IUS LAW JOURNAL

Journal of the Faculty of Law of the International University of Sarajevo

Volume V, Issue I

2026

Volume V

Issue I

2026

IUS Law Journal

Journal of the Faculty of Law of the International University of Sarajevo

e-ISSN 2831-0039

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CORRESPONDENCE IUS LAW JOURNAL

Faculty of Law International University of Sarajevo

Hrasnička Cesta 15, 71210 Ilidža, Sarajevo Bosnia and Herzegovina

Email: iuslawjournal@ius.edu.ba

IMPRESSUM IUS LAW JOURNAL

Publisher: International University of Sarajevo

Editor-in-Chief: Assoc. Prof. Dr. Ena Kazić - Çakar

e-ISSN 2831-0039

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CONSTITUTIONAL LIMITS ON THE EXERCISE OF PRESIDENTIAL POWER IN NIGERIA

Felix Dimkpa Biiragbara*

Abstract

This research sought to interrogate the ramifications of presidential power under the Nigerian constitution and to ascertain what limits, if any, are imposed on the exercise of presidential power in Nigeria. To achieve the overarching aim of this research, the doctrinal research methodology was utilised and the method of data collection was through textual analysis of both primary and secondary source materials, including the Constitution of the Federal Republic of Nigeria 1999 (as Amended) [CFRN] and case law. Amongst other key findings, the paper found that despite the enormous powers conferred on the president, the framers of the CFRN in their wisdom of establishing a limited government imposed crucial limits on the exercise of some of the key powers; and the implication of such limitations is that the president must obtain the approval of other governmental branches before exercising those powers. The paper further observed that the institutional checks on presidential power are not effectively applied and recommended that the other governmental branches, especially the National Assembly (NASS) and the courts should live up to their responsibilities in upholding the separation of powers enshrined in the CFRN.

Keywords: Presidential, Powers, Executive Power, Limits, Nigeria

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1. Introduction

The implementation of government policies by the executive arm rests squarely on the exercise of executive powers. Of all the powers vested in the three arms of government, executive powers appear to be the most controversial. This is because it has not been easy to delineate the exact nature and boundary of executive powers (Egomonu 2022:5, Obidimma and Oyewumi 2025:86). There have been apprehensions among scholars that the executive powers, even in a more developed presidential systems, are gradually expanding beyond what used to be traditionally conceded to the executive arm (Egomonu, 2022:4, Pushaw 2026:395). For instance, the president of the Federal Republic of Nigeria is one of the most powerful presidents in the world, in terms of the amplitude and plenitude of his powers under the constitution. The president symbolises the unity, strength and prestige of Nigeria. The executive powers of the federation are vested in the president exclusively, subject to his own discretion to delegate any part of it to subordinate officials within the executive branch, as well as necessary limitations imposed by the Constitution of the Federal Republic of Nigeria 1999 (as Amended) [CFRN].

Many scholars and commentators in Nigeria have paid glowing tributes to the immensity of presidential power under the CFRN (Nwabueze, 2003, Egomonu, 2022:5, Obidimma and Oyewumi 2025:86). Miller went as far as claiming that a president can do anything he wishes to do (Miller, 1977:2). Studies have demonstrated that the executive arm under the guise of exercising its executive powers is making gradual but steady incursion into the powers of the legislative arm, and thereby upending the delicate balance required for the proper functioning of the power dynamics established in a constitutional democracy (Amadi: 2019:75). This ascription of near-omnipotence to presidential power appears to be a contradiction of the doctrine of separation of powers which forms the cornerstone of modern constitutions. Separation of powers advocates limited government and this not only precludes one branch of government from performing the constitutional responsibilities of other branches, but also precludes each branch of government from exercising all the powers allocated to the branch without some element of inter-branch collaboration (Ayim-Ben, 2017:78). This paper interrogates the extent and ramifications of presidential power as well as its limits under the CFRN.

2. Definition of Presidential Powers

A president is defined as, "[T]he chief political executive of government; the head of state" (Garner 2019:1304). This definition accords with the status or ranking of the president in any system of government, especially in presidential systems, such as Nigeria's. Presidential powers are aspects of the executive powers of a country that are vested in the president to be exercised by him exclusively. The President may exercise such power directly or, in his absolute discretion, delegate some aspects of the power to subordinate officials or bodies within the executive branch of government. However, it should be noted that there is a difference between executive powers and presidential powers. Presidential powers may not encompass the entire gamut or aggregate of the powers assigned to the executive branch of a country. Presidential powers are those portions of the executive branch's powers that are granted to the president exclusively, although he may wish to delegate some aspects of such powers to his subordinates in the executive branch. This means that all the powers of the executive branch do not always belong to, or vest in the president. Some constitutions or laws enacted by the relevant legislature usually take out some portions from the aggregate of a country's executive powers and vest them in persons, officials or bodies within the executive branch other than the president. Although a derivative of executive power, presidential power is not synonymous with executive power. However, Edet (2024:320) asserts that both terms are synonymous and can be used interchangeably. Edet asserts that presidential power is the ability or capacity of the president to influence decisions that affect the people across all strata of society (Edet, 2024:321)

On the other hand, executive powers have been defined as the aggregate power of government that remains after the legislative and judicial powers are subtracted (Appadorai, 1975; Oshewolo, 2012; Lafenwa and Oluwalogbon, 2021). Executive powers encompass all the powers allocated to the executive branch of government under the power sharing scheme institutionalised by separation of powers. As already noted, more often than not, all of these powers are not granted to the president. Some portions of executive powers are taken away and assigned to other officials or bodies to exercise. The CFRN establishes the office of a president of the federation of Nigeria and vests upon him the executive powers of the federation (CFRN, Sections 130(1) and 5(1)). However, as will be demonstrated in this paper,

the CFRN imposes limits on the executive powers exercisable by the president of Nigeria. Not all the executive powers of the Federation are vested in the president as some aspects of federal executive powers are vested in certain federal bodies established by the same CFRN. The president is described as possessing a triune personality under the CFRN. He is the Head of State, the Chief Executive of the Federation, and the Commander-in-Chief of the Armed Forces of the Federation of Nigeria (CFRN, Section 130(2)). Section 5 of the CFRN establishes the federal executive branch of government and its structure (Edet, 2024:323; Okorie, 2025:140).

