaty does not provide guidance on this specific point. Based on the determination of nationality pursuant to that Act, the relevant bilateral treaty should then be applied with respect to the state whose nationality the person is deemed to possess. From our perspective, it would be desirable for Section 33(2) to allow Slovak courts to consider the nationality of the state with which the individual has a stronger factual connection, similarly to the approach embedded in Czech legislation. On the other hand, the state whose nationality would thus be disregarded might argue that the Slovak court, in neglecting to apply the relevant bilateral treaty, effectively undermined the legal bond of nationality for the purposes of private international law. This places the court in a complex position that nevertheless demands resolution. Accordingly, we advocate for the proposed interpretive approach. Bilateral treaties frequently employ nationality as a connecting factor, which, particularly in the Slovak Republic, holds considerable practical significance in matters involving Ukrainian nationals.<sup>26</sup> For the purpose of applying bilateral treaties, it is essential to determine a single prevailing nationality. Since the treaties themselves do not resolve this issue, it remains at the discretion of the court to choose the appropriate approach. To ensure the protection of individuals, a clear methodology should be adopted. Where a person holds the nationality of a state with which the Slovak Republic has a bilateral treaty, and simultaneously the nationality of a third state with which no such treaty exists, with the latter nationality acquired subsequently, this individual should not be excluded from the protection offered under the treaty. Conversely, if the person is a dual national of two countries with which the Slovak Republic has bilateral treaties, the court should, pursuant to Section 33(2) of the Act on PIL, determine which nationality is decisive and proceed under the relevant treaty accordingly. This approach, however, calls for a revision of the current provision to allow Slovak courts, similarly to Czech practice, to consider the individual's genuine link with the respective states and identify the prevailing nationality based on substantive factual ties. As demonstrated, both under the Act on PIL and in the context of bilateral treaties on legal assistance, where nationality is a frequently used connecting factor, it is imperative to adhere to the principle that a person should, for these legal purposes, be regarded as the national of only one state.

M. Wilke argues that these general provisions should be applicable even beyond the confines of the statute in which they are contained (Wilke, 2023). We would, however, endorse this position only to a limited extent, namely insofar as the application of Section 33 of the Slovak Act on PIL must in no circumstance undermine the obligations arising from existing bilateral regimes, nor conflict with European Union law and the key jurisprudence of the Court of Justice. Where the application of national law is expressly enabled or permitted by an EU regulation itself, the situation must, of course, be regarded as a different one.

#### 4. FOREIGN NATIONALITY AS THE ONLY CROSS-BORDER ELEMENT IN PRIVATE INTERNATIONAL LAW

In the context of nationality, the present article aims to raise one further topic for discussion: namely, the question of whether the possession of a foreign nationality *per*

---

<sup>26</sup> E.g., Art. 42 (capacity to make or revoke a will), art. 35 (matters of adoption) and other matters of the Treaty between the Czechoslovak Socialist Republic and the Union of Soviet Socialist Republics on Legal Assistance and Legal Relations in Civil, Family, and Criminal Matters, 95/1983 Coll.

se automatically activates the rules of international private and procedural law. Here, two situations should be distinguished, if a person is a national of the Slovak Republic and at the same time a national of another state, and what is the relevance if a person has only a nationality other than the Slovak one. In the first case, we are inclined to follow what the doctrine of Czech private international law also states, that if a Czech citizen also has the nationality of another state, this will not, in itself, constitute a foreign element (Bříza et al., 2014, p. 172). Generally speaking, therefore, we would argue that if a person has the nationality of the forum state and the private law relationship has no other foreign element, the mere fact that this person has dual nationality should not, in our view, be sufficient to activate the rules of international private and procedural law because of the absence of a foreign element. Scholars agree that the objective foreign element will most commonly arise from the subject, most notably through foreign nationality (Lysina et al., 2023, p. 10). As previously indicated, in cases of dual nationality involving Slovak citizenship, such status must be interpreted restrictively, treating the legal relationship as if the foreign nationality were absent. Notwithstanding the foregoing, the Act on PIL presumes that Slovak nationals may simultaneously hold the nationality of another state. However, it is our opinion that the application of Section 33(1), as well as all conflict-of-law provisions, is triggered only where the private-law relationship in question has an additional foreign element. A separate issue arises in the case of stateless persons whose personal and legal ties are limited exclusively to a single jurisdiction. As a general rule, it may be stated that if a party to a given relationship does not possess Slovak nationality, such a relationship will, from the perspective of Slovak private international law, invariably qualify as a relationship with a foreign element. This raises the further question of whether every legal relationship involving a stateless person must automatically be regarded as a private-law relationship with a foreign element.<sup>27</sup> This, however, invites a degree of critical reflection. In the case of an individual who, for instance, has resided in the territory of the Slovak Republic for their entire life, maintains habitual residence therein, and has established the centre of their personal and social interests within this jurisdiction, it is our considered view that not every legal relationship involving such a person should necessarily activate the provisions of private international law. This issue bears particular practical significance in the context of EU private international law, which does not expressly account for the legal status of stateless persons. In such scenarios, where no additional foreign element is present, can one truly speak of a conflict of laws? If a person has neither nationality nor any actual connection to another legal order, which legal systems could be said to be in conflict? Accordingly, we submit that a legal relationship should not automatically be classified as a private-law relationship with a foreign element solely on the basis of the individual's statelessness.

The third issue that arises is whether foreign nationality *per se* automatically constitutes a foreign element in a private-law relationship. While doctrinal consensus largely affirms this link, foreign nationality being a typical indicator of the foreign element, this position merits re-examination. Across EU Member States, many third-country nationals reside permanently, often as family members of Union citizens. These individuals may never have set foot in the country whose nationality they formally hold. They possess habitual residence, personal and economic ties, and the centre of life interests in the host Member State. Nevertheless, their legal relationships are consistently treated as cross-border solely due to their nationality, triggering the application of private international law. In light of this, it may be time to reconsider whether nationality should

---

<sup>27</sup> Nevertheless, even under such circumstances, the Act on Private International and Procedural Law would, pursuant to Section 33(3), ultimately consider the person a Slovak citizen.

continue to operate as a standalone foreign element. A shift towards recognising foreign elements based on genuine and factual personal connections rather than formal nationality would reflect the contemporary legislative trend. This is supported by EU regulations and Hague Conference instruments, which increasingly prioritise habitual residence over nationality. It is, therefore, worth considering whether the factual foreign element embodied in the person should prevail for the purpose of activating conflict-of-law rules. We concur with the view that this does not imply that nationality has entirely lost its relevance within the framework of private international law, when appropriately employed, it may still contribute meeting the new challenges of an increasingly diverse and complex European society (De Vido, 2012).

## 5. CONCLUDING REMARKS

In the present article, the issue of nationality has been addressed from the perspective of private international and procedural law. Nationality as a criterion in conflict of laws norms and in norms determining international jurisdiction is constantly used both at the national level, in the context of the Slovak Republic in the Act on PIL, and in the case of bilateral treaties on legal assistance. In contrast, with a few exceptions, the EU *acquis* and the multipartite conventions do not include this criterion, instead focusing on criteria that are not legal but factual in nature, such as habitual residence and, in the context of jurisdiction, the criterion of domicile. Notwithstanding the foregoing, with regard to the application of conflict-of-law rules, in instances where the connection factor is *lex patriae*, it is imperative that the individual in question be regarded as a national of a single state. This is necessary so that the conflict-of-law rule can be employed to ascertain the state whose law will govern the private-law relationship with a foreign element under consideration. The Act on PIL accordingly sets out rules for addressing cases of multiple nationality, as well as for determining the legal status of individuals who possess no nationality at all. The procedure within the limits of the Act is therefore clear, although in our view it would require amendment of the wording in favour of taking account of the real link in the case of multiple nationalities. As outlined in the article, with minor discrepancies, a comparable provision can also be found in the national legal frameworks of other states. But is this “unwritten” rule generally applicable to rules of international private and procedural law?

As stated in this article, we do not consider this to constitute a general rule for the purposes of applying multilateral conventions and EU regulations. Where a regulation expressly addresses the issue of multiple nationality, its solution must be followed. In the more common scenario where no such rules are provided, we think that a Slovak court should not default to the Act on PIL to resolve the question. Instead, it should adopt a broader approach that takes into account all relevant nationalities. Perhaps the most complex situation arises in the context of bilateral international treaties. We propose a combined approach, contingent upon whether the Slovak Republic has concluded a bilateral treaty on legal assistance with the state in question. In such cases, we do not entirely exclude the subsidiary application of Section 33 of the Act on PIL. Although the applicability of Section 33 of the Act on PIL should not be extended beyond the scope of the act itself, it cannot be excluded that this provision may nevertheless be triggered in certain practical situations. These would include cases in which the relevant legal instrument, by virtue of its primacy of application, expressly refers to the use of national law for resolving this issue. At the same time, however, it is essential to ensure that such application does not give rise to any conflict with European Union law, particularly where

the nationality of Member States is concerned, and that it does not jeopardise the international obligations arising for Slovakia under its bilateral and multilateral treaties.

To conclude the article, we raised the question, within the context of nationality, whether foreign nationality *per se* constitutes a triggering element of international private and procedural law norms, functioning as a foreign element. In our view, in cases involving individuals with dual nationality holding both Slovak and foreign nationality, as well as stateless persons, such status should not be regarded, in and of itself, as a sufficient foreign element. Conversely, where exclusive foreign nationality is present, current developments in private international law doctrine would support treating this as a sufficient foreign element. However, is it not time to progress toward an approach that considers only those elements which reflect a genuine and effective link between the individual and the state in question?

#### BIBLIOGRAPHY:

- Achiron, M. (2005). *Štátna príslušnosť a osoby bez štátnej príslušnosti (Občianstvo a bezštátnosť)* [Citizenship and persons without nationality (Citizenship and statelessness)]. Available at: [http://archive.ipu.org/PDF/publications/nationality\\_slk.pdf](http://archive.ipu.org/PDF/publications/nationality_slk.pdf) (accessed on 10.10.2025).
- Bauböck, R. (2021). The Toleration of Dual Citizenship: A Global Trend and its Limits. In: Rainer Bauböck and Max Haller (eds.), *Dual Citizenship and Naturalisation: Global, Comparative and Austrian Perspectives*. Vienna: Österreichische Akademie der Wissenschaften, Sitzungsberichte der philosophisch-historischen Klasse.
- Bříza, P. et al. (2014). *Zákon o mezinárodním právu soukromém* [Private International Law Act]. Praha: C. H. Beck.
- Davrados, N.A. (2017) Nationality, domicile, and private international law revisited. In: *Essays in Honour of Nestor Courakis*. Available at: [http://crime-in-crisis.com/en/wp-content/uploads/2017/06/12-DRAVRADOS-KOURAKIS-FS\\_Final\\_Draft\\_26.4.17.pdf](http://crime-in-crisis.com/en/wp-content/uploads/2017/06/12-DRAVRADOS-KOURAKIS-FS_Final_Draft_26.4.17.pdf) (accessed on 10.05.2025).
- De Vido, S. (2012). The relevance of double nationality to conflict-of-laws issues relating to divorce and legal separation in Europe. *Cuadernos de Derecho Transnacional*, 4(1), 222-232.
- Drgonec, J. (2018). Základné právo na štátne občianstvo podľa ústavného súdu Slovenskej republiky [The fundamental right to nationality according to the Constitutional Court of the Slovak Republic]. *Právnik*, 157(5), 417–436.
- iFLG (2023). *Habitual Residence*. Available at: <https://iflg.uk.com/definition/habitual-residence> (accessed on 10.05.2025).
- Lysina, P., Štefanková, N., Ďuriš, M. and Števček, M. (2012). *Zákon o medzinárodnom práve súkromnom a procesnom* [Act on International Private and Procedural Law]. Praha: C. H. Beck.
- Lysina, P., Haťapka, M., Burdová, K. et al. (2023). *Medzinárodné právo súkromné* [International private law] (3rd ed.). Bratislava: C. H. Beck.
- Magnus, U. and Mankowski, P. (2007). *Brussels I Regulation*. Berlin, New York: European Law Publishers, <https://doi.org/10.1515/9783866537040>
- Nagy, C. I. (2012). *Private International Law in Hungary*. Kluwer Law International.
- Nagy, C. I. (2024). *Private International Law: A Hungarian Perspective*. Law in Eastern Europe (Vol. 71). Leiden: Brill.
- Raiteri, M. (2014). Citizenship as a connecting factor in private international law for family matters. *Journal of Private International Law*, 10(2), 309-334, <https://doi.org/10.5235/17441048.10.2.309>

- Wautelet, P. (2012). L'Option de Loi et les Binationaux: Peut-On Dépasser le Conflit de Nationalités? [Choice of Law in Family Relationships and Multiple Nationalities – A Case for a New Approach?]. *Revue générale de droit civil belge/Tijdschrift voor Belgisch burgerlijk recht*, 26, 414–430.
- Wilke, F. M. (2023). A German Approach: Lex Supervisionis Registri and Subordinate Connecting Factors. *Blockchain and Private International Law* (International and Comparative Business Law and Public Policy, 4, 727–753). [https://doi.org/10.1163/9789004514850\\_026](https://doi.org/10.1163/9789004514850_026)
- Act No. 97/1963 Coll., on International Private and Procedural Law.
- Act. No. 460/1992 Coll., Constitution of the Slovak Republic.
- Convention on Certain Questions Relating to the Conflict of Nationality Law.
- Convention on the Reduction of Cases of Multiple Nationality and on Military Obligations in Cases of Multiple Nationality.
- Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, OJ L 343, 29.12.2010, 10–16.
- Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction, OJ L 178, 02.07.2019, 1–115.
- Czech Act No. 91/2012 Coll. on Private International Law.
- European Convention on Nationality.
- German Introductory Act to the Civil Code (Einführungsgesetz zum Bürgerlichen Gesetzbuche).
- Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations.
- Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession, OJ L 201, 27.07.2012, 107–134.
- Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 351, 20.12.2012, 1–32.
- Treaty between the Slovak Republic and the Czech Republic on Legal Assistance Provided by Judicial Authorities and on the Regulation of Certain Legal Relations in Civil and Criminal Matters, 193/1993 Coll.
- CJEU, judgment of 19 November 1998, Nilsson and Others, C-162/97, ECLI:EU:C:1998:554.
- CJEU, judgment of 7 July 1992, Micheletti and Others v. Delegación del Gobierno en Cantabria, C-369/90, ECLI:EU:C:1992:295.
- CJEU, judgment of 16 July 2009, Hadadi, C-168/08, ECLI:EU:C:2009:474.
- CJEU, judgment of 22 December 2010, Mercredi, C-497/10, ECLI:EU:C:2010:829.
- CJEU, judgment of 29 April 2025, Commission v. Malta (Citoyenneté par investissement), C-181/23, ECLI:EU:C:2025:283.
- Germany, Federal Court of Justice [Bundesgerichtshof (BGH)], XII ZB 158/18 (26 August 2020).

## THE USE OF DIGITAL DIPLOMACY BY INTERGOVERNMENTAL ORGANISATIONS: THE CASE OF THE UNITED NATIONS

Dr. Viona Rashica  
South East European University  
Faculty of Contemporary Social  
Sciences  
Ilindenska n. 335  
1200 Tetovo  
North Macedonia  
[vionarashica@hotmail.com](mailto:vionarashica@hotmail.com)  
ORCID: 0000-0002-8046-8353

**Abstract:** *Digital diplomacy plays a very important role in realising the diplomatic objectives of the subjects of international law, in which case it is understood that, in addition to states, it has also been adopted by intergovernmental organisations (IGOs). However, when the digital diplomacy of IGOs is discussed, the focus is undoubtedly on the United Nations (UN) as the most powerful political organisation in the world, as well as its agencies. Therefore, this research article aims to specify the main characteristics of IGOs' digital diplomacy, thus taking the UN as a case study. For the realisation of the article, qualitative methodology was applied, namely methods such as case study and documents analysis. The research results show that digital diplomacy has extraordinary importance to the UN because it enables increased public support through rapid and broad engagement with global audiences, thus strengthening its position in the international arena for solving global challenges. The conclusions of the article contribute to increasing information about the digital diplomacy of the UN and its agencies, specifying both its benefits and challenges.*

**Key words:** *Digital Diplomacy; Intergovernmental Organisations; United Nations; UN Agencies; Benefits; Challenges*

### **Suggested citation:**

Rashica, V. (2025). The Use of Digital Diplomacy by Intergovernmental Organisations: The Case of the United Nations. *Bratislava Law Review*, 9(Spec), 161-174. <https://doi.org/10.46282/blr.2025.9.Spec.1018>

**Submitted:** 16 April 2025

**Accepted:** 24 November 2025

**Published:** 28 December 2025

### 1. INTRODUCTION

Digital diplomacy represents a great support in fulfilling diplomatic goals not only of states, but also of intergovernmental organisations (**IGOs**). The role of the latter, especially in the twenty-first century, has seen a significant growth as a result of numerous challenges and problems that transcend national borders and impose international cooperation. Although it is the main global forum for diplomacy and cooperation, as well as the most powerful universal IGO, through digital diplomacy the importance of the United Nations (**UN**) and its agencies in addressing global issues has increased even further.

The main purpose of this research article is to highlight the key features of digital diplomacy of IGOs, taking the UN and its agencies as a case study. The research question of this article is: *Has digital diplomacy strengthened the role of IGOs towards states that are primary subjects of international law?* Meanwhile, the main hypothesis is: *Through the adoption of digital diplomacy, the role of IGOs, especially the UN and its agencies, as new bearers of global events and issues has been strengthened, although not to the point of contesting the position of states as the primary subjects of international law.*

Therefore, in order to answer the research question as accurately as possible and to verify the raised hypothesis, in addition to the abstract, introduction, conclusion and references, this article also consists of four separate sections. The first section explores the importance of digital diplomacy for IGOs. The second section highlights the main

characteristics of the digital diplomacy of the UN and its agencies. Whereas, the other two sections of the article are quite special because the main benefits of digital diplomacy for the UN are elaborated in the third section, and its key challenges are analysed in the fourth section.

This article has descriptive, explanatory, comparative and analytical nature, and *qualitative methodology* was used to conduct the research. The *case study* method was applied, exploring in depth the main characteristics of the digital diplomacy of the UN and its agencies. While *documents analysis* includes important official and public documents, published on the websites of the UN and its agencies, as well as media and digital content taken from these IGOs' social media accounts within the time period October-November 2025. Important data has also been collected from books, scientific articles, as well as communities and important research organisations related to digital diplomacy, IGOs and technological issues.

## 2. THE IMPORTANCE OF DIGITAL DIPLOMACY FOR INTERGOVERNMENTAL ORGANISATIONS

Diplomacy has constantly been exposed to major changes, which have resulted from the changing structure of the international community and its dynamics (Sandre, 2015, p. 4). After the end of the Cold War, public diplomacy was directly affected by the forces of globalisation and the information and communications technology (ICT) revolution, which brought an end to classical public diplomacy and opened the door to new public diplomacy, that is one of the most important instruments of soft power<sup>1</sup> (Cull, 2019, p. 4). As a product of globalisation and as a fruit of new public diplomacy, digital diplomacy is considered one of the major trends of the 21st century in diplomatic communication (Rashica, 2018, p. 75). Digital diplomacy is defined as a form of new public diplomacy, which enables the realisation of diplomatic objectives of the subjects of international law<sup>2</sup> through the use of ICT, the internet and social media (Rashica, 2024, p. 7). From this definition, it can be understood that digital diplomacy is not only adopted by states, but also by IGOs.

ICT has a profound impact on diplomatic functions, which can be seen from the way the role of diplomacy is changing in the digital age due to geopolitical and societal changes in the international environment. The usage of websites by ministries of foreign affairs, embassies and IGOs is now considered a standard practice. Whereas, social media has become diplomacy's significant tool, which provides a platform for unconditional communication, and has become a communicator's most powerful tool (Rashica, 2019a, p. 25). It is not only able to break the hierarchical chains of diplomatic communication, but by bringing ordinary people into the spotlight of political life and making their voices heard, social media also enables diplomats to directly engage foreign public in a sustained dialogue (Bjola and Holmes, 2015, p. 71).

IGOs are institutions established by states and whose members are the governments of states, and they are widespread in the international system today (Mingst and McKibben, 2022, p. 651). When analysing in-depth the IGO and its states, the existence of many bureaucratic constraints is noted that can result in natural tensions between them. Not infrequently, a part of a state's national interests may be in conflict

---

<sup>1</sup> The term "soft power" was coined by American political scientist Joseph Nye in 1990 and involves the ability to shape the preferences of others through appeal and attraction, rather than coercion.

<sup>2</sup> Subjects of international law, in addition to states, also include international governmental and non-governmental organisations, political movements of an international character, multinational corporations, religious movements, various professional organisations, nations, groups of people, but also individuals.

with some principles, actions, and decisions of the organisation of which it is a member. Then, when a member state creates an information campaign against the organisation, the latter has less opportunity to confront the state itself and may face consequences that come from other member states. However, membership in IGOs has become very necessary for sovereign states, as in some cases they are powerless to respond to problems and challenges that do not recognise territorial boundaries and require multilateral cooperation to solve them (Rashica, 2019b, p. 74). IGOs can be assumed to have mandates that do not necessarily require public support because their work is government-to-government and will continue as long as the mandating agreement is in effect. However, public support turns out to be very necessary to communicate the organisation's mission. The sharing of accurate and timely information by an IGO contributes to increasing its support and cooperation with other subjects of international law.

In general, IGOs have their own websites, and in some cases even their bodies have separate websites. Like states, IGOs use them to publicise their activities and inform the public in more detail about their mission. Within their websites, IGOs also have their statutes, and by publishing various documents on a range of issues, they demonstrate their transparency. Regarding social media, IGOs began their presence on social media in 2009/2010, but the peak of their greater presence began in 2015. In a very short time, social media have transformed into broadcasting tools and communication channels for them, with the aim of distributing their messages to a global audience. There are a large number of social media platforms, but the most used ones by IGOs are: X; Facebook; Instagram; Threads; LinkedIn; TikTok; and YouTube (Lüfkens, 2025a).

How powerful is digital diplomacy to increase the influence and reputation of IGOs? Determining the effects of digital diplomacy on the reputation of an IGO is quite challenging, although many IGOs are adapting to the digital diplomacy revolution. In addition to the coronavirus pandemic in 2020, the outbreak of the war in Ukraine in 2022 brought more attention to the global conversation on a number of issues related to energy challenges, as well as the rapid rise in inflation and the cost of living. The instability, uncertainty and prolonged sense of emergency that have accompanied the years 2020, 2021, 2022, 2023, continued to be present throughout the year 2024 and 2025. Health crises, humanitarian, climate and environmental emergencies, but also economic ones require global solutions, so IGOs responding to them are making maximum efforts to find new levels of digital impact. It can be asserted that digital diplomacy has already illuminated the power of international affairs conducted through the digital channels of IGOs.

Within social media spaces, there are various ways to calculate the activities of IGOs, such as engagement rates, audience impressions, likes, clicks, etc. However, managing a global network of digital communications and working on social media is not easy. It is very challenging to maintain a consistent brand while allowing the flexibility needed to adequately communicate and reach a global audience. Being fully aware of the importance of building their brands globally, as well as the limited capacities of staff in worldwide communication, the initial focus and strategy of IGOs was to start with global accounts in each language. Initially, this enabled them to build a global audience and focus on creating content on a few select platforms. Then they expanded their strategies and after a few years they also opened regional accounts. Of course, this also helped them better represent relevant content to different regions. Digital organisation teams, when preparing a social media plan, should focus on the objectives, target audience, capabilities and suggested platforms. This strategy allows the amplification of the

content of IGOs' social media accounts, resulting in the best performance on the platforms, which in turn strengthens their brand.

It should be clarified that the digital diplomacy of states and the digital diplomacy of IGOs have differences in terms of scope and goals. States use digital diplomacy to protect their national interests, increase the effectiveness of public diplomacy, and achieve foreign policy objectives. Digital diplomacy tools enable states to address a global audience, as well as facilitate the management and control of the international narrative, in order to present a positive image. While the digital diplomacy of IGOs aims to coordinate multilateral cooperation on a variety of issues that concern world politics. Through the tools of digital diplomacy, IGOs act and serve as a multilateral voice, engaging with citizens around the world, their member states, and non-state actors to provide solutions to a range of global problems. The relationship between IGOs and states in digital spaces is characterised by interdependence that results from the dynamic cooperative interactions of states.

### 3. KEY FEATURES OF THE DIGITAL DIPLOMACY OF THE UNITED NATIONS AND ITS AGENCIES

The UN is an international political organisation based in New York, which was founded on October 24, 1945, as a replacement of the League of Nations that was dissolved on April 18, 1946 (Lamb and Robertson-Snape, 2017, p. 214). The Charter of the UN is its founding document, while its main bodies are: the General Assembly; the Security Council; the Economic and Social Council; the Trusteeship Council; the International Court of Justice; and the Secretariat. The activity of the UN is based on several important principles, which are: the principle of sovereign equality; peaceful resolution of international disputes; prohibition of the use of force or the threat of force; prohibition of interference in the internal affairs of states; the principle of cooperation; the principle of equality and self-determination; and the principle of fulfilment of obligations (Rashica, 2023, p. 106). The UN has 193 member states divided into two categories, of which 51 states are founding members and the others are members that joined the UN later. Meanwhile, the UN system, in addition to the UN itself, comprises many funds, programs and specialised agencies, where each of them have their own area of work, leadership and budget. The specialised agencies are independent international organisations funded by both voluntary and assessed contributions (United Nations, n.d.a).

The world power of international organisations is based on the UN and its agencies, as well as in several other intergovernmental and non-governmental organisations that receive invitations from the UN to have the role of observers. The UN and its agencies provide rich social media content on international mediation processes, focusing maximally on the respect of fundamental human rights and freedoms. The last few years have been quite difficult on the global stage, mainly due to economic, ecological, and technological challenges. Global temperatures are breaking records, which means that climate change, in addition of being a serious threat to the world, is also its new reality. Humanity is at risk of losing the chance to avoid catastrophic climate change, warnings that are constantly part of the posts of the UN and its agencies on social media. Then, their reactions to the outbreak of armed conflicts anywhere in the world are also part of their posts on institutional and personal social media accounts. The war in Ukraine, especially the suffering of the Ukrainian population, is being shown through their posts. The same thing happened when Hamas attacked Israel on October 7, 2023, and in response Israel launched air and ground attacks against Gaza, the

consequences of which are being suffered by Palestinian civilians. The UN addresses technological challenges on social media by posting on combating disinformation and on the dual nature of technological advancements, with a particular emphasis on the ethics of artificial intelligence (AI) and digital inequality.

X remains an important social network for the UN and its agencies, whose communicative power is impossible to ignore. There is still uneasiness with the atmosphere and the changes on X, but there hasn't been any notable exodus from the platform (Lüfkens, 2025b). They have created institutional accounts on X, and even their leaders are present on this platform with their personal accounts. The most followed UN leaders on X are: the Secretary-General of the UN, *António Guterres* (@antonioguterres); the Director-General of the World Health Organization (**WHO**), *Tedros Adhanom Ghebreyesus* (@DrTedros); and the Managing Director of the International Monetary Fund (IMF), *Kristalina Ivanova Georgieva-Kinova* (@KGeorgieva). UN agencies have strengthened their digital teams and are posting in the six official UN languages (English, French, Spanish, Russian, Arabic, and Chinese). Although the large number of followers is part of the priorities of the institutional and personal accounts of the UN and its agencies, it should be noted that it is not the only indicator of their popularity. A significant part of them attaches pictures or videos to each post, while a small percentage of their posts are textual. Posts that have website links attached generate the most interactions of all the posts from the UN and its agencies, followed by posts with native pictures and videos. Teams managing the UN and its agencies' X accounts do not post press releases, but within 280 characters they must shorten the intended media release and post it as a separate organisation post. This is also seen as an effort to provide engaging content to followers. It can be argued that the secret to the success of the UN and its agencies on this social network is demand-driven content, created for the right audience and target. As for followers, their number is not always related to the content provided by the UN or its agencies on X, but to global events, about which different audiences want to be as informed as possible.