3. The Scope and Ramifications of Presidential Powers under the CFRN

The executive powers conceded to the president extends to three aspects: (1) execution and maintenance of the CFRN; (2) execution and maintenance of all laws enacted by the National Assembly (NASS); and (3) execution ana maintenance of all matters with respect to which the NASS is empowered to make laws at any given time (CFRN, Section 5(1)(b)). It should be noted that the word ‘extends’ use in Section 5(1)(b) of the CFRN means “to cause to cover a wider area; make larger”, to “straighten or speed out…at full length”, to “occupy a specified area,” and to “be applicable to a thing (online Oxford English Dictionary). This implies that the executive powers of the federation vested in the president stretch to, cover, spread to, or apply to the three areas mentioned in Section 5(1)(b) which are to be examined in this segment.

3.1 Execution and Maintenance of the Constitution

The first question that would naturally come to mind is: what does it mean to execute and maintain the CFRN? The verb ‘execute’ has been defined to mean to “put (a plan, order, or course of action) into effect.” (online Oxford English Dictionary). It is to carry out or accomplish a task; to make a thing come to fruition. On the other hand, the verb ‘maintain’ implies to “cause or enable (a condition or situation) to continue”, to “keep (something) at the same level or rate”, to “keep (a billing, machine, or road) in good condition by checking or repairing it regularly”, to “provide with necessities of life or existence”, and to “give one’s support to; uphold” (online Oxford English Dictionary). The sum total of the attempts at definitions of the verb ‘maintain’ is that it connotes the task of upholding, repairing and keeping a thing in good condition regularly. To maintain involves

ensuring that the quality of a thing is constantly improved, to the intent that the thing maintained does not fall into disrepair or disuse. Thus, applied to presidential power, to execute and maintain the CFRN denotes the presidential responsibility to ensure that all the provisions of the CFRN are carried out, that the objectives of the CFRN are realised, and that the dividends of democratic governance enshrined in the CFRN are delivered to Nigerians. It also entails the presidential power to ensure that the institutions, agencies, persons and authorities saddled with one responsibility or the other under the CFRN carries out their duties, and that disobedience to the CFRN is not entertained, tolerated or condoned.

3.2 Execution and Maintenance of Acts of the National Assembly

The executive branch of government at both the federal and State levels have the primary obligation of executing and maintaining all laws enacted by the relevant legislature. In the case of the president, he is to execute and maintain all the laws enacted by the NASS. The NASS has enacted hundreds of laws which regulate various sectors of the country. Each of these laws is tailored towards the implementation of one policy of government or the other.

3.3 Execution and Maintenance of All Matters within the Legislative Competence of the National Assembly

The president is empowered by the CFRN to execute and maintain not only the laws actually enacted by the NASS, but also to execute and maintain all matters with respect to which the NASS would naturally derive power under the CFRN to enact legislation. This presidential power is not merely repetitive of the immediately preceding executive power, which is exercisable in relation to laws that have been enacted by the NASS. Thus, to exercise the second strata of presidential power, the NASS must first have enacted laws; because what is being executed and maintained are the laws. Thus, the executive power of the president cannot be exercised in the absence of a law passed by the NASS. However, when it comes to the third strata of presidential power, a different consideration applies. The requirement here is that the president can execute and maintain all matters that are within the legislative competence of the NASS, even in the absence of specific laws on the subject. Thus, the president is empowered to implement all matters with respect to which the NASS is constitutionally empowered to make laws.

4. Constitutional Limits on Presidential Power in Nigeria

It should be noted that the executive powers of the federation vested in the President are made subject not only to the provisions of the CFRN but also to any law made by the NASS. The implies that the President is to exercise his executive powers subject to the limitations imposed by the relevant provisions of the CFRN as well as Acts of the NASS. There are various provisions of the CFRN that impose restrictions on the president's executive powers. The present segment of this paper examines some of these restrictions on the exercise of presidential power in Nigeria.

4.1 Granting of Operational Autonomy to Certain Federal Executive Bodies

One of the limits imposed on the exercise of presidential power over the executive department is the deliberate concession of operational independence to certain institutions, bodies or agencies within the executive branch in relation to control over the appointment of their personnel as well as in determining their own *modus operandi*. Thus, such bodies are granted the power to regulate their own procedure. For instance, in exercising their powers to make appointments or to exercise disciplinary control over persons, the Code of Conduct Bureau, the National Judicial Council, the Federal Civil Service Commission, the Federal Judicial Service Commission, the Revenue Mobilisation Allocation and Fiscal Commission, the Federal Character Commission and the Independent National Electoral Commission are constitutionally insulated from the direction or control of any other authority or person (CFRN, Section 158(1)). In addition, the National Population Commission is not subject to the direction or control of any authority or person in relation to the performance of its core mandates (CFRN, Section 158(2)).

Similar independence is granted to the State bodies established under Section 197(1) of the CFRN. Thus, the State Civil Service Commission, the State Independent Electoral Commission and the State Judicial Service Commission are, in the exercise of their powers to make appointments or to exercise disciplinary control over persons, completely insulated from the direction or control of any other authority or person (CFRN, Section 202). There are other Acts of the NASS that establish independent agencies for the federal executive branch, such as the Central Bank of Nigeria Act 2007, the Economic and Financial Crimes (Establishment) Act 2004 and the Independent Corrupt Practices and Other Related Offences

Commission (Establishment) Act 2000. The same independence is granted to other bodies established under the Laws of the various State legislatures in Nigeria.

4.2 Dismissal Power over Independent Agencies

Another restriction imposed on the exercise of presidential power under the CFRN is the fettering of the presidential at-will dismissal power in relation to certain presidential appointees. For instance, the president's unilateral dismissal power is similarly fettered in relation to the judicial officers established in Chapter VII of the CFRN. To remove such judicial officers from office, the president must demonstrate that the reason for their dismissal aligns with the constitutionally stipulated 'for-cause' provisions; also, the president must obtain NASS's approval. Similarly, the CFRN fetters presidential at-will dismissal power in relation to what is usually referred to as the independent agencies. Independent agencies are federal executive bodies established by the CFRN or an Act of the NASS that are granted some degree of independence from the direction or control of the president or any of the officers or authorities of the federal executive department. The CFRN is replete with independent agencies and they include the federal executive bodies established by Section 153(1) of the CFRN and the State executive bodies established under Section 197(1) of the CFRN (already discussed under 4.1 above). Some examples of such federal independent agencies are: the Code of Conduct Bureau, the National Judicial Council, the Federal Civil Service Commission, the Federal Judicial Service Commission, the Revenue Mobilisation Allocation and Fiscal Commission, the Federal Character Commission and the Independent National Electoral Commission.