Given the potential size of the audience, *Facebook* is one of the most important social networks for the UN and its agencies. In addition to institutional accounts, their leaders have also created personal accounts. The most followed UN leaders on Facebook are: the Director-General of the WHO, *Tedros Adhanom Ghebreyesus*; the Managing Director of the IFM, *Kristalina Georgieva*; and the President of the UN General Assembly, *Annalena Baerbock* (Lüfkens, 2025c). Almost half of all posts by the UN and its agencies on Facebook are about other websites. 1/3 of their posts are pictures, including one or more pictures in a single post. Then, Facebook live video streams represent a very important part of all their Facebook posts, which manage to get a large number of interactions, such as likes, comments, shares and views. Videos that provide important messages, promote specific causes, explain certain phenomena, as well as direct interviews related to the activities of the UN, are destined to receive the greatest number of interactions and turn into viral. In addition to reactions with likes and admiring reactions, the posts of the UN accounts in certain situations also receive sad, grateful and angry reactions, depending on the content. News videos specifically edited for social media helped in increasing engagement and significantly increased their Facebook followers. As for personal accounts, some UN leaders personally manage their own accounts. They are very engaged and well followed, which is best proved by the interactions they get on their posts. However, there are also leaders of the UN and their agencies, whose personal accounts are not managed by themselves, but by their teams.

*Instagram* is the third most used social network by the UN and its agencies, where in addition to institutional accounts, some of their leaders also have personal

accounts (Lüfkens, 2025d). The platform combines three distinct channels: the main feed where pictures and videos are displayed in the traditional square format; the reels feed where videos are displayed in vertical format; and the stories feed with full vertical pictures or videos (Lüfkens, 2023a). The most followed UN leaders on Instagram are: the President of the UN General Assembly, *Annalena Baerbock* (@*abaerbock*); the Secretary-General of the UN, *António Guterres* (@*antonioguterres*); and the Director-General of the WHO, *Tedros Adhanom Ghebreyesus* (@*drtedros*). Institutional and personal accounts of the UN and its agencies post mostly pictures on Instagram. Although video posts have a lower share compared to pictures, they receive a higher number of interactions, such as likes, comments and views. The UN and its agencies also post on Instagram Stories, and such posts are considered the best way to stay in the minds of their followers. Their teams publish every activity on the Instagram space, including several one-minute video statements by their leaders. With specific posts, they take their followers inside their special sessions, sharing behind-the-scenes pictures and videos. In cases of natural disasters, diseases and various pandemics, but also wars, they post on Instagram Stories pictures from the subsequent crises, informing followers about the current circumstances. The UN and its agencies, along with their leaders, have also opened accounts on *Threads*, Meta's attempt to compete with X (Lüfkens, 2025e). The most followed UN leaders on *Threads* are: the Secretary-General of the UN, *António Guterres* (@*antonioguterres*); the Director of the UN World Food Programme, *Cindy Lou McCain* (@*cindymccain*); and the Director-General of the WHO, *Tedros Adhanom Ghebreyesus* (@*drtedros*).

Although *LinkedIn* is often not considered a powerful social media channel, the UN and its agencies have a presence on it. It appears that *LinkedIn* is the least used social media by them as their engagement on it is generally much lower compared to other social media platforms. Then, few leaders of IGOs have an official presence on *LinkedIn* and few of them are part of the select group of *LinkedIn* influencers. Those who are influencers in the latter, regularly share their personal opinions in the format of blog posts. Most other leaders just have regular *LinkedIn* profiles and few of them are active, posting status updates or long-form content. The most followed UN leaders on *LinkedIn* are: the Secretary-General of the UN, *António Guterres*; the Executive Director of the Joint UN Programme on HIV and AIDS (UNAIDS), *Winnie Byanyim*; and the Director-General of the WHO, *Tedros Adhanom Ghebreyesus* (Lüfkens, 2025f).

Since the beginning of the coronavirus pandemic, the UN and its agencies have gradually launched their own *TikTok* accounts (Lüfkens, 2025g), initially as an effort to combat online disinformation about the virus. Operating on *TikTok* and producing content, especially for the UN and its agencies is not easy, both in terms of planning and creation. They just need to understand the vibe and culture of *TikTok* if they intend to produce content, as it is very different from any other platform. *TikTok* can be described as an example of the democratisation of creativity, a new and globally influential community that enabled the spread of messages with extraordinary results. Overall, *TikTok* has moved from being an entertainment application to a platform that includes talking about political and social issues (Sandre, 2020).

The UN and its agencies are present on *YouTube* with their own channels, which also have a large number of subscribers (Lüfkens, 2025h). Some of their channels are quite active, in which case they share and store various video content for the activities they characterise. Some of them are active every day with videos that promote causes and offer important messages, while some publish videos from their sessions, and there are those who provide important information when the world faces global phenomena and processes. This variety of videos on the channels of the aforementioned institutions

has resulted in thousands to millions of subscribers. Also, their videos reach millions of views, thus receiving many likes and comments. The UN live streams on YouTube public events from the Security Council and has a live broadcast from the annual UN General Assembly in September. It also has dedicated channels in all six official languages, namely Arabic, Chinese, English, French, Russian and Spanish (Lüfkens, 2023b).

The table 1 presents a ranking of the UN and its agencies' accounts on X, Facebook, Instagram, Threads, LinkedIn, TikTok and YouTube. The data presented shows the five most followed accounts on the aforementioned social media. Each account is also accompanied by the number of followers, data collected in November 2025. This account ranking based on the number of followers and subscribers demonstrates the reach and popularity of the UN, the WHO, the UN Children's Fund (**UNICEF**), the Office of the UN High Commissioner for Human Rights (**OHCHR**), the UN High Commissioner for Refugees (**UNHCR**), the UN Educational, Scientific and Cultural Organization (**UNESCO**), The UN Programme for Gender Equality and the Empowerment of Women (**UN Women**), the UN Environment Programme (**UNEP**), the World Food Programme (**WFP**), and the UN Network on Migration (**UN Migration**).

**Table 1:** Ranking of institutional accounts of the UN and its agencies on X, Facebook, Instagram, Threads, LinkedIn, TikTok and YouTube by number of followers

X	Facebook	Instagram	Threads	LinkedIn	TikTok	YouTube
@UN - 16,3 million followers	World Health Organization (WHO) - 37 million followers	@who - 11,8 million followers	@who - 2 million followers	@United-Nations - 6,3 million followers	@who - 4,5 million followers	@unitednations - 3,26 million subscribers
@WHO - 12,1 million followers	UNICEF - 29 million followers	@unicef - 11,3 million followers	@unicef - 1,5 million followers	@World-Health-Organization - 6,1 million followers	@unmigrat ion - 1,8 million followers	@who - 948,000 subscribers
@UNICEF - 9 million followers	United Nations - 6,2 million followers	@unitednations - 8,2 million followers	@unitednations - 1,4 million followers	@UNICEF - 5,3 million followers	@refugees - 1,6 million followers	@UNICEF - 765,000 subscribers
@UNHuman Rights - 4,1 followers	UNHCR, the UN Refugee Agency - 4,8 million followers	@unesco - 3,4 million followers	@unesco - 588,000 followers	@UNDP - 2,7 million followers	@worldfoodprogram me 1,3 million followers	@UNESCO - 523,000 subscribers
@WorldBank - 3,8 million followers	United Nations Human Rights - 3,2 million followers	@unwome n - 2,1 million followers	@unep - 461,000 followers	@UNESCO - 2,3 million followers	@unicef - 530,000 followers	@WorldBank - 442,000 subscribers

Source: Data collected by the author on the social media accounts of these IGOs

#### 4. THE BENEFITS OF DIGITAL DIPLOMACY FOR THE UNITED NATIONS

The era of globalisation is characterised by the growth and intensification of political, economic and cultural interactions around the world (Salmon, 2000, p. 24). The main characteristic of international relations in the 21st century is the fact that in addition to states, comprehensive spaces have been created for IGOs to solve global emergencies. Digital diplomacy has extraordinary power in terms of increasing international cooperation, thus contributing to the growth of international interdependence. For example, a global challenge that has made cooperation between states more than necessary, whether bilaterally or multilaterally, is climate change. Through digital diplomacy tools, raising the voice for the drafting of more ambitious policies and regulations is facilitated, as well as demonstrating a more serious commitment to tackling climate change. Then, on social media specific communities can be created for the dissemination of serious research on climate change, communications and responses in various cases of natural disasters are facilitated, and disinformation is combated through credible research results. As a result, the UN, by applying digital diplomacy, has facilitated and strengthened international cooperation.

In the last two decades, diplomatic tools changed rapidly as a result of electronic mail, the use of websites, the presence of computers in conference rooms, the intensive use of social media, but also of AI tools. Digital technologies and platforms have proven to be very useful in responding and reacting quickly in cases of complicated situations, such as natural disasters, crises caused by human rights violations, terrorist attacks, or armed conflicts. Many argue that diplomacy generally, and face-to-face diplomacy specifically, is cheap talk. Costless communication that is expected to reveal preferences often fails to do so because diplomats and leaders have incentives to deceive during crisis bargaining (Holmes, 2018, p. 3). Therefore, facilitating large-scale data collection and public dissemination of information are some of the main benefits of digital diplomacy against face-to-face diplomacy. Social media has transcended the hierarchical chains of diplomatic communication and have brought diplomats closer to various audiences around the world, thus facilitating their targeting. The UN and its agencies on social media are committed to create a good image and cultivate relations with the public, making diplomatic processes more transparent and participatory, as well as fighting the hate speech and different types of violence. The internet and social media have proven to be quite successful in combating terrorism and reducing violent extremism.

If traditional diplomatic methods are compared with the tools of digital diplomacy, it is noted that the latter are more affordable for carrying out diplomatic engagements, especially from the financial perspective. Digital diplomacy, in addition to not always requiring financial investments, also aims to reduce costs and result in budget savings. On the side of low financial costs, social media and other internet providers are also developing quite favourable technological solutions. The COVID-19 pandemic further revealed the dependency they have created in the modern world (Rashica, 2022, p. 62). Zoom, Google Meet, and other similar platforms became important for global decision-making meetings, diplomatic summits, and conferences, since travels were hardly feasible. However, the use of video conferences is continuing even in the post-pandemic period by the UN and its agencies for internal coordination and meetings. The main advantages of using them lie in saving time and travel expenses. A very important part of the UN's digital diplomacy is the training of its officials and diplomats. Even in this process, the financial costs of using online learning for them are quite modest, including payments for teaching staff and lecture support.

## 5. THE CHALLENGES OF DIGITAL DIPLOMACY FOR THE UNITED NATIONS

Within the spaces of the internet and social media, cyberbullying, self-harm, fake news, harmful or disturbing content, as well as threats to privacy also find their place. For IGOs, in this case the UN, it was very shocking that many citizens of the world had abandoned their homes to join terrorist organisations operating in Syria, Iraq, and Libya. The number of those joining the fight on the side of the extremists, and many more who were caught trying to join them, became a global nightmare. Terrorist groups had a variety of reasons to use social media, whose popularity was adapted in many forms, mainly due to its easy way of use and low financial costs. By using social media, terrorists can tailor messages to narrow audience groups, but at the same time manage to penetrate the homes of millions of people. The abuse of internet freedom and social media for terrorist and extremist purposes continues to be a highly problematic challenge for UN's digital diplomacy. It is continuously making efforts to combat extremism on social media, promoting cooperation among stakeholders, but also supporting national strategies and building digital resilience. Together with its agencies, the UN encourages partnerships between governments, technology companies and civil society to combat terrorist narratives, develop tools for content moderation and use advanced technologies such as AI to identify extremist content (United Nations, n.d.b). The UN supports initiatives aimed at increasing media literacy, empowering victims, and funding research to understand and address the spread of extremism online (United Nations, n.d.c).

The UN has offices in 193 countries and a staff over 37,000 employees (United Nations, n.d.d), while the entire UN system has over 130,000 personnel (UNSCB, n.d.). Lack of knowledge on the use of digital technologies and platforms poses a difficult challenge of digital diplomacy for the UN. Adopting digital diplomacy does not require a degree in computer engineering, web development, computer science, telecommunications, or any similar field. However, diplomats must be motivated to take basic training in the use of digital technologies, the internet, social media, and even AI tools. The lack of knowledge on the use of digital technologies and platforms has created favourable spaces for the penetration of weapons and means of attacks against various targets. Referred to as "defects of the mind", including users' lack of awareness, ignorance, negligence and carelessness, they can result in costly damages, thereby endangering the careers of politicians and diplomats. The most common mistakes made by diplomats on social media are: sharing confidential or sensitive information; posting inappropriate or offensive content; mixing personal and professional accounts; engaging in arguments or drama; and neglect of reputation on social media (LinkedIn, 2023).

Symbolic violence relates to the power of symbols to impose, destroy, attack, suppress and distort ways of seeing, thinking and speaking. Its most negative characteristic is the fact that it can be far more destructive than physical assault, to the extent that it imposes and reinforces the social damage caused by class, gender and status differences, strengthens social barriers and reinforces culturally embedded dominance games. Symbolic violence has a very large presence on social media. This is demonstrated by the use of insults, intimidation caused by various threatening forms, comments that distort the truth, etc. It is done with the intention of damaging the reputation or status of an actor, whether state or non-state (Kurbalija, 2018). Addressing symbolic violence is one of the most complex challenges of UN digital diplomacy, especially disinformation, which is not only inaccurate, but intends to deceive and is spread in order to cause serious damage. Disinformation can be spread by state or non-state actors. It can affect a broad range of human rights, undermining responses to public policies or amplifying tensions in times of emergency or armed conflict (United Nations,

n.d.e). Quite problematic for the UN in the age of digitalisation is finding a balance between fundamental rights to freedom of expression and countering harmful narratives. The UN has several initiatives and strategies to demonstrate its efforts in preventing symbolic violence. "The UN Global Principles For Information Integrity" presents a vision of a future in which power imbalances are redressed so that a small group of actors, including technology companies based in a handful of countries, no longer monopolise control over global information flows. Its five principles are: Societal trust and resilience; healthy incentives; public empowerment; independent, free and pluralistic media; as well as transparency and research (United Nations, n.d.f).

Two interrelated problems arise from the internet, which are the lack of reliable user identification and the lack of content verification. Social media users can hide behind pseudonyms, or provide false identities, take on different personalities, thus spreading the culture of anonymity. Psychologists claim that in conditions of anonymity individuals or groups tend to become much more extreme. The consequence of anonymity and great openness is the impossibility of adequate content verification. Not all can be checked, not all can be used, or rather people can sink in unverified information (Matteucci, 2015). Anonymity allows stigmatised and abused communities to find safety and support on social media because revealing their identity in the real world can expose them to danger. However, following the horrific racism and abuse that is happening on social media, many politicians and diplomats are facing the worst level of online abuse. Concerned about the risks arising from the culture of anonymity on social media, the UN should pressure digital platform leaders to implement a stronger system of verification and security measures.

Cyber threats targeting the UN and its agencies are increasing in frequency and severity, representing a critical risk to the entire UN system. The UN experiences cybersecurity incidents ranging from advanced actors to cyber criminals and hacktivists. The main goals of these adversaries include information gathering, financial gain through different targeted fraud schemes or disrupting the mandate of the UN. As attackers increasingly leverage AI, the threat landscape is expected to evolve, making detection of these threats increasingly difficult (UNICC, 2024). Adopted by the UN General Assembly in December 2024 after five years of negotiation, the Convention against Cybercrime establishes the first universal framework for investigating and prosecuting offences committed online, from ransomware<sup>3</sup> and financial fraud to the non-consensual sharing of intimate images (UN News, 2025). AI is defined as the ability of a computer or other machine to perform actions thought to require intelligence. Among these actions are logical deduction and inference, the ability to make decisions based on experience or insufficient or conflicting information, and the ability to understand spoken language (Roumate, 2024, p. 1). It can be used for political influence and information warfare. AI-generated content, deepfakes, and automated propaganda campaigns can sow discord, manipulate public opinion, and undermine democracy (Kurbalija, 2025, p. 342). As AI technologies become more widespread, there is a need for globally coordinated AI governance to effectively minimise AI cyber risks. In response to this challenge, the UN Secretary-General has established a High-Level Advisory Body on AI. It engages with various stakeholder groups, including governments, the private sector, and civil society, to ensure a collaborative approach and outlines a blueprint for addressing AI-related risks (United Nations, n.d.g).

---

<sup>3</sup> Ransomware is a type of malware that encrypts a victim's files, making them inaccessible. Beyond encryption, modern ransomware attacks may also steal data and threaten to release it if the ransom isn't paid.

## 6. CONCLUSION

Global economic, energy, ecological and technological emergencies have imposed the cooperation of states and non-state actors. As a result, the 21st century has seen a strengthening of the position of IGOs as subjects of international law, as they serve as a multilateral voice and offer an extraordinary contribution in providing adequate solutions to the aforementioned challenges. However, the growth of the role of IGOs in the international arena has also been influenced by their adoption of digital diplomacy. The latter, through ICT, the internet and social media, has contributed to increasing public support, which is very necessary for IGOs in advancing their goals. It is standard practice for IGOs to have their own websites and provide information about their activities, but also to be present on social media (X; Facebook; Instagram; Threads; LinkedIn; TikTok; and YouTube) with institutional and personal accounts.

When analysing the digital diplomacy of IGOs, the focus is on the UN with its agencies, as the most powerful international political organisation in the world. The adoption of digital diplomacy by the UN has resulted in a multitude of benefits in terms of achieving its diplomatic objectives. Increasing international cooperation, fast and direct communication with global audiences in cases of world crises, as well as high effectiveness and low financial costs of using digital platforms are benefits of digital diplomacy that contribute to the core principles of the UN.

However, very challenging for UN digital diplomacy are issues such as the abuse of internet freedom and social media for terrorist and extremist purposes, the lack of knowledge among UN staff and employees about the use of digital technologies and platforms, combating disinformation without harming fundamental freedoms of expression, the presence of racism and online abuse as a consequence of the culture of anonymity on the internet and social media, as well as cyber threats, including those evolved by AI. Therefore, the UN establishes and implements a multitude of strategies and initiatives to prevent the risks of digitalisation.

## BIBLIOGRAPHY:

- Bjola, C. and Holmes, M. (eds.) (2015). *Digital Diplomacy: Theory and Practice*. New York: Routledge.
- Cull, J. N. (2009). *Public Diplomacy: Lessons from the Past*. Los Angeles: Figueroa Press.
- Holmes, M. (2018). *Face-to-Face Diplomacy: Social Neuroscience and International Relations*. Cambridge: Cambridge University Press.
- Kurbalija, J. (2018). Confessions of a #DigitalDiplomat. *Diplo*. Available at: <https://www.diplomacy.edu/blog/confessions-digitaldiplomat/> (accessed on 06.10.2025).
- Kurbalija, J. (2025). *History of Diplomacy and Technology: From smoke signals to artificial intelligence*. Malta: DiploFoundation.
- Lamb, P. and Robertson-Snape, F. (2017). *Historical Dictionary of International Relations*. Maryland: Rowman & Littlefield Publishers.
- LinkedIn. (2023). What are the most common social media mistakes that employees make and how can you prevent them?. Available at: <https://www.linkedin.com/advice/0/what-most-common-social-media-mistakes> (accessed on 09.10.2025).
- Lüfkens, M. (2023a). International Organizations on Social Media 2023: Instagram. *DigitTips*. Available at: <https://digitips.ch/international-organizations-on-social-media-2023/> (accessed on 07.10.2025).

- Lüfkens, M. (2023b). International Organizations on Social Media 2023: YouTube. *DigiTips*. Available at: <https://digitips.ch/international-organizations-on-social-media-2023/> (accessed on 07.10.2025).
- Lüfkens, M. (2025a). International Organizations on Social Media 2025. *DigiTips*. Available at: <https://digitips.ch/international-organizations-on-social-media-2025/> (accessed on 07.10.2025).
- Lüfkens, M. (2025b). International Organizations on Social Media 2025: X. *DigiTips*. Available at: <https://digitips.ch/international-organizations-on-social-media-2025/> (accessed on 07.10.2025).
- Lüfkens, M. (2025c). International Organizations on Social Media 2025: Facebook. *DigiTips*. Available at: <https://digitips.ch/international-organizations-on-social-media-2025/> (accessed on 07.10.2025).
- Lüfkens, M. (2025d). International Organizations on Social Media 2025: Instagram. *DigiTips*. Available at: <https://digitips.ch/international-organizations-on-social-media-2025/> (accessed on 07.10.2025).
- Lüfkens, M. (2025e). International Organizations on Social Media 2025: Threads. *DigiTips*. Available at: <https://digitips.ch/international-organizations-on-social-media-2025/> (accessed on 07.10.2025).
- Lüfkens, M. (2025f). International Organizations on Social Media 2025: LinkedIn. *DigiTips*. Available at: <https://digitips.ch/international-organizations-on-social-media-2025/> (accessed on 07.10.2025).
- Lüfkens, M. (2025g). International Organizations on Social Media 2025: TikTok. *DigiTips*. Available at: <https://digitips.ch/international-organizations-on-social-media-2025/> (accessed on 07.10.2025).
- Lüfkens, M. (2025h). International Organizations on Social Media 2025: YouTube. *DigiTips*. Available at: <https://digitips.ch/international-organizations-on-social-media-2025/> (accessed on 07.10.2025).
- Matteucci, A. (2015). Internet's silent and hidden effects. *Diplo*. Available at: <https://www.diplomacy.edu/blog/internets-silent-and-hidden-effects/> (accessed on 08.10.2025).
- Mingst, A. M. and McKibben, E. H. (2022). *Essentials of International Relations* (9th edition). New York: W. W. Norton & Company.
- Rashica, V. (2018). The Benefits and Risks of Digital Diplomacy. *SEEU Review*, 13(1), 75-89. Available at: <https://sciendo.com/article/10.2478/seeur-2018-0008>. (accessed on 02.10.2025).
- Rashica, V. (2019a). Digital diplomacy: aspects, approaches and practical use. *International Scientific Journal on European Perspectives*, 10(1), 21-39. Available at: [https://www.europeanperspectives.org/storage/24/DIGITAL-DIPLOMACY\\_Rashica.pdf](https://www.europeanperspectives.org/storage/24/DIGITAL-DIPLOMACY_Rashica.pdf). (accessed on 02.10.2025).
- Rashica, V. (2019b). The right, procedures and reasons of the withdrawal of states from international organizations. *SEEU Review*, 14(2), 62-77. Available at: <https://reference-global.com/article/10.2478/seeur-2019-0019>. (accessed on 03.10.2025).
- Rashica, V. (2022). Is Digital Diplomacy Triumphant Over Political Diplomacy?. *International Scientific Journal on European Perspectives*, 13(2), 47-67. Available at: <https://www.europeanperspectives.org/storage/197/EPs04-Oct22-Digital-Diplomacy-Rashica.pdf>. (accessed on 10.10.2025).
- Rashica, V. (2023). The Rainbow Beyond the Soul: Reflecting the Diplomat's Profession and Personality. *International Scientific Journal on European Perspectives*, 14(2),

- 101-122. Available at: <https://www.europeanperspectives.org/storage/265/06-EPS-Oct23-The-rainbow-Beyond-the-Soul.pdf>. (accessed on 04.10.2025).
- Rashica, V. (2024). *Diplomacia Digjitale në Teorinë dhe Praktikën e Diplomacisë së Shekullit Njëzet e Një*. Prishtinë: Botime Artini.
- Roumate, F. (2024). *Artificial Intelligence and the New World Order: New Weapons, New Wars and a New Balance of Power*. Cham: Springer Nature.
- Salmon, C. T. (2000). *Issues in International Relations*. UK: Routledge.
- Sandre, A. (2015). *Digital Diplomacy: Conversations on Innovation in Foreign Policy*. Maryland: Rowman & Littlefield Publishers.
- Sandre, A. (2020). Digital diplomacy on TikTok is growing. *Medium*. Available at: <https://medium.com/digital-diplomacy/digital-diplomacy-on-tiktok-is-growing-8ad1eb940719> (accessed on 06.10.2025).
- UNICC. (2024). Cyber Threat Landscape Report 2023. Available at: <https://www.unicc.org/wp-content/uploads/2024/11/2023-Cyber-Threat-Landscape-Report-v2.pdf> (accessed on 13.10.2025).
- United Nations. (n.d.a). UN System. Available at: <https://www.un.org/en/about-us/member-states> (accessed on 04.10.2025).
- United Nations. (n.d.b). United Nations Security Council Counter-Terrorism Committee holds special meeting on preventing exploitation of the Internet and social media for terrorist purposes. Available at: <https://www.un.org/securitycouncil/ctc/news/united-nations-security-council-counter-terrorism-committee-holds-special-meeting-preventing> (accessed on 10.10.2025).
- United Nations. (n.d.c). Cybersecurity and New Technologies. Available at: <https://www.un.org/counterterrorism/cybersecurity#~:text=Misuse%20of%20information%20and%20communications,in%20preventing%20and%20countering%20terrorism.> (accessed on 10.10.2025).
- United Nations. (n.d.d). #Work4UN: Basic Facts about Working for the United Nations. Available at: <https://www.un.org/en/academic-impact/work4un-basic-facts-about-working-united-nations#~:text=Working%20around%20the%20clock%2C%20the,development%20and%20promote%20human%20rights> (accessed on 10.10.2025).
- United Nations. (n.d.e). Countering Disinformation. Available at: <https://www.un.org/en/countering-disinformation> (accessed on 09.10.2025).
- United Nations. (n.d.f). United Nations Global Principles For Information Integrity. Available at: <https://www.un.org/en/information-integrity/global-principles> (accessed on 12.10.2025).
- United Nations. (n.d.g). Artificial Intelligence (AI). Available at: <https://www.un.org/en/global-issues/artificial-intelligence#~:text=Lights%20and%20shadows%20of%20AI,democratic%20processes%20around%20the%20world> (accessed on 14.10.2025).
- UN News. (2025). Sixty-five nations sign first UN treaty to fight cybercrime, in milestone for digital cooperation. Available at: <https://news.un.org/en/story/2025/10/1166182#~:text=Adopted%20by%20the%20General%20Assembly,consensual%20sharing%20of%20intimate%20images> (accessed on 14.10.2025).
- UNSCEB. (n.d). Structure of the CEB. Available at: <https://unsceb.org/structure> (accessed on 10.10.2025).



# THE BIONIC TURN IN LEGAL EPISTEMOLOGY: SOME REMARKS ON THE FUSION OF LAW AND CYBERNETICS, LEGAL INFORMATION AND DATA, SOURCES OF LAW AND HYBRID INTELLIGENCE

JUDr. Dominik Šoltys, PhD.  
Assistant Professor  
Pavol Jozef Šafárik University in Košice  
Faculty of Law  
Kováčska 26  
040 75 Košice; Slovakia  
[dominik.soltys@upjs.sk](mailto:dominik.soltys@upjs.sk)  
ORCID: 0000-0002-0827-4722

This paper is a partial output of APVV no. 21/0336, "Analysis of court decisions using artificial intelligence methods."