While the president generally possesses the power to hire and fire executive branch employees, the chairmen and members of these independent agencies cannot be removed from office by the president arbitrarily as the president would do to other officers of the executive branch. Usually, the CFRN or the laws establishing such independent agencies impose what is called a 'for cause' provision as a condition to be fulfilled by the president in order to remove members of such independent agencies from their office. In other words, the president may be able to exercise his dismissal power over a chairman or member of any such independent agencies if and only if the president is able to prove that the affected officer sought to be removed is unable to perform the duties of his office by reason of infirmity of

the mind or body or any other cause, or for misconduct, or for contravention of the Code of Conduct.

The president or other appointing authority is generally without power to dismiss where none of the causes for dismissal could be satisfied. Any presidential exercise of dismissal power over members of independent agencies without satisfying the 'for cause' threshold is invalid. The US Supreme Court in *Humphrey's Executor* v *Federal Trade Commission* (295 US 602 (1935)) upheld the independence of the Federal Trade Commission (FTC) – an agency of the federal executive branch and stated that the president could not validly remove a commissioner of the FTC without first satisfying the 'for-cause' requirements stipulated in the congressional Act establishing the FTC. This reasoning in the *Humphrey's Executor*'s case was applied in *Morrison* v *Olson* (487 US 654 (1988)). However, it would seem that the US Supreme Court took a different view in both *Seila Law LLC* v *Consumer Financial Protection Bureau* (591 U.S. 197 (2020)) and *Collins* v *Yellen* (594 U.S. 220 (2021)). In both cases – *Seila Law LLC* v *CFRB* and *Collins* v *Yellen*, the Supreme Court rejected congressional statutes which purported to fetter the presidential 'at-will' dismissal power over high-level federal officers with substantial executive power; and held that the US Constitution vests all the executive powers in the president alone, even though subordinate officers may be appointed to assist the president in the performance of the duties of his office.

Despite what would seem to be a triumph of presidential control over executive branch officials, the present author submits that Supreme Court in both *Seila Law LLC* v *CFRB* and *Collins* v *Yellen* recognised two exceptions to the general rule that Congress cannot restrict presidential control over officers or agency heads within the federal executive branch by fettering the president's at-will dismissal power. The first exception is that Congress may grant 'for-good cause' removal protection to a multi-member body of experts who were balanced along partisan lines, appointed to staggered terms and performing only quasi-legislative and quasi-judicial duties, and which does not exercise any real executive power. The second exception is that congress may grant 'for-cause' removal protection to an inferior officer of the executive branch, such as the independent counsel, who has limited duties, and no real policy-making or administrative authority. In *Seila Law*'s case, the

congressional statute vested all the executive powers exercisable by the Bureau in a single director who was removable on grounds of inefficiency, neglect or malfeasance only. The Supreme Court took the view that the Director of the CFPB exercised substantial executive powers which were incompatible with the Article II's executive power conferred on the president. The Court further held that the two exceptions did not apply to the case, as to pave the way for the application of the *Humphrey's Executor*'s precedent. Similarly, in *Collins v. Yellen*, the Supreme Court took the view that the structure of the Federal Housing Finance Authority (FHFA) violated the Constitution's separation of powers because it was composed of a single director exercising substantial executive powers, but who can only be removed by the president 'for-cause'.

It would seem that the Supreme Court's decisions in the *Humphery's Executor* and the subsequent cases of *Seila Law LLC* v *CFRB* and *Collins* v *Yellen* can be reconciled. In all three cases, the Supreme Court agreed that the president as the head of the federal executive branch possesses undisputed power to exercise control over officials and agencies under the executive branch. This power extends to the presidential power to remove such officials or heads of federal agencies, even for policy or political reasons. However, the Supreme Court established that an official or head of a federal agency that is established to execute tasks that are quasi-legislative or quasi-judicial in nature (as in the *Humphrey's Executor*'s case), is not an official of the executive branch and as such cannot be controlled in the manner in which he will do his work. Such official cannot be arbitrarily removed from his post by the president in defiance of the statutory stipulations and procedure for the removal of such officer from office. The reasoning of the Supreme Court in the *Humphery's Executor's* case is that the FTC was not an agency under the federal executive branch that is subject to the nature of presidential control canvassed by the president, since the duties of the FTC are quasi-legislative and quasi-judicial in character. Thus, the factual situations in *Seila Law LLC* v *CFRB* and *Collins* v *Yellen* are different from those that gave rise to the decision in the *Humphrey's Executors.* In both *Seila Law LLC* v *CFRB* and *Collins* v *Yellen*, the structural composition of the CFRB (as in Seila Law LLC) and the FHFA (as in Collins v Yellen) placed the agencies under a single director with extensive executive powers; unlike in the *Humphrey's Executors,* where the FTC had a multi-member composition, drawn along partisan lines and appointed to staggered terms, and with no real executive functions at stake.

It is crucial to state that the US Constitution does not have provisions comparable to Sections 5(1)(a), 153, 157 and 158 of the CFRN. As indicated elsewhere in this paper, Sections 153, 157 and 158 of the CFRN directly establish independent agencies and proceed to fetter the exercise of presidential at-will dismissal power in relation to the chairmen and members of such agencies. The president cannot unilaterally dismiss the chairmen and members of such agencies, without first satisfying the 'for-cause' protection provisions of the CFRN or relevant NASS legislation, as well as securing the prior approval of the Senate. In addition, the internal operations of such agencies are substantially, and in some cases, completely insulated from presidential control. Furthermore, Section 5(1)(a) of the CFRN directly subordinates the president's executive power to the provisions of the CFRN as well as Acts of the NASS. Thus, while independent agencies are direct constitutional stipulations in the case of Nigeria, there are no direct provisions creating independent agencies in the US Constitution. What is obtainable in the US is that independent agencies and counsel are created by Congress in the exercise of its legislative power under Article I of the US Constitution; and this explains the reluctance of the courts to accept congressional legislation that unreasonably restricts presidential control over executive branch officials. The implication of this distinction is that the reasonings of the US Supreme Court in *Seila Law LLC* v *CFRB* and *Collins* v *Yellen,* and even in *Humphrey's Executor,* may not be applicable in Nigeria.