**Abstract:** *The paper addresses how technology, legal informatics, and legal cybernetics can transform the traditional understanding and structure of sources of law. The author wonders whether AI-generated outputs, such as texts, analyses, or decision-making recommendations, can be perceived as a new type of legal normativity. The central concept is the bionic lawyer figure – a person equipped with a digital interface or augmented rationality who acts as an intermediate link between the traditional legal system and technological outputs. The paper also examines the philosophical, theoretical, and epistemological features that led to the synthesis of law, cybernetics, and informatics. The author argues that in a particular situation, advanced legal analytical tools (equipped with machine learning and natural language processing) and data-driven law can acquire the status of a factual source of law, thus creating a hybrid model of new legal ontology concerning a broad spectrum of legal information and legal data.*

**Key words:** *Law and Technology; Sources of Law; Bionic Lawyer; Legal Consciousness; Posthuman Law*

## Suggested citation:

Šoltys, D. (2025). The Bionic Turn in Legal Epistemology: Some Remarks on the Fusion of Law and Cybernetics, Legal Information and Data, Sources of Law and Hybrid Intelligence. *Bratislava Law Review*, 9(Spec), 175-192. <https://doi.org/10.46282/blr.2025.9.Spec.1047>

Submitted: 07 May 2025

Accepted: 24 November 2025

Published: 28 December 2025

## 1. INTRODUCTION

As a normative system, law has been shaped exclusively by human rationality and social context for centuries. However, with the advent of artificial intelligence (AI), the question arises as to whether and how AI can interfere with the essence of law and what philosophical and theoretical challenges its application in law may entail. The development of advanced legal analytical tools utilising the potential of AI brings opportunities to accelerate, streamline, and enhance the quality of work in legal professions or even improve the functioning of the entire legal system. By advanced legal analytical tools, we refer to software and hardware solutions that harness the potential of machine learning (ML) and natural language processing (NLP). These technologies generate texts used by judges, lawyers, or public administration, representing a new stage of knowledge, analysis, prediction, creation, interpretation, and application of law.

Why are the discussion and use of technology in law currently increasing? This is not only a practical question, but also a philosophical one. It presents posthumanist starting points and a posthumanist approach to law. The purpose of the paper is to examine the thesis that the increasing quantity of data, the reliability of its processing, and the availability of these data change the current knowledge and perception of law. This paper aims to do more than describe relevant concepts; it advocates for a hybrid

model of legal epistemology. In this model, the law functions as both a normative and an informational system, incorporating psychological and sociological aspects. It is increasingly co-created by technologies in a posthumanist way. The paper specifically explores how cutting-edge legal analytical tools that incorporate MP and NLP, together with data-driven technology, can become recognised as a factual legal source, thus forming a hybrid model for a new legal ontology.

The paper examines the historical, current, philosophical, and theoretical conditions under which the outputs of advanced legal analytical tools can be understood as legally relevant or as a source of law. It predominantly utilises cybernetics as an integrative transdisciplinary framework. Through a synthesis of philosophical-theoretical analysis and a descriptive methodology, it examines the historical and posthumanist contexts of the convergence of legal systems and technological advancements.

This paper pursues three main research questions: How does the application of cybernetics contribute to understanding law as a system of information and control? If so, can the increasing amount of information and data become recognised as a new source of law, either formally or factually? Are advanced legal analytical tools and AI-based legal systems just pragmatic tools to foster efficiency? Or do the ongoing technological shifts reshape legal consciousness and the identity of the lawyer?

However, to what extent such technologies can affect a lawyer's professional consciousness and, consequently, the solutions to legal problems he or she encounters is still questionable. In this sense, the presented paper will also focus on the assumptions that led to the current discussion on the direct interaction of machine reasoning with human reasoning at the interface of law. To this end, we will examine the nature of cybernetics as a science, the application of cybernetics in the field of law, and the approach to law as a regulative (cybernetic) system and a system of information. Cybernetics can represent a unifying method for collecting and evaluating diverse information, as we will present in the first part of the paper.

The paper is structured into several interconnected parts. First, we will provide a general introduction to cybernetics and its potential (Part 1.), in order to outline the conceptual tools needed for analysing law as a systemic phenomenon (Part 2.). On this basis, we will turn to the idea of law as a system of information and highlight the central role of legal information in sustaining law's regulatory function (Part 3.). This perspective then allows us to approach law as a historical data set ready to be analysed, where legal norms, institutional practices, and social contexts can be studied as layers of legally relevant data (Part 4.). Finally, we will address how the technological transformation of law reshapes legal consciousness and the very identity of the lawyer, introducing the notion of a "bionic lawyer" as a hybrid human-machine actor. At the same time, we will examine in more detail whether the application of advanced legal analytical tools and AI has yet influenced the philosophical and theoretical setting of the legal consciousness (Part 5.).

The paper situates this analysis within the broader conditions of posthumanist philosophy and society, which form the conceptual background for rethinking both law and technology. We will examine the cultural and philosophical implications arising from the synthesis of biological and mathematical neural networks within the legal domain.

## 2. A GENERAL INTRODUCTION TO CYBERNETICS AND ITS POTENTIAL

Originally, the field of cybernetics, founded by Norbert Wiener, focused mainly on the science of information management (Wiener, 1962, p. 11). Wiener recognised that information serves as the fundamental building block (Polčák et al., 2018, pp. 9-10).

However, even before that, in 1843, the French physicist and mathematician André-Marie Ampère mentioned cybernetics as an independent (political) science. The object of its interest was to be "the art of governing in general" or of making correct political decisions (see Ampère, 1843, pp. 140-142). Thus, Ampère relied on procedures that can be scientifically discovered and will make the right decisions. In the current vocabulary, it can be said that such a flow and sorting of information will lead to the right choices. Although Ampère's definition of cybernetics did not catch on during the 19th century, he understood the need for proper decision-making. Of course, Ampère's observation is significant from another point of view and acquires its significance in the similarities that the German-Czech political scientist Karl W. Deutsch later introduced. In addition, Deutsch was influenced by Wiener's conception of cybernetics, which he applied to the function of communication in politics and society. Moreover, he concluded that politics is not only a question of power but also a question of communication, i.e., the sharing of information. The intersection between communication and information thus necessarily results in the issue of decision-making and control (Říchová, 2014, pp. 84-85). In this sense, Deutsch writes about the political system as the control of society through communication. In other words, politics is the steering of society through communication (Deutsch, 1963, p. 191). Politics thus becomes a whole network of channels through which information is disseminated. According to Deutsch, politics is the process of managing society through processing information, feedback, and communication, similar to how the nervous system works in the body (see Deutsch, 1963, pp. 182-199).

However, the parallel with the nervous system in the body is not accidental. The driving force behind the initial development of cybernetics was the hope that it could discover some of the control and communication processes in living organisms and then apply them to machines and technologies (see, e.g., Heylighen and Joslyn, 2001). In this regard, the general subject of cybernetics is processes and control in technical facilities, animals, and human organisations (Rozental et al., 1974, p. 274). Cybernetics thus tries to reconcile three types of modern worldviews: non-living sciences, living sciences, and social sciences (Fedorov, 2016, pp. 2-3).

Wiener assumed that feedback stands at the centre of cybernetics and is crucial for biological-individual and social-collective life (see, e.g., Hoefnagel, 1971). For Wiener, feedback is the basic principle of system control and regulation, which allows biological and technical systems to modify their behaviour based on information about the outcome of their activities. He argued that properly used feedback will enable systems to learn, adapt, and achieve goals. Thus, cybernetics, in this sense, deals with the process of communication and regulation, and therefore, its essential parts are information theory and control theory (Zimmermann, 1983, p. 315).

In connection with the above, we would like to give one example of the human body and the regulation of its body temperature. The temperature naturally rises if the human body overheats due to excessive movement. The organism reacts to this fact by sweating. Sweating cools the body, but not to the point where it starts to shiver from the cold. The nervous system tries to prevent the moment of overheating of the body and hypothermia, thanks to the feedback it receives in the form of outputs, and responds appropriately to them with its responses as inputs. The human body forms a specific system here. Based on feedback, this system's essence is the ability to self-regulate, i.e., to achieve stability and adapt without external intervention. Wiener also wrote about applying the concept of homeostasis to both technical and social systems for self-regulation through internal mechanisms that keep the system's state within the required limits (see Wiener, 1962, pp. 114-115). In addition, systems are supposed to become

adaptive because they learn to improve their behaviour over changing conditions and time.

Cybernetics is, in a sense, the science of systems or how systems use information, models, and control actions to move toward an optimal goal (see, e.g., Siddique et al., 2011, p. 109). This also reveals the universality of cybernetics because the knowledge of these principles can be applied to any area in which we encounter systems. Cybernetics was already planned as an interdisciplinary approach at its birth (see Love, 2023, p. 6). It can also be viewed as a multidisciplinary approach integrating insights from various scientific fields, providing new understanding of reality (see Alvarez and Ramírez-Correa, 2023; Medvedeva and Umpleby, 2024). Cybernetics is also described as a transdisciplinary field that develops a shared language and discourse essential for comprehension among various scientific areas (see François, 2006; Chapman, 2019). In this sense, cybernetics brings together different areas of knowledge and creates a common framework for solving complex problems. Cybernetics is thought to apply to any system, no matter its origin. But this does not mean that cybernetics approaches every system equally without considering their particularities. Not all systems are of the same nature. Biological regulation, such as human thermoregulation, operates on fundamentally different grounds than social or legal systems. If cybernetics is applied across such diverse domains, it must account for these ontological differences and find process analogies rather than assume a perfect analogy (see Skansi and Šekrst, 2021, p. 465).

From the above, it follows that cybernetics is more than just a precisely separated science of systems. It can be considered an attitude or an insight into life, as the first founders of cybernetics thought about it. We can speak of it as a meta-discipline that brings new knowledge through synthesising knowledge from various scientific disciplines (see Scott, 2001, p. 412). It can even be understood as a particular philosophy (see Glanville, 2013, p. 47). The characteristics of cybernetics suggest it is a fitting framework for examining today's information age. This era is marked not only by swift technological advancements and their applications but also by intricate issues like economic and social disparities, climate change, the ecological crisis, and challenges related to social stability. All these complex problems (the so-called wicked problems) and, in particular, their solutions may be, or are already, the subject of cybernetic considerations. Cybernetics can be a tool for understanding and solving systemic problems of postmodern and posthuman challenges that bring complex, dynamic, and interconnected social problems.

Solutions to today's complex problems are also expected to be solved legally. This raises the question of whether the availability of extensive information, along with analysis via AI, ML, and NLP, and the use of cybernetics can transform law as a social phenomenon and philosophical concept. Simultaneously, it can also alter the practical aspects of legal systems through legislation, interpretation, implementation, and application of law.

### 3. SYNTHESIS OF LAW, CYBERNETICS, SYSTEM, AND CONTROL

What can bring law and cybernetics closer together? The answer to this question is unclear, but it can be found in a few basic concepts common to both areas. These are mainly concepts such as system, control, information, and feedback. These concepts create a possible contact point between legal theory and cybernetic reasoning – they suggest that law can be understood as a system of control of social processes in which information and feedback are of fundamental importance.

While the focus of law may not be systems, one could argue that law itself functions as a particular system characterised by internal consistency, stability, and dynamism (see, e.g., Brösl et al., 2013, pp. 31 et seq.). Considering law as a system involves seeing it as more than a sum of disorganised legal norms (Ottová, 2002, pp. 117-118). The understanding of law as a system presupposes assigning features, criteria, and standards applicable to all systems, especially if we are to talk about the interdependence of the system as a whole and its elements.

An important moment in all systems is the interconnectedness of its elements, i.e., the relationships between the elements of the system that make up its structure as a whole (Bárány, 2021, p. 23). All this presupposes that a systemic approach can be applied to the law (Večeřa et al., 2013, p. 143).

However, law cannot be understood only as a formal system limited to a certain hierarchy of sources of law according to legal force. This includes all elements that constitute state governance and other public entities involved in lawmaking and enforcement of law (Prusák, 2023, p. 441). In this sense, we speak of a legal order that, in addition to the formal aspect of positive law, captures public authorities' wider existence and activity. In classical legal theory, Kelsen's Pure Theory of Law defines law as a hierarchical normative system. Kelsen deliberately excludes sociological criteria, treating law as a normative system grounded in validity rather than social facts (see, e.g. Kelsen, 2005, pp. 193 et seq.). He allows only minimal reference to social reality through the requirement of effectiveness, but otherwise excludes morality, politics, and sociology. In contrast, Ota Weinberger's (neo)institutional theory emphasises that law cannot be understood without its institutional and social dimensions, arguing that legal norms are embedded in and gain meaning from the broader framework of social practices and institutions (see Weinberger, 2010, pp. 43-45, 318).

So here we come to the idea that the concept of a system of law has a much broader meaning if we consider its social aspect. Therefore, law can be understood as a social system or, specifically, a system of social norms. In this sense, law is a fundamental social mechanism (Příbrán, 1996, p. 16). Law as a social system undertakes to set the boundaries of the social world, co-creates the reality of everyday life, creates social structures, etc. (Večeřa and Urbanová, 2006, pp. 84-85). In this way, law operates alongside other factors of social life, such as morality, customs, traditions, ethics, aesthetics, economics, politics, religion, and others. The problem is further complicated because society itself can be regarded as a highly complex system in which various social phenomena and processes operate (see Bakošová and Vaculíková, 2006, pp. 47-51). Now we can discuss law as a system in a broader sense and understand its historical essence, how it can be influenced by other normative systems (e.g., morality, ethics, traditions) and also influence them. The question of whether law is a closed system that "codes" everything according to its own nature and principles (see Luhmann, 2004) or an open system that uses politics, morality, tradition, economics, and more for its own efficiency (see Pound, 1910; Unger, 1986) is complex, and jurisprudence does not provide a clear answer.

It can be noted that the law is not only a system but also fulfils a regulatory function and controls society. This function consolidates and stabilises social relations by imposing obligations and entitlements on citizens and institutions (Fábry et al., 2018, p. 179). Following this, Knapp says that the law hypostasises in society, thus gaining its existence and acting on society as a control mechanism (Knapp, 1995, p. 40). The law itself is the systematic activity that controls society. In other words, law as a social system is undoubtedly a system of control in which the regulatory function is linked to the normative function. The actual object of this normative function is to determine what

behaviour or state is commanded, prohibited, or allowed. Thus, law is also a system that can provide feedback from the rulers to the ruled, and if we are to speak of a rule of law, then the opposite should also apply.

In summary, it can be argued that a cybernetic approach to law as a system must necessarily consider this broader historical, normative, and social context. The social impacts that law has send feedback and serve as an assessment of the desired effect or achievement of desired goals in social conditions. This entire process assumes the transfer of information because of the effective management of the law.

#### 4. LAW AS A SYSTEM OF INFORMATION AND THE IMPORTANCE OF LEGAL INFORMATION

It is interesting to consider that law can be viewed as a system of information (Hildebrandt, 2016). In this sense, law is a system of information that can be stored, altered, processed, or analysed by various methods. In this sense, we are talking about legal information.

The classic of Czechoslovak jurisprudence and legal theorist Viktor Knapp defined legal information as information about law. However, such a definition may be too general. Therefore, Knapp distinguished: first, legal information about a legal norm, and second, legal information, which is information about a legal norm as conveyed through decisions by public authorities, legal literature, and related sources. Nevertheless, legal norm remains the centre of legal information. The broader interpretation of legal information might also include, for instance, data regarding the existence and content of a legal norm (Knapp, 1995, p. 223).<sup>1</sup>

According to Mireille Hildebrandt, legal information derives from sources of law, while it is inseparably linked to knowledge of law. According to her, legal information is inextricably linked to the knowledge of the legal consequences of an action (Hildebrandt, 2018, p. 19).

To claim that the law is a system of information does not remain without further theoretical and practical consequences. Law is in the information age, and other information systems operate alongside it. Understanding law through the prism of information means clarifying its informational nature and understanding how it interacts with other information systems (Lee, 2017, p. 324). Law may be interconnected by other social systems of information, such as morality, ethics, and other cultural aspects and regulative factors of society.

The core idea behind using technology in law is recognising that legal information is also digital. Like any digital information, law is expressed here by a binary of zeros and ones stored in computer memory, drives, databases, etc., being processed. However, quite naturally, this is a technical issue, but it does not exhaust the proper purpose of the law. Evidently, the law predates current digital technologies and was not developed solely for digital processing technologies. Legal information can be understood primarily as semantic information intended to have a recognisable sense for officials, lawyers, and citizens. Law regulates and standardises specific behaviour in the legal sense, and acts informatively or preventively for this purpose. In cases of violation, sanctions will be

---

<sup>1</sup> Knapp further distinguished three levels of legal information: The first level is the indicative level of legal information, representing the identification number of the relevant legal regulation, such as the number, year of issue, and title of the legal regulation. The second level is the reproducible level of legal information, which consists of the possibility of extending the text of a legal norm to a computer monitor. Finally, according to Knapp, the third, i.e., deductive level, has the highest utility value. This legal information is gathered using an AI (Knapp, 1995, p. 224).

imposed. In this regard, Mireille Hildebrandt recalls that law can be considered as a system of information in a dual sense (Hildebrandt, 2016, p. 21 et seq.): first, the law stores and provides information about the consequences of our behaviour (external view of the law); and second, the law influences our interactions (the internal view of the law). In both cases, the law is a normative matter. Although the law is processed by technical means, its technical side remains hidden, i.e., not relevant to the goals.

Therefore, the law as an information or information system must be distinguished from the law as a computation and algorithm (Hildebrandt, 2018, p. 28). In that regard, we speak of computational law. Computing law is an aspect of law adapted for machine processing through a computer, often automatically and without human intervention. In other words, it is the machine-readable law done by digital computers. Here, the law is expressed in binary data and works through algorithms. Through the prism of computing law, law can also be defined as a system of algorithms adapted for computer processing. However, the question is, what place will these algorithms have in law, and, thus, how will the legal philosophy and theory of law evaluate them? If this question is to be answered, it is necessary to consider the factual scope and the methods of applying the law through technology. A law primarily driven by technology, or mainly applied through technological means, will see these algorithms fully integrated into the legal framework and even into the historical nature of law. This could be an important shift from the mere technological aspect of law to technological law.

Of course, all these ideas would not have begun if an approach to law that considers its informational value did not exist. In this context, Knapp discusses the field of legal informatics, with legal information serving as its primary focus. Simultaneously, he is regarded as a pioneer in viewing law as an information system, particularly in legal information systems (see Cvrček, 2013) and in the use of cybernetics within law (see, e.g., Polčák, 2013). At the time in the Eastern Bloc, when and where Knapp lived and worked, cybernetics was initially considered a bourgeois pseudoscience, which brought the threat of sharpening the exploitation of workers. Gradually, however, there was a very mild and cautious weakening of this attitude in law, as evidenced by experiments during the 1960s and 1970s in the Soviet Union (see Kerimov, 1963; Shliakov, 1976) or during the 1970s in Hungary regarding the court decisions (see Bárdos and Bárdos, 1974). Likewise, in the Eastern Bloc, Franciszek Studnicki pioneered research in Poland on the application of cybernetics and informatics to law (see Studnicki, 1969). All this led to the emergence of a new science during the 1960s, which can be named legal cybernetics (Ilková and Ilka, 2016, p. 329).

Following this, two meanings of cyber law come to the surface. Cyber law can be understood as a law that focuses on regulating the digital world as part of its purpose. Thus, in this respect, law will be a set of norms that control or regulate cyberspace (see, e.g., Tsybalyuk, 2024). At the same time, however, cyber law can be understood as the application of cyber analyses to the law in a broader scope, as a result of which legal relationships begin to be modelled, shaped, and finally controlled by the application of cybernetics (see, e.g., Purge, 2023). More precisely, the principles of control according to cybernetics are applied to law. In theory, the jurisprudence would undergo reconstruction according to basic cybernetics standards, transforming it into legal cybernetics. The results from this process should be utilised within a practical, real-life legal framework, leading to the emergence and application of cybernetic law.

However, such an approach to law is not a new idea. In connection with this, the contribution of Viktor Knapp can be mentioned again. Knapp focused primarily on the theoretical side, or at least some theoretical and methodological aspects of the application of cybernetics in the state and law. He distinguished between the use of

cybernetic methods for scientific examination of the law and the use of cybernetic methods in human activities (Cvrček, 2013, p. 1220). He evaluated the importance of cybernetics in connection with other sciences. This connection not only shows the limits of the application of cybernetic methods (i.e., their (in)appropriateness for a specific scientific field) but also adapts cybernetic methods (Knapp, 1963, p. 15). Despite the theoretical and scientific nature of Knapp's research, his motivation was the potential for the social applicability of cybernetics (Knapp, 1963, p. 7), i.e., to address the question of how and in what specific ways cybernetic methods can help improve the control/administration of society by law.

So, what is the explanation for the application of cybernetics in the state and law? The answer is information. In this context, Knapp appreciated when the law-making resulted from scientifically collected, verified, and accurate information. However, this does not exhaust the value of information for the law because information on the social impact of legal norms is important and must also be added (Knapp, 1963, pp. 12-13). In this regard, feedback will lead to additional potential changes in the legal regulation. Therefore, Knapp said that within the framework of legal regulation, feedback is important, which consists of ensuring that the controlling entity is constantly informed about the real-life effects of specific legal regulation. This means that the legislator should be constantly informed about how the legal norm operates in society. If a legal norm is not effective, the legislator should react appropriately to the correction of the relevant legislation (Knapp, 1995, p. 40). In this example, it is possible to explore how Knapp briefly described the self-regulation of the legal system, where inputs in the form of relevant information about the effectiveness of a legal norm lead to outputs in the form of a reaction from the legislator, who corrects the legal norm in order to achieve the desired goals according to legal policy.

This also describes the very operation of law in society as a purposeful human activity to achieve a specific goal (Bakošová and Vaculíková, 2006, p. 53). Currently, this is enabled by applying cybernetic epistemology in law, which views law as a cognitive system. Law, as a cognitive system, learns, adapts, and self-regulates through feedback, and at the same time, as a complex system, it learns to adapt to changing conditions (see Fedorov, 2016). Law is no longer approached only as a formal hierarchy of sources of law, a passive instrument of political will, and mere control of power. However, much more emphasis is placed on its dynamics, self-regulation, openness, and complexity. It is primarily a question of how to apply control through relevant information in law.

## 5. LAW IS A HISTORICAL DATA SET READY TO BE ANALYSED

In recent years, the digitisation of legal texts and developments in statistics, informatics, and data analysis have opened up entirely new ways to the study of law. These approaches take into account the datasets that constitute the law. The volume of legal data available and processed reflects an approach considering law a large data set. Data-driven legal approaches transform law into an analytical discipline focused on quantitative legal predictions (Katz, 2013; Catanzariti, 2021). With the help of mathematical models, statistics, and AI algorithms, legal situations can be analysed and even predicted. Such an approach makes it possible to work with a large amount of historical legal data and predict, for example, court decisions (see Katz, Bommarito, and Blackman, 2017). In the future, it is essential to use the potential of prediction to identify the consequences of legal policies.

All these results, the potential of technological law, the availability of big data, the effort to select the correct information, and its subsequent use with the aim of better

knowledge, creation, and application of law are changing the current approach to law. It expands the scope of traditional formal sources of law, such as laws and court decisions, to include additional layers of legally relevant data. These include, for example, legislative history, judicial practice, the length of proceedings, the litigant's argumentations in the dispute, contractual practice, or social and economic contexts (Surden, 2014). Legal analysis is thus transformed into a multidisciplinary activity that combines normative and empirical approaches with algorithms. It is a legal analysis helping lawyers in decision-making, argumentation, and predicting or assessing the impact of specific legal policies.

In this context, the practical implementation of technological law shifts from being just a theoretical exercise or legal knowledge to a true reflection of how the law functions. Nevertheless, traditional formal sources of law continue to be part of the historical legal data package. The analysis of this legal data is significantly broader, and technological law counts on it. It can be said that in the technological law of the posthuman era, legal information and data are becoming more important than the traditional theoretical distinction between formal sources of law. In this context, we refer to the role of formal legal sources among other legal data being analysed, such as legislative history, judicial practices, duration of proceedings, litigant's claims in disputes, contractual practices, social practice, and the broader social, political, cultural, and economic contexts. At this point, a series of questions arises: who determines the criteria for data selection, i.e., what data should be considered, and what weight will they have for decision-making? Will the criteria for data selection be the same for all legal relationships, legal branches, or countries, or should they take into account specificities? These are fundamentally important questions that need to be examined separately and thoughtfully adapted to the purposes or needs of practice.

This potential frequently fosters significant optimism about implementing technology in law. At this point, it is necessary to stop and recognise certain limits; despite the intersection between law, cybernetics, information, and data, which can work together and bring relevant results. That limit is legal consciousness. Although the technological era, or rather the information and digital age, brings possible philosophical and theoretical changes in the view of law, we have a category of legal consciousness that has always been associated with a human individual or a group of persons.

## 6. IS THE FUSION OF LAW AND TECHNOLOGY ALSO CHANGING THE LEGAL CONSCIOUSNESS?

The question of legal consciousness has always been an interesting one. The theory of law understands, under legal consciousness, the total of human ideas, opinions, and attitudes towards law. Legal consciousness is understood as a part of social consciousness and its specific form (see, e.g., Šoltys, 2021, p. 19). It reflects the psychological side of the law (see Večeřa et al., 2013, p. 24). Legal consciousness does not include only mutually conditioned ideas about law at the level of *de lege lata* and *de lege ferenda* (see Hencovská and Jesenko, 2010, pp. 46-47), but also the attitudes towards law that affect them (see Bakošová and Vaculíková, 2006, pp. 61-64). Until now, the question of legal consciousness – perhaps with one exception and to a limited extent (see Petrazycki, 1955, p. 79) – has been associated only with humans. Several types of legal consciousness are distinguished, among which we can find the legal consciousness of the whole society, different social groups, or individuals. Such a division is understandable and reflects that society comprises different social groups and individuals with different forms and levels of information and opinions about the law. Therefore, legal consciousness as a part of social consciousness is not one but is

comprehensively divided. It is internally heterogeneous – it differs from group to group, from individual to individual, and takes on a completely different dimension if the criterion of professional knowledge comes into play (see Večeřa and Urbanová, 2006, pp. 243 et seq.). Overall, legal consciousness thus becomes a complex, internally structured social phenomenon based on elements of knowledge and evaluation of law.

However, if we choose to view legal consciousness as a reflection of the socio-legal mindset, then it encompasses both notions of valid law and ideal law. In that case, we will soon discover that, along with reflections on "what law is" at the level of *de lege lata* and "what the law ought to be" at the level of *de lege ferenda*, we can also explore, perhaps thanks to our human imagination and creativity, "what law could be" at the level of *de lege imaginata*. This degree of legal awareness is frequently overlooked in jurisprudence, although one may find the imaginative application of potential forms of law within it (see, e.g., White, 1985; Robson, 1992).

In this respect, we consider how legal consciousness is structurally formed, i.e., what elements are structurally active. Bakošová and Vaculíková distinguish between the cognitive, emotional-evaluative, and decision-making elements (see Bakošová and Vaculíková, 2006, p. 56). The cognitive aspect of legal consciousness encompasses cognitive elements and demonstrates knowledge and information about the law. The emotional-evaluative element contains ideas, principles, and evaluative judgments about the law. The third element is decision-making, which expresses attitudes towards the law. Considering the level of *de lege imaginata*, we can add another element related to imagination.