4.3 Requirement of Presidential Consultation with Certain Federal Executive Bodies

A further limitation imposed on the exercise of presidential power under the CFRN is the requirement that before taking certain sensitive decisions, the president shall act 'in consultation with' or 'on the recommendation of', or 'with the approval or sanction of' another person or authority within the federal executive branch. In such cases, the exercise of presidential power is made subject to the consultation with, or upon the recommendation, approval or sanction of the constitutionally or statutorily designated authority or person. It would seem that where consultation or recommendation is required, the president cannot lawfully exercise that power in the absence of the requisite consultation or recommendation. There are, at least, five instances where the president is required to act on or after

consultation with another authority or person; or to act on the recommendation of another authority. For instance, under Section175(2) of the CFRN, the president is required to exercise his power of prerogative of mercy after consultation with the Council of State. Under Section 5(5) of the CFRN, the president may deploy members of the armed forces of the federation on limited combat duty abroad, but must take such decision in consultation with the National Defence Council.

Under Section 215(1)(a) of the CFRN, the president is empowered to appoint the Inspector-General of Police, on the advice of the Nigeria Police Council. Under Section 213(2) and (5), the president is required to act on the advice of the Council of State in exercising his power whether to accept or reject a national census report presented by the National Population Commission. Finally, the president must act on the recommendation of the National Judicial Council (NJC) in the appointment of all the heads and Justices, as well as Judges and Kadis of the federal courts (CFRN, Sections 231(1) and (2), 238(1) and (2), 250(1) and (2), 254B(1) and (2), 256(1) and 2), 261(1) and (2) and 266(1) and (2)). In order to remove judicial officers appointed to the federal courts, apart from the heads of those courts, the president must act on the recommendation of the NJC (CFRN, Section 292((1)(b). The exception to the requirement of relying on the NJC's recommendation in dismissing the judicial officers of federal courts, is in relation to the heads of the courts whose removal does not require the recommendation of the NJC (CFRN, Section 292(1)(a)(i) and (ii)).

4.4 Subjecting the Exercise of Key Presidential Appointment Powers to Legislative Confirmation/Approval

Another limitation imposed on the exercise of presidential power is the confirmation power vested in the Senate in relation to certain appointments required to be made both under the CFRN and laws enacted by the NASS (Abifarin, 2024:6). Thus, although the power to appoint persons that would assist him in the discharge of his executive functions is vested in the president, the CFRN deliberately makes such appointments to be subject to the approval of the Senate. In such circumstance, it seems the president may not validly make the appointment without the necessary legislative confirmation. Presidential appointments that require senatorial confirmation include: appointment of Ministers of the Government of the Federation; appointment of the chairman and members of the federal executive bodies

established under Section 153(1) of the CFRN (excluding the Council of State, National Defence Council and National Security Council); appointment to the office of Ambassador, High Commissioner or other principal representative of Nigeria abroad; and appointment of the heads of federal courts; and other appointments made pursuant to Acts of the NASS.

4.5 Restriction of Presidential Dismissal Power over Key Executive Branch Officers

Another restriction on the exercise of presidential power under the CFRN is the subjection of the president's dismissal power in certain cases to the approval of the Senate. In situations where this restriction applies, the president's 'at-will' dismissal power is trammeled and cannot be exercised. Even if the president is able to satisfy the grounds for dismissal stipulated in the CFRN or in a legislative enactment for the removal of an appointee from office, the president would still require the support of the Senate before exercising his removal power (Abifarin, 2024:6). This requirement applies mainly in relation to independent agencies within the federal branch. For instance, the president cannot remove the chairmen and members of the federal executive bodies specified under Section 153(1) of the CFRN from office before the expiration of their terms of office, without the support of two-thirds majority vote of the Senate (CFRN, Section 157(1) and (2)). It should be noted that there are fourteen federal executive bodies established by Section 153(1) of the CFRN and the requirement of senatorial approval of dismissal applies to eleven out of the fourteen federal executive bodies. Thus, the requirement does not apply to the chairmen and members of the Council of State, the National Defence Council and the National Security Council. Similarly, the president cannot remove the heads of the of the federal courts from office without the approval of two-thirds majority vote of the Senate (CFRN, Section 292(1)(a)(i) and (ii)). In *FRN v Nganjiwa* ((2022) 17 NWLR (Pt. 1860) 467, 460), the Court of Appeal held that a judicial officer must be subjected to the administrative discipline of the NJC before such judicial officer can validly be prosecuted for any criminal infraction he/she may have been alleged to have committed. On its part, in *Elelu-Habeeb v Attorney-General of Kwara State* ((2012) 13 NWLR (Pt. 1318) 422, 492-493), the Supreme Court held that that a judicial officer cannot validly be removed from office without the recommendation of the NJC.

4.6 Restriction on Appropriation Power

Another demonstration of the limits imposed by the CFRN on the exercise of presidential power in Nigeria, can be observed in the area of public expenditure. Under the CFRN, the president is granted power to expend public funds but this can be achieved only on the authorisation of the NASS. Thus, all monies generated or received by the Federation of Nigeria are required to be paid into and to form one Consolidated Revenue Fund of the Federation (CRFF) (CFRN, Section 80(1)). The president is empowered to withdraw money from the CRFF or other public fund of the Federation but such withdrawal or expenditure of funds must first be authorised by an appropriation Act of the NASS (CFRN, Section 80(1) and (2)). To effectuate this constitutional approval, the president is to prepare and table before the NASS, on an annual basis, the estimates of the revenues and expenditure of the Federation for the next following year (CFRN, Section 81(1)). These estimates shall be included in the appropriation bill which when passed by the NASS serves as authorisation to the president to spend the approved public funds (CFRN, Section 81(2)). The implication of Section 80(!) and (2) of the CFRN is that the president cannot validly spend public money without legislative approval. This principle was emphasised in *Rivers State House of Assembly v The Government of Rivers State*, where the Supreme Court of Nigeria held that the expenditure of funds from the Consolidated Revenue Fund of Rivers State by the governor of the State without legislative authorisation was unconstitutional and illegal ((2025) 7 NWLR (Pt 1990) 591).

5. Critique of Enforcement of Limitations on Presidential Powers in Nigeria

It can be seen from the foregoing discussion that the CFRN grants gargantuan powers to the NASS, the independent federal executive agencies and the courts to checkmate the exercise of presidential powers in Nigeria. The essence of removing some of the executive powers outside the control of the president is to prevent absolute powers and dictatorship. However, the pertinent questions are: Are the independent agencies truly exercising their independence in the performance of their responsibilities? Is the NASS playing its supervisory role over the exercise of presidential power in Nigeria? Are the courts effectively performing their responsibilities of holding those who exercise executive power accountable to constitutional dictates in Nigeria? From available evidence, it does not seem that these questions can be answered in the affirmative in Nigeria. It appears the president has, in spite of these constitutional checks on his power, been allowed to grow obese with

powers not granted to him by the CFRN, and there is the urgent need for the president to shed some weight through effective legislative and judicial oversights.

For instance, in the context of independence of the federal executive bodies established under the CFRN, concerns have been raised that the president actually directs and controls the agencies as to the manner of discharging their responsibilities. Thus, these institutions have surrendered their autonomy to the president in exchange for political patronage. The same accusation has been levelled against the NASS which has been accused of being a rubber stamp, lacking clear-cut independence and always pandering to the sentiments of the president (Sam-Duru, 2023; Oyededeji, 2024; Agbede and Agbede, 2023:4; Arise Tv, 2025). Recently, on 18 March 2025, President Bola Ahmed Tinubu proclaimed a state of emergency in Rivers State – one of the 36 States of the Federation of Nigeria – over what was clearly a political dispute between the Governor of the State and the House of Assembly. It was expected that the NASS would puncture the emergency rule by refusing to approve it. However, to the utter consternation of the Nigerian populace, not only did the NASS in utter genuflection to the president endorse the emergency rule, but also violated the constitutional quorum required for the endorsement (Omogbolagun, 2025). The NASS refused to carry out a head-count of legislators present during the proceedings to determine if it met the quorum of two-thirds required by the CFRN but rather opted for the voice vote procedure, in order to conceal its obvious lack of quorum to approve the emergency proclamation (PLAC, 2025; Bello, 2025).

Similarly, the Independent National Electoral Commission (INEC) has been viewed by majority of the populace and international observers as not being independent of the ruling government and ruling political party (Alabi, 2024: 71-72; Kazachiang and Angalapu, 2025). As regards the courts, there have been allegations that the courts are no longer living up to their billing as the hope of the common man and the bastion of the rule of law. A case in point is the suit filed by the opposition Peoples Democratic Party (PDP) challenging the declaration of emergency rule in Rivers State. The PDP Governors' suit which was filed in March 2025 was yet to be heard until the cessation of the emergency rule. It took until January 2026, after the expiration of the emergency rule, for the Supreme Court to reluctantly pronounce on a grave constitutional matter brought before it.

6. Conclusion and Recommendation

This paper has demonstrated that although the president of Nigeria possesses enormous powers, the CFRN imposes some forms of restrictions on the exercise of the powers in many ways. These limits are in line with the desire of the framers of the CFRN to establish a limited government in which one person or authority will not perform all of the functions assigned to it by the CFRN. The purpose of the restrictions is to enshrine some checks on the exercise of presidential power and to prevent presidential descent into dictatorship. From the discussion in the paper, the key limits on presidential power include granting of operational autonomy to certain federal executive bodies, fettering presidential dismissal power over independent agencies, requirement of presidential consultation with certain federal executive bodies prior to taking sensitive decisions, subjecting the exercise of key presidential appointment powers to legislative confirmation/approval, restriction of presidential dismissal power over key executive branch officers, and restriction on presidential appropriation power.

The paper recommends that the institutions charged with the responsibility of checking the exercise of presidential power, notably the federal executive bodies, the NASS and the courts should be active to their responsibilities and should continue to jealously guard the CFRN in ensuring that the president stays within constitutional bounds in the exercise of his powers. It is hoped that if this is done, presidential power will not be abused in Nigeria.

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THE WTO AT A CROSSROADS: A CRITICAL ANALYSIS OF INSTITUTIONAL ACHIEVEMENTS AND SYSTEMIC CHALLENGES

Bukre Seyma Donder* *

Abstract

This article offers a comprehensive examination of the World Trade Organization (WTO), analyzing its institutional successes and systemic challenges over the past decades. Since its inception following the Uruguay Roundthe WTO has become an important actor in global economic governance by enhancing trade capacity, reducing tariffs by nearly half, and integrating major economies like China and Russia into a rules-based multilateral system. Central to the organization's success is its dispute settlement mechanism, which has historically transformed international trade relations from a "rule of power" to a "rule of law," offering greater security for both developed and developing nations.

However, the organization currently faces significant hurdles, including the protracted deadlock of the Doha Development Agenda, resource limitations, and the increasing complexity of behind-the-border issues, such as environmental and health standards. By examining landmark disputes such as the *EC-Hormones* case, this study highlights the procedural difficulties in achieving equity for developing members and the pressure to implement a broader set of global rules. The article concludes that while the WTO remains a successful and indispensable framework for global trade, its future effectiveness depends on urgent institutional reforms to enhance transparency, update decision-making processes, and address the specific needs of the 21st-century global economy.

Keywords: WTO, GATT, Multilateral Trading System, Dispute Settlement, Trade Liberalization

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1. Introduction

The World Trade Organization (WTO) resumes to serve as a central pillar of the multilateral trading system, yet its effectiveness is a subject of intense scholarly debate. While some experts laud the organization as a successful and powerful arbiter of global trade, others characterize its history as a series of failures in the face of modern challenges. A third perspective suggests that both views hold merit, viewing the WTO as a complex institution defined by both significant triumphs and persistent systemic obstacles.

This article provides a critical analysis of the WTO's trajectory over the last few decades, examining its achievements alongside the failures that have hindered its progress. The discussion begins with a foundational overlook of the WTO, defining its core functions and operating systems. Subsequently, it explores the organization's primary objectives, specifically regarding the General Agreement on Tariffs and Trade (GATT), which formed the basis of the post-war multilateral trading system, . Central to this analysis is an evaluation of how the WTO manages global trade rules, supports developing nations, and functions as a forum for dispute resolution. Finally, by examining landmark cases such as the "Hormones Case," this study aims to determine whether the WTO's institutional framework is resilient enough to govern the complexities of 21st-century international trade.