Such a form of legal consciousness, which has been present in the theory of law so far, reflects a certain anthropocentrism. Therefore, one can ask whether this anthropocentrism is still justified. Until now, legal reasoning has represented human's predominant method of thought. That is, how people usually think about law. However, in technological law, we encounter algorithmic legal reasoning, which is carried out by computers. With continued technological development and growing posthumanism, the concept of legal consciousness and reasoning may change fundamentally. Integrating AI, ML, and NLP in the law led to the partial externalisation, automation, and transformation of legal information and data processing into computational models. Posthumanism generally transforms the existing values of society in a way that reflects human interactions with technology (see, e.g., Pepperell, 2003). Francesca Ferrando considers posthumanist philosophy to be the decisive philosophy of our time, which comes within postmodernism (the second generation of postmodernism) and after it (see Ferrando, 2019, pp. 1, 22, 24). Undoubtedly, technological influence is changing human activities, interests, lifestyle, problem-solving, and thus reasoning. In short, the posthumanist technological influence on humans can cause a transformation of the essence of human. The way humans adapt to technology, along with various technological advancements, fundamentally reshapes them into posthuman (see Ferrando, 2019, pp. 2-3). These overarching trends allow for a reevaluation of current philosophical, social, ethical, cultural, and political concepts. The legal concepts and the practice of legal professions are no exception (see, e.g., Susskind, 2000; Susskind and Susskind, 2015; Deakin and Markou, 2020; Brownsword, 2021).

Posthuman law refers to a legal framework that addresses significant technological trends and challenges we currently face, which are difficult to overlook from philosophical, social, political, and professional perspectives. Among all these issues, there is the question of legal consciousness. So, will the rise of posthumanism in law cause legal consciousness to be supplemented (or has it already been supplemented?) by some new machine legal consciousness?

The response to this question revolves around the existence of machine legal consciousness. Answering yes to this question would require considerable courage at this time. In general, machine consciousness is philosophically and technologically complex (see Bröstl, 2024, pp. 86 et seq.) and an ethically controversial issue (see, e.g., Basl, 2013; Chella, 2023). A brief overview of the current literature is not conducive to claims about the possible existence of machine legal consciousness (see, e.g., Baranov, Mamychyev, Dremluiga and Miroshnichenko, 2021, p. 903).

Skepticism and caution are appropriate here, and it is understandable because consciousness is a very complex phenomenon. For example, David Chalmers has categorised questions of consciousness and the resulting explanations into two sets of problems, namely "easy problems of consciousness" and "hard problems of consciousness" (Chalmers, 1995). The easy problems of consciousness are explained by neuroscience and cognitive science. They concern the functioning of the brain and the processing of information. Thus, it is about explanations by the mechanism of distinguishing, sorting, and responding to external stimuli, information processing, conscious control of movements, maintaining attention, etc. These are all technically complex processes, but still scientifically detectable and explainable.

However, there are the hard problems of consciousness, which relate to the problems of subjective experience, i.e., why we feel and experience something in a way that is inherent in the human subject. In other words, why do we not only process information in a dry manner, but also incorporate subjective perception into it? The answer is *qualia*.

Explaining how *qualia* work – i.e., the process of subjective conscious experience, which is responsible for creating subjective experiences – is a demanding philosophical assignment. In this sense, it is so clear that we cannot entirely explain it. Thus, we cannot comprehend consciousness. Can it then be effectively simulated by machines? What are advanced legal analytical tools, and what problems can they solve?

The currently available use of AI in law has focused only on computationally manageable aspects of legal information and data processing (e.g., legal algorithms, predictive models, NLP tools for contract or decision analysis). The tasks assigned to the legally advanced tool and for which they have been created so far are functional, computational, and algorithmisable. All these tools can only solve the so-called easy problems of (legal) consciousness. A subjective understanding of the law and individual legal situations that would lead to formulating subjective legal attitudes or experiences remains an exclusively human matter. It is accessible only to human legal consciousness. AI completely lacks this aspect and cannot authentically take into account value judgments, an authentic sense of responsibility for one's own decisions, or other irrational influences (including historical perspective) necessary for reasonable and morally sound decision-making. Whether it may be different in the future, i.e., whether we will ever talk about machine (legal) consciousness, may be one of the subjects of visionary or (legal) futurology. Similarly, it can be a stimulus for the development of ideas about law at the level of *de lege imagination*, what the law would look like in entirely different conditions (e.g., in a society controlled exclusively by AI) – as we have the opportunity to encounter more than once in the literary genre of science fiction.

In summary, however, we can already encounter the application of machine reasoning thanks to the advanced legal analytical tools they use. Reasoning can exist and apply itself even without the need for a broader consciousness. Moreover, if we mention AI, we already have an example of reasoning without needing consciousness. In the context of advanced legal tools, the cognitive element of legal information is significantly improved. This enhancement appears to exceed that of any individual or group of experts

regarding the volume of information and data processed and analysed, as well as the speed at which this occurs. However, it does not have to end here. In the next part of the paper, we will discuss the fusion of the human (natural) and the machine (artificial) for the law in the posthuman era. This can be understood as a pragmatic reason for the fusion of law and technology, which justifies approaching it as a hybrid – partly still human and partly already machine activity.

In the following part of the paper, we will briefly focus on how this hybrid can affect the essence of lawyers as professionals in a posthuman situation. In this regard, I focus mainly on a rough hybrid legal consciousness with an enhanced cognitive side. One might ask how this is related to the sources of law. If part of decision-making about law and its creation, application, or evaluation is to include feedback in the form of an output processed by a reliable analysis of the quantum of available data, then we must necessarily ask whether the data evaluated in this way remains without real weight and practical consequences. Therefore, the brief analysis of the shift of legal consciousness is included here not as a digression but because it directly concerns the transformation of the sources of law. If advanced analytical tools and technological law become embedded in legal practice, they will inevitably affect the way lawyers perceive law, interpret legal sources, apply legal norms, prepare argumentation, and make decisions about the legal side of all kinds of matters. Legal consciousness is, therefore, a crucial category for understanding how these technological changes reshape the posthuman epistemology of law. The bionic lawyer represents a pragmatic justification for the hybrid nature of legal practice.

## 7. THE LAWYER OF TODAY IS ALREADY A CYBORG/POST-LAWYER/POSTHUMAN

The concept of a bionic lawyer represents a specific fusion of law and technology. This concept represents the balance between the human element and the technical aspects. To represent the idea of a bionic lawyer does not imply removing the human element from legal practice (Hesse, 2023). The idea of a bionic lawyer represents a particular intermediate stage or balance between exclusively human activities in law and full automation of the law. They combine traditional legal skills with advanced technologies, relying mainly on the potential of AI, MP, and NLP.

A bionic lawyer is a cyborg. The use of advanced legal analytical tools and the fact that lawyers allow themselves to be influenced by advanced legal analytical tools by drawing information and knowledge from them blur the differences between a human legal expert and a machine. The bionic lawyer is, therefore, a hybrid. Moreover, like everything hybrid, it embodies the erasure of the boundary between natural and artificial (see Haraway, 2016, p. 5).

This is the basic ontological situation of the lawyer in posthuman conditions. Thus, there is a certain organic continuity between human-lawyer and machine-legal tool. At the same time, it is one of the representations of the posthuman. Better said, it is a concrete adaptation of the posthuman in the conditions of posthuman legal professions. Moreover, the abstract and complex question of the possible existence of machine (legal) consciousness is eliminated in this case. This is because the bionic lawyer is, on the one hand, a natural person of flesh and blood; on the other hand, he or she is a machine. Not only is the boundary of the old dualism, distinguishing between the natural and the artificial, erased (Harrington et al., 2006, p. 426), but the natural is expanded to include the artificial, and the artificial, on the contrary, expands to include the natural so that they become one. A natural person with a limited cognitive capacity of legal consciousness obtains the benefits of machine reasoning. Machine reasoning can be applied even

though it does not have an absolute consciousness and, therefore, lacks *qualia*. In this sense, it represents a cybernetic professional organism. Part of his or her individual legal consciousness as a legal expert and professional is made up of information that he or she obtains cybernetically.

The bionic lawyer is a unique concept because his or her work results from the interaction between personal and technological. He or she searches for legislation and court decisions through dedicated portals. He or she reads a text that is electronically and digitally processed. To a certain extent, he or she becomes dependent not only on his or her ability to work with them – i.e., to search correctly and efficiently – but also on the results these advanced legal analytical tools offer him. At the end of the day, however, the ability to process this information and thus deal with it efficiently is crucial. However, the situation is entirely different when advanced legal analytical tools can prepare a text as a legal analysis by considering legal regulations, court decisions, and other legal information and data. These will, therefore, be outcomes that will prepare a professional text in the form of a thorough legal analysis by considering a large amount of available and relevant data on the legislation, the possibilities of argumentation, or the possibilities of resolving possible legal disputes.

However, we do not have to stop at the individual legal consciousness of lawyers. The cyborg becomes, in the Harawayian sense, a prefiguration of the existence of a society in which the application of technological innovations in different areas of social life is mixed to such an extent that the everyday life of individuals is affected (see Haraway, 2016, pp. 15, 38; see also Pohl, 2017, pp. 10 et seq.). So, we come to the general picture of a technologically improved society. Technological law can become some kind of a bionic social system. Therefore, it is the law or knowledge of the law that is made accessible to us through technology, along with all the information, data, and required processed outputs about the institutional context (decisions and practice of courts and other state bodies) and the broader social context of law. But it is also a hybrid normative framework, where human and machine reasoning cooperate in the formulation of legal policy, legislation, preparation of legal argumentation, legal decision-making, etc. In this sense, it also represents the link between man and machine for the functioning of society. Law as a social system is becoming a hybrid system combining the human and social components with sophisticated technologies such as AI, ML, NLP, algorithms, and data. Undoubtedly, this trend to adopt technology is also approached by law itself. As Roger Brownsword shows, the law is not entirely separable from technology. The law is also no longer just a regulator of the legal limits of the application of technology. On the contrary, it innovates itself technologically and thus changes its form from law 1.0 and law 2.0 to law 3.0. So that law becomes more technological, and technology becomes more like another regulative system (see Brownsword and Somsen, p. 4). However, what seems to be missing in Brownsword's considerations is a critical reassessment of the symbiosis between technology, law, and the human. It is essential to emphasise that humans should be influenced by technologies and law, but also remain subjects actively deciding about them, rather than being reduced to passive objects of their development and regulation. In other words, law and technology as regulation become alienated from humans.

## CONCLUSION

This paper examined how the increasing amount of data, the reliability of its processing, and the potential to alter current knowledge and perceptions of law are

connected to the fusion of law and technology. Such a fusion demands new epistemological and ontological perspectives on law.

Applying cybernetics is crucial because it offers a unifying transdisciplinary framework that enables us to see law as a regulatory (cyber) system and a system of information and control for social processes. In the era of data-driven law and the availability of large data sets, the traditional hierarchy of legal sources, especially formal sources, can be reshaped. The cybernetics approach allows us to leverage the analysis of such data and understand that law functions on the principles of self-regulation and adaptation through feedback. Without this, the vast amount of data on law would be useless, and analysing it would just be a meaningless exercise.

The development of AI, ML, and NLP is fundamentally changing not only how legal professionals gather and analyse information but also the core structure of legal reasoning itself. In the context of posthumanism, legal reasoning is enhanced by algorithmic processes that incorporate the evaluation of legal issues with greater efficiency, accuracy, complexity, and speed. While advanced AI tools certainly offer opportunities to speed up, improve, and elevate the quality of legal work, this paper shows that their impact goes beyond simple practical improvements.

Moreover, advanced legal analytical tools, with the help of AI, ML, and NLP, mediate law expressed in formal legal sources. Therefore, in the traditional structure of sources of law, they are gnoseological sources of law. Gnoseological sources of law are the sources of knowledge about law, meaning any available information regarding law and its social effects (see Gerloch, 2013, p. 71). However, will these outputs remain merely mediators of legal knowledge, serving only to mediate information about law? These questions are mainly relevant for actual availability, especially given their frequent increase in legal practice and understanding of the law and its potential impacts. A key reason for their usability is the volume of data they can process.

Therefore, it is worth considering an alternative perspective on the implications of advanced legal analytical tools. These analyses can, in theory, represent the pinnacle of legal expertise. Similar to the opinions issued by Roman jurists, they may serve as authoritative testimonies (see, e.g., Blaho and Rebro, 2019, p. 55; Gregor, 2022, p. 37), which were historically used in resolving legal disputes (see, e.g., Dobrovič, 2015, 2017).

To go beyond merely practical improvements, gnoseological sense, or advisory roles of advanced legal analytical tools, we must consider their influence on ongoing philosophical, public, and professional discussions. The adoption of these technologies represents a significant philosophical shift within the framework of posthumanism discourse. The legal domain, through technological innovation, evolves into a collaborative system of control characterised by human-algorithm cooperation. As a result, AI systems go beyond their role as mere tools, contributing to the co-creation of a hybrid model of legal epistemology.

These findings suggest that the widespread use of AI, ML, and NLP and their integration into daily practice are transforming not only how lawyers work but also the fundamental structure of legal reasoning. This change results from the synthesis of biological and mathematical neural networks within the legal domain. Law is evolving into a hybrid system where human and social elements are combined with advanced technologies. The concept of a bionic lawyer indicates the emergence of a new form of legal professionalism and reality in which human rationality and machine algorithms work together to create a collaborative control system – even on a professional and personal level.

However, the question of what criteria AI output must meet to become legally acceptable remains open. It is also unclear what ethical and value criteria artificial

intelligence must meet to be fully acceptable. The discussion must be conducted at a theoretical level to determine whether current trends can fit into existing legal theories, or whether a completely new theory adapted to technological law in a posthumanist context is needed. As previously mentioned, technological law draws legal information and data from wider sources than just legislation and court rulings. Theoretically, this reality could greatly influence the traditional classification of legal sources and signify a major change in practice.