2. Research Methodology

In this article, a qualitative research method is mainly used. Statistical or empirical field research is not preferred in this study. First, the strengths, achievements, and challenges of the World Trade Organization are examined through legal texts, institutional documents, academic literature, and official reports related to the organization. The reason for using this method is to evaluate the WTO's institutional role within the multilateral trading system, its achievements, and the main problems it faces in the modern global trade system. In this respect, the article adopts an analytical approach while also including descriptive elements.

This study also uses the doctrinal legal method. WTO agreements, dispute settlement rules, official WTO documents, judicial decisions, and relevant secondary sources are evaluated together within this framework. The article analyzes the way in which the WTO makes trade rules, manages the multilateral trading system and functions as a central forum for the settlement of disputes among its members. In this framework, the Doha Round, the Appellate Body crisis, and the Agreement on Fisheries Subsidies, and e-

commerce negotiations are examined in order to evaluate whether the WTO can respond to new problems arising in international trade.

Within the scope of document analysis, reports published by international organizations are also used. The WTO's Trade Policy Review reports are examined to evaluate the trade policies of member states and their practices within the WTO system. In addition, reports published by the OECD and UNCTAD are used as supporting sources, as they provide a general framework on global trade, investment policies, and international economic developments. The use of these reports enables the study to rely not only on theoretical sources but also on institutional and up-to-date data.Furthermore, the article adopts a case study approach. In this context, the Banana Case and the Hormones Case are examined as case studies that illustrate the operation, effectiveness, and limitations of the WTO dispute settlement mechanism, since both cases illustrate the system's capacities as well as its limitations. The Banana Case highlights how the WTO can respond to discriminatory trade measures and demonstrates the effectiveness of its dispute settlement function. By contrast, the Hormones Case reflects the difficulties that arise when trade liberalization conflicts with public health concerns. Accordingly, the article's methodology is built on document analysis, doctrinal legal analysis, and the examination of selected WTO case studies.

3. The Institutional Structure and Functioning of the WTO: Origins and Objectives

This section of the article introduces the WTO in general terms by explaining its definition, institutional functioning, and primary purposes.

3.1. Definition and Legal Status in the Global Economy

In the World Trade Organization (WTO) official website defines the WTO as *"The only global international organization dealing with the rules of trade between nations. At its heart are the WTO agreements, negotiated and signed by the bulk of the world's trading nations and ratified in their parliaments."* On the same page, the aim of the WTO is explained as "*to ensure that trade flows as smoothly, predictably and freely as possible."* (WTO, 2019). A large part of the WTO's present legal framework originates from the Uruguay Round, which was held between 1986 and 1994 under the GATT system. After the Uruguay Round and the establishment of the WTO, the organization continued its trade

negotiations through the Doha Development Agenda, launched in 2001 (Lester, Mercurio & Davies, 2018). However, after 2001, the WTO entered a more challenging period because the Doha negotiations progressed slowly and members struggled to reach consensus. The Doha Round aimed to continue multilateral talks on agriculture, services, market access, development and trade rules. However, it could not be completed as one broad package because WTO members had serious disagreements and the conditions of global trade changed. Wolfe argues that the problems of the Doha Round should not be explained only by the internal structure of the WTO. In his view, wider changes in trade flows, commodity fees and the global economy also played an important role (Wolfe, 2015). Even so, the WTO continued to reach results in more limited areas. The Bali Package of 2013 was important because it showed that the WTO could still work as a negotiating forum after the Doha deadlock. Its main element was the Trade Facilitation Agreement, which focused on reducing customs-related obstacles and making trade procedures easier (Bellmann, 2014). The Nairobi Ministerial Conference of 2015 also produced an important decision on export competition, especially by dealing with agricultural export subsidies (Díaz-Bonilla & Hepburn, 2016). In the following years, the WTO moved more toward narrower and issue-based agreements. A notable example is the Agreement on Fisheries Subsidies, accepted in 2022 and entering into force on September 15, 2025. The agreement connects WTO trade rules with the protection of marine resources and environmental sustainability. Nevertheless, the WTO has also faced serious institutional problems during this period. In particular, the Appellate Body could no longer examine new appeals after 10 December 2019 because new appointments were blocked and the body no longer had the required number of members (Dhlamini, 2021). More recently, the WTO has also focused on digital trade and e-commerce. The Joint Statement Initiative on E-commerce is seen as an important attempt to develop common digital trade rules and to show that the WTO can still make rules in new areas of trade (Mitchell & Chin, 2023). Therefore, the post-2001 period shows both the limits of broad multilateral negotiations and the WTO’s effort to remain relevant through smaller agreements, issue-based negotiations and plurilateral formats. The WTO performs various functions, including the administration of the global system of trade rules and the promotion of the interests of developing countries. Moreover, in the process of concluding trade agreements, the WTO serves as a negotiating forum and provides a system for settling trade disputes between its members (WTO, 2019). Therefore, the WTO’s role is not

confined only to dispute settlement. It also contributes to the governance of the international trade rule and seeks to address the concerns of developing countries. Setiawan and Karnen emphasize that the WTO plays an important part in the integration of the global economy. In their view, the WTO has contributed to the alignment of international trade rules by relying on the principles of Most-Favoured Nation treatment, National Treatment, and a compulsory dispute settlement system. Nevertheless, this process of integration has not developed in an entirely equal manner. The gap between developed and developing states, the insufficient impact of Special and Differential Treatment provisions, and the restricted regulatory freedom of developing countries continue to constitute major challenges. For this reason, WTO governance reform and stronger domestic capacities in developing countries are needed for fair and sustainable global economic integration (Setiawan & Karnen, 2026, pp. 2074–2082).

3.2. Decision-Making Mechanisms and the Secretariat

The WTO has a fundamental function in maintaining an open international trading order and in resolving trade conflicts between its members. It is the sole worldwide institution responsible for regulating the rules of global trade and offers a platform through which member countries can work together on new and developing trade-related matters. The WTO framework rests mainly on the principle of non-discrimination, which appears in core obligations such as Most-Favoured Nation Treatment and National Treatment (WTO, 2015).

The WTO operates as a member-led institution. Its principal decisions are taken by the governments of its members, either at the ministerial level or through representatives and ambassadors. Ministerial meetings are generally held every two years, whereas delegates and ambassadors gather more frequently in Geneva. Alongside the member states, the WTO Secretariat also performs an essential auxiliary function.

The Secretariat employs more than six hundred staff members, including legal, economic, statistical, and communication experts, who assist WTO members in different areas. It also helps ensure that negotiations proceed effectively and that international trade rules are properly implemented (WTO, 2019). In brief, the WTO is governed by its members, while the Secretariat provides technical and administrative support to facilitate the organization’s work.

3.3. Strategic Goals: Beyond Trade Liberalization

The objectives of GATT were to lower tariffs, eliminate obstacles to trade, abolish discriminatory practices in international commerce, and ensure that such benefits were granted on a reciprocal basis (Özlük, 2018).The main purpose of the WTO is to enable the implementation, operation, and administration of WTO agreements and to support the realization of their objectives. In addition to this general function, the WTO performs several specific tasks. It assists in organizing trade relations in a fairer and freer manner, offers a forum for negotiations among members on both existing problems and future agreements, and administers the dispute settlement system (Matsushita, Schoenbaum & Mavroidis, 2015). It also aims to prevent discrimination, promote trade by lowering trade barriers (Lester, Mercurio & Davies, 2018), and give foreign companies greater confidence that trade restrictions will not be raised arbitrarily. Furthermore, the WTO seeks to encourage competition, support investment, create employment opportunities, allow consumers to benefit from lower prices through competitive markets, and prevent unfair practices in international trade.

To ensure that less developed countries can contribute more efficiently in the world trade system; to grant these countries more time during their adjustment processes and to provide other flexibilities and special advantages. In addition, the WTO framework allows member states to accept measures designed to defend public health, the environment, and plant and animal life and health (WTO, 2019).

4. Defining Success: Milestones of the rules-based multilateral trading system

This part of the article examines the main achievements of the WTO. Since its establishment, the WTO has contributed to the development of the global trading system in several important ways. The following achievements will be discussed in this section:

- International trade rules have become more widely respected, transparent, open, and integrated at the global level.

- Trade capacity has improved, and trade barriers have been reduced.

- The dispute settlement system has developed and become one of the central mechanisms of the WTO.

- The WTO framework has contributed to greater stability and predictability in the international trading system. The WTO has provided a significant platform for policy dialogue, information sharing, and economic cooperation between its members. In this way, it has become one of the fundamental supports of the global trade governance system.

Developing c ountries and transition economies have increased their participation and influence in the international trading system.

The implementation of the Bali Package will contribute to reducing trade costs. International trade rules have become more widely respected, while global trade barriers have gradually decreased. As a result, a gradually combined, broad, and rules-based world trade system has become about universal. The dispute resolution system is used by more members and WTO trade law is developing with fresh cases. Information about national trade policies and international trade relations can be reached by more member throughout directness and omission mechanisms of the WTO (WTO (2015). To explain, both the quality and volume of international trade have increased, while trade barriers have gradually decreased. At the same time, the WTO dispute settlement system has developed and has been used by an increasing number of member States over the years.

After the creation of the WTO in 1995, almost all major economies, including China and Russia, became members of a shared multilateral trade order. The WTO dispute settlement system supports the control of expanding trade relations and provides a legal method for solving trade disagreements between states. As trade restrictions decline, national economies become more integrated and interdependent. In addition, the growth of WTO agreements has created new trade chances in different sectors, although the Doha Development Agenda has faced serious difficulties (WTO, 2015).

The WTO has gradually taken on broader functions in promoting an international trade order that is more open and economically connected. In this context, transparency has become one of the main areas of attention. At the same time, greater importance has been given to enabling developing countries to gain from trade liberalization and to use WTO rules more effectively. The organization has also expanded its collaboration with other international institutions in areas connected with trade, including technical standards. Taken together, these developments show that the WTO resumes to occupy an important position

in the governance of the global economy (WTO, 2015). Therefore, through its focus on transparency, its support for developing countries, and its cooperation with other international bodies, the WTO has helped advance a more open and integrated system of world trade.

One of the strongest indications of the WTO's achievements is the expansion of global commerce. Since the WTO was established, global trade capacity has increased significantly and has grown faster than world production. The portion of developing countries in global merchandise trade rose from 27 percent in 1995 to more than 43 percent over the following twenty years. Similarly, their share in global services trade increased from 25 percent to 35 percent during the same period (WTO, 2015). To illustrate, China, which was the world's 11th largest exporter twenty-four years ago, has now become the leading global exporter. The WTO has not only played an important role in opening and integrating the world economy; more significantly, it has helped prevent the termination and fragmentation of the global trading system in the face of recurring economic and geopolitical shocks. (WTO, 2015). Therefore, the WTO's achievements have also made a noteworthy contribution to the development of world trade. In addition to all this, it should be noted that, in the face of recurring economic and geopolitical shocks and crises from time to time, the WTO has helped prevent the deterioration and fragmentation of the global trade system.

The multilateral trading system is an initiative developed by governments to create a more stable, consistent, and predictable business environment. Within the WTO framework, commitments made by member states to open the markets for goods or services are not merely political promises; they create legally binding obligations (WTO, 2019). In this respect, the multilateral trading system provides greater security and predictability than a system outside the WTO framework, even for the smallest and poorest countries. Multilateral negotiations permit weaker countries to combine their institutional influence and benefit from collective bargaining. However, this system does not always operate fully in favor of the smallest and weakest countries. Nevertheless, it offers an important alternative to a world in which trade relations are determined only by political and economic power, leaving smaller states vulnerable to dominant economies. In this sense, the WTO

aims to replace power-based trade relations with a rules-based system and a more neutral dispute settlement mechanism (Moore, 2005).

The WTO has further supported the inclusion of a fast-growing world economy within an open and rules-based global trade framework. It has also made a significant contribution to strengthening the rule of law in international economic relations and to lowering obstacles to trade. Since the WTO was created, tariff levels have decreased by nearly fifty per cent (WTO, 2015). Furthermore, the WTO has become an increasingly significant pillar of today's global governance structure by providing a platform in which its members can discuss trade-related issues, common concerns, and the broader objectives of the multilateral trading system. Through this forum function, the WTO strengthens dialogue and cooperation among its members (Bossche & Prévost, 2016).