## BIBLIOGRAPHY:

- Alvarez, J. T. and Ramírez-Correa, P. (2023). A Brief Review of Systems, Cybernetics, and Complexity. *Complexity*, 2023. <https://doi.org/10.1155/2023/8205320>
- Ampère, A. M. (1843). *Essai sur la philosophie des sciences*. Paris: Bachelier, Libraire-Éditeur.
- Bakošová, E. and Vaculíková, N. (2006). *Základy sociológie práva [Foundations of the Sociology of Law]*. Bratislava: Univerzita Komenského.
- Baranov, P. P., Mamychyev, A. Y., Dremluiga, R. I. and Miroshnichenko, O. I. (2021). Legal consciousness and legal culture in the era of total digitalization: theoretical-methodological and legal-technical problems. *Linguistics and Culture Review*, 5(S3), 899-910. <https://doi.org/10.21744/lingcure.v5nS3.1665>
- Bárány, E. (2021). *Formálne vlastnosti práva [Formal nature of Law]*. Bratislava: Wolters Kluwer SR s.r.o.
- Basl, J. (2013). The Ethics of Creating Artificial Consciousness. *APA Newsletter on Philosophy and Computers*, 13(2), 25-30.
- Blaho, P. and Rebro, K. (2019). *Rímske právo [Roman Law]*. Plzeň: Aleš Čeněk.
- Brownsword, R. (2021). *Law 3.0: Rules, Regulation and Technology*. New York, NY: Routledge.
- Bröstl, A. (2024). Artificial Intelligence, Law-Making and Law-Application. In: L. Mezzetti (Ed.), *Science, Technology and Law: Mutual Impact and Current Challenges* (pp. 85-93). Bologna: Bologna University Press.
- Bröstl, A. et al. (2013). *Teória práva [Theory of Law]*. Plzeň: Vydavateľství a nakladateľství Aleš Čeněk.
- Catanzariti, M. (2021). Algorithmic Law: Law Production by Data or Data Production by Law? In: H.-W. Micklitz, O. Pollicino, A. Reichman, A. Simoncini, G. Sartor and G. De Gregorio (Eds.), *Constitutional Challenges in the Algorithmic Society* (pp. 78-92). Cambridge, UK; New York, NY: Cambridge University Press. <https://doi.org/10.1017/9781108914857.006>
- Cvrček, F. (2013). V. Knapp a 50 let právní informatiky v ČR [Knapp and 50 Years of Legal Informatics in the Czech Republic]. *Právník*, 152(12), 1219-1230.
- Chalmers, D. (1995). Facing up to the problem of consciousness. *Journal of Consciousness Studies*, 2(3), 200-219.
- Chapman, J. (2019). Why Cybernetics? Why Love? *World Futures*, 75(1-2), 1-4. <https://doi.org/10.1080/02604027.2019.1568796>
- Chella, A. (2023). Artificial Consciousness: the Missing Ingredient for Ethical AI? *Frontiers in Robotics and AI*, 10. <https://doi.org/10.3389/frobt.2023.1270460>
- Deakin, S. and Markou, C. (Eds.). (2020). *Is Law Computable? Critical Perspectives on Law and Artificial Intelligence*. New York, NY; Oxford, UK: Bloomsbury Publishing Plc.
- Deutsch, K. W. (1963). *The Nerves of Government*. London, UK: Collier-MacMillan Limited; New York, NY: The Free Press.

- Dobrovič, L. (2015). Inštitút societas včera, dnes a zajtra [Institute of societas yesterday, today, tomorrow]. In: *Bratislavské právnické fórum 2015 [Bratislava legal forum 2015]: Spravodlivý proces a jeho podoby, garancie a ľudskoprávna dimenzia: zborník príspevkov z medzinárodnej vedeckej konferencie [Fair Trial - Patterns, Guarantees and the Human Rights Dimension]* (pp. 587-592). Bratislava: Univerzita Komenského v Bratislave.
- Dobrovič, L. (2017). Špecifické modifikácie vymožitelnosti práva v právnom inštitúte societas [Specific Modifications of the Enforceability of Law within the Legal Institute of Societas]. In: *Vymožitelnost' práva v kontexte vývoja spoločnosti - právne, historické a politologické východiská a problémy aplikačnej praxe: recenzovaný zborník vedeckých prác [The Enforceability of Law in the Context of Social Development: Legal, Historical, and Political Foundations and Issues of Applied Practice]* (pp. 89-96). Košice: Univerzita Pavla Jozefa Šafárika v Košiciach.
- Fábry, B. et al. (2018). *Aktuálne otázky teórie práva [Current Issues in Legal Theory]*. Bratislava: Wolters Kluwer.
- Fedorov, M. V. (2016). Cybernetic Epistemology as a New Methodological Paradigm of Comparative Legal Researches. *Indian Journal of Science and Technology*, 9(48). <https://doi.org/10.17485/ijst/2016/v9i48/90195>
- Ferrando, F. (2019). *Philosophical Posthumanism*. London, UK; New York, NY: Bloomsbury Academic.
- François, Ch. (2006). Transdisciplinary unified theory. *Systems Research and Behavioral Science*, 23(5), 617-624.
- Gerloch, A. (2013). *Teorie práva [Theory of Law]*. Plzeň: Vydavatelství a nakladatelství Aleš Čeněk.
- Glanville, R. (2013). Cybernetics: Thinking through the technology. In: D. Arnold (Ed.), *Traditions of systems theory: Major figures and contemporary developments* (pp. 45-77). New York, NY: Routledge.
- Gregor, M. (2022). *Základy rímskeho práva: historický úvod, pramene a subjekty [Fundamentals of Roman Law: Historical Introduction, Sources, and Legal Subjects]*. Praha: Leges.
- Haraway, D. (2016). *A Cyborg Manifesto: Science, Technology, and Socialist-Feminism in the Late Twentieth Century* [online]. Minneapolis, MN: University of Minnesota Press. Available at: <http://ebookcentral.proquest.com/lib/warw/detail.action?docID=4392065> (accessed on 27.04.2025)
- Harrington, A. et al. (2006). *Moderní sociální teorie: základní myšlenkové proudy [Modern Social Theory: An Introduction]*. Praha: Portál.
- Hencovská, M. and Jesenko, M. (2010). *Teória práva pre študijný program „verejná správa“ [Legal Theory for the Study Programme "Public Administration"]*. Košice: Univerzita Pavla Jozefa Šafárika v Košiciach.
- Heylighen, F. and Joslyn, C. (2001). Cybernetics and Secondorder Cybernetics. In R. A. Meyers (Ed.), *Encyclopedia of Physical Sciences & Technology* (3rd ed.) New York: Academic Press.
- Hildebrandt, M. (2016). Law as Information in the Era of Data-Driven Agency. *The Modern Law Review*, 79(1), 1-30. <https://doi.org/10.1111/1468-2230.12165>
- Hildebrandt, M. (2018). Law as Computation in the Era of Artificial Legal Intelligence: Speaking Law to the Power of Statistics. *The University of Toronto Law Journal*, 68(1), 12-35.
- Hoefnagel, A. H. J. M. (1971). Cybernetica en Ideologie [Cybernetics and Ideology]. *Mens en Maatschappij*, 46(4), 322-335.

- Ilková, V. and Ilka, A. (2016). Legal Cybernetics: An Educational Perspective. *IFAC-PapersOnLine*, 49(6), 326-331. <https://doi.org/10.1016/j.ifacol.2016.07.198>
- Katz, D. M. (2013). Quantitative Legal Prediction – or – How I Learned to Stop Worrying and Start Preparing for the Data Driven Future of the Legal Services Industry. *Emory Law Journal*, 62, 909–966.
- Katz, D. M., Bommarito, M. J. and Blackman, J. (2017). A general approach for predicting the behavior of the Supreme Court of the United States. *PLOS ONE*, 12(4). <https://doi.org/10.1371/journal.pone.0174698>
- Kelsen, H. (2005). *Pure Theory of Law*. Clark, NJ: The Lawbook Exchange, LTD.
- Kerimov, D. A. (1963). Cybernetics and Soviet Jurisprudence. *Law and Contemporary Problems*, 28(1), 71-77.
- Knapp, V. (1995). *Teorie práva [Theory of Law]*. Praha: C. H. Beck.
- Knapp, V. (1963). *O možnosti použití kybernetických metod v právu [On the Possibility of Using Cybernetic Methods in Law]*. Praha: Nakladatelství Československé akademie věd.
- Lee, K. P. (2017). A Preface to the Philosophy of Legal Information. *SMU Science and Technology Law Review*, 20(2), 278-340.
- Love, H. A. (2023). *Cybernetic Aesthetics*. New York: Cambridge University Press.
- Luhmann, N. (2004). *Law as a social system*. Oxford, UK; New York, NY: Oxford University Press.
- Medvedeva, T. A. and Umpleby, S. (2024). Cybernetics of large social systems: The example of economics. *Systems Research and Behavioral Science*, 41(3), 524-533. <https://doi.org/10.1002/sres.2991>
- Ottová, E. (2002). *Základy teorie práva [Foundations of Legal Theory]*. Brno: Institut Dalšího vzdělávání.
- Pepperell, R. (2003). *The Posthuman Condition: Consciousness Beyond the Brain*. Bristol: Intellect Books.
- Petrażycki, L. (1955). *Law and Morality: Leon Petrażycki*. Cambridge: Harvard University Press.
- Pohl, R. (2017). *Donna Haraway's A Cyborg Manifesto: Science, Technology, and Socialist-Feminism in the Late Twentieth Century*. Oxon – London – New York: Macat International Ltd – Routledge.
- Polčák, R. (2013). Pět tichých minut za Viktorem Knappem [Five Silent Minutes for Viktor Knapp]. *Právník*, 152(12), 1231-1255.
- Polčák, R. et al. (2018). *Právo informačních technologií [Information Technology Law]*. Praha: Wolters Kluwer.
- Pound, R. (1910). Law in Books and Law in Action. *American Law Review*, 44(1), 12-36.
- Prusák, J. (2023). *Teória práva [Theory of Law]*. Krásno nad Kysucou: Kalligram.
- Purge, A. R. (2023). Juridicheskaia konstrukcija kak kategorija kibernetičeskogo metoda poznanija prava [Legal construction as a category of the cybernetic method of knowledge of law]. *Pravo i politika*, 6, 48-58. <https://doi.org/10.7256/2454-0706.2023.6.40900>
- Příbráň, J. (1996). *Sociologie práva [Sociology of Law]*. Praha: Sociologické nakladatelství.
- Robson, R. (1992). *Lesbian (Out)Law: Survival Under the Rule of Law*. New York: Firebrand Books.
- Rozental, M. M. et al. (1974). *Filozofický slovník [Philosophical Dictionary]*. Bratislava: Nakladateľstvo Pravda.
- Říhová, B. (2014). *Přehled moderních politologických teorií: empiricko-analytický přístup v soudobé politické vědě [Overview of Modern Political Science Theories: The Empirical-Analytical Approach in Contemporary Political Science]*. Praha: Portal.

- Shliakov, A. (1976). Problems in the Development of Legal Cybernetics. *Soviet Law and Government*, 15(3), 38-47. <https://doi.org/10.2753/RUP1061-1940150338>
- Siddique, N. et al. (2011). Cybernetic Approaches to Robotics. *PALADYN Journal of Behavioral Robotics*, 2(3), 109-110.
- Skansi, S. and Šekrst, K. (2021). The Role of Process Ontology in Cybernetics. *Synthesis philosophica*, 36(2), 461-469. <https://doi.org/10.21464/sp36211>
- Studnicki, F. (1969). *Cybernetyka i prawo [Cybernetic and Law]*. Warszawa: Państwowe Wydawnictwo Naukowe.
- Surden, H. (2014). Machine Learning and Law. *Washington Law Review*, 89(1), 87-115.
- Susskind, R. E. (2000). *Transforming the Law: Essays on Technology, Justice, and the Legal Marketplace*. Oxford: Oxford University Press.
- Susskind, R. E. and Susskind, D. (2015). *The Future of the Professions: How Technology will Transform the Work of Human Experts*. Oxford: Oxford University Press.
- Šoltys, D. (2021). *Repetitóriúm teórie práva [Revision Guide to Legal Theory]*. Bratislava: IURIS LIBRI.
- Tsymbalyuk, V. (2024). Sistemni oznaki objektneho skladu kibernetichnogo prava [System features of the object composition of cybernetic law]. *Teorija derzhavi i prava*, 45(4), 71-81. [https://doi.org/10.37566/2707-6849-2023-4\(45\)-6](https://doi.org/10.37566/2707-6849-2023-4(45)-6)
- Unger, R. (1986). *The Critical Legal Studies Movement*. Cambridge, MA; London, England: Harvard University Press.
- Večeřa, M. and Urbanová, M. (2006). *Sociologie práva [Sociology of Law]*. Plzeň: Vydavatelství a nakladatelství Aleš Čeněk.
- Večeřa, M. et al. (2013). *Teória práva [Theory of Law]*. Bratislava: EUROKÓDEX.
- Weinberger, O. (2010). *Inštitucionalizmus: Nová teória konania, práva a demokracie [Institutionalism: A New Theory of Conduct, Law, and Democracy]*. Bratislava: Kalligram.
- White, J. B. (1985). *The Legal Imagination*. (Abridged ed.). Chicago – London: The University of Chicago Press.
- Wiener, N. (1962). *Cybernetics: Or Control and Communication in the Animal and the Machine* (2nd ed.). Massachusetts: The M.I.T. Press.
- Zimmermann, M. (1983). Cybernetic Aspects of the Nervous System and Sense Organs. In R. F. Schmidt and G. Thews (Eds.), *Human Physiology* (pp. 315-328). Berlin; Heidelberg: Springer.