A large proportion of WTO members consist of developing states and economies in evolution toward market-based systems. Through the Uruguay Round, many developing countries independently adopted trade liberalization policies. Compared with earlier negotiation rounds, these countries participated in the Uruguay Round in a more active and influential manner, and their role became even more visible during the Doha Development Agenda (Lester, Mercurio & Davies, 2018). Moreover, countries that had remained relatively isolated from the global economy for almost five decades gradually moved toward open-market policies and economic integration under the combined influence of globalization, liberal economic approaches, and the WTO framework. Many developing countries began to benefit from economic growth, while economies and international relations were reshaped by advances in transportation, communication, and information technologies (WTO, 2015).

Today, the World's production networks link goods, investment, services, intellectual property, digital commerce and logistics. They are also influenced by the growing need for sustainable production and trade in the fight against climate change. Although the Doha process has remained largely stalled, WTO members have demonstrated the flexibility of the organization by reaching important agreements through different methods. Two important achievements can be mentioned in this regard. The first was the Trade Facilitation Agreement, concluded in Bali in 2013, which reduced average trade costs by more than 14 percent. The second was the decision taken at the Nairobi Ministerial

Conference in 2015 to prohibit agricultural export subsidies (Soobramanien, Vickers, & Enos-Edu, 2019). Beside that, global production networks are taking steps to fight combat climate changes. The regulations concerning the mechanism reflects the central role of WTO rules in shaping the Union's external trade obligations and has been prepared in conformity with both WTO regulations and the Union's broader global legal commitments (Günay, p. 164).

The system has been successful because an increasing number of countries have recognized the importance of open trade, common rules, and multilateral cooperation. Through this process, countries have contributed to the development of the modern WTO as a shared international system, whose influence has grown with its expansion and institutional development (WTO, 2015). The problems experienced within the WTO are related not only to economic and geopolitical crises, but also to the institutional functioning of the organization. According to Hoekman, consensus-based decision-making and the preferential treatment granted to developing countries under WTO rules are two key factors that limit the effectiveness of the WTO (Hoekman, 2018). While the principle of consensus has led to the vetoing of specific initiatives and special and differential treatment mechanisms has enabled more advanced developing countries to participate in negotiations without offering full reciprocity. This has strengthened the perception of an uneven playing field and made it more difficult for multilateral negotiations to succeed. As a result, states have increasingly turned to preferential trade agreements; however, such agreements carry the risk of fragmenting global trade rules and offer only limited solutions to trade-distorting policies (Hoekman, 2018; Egger & Olarreaga, 2014).The institutional success of the WTO can be explained by the fact that, unlike other international economic organizations, it has focused on a limited but functional area of competence. According to Niskanen, the WTO has concentrated on widely shared trade-related concerns and has preserved its institutional effectiveness by resisting internal and external pressures to expand its mandate (Niskanen, 2000). Similarly, McGinnis and Movsesian argue that, rather than assuming responsibility for all regulatory issues in the field of global governance, the WTO should remain committed to its core function of reducing trade barriers (McGinnis & Movsesian, 2004). Despite institutional gridlock, the WTO has continued to demonstrate its relevance through important developments. The adoption of the historic Agreement on Fisheries Subsidies in 2022 showed that WTO members could still reach multilateral outcomes in areas closely

connected to environmental sustainability. In addition, the accessions of Comoros and Timor-Leste in 2024 expanded WTO membership to 166 members. The founding of the Multi-Party Interim Appeal Arbitration Arrangement (MPIA) also reflects the resilience of certain WTO members in conserving a rules-based dispute settlement culture in the absence of a fully functioning Appellate Body. After this historical background, the WTO's institutional achievements may be briefly assessed with reference to the relevant literature. From an institutional perspective, the WTO's key achievement has been the consolidation of a rules-based multilateral trading system. The WTO has not left international trade relations solely to power-based bargaining; rather, it has established common legal rules, negotiation procedures, and a formal dispute settlement mechanism. Bagwell and Staiger describe the GATT/WTO system as an institutional framework designed to govern trade through trade rules and reciprocal bargaining (Bagwell & Staiger, 2002). Similarly, Niskanen attributes the WTO's relative success to its limited and focused mandate, particularly its concentration on widely shared trade concerns and its resistance to demands for expansion into non-trade areas (Niskanen, 2000). Hoekman also characterizes the WTO's work in regulating the global trade regime as a remarkable achievement of multilateral cooperation. He emphasizes that this regime has contributed to broader participation in world trade, greater consumer choice, lower prices, and higher productivity (Hoekman, 2018). As Witts (2025) notes, the Dispute Settlement Mechanism has strengthened predictability and legal certainty in the multilateral trading system by replacing unilateral retaliation with rule-based dispute settlement procedures. Unlike the GATT system, this binding framework has made an important contribution to the WTO's legitimacy by promoting impartial decision-making and encouraging compliance (van den Bossche, 2015; Bown & Hoekman, 2005). It has also supported trade justice by giving smaller and developing countries a meaningful opportunity to challenge the practices of more powerful economies. At the same time, the paralysis of the Appellate Body has emerged as the most serious and immediate problem facing the system today (Witts, 2025).

Another major institutional contribution of the WTO is the Trade Policy Review Mechanism. By subjecting members' trade policies to regular review, this mechanism helps improve transparency and accountability (Bown, 2017; Kim & Lee, 2020). Although it does not have direct enforcement power, it performs an important governance function by opening national trade practices to multilateral scrutiny (Voon & Mitchell, 2017). For this

reason, when The WTO supports the stability of the multilateral trading system through the Dispute Settlement Mechanism and the Trade Policy Review Mechanisms are considered together, it becomes clear that the WTO's real achievement lies not only in trade liberalization, but also in preserving a rules-based international trading order (Witts, 2025).

5. Systemic Challenges and Institutional Crises

This section analyses the systemic challenges and institutional crises faced by the WTO. Although the WTO has contributed to the development of a rules-based "multilateral trading system," it has also faced serious difficulties in maintaining its effectiveness, legitimacy, and decision-making capacity. These difficulties are as follows:

- New rules and clearer understandings of existing rules can mainly be achieved through major rounds of negotiations.
- The WTO also faces limitations in terms of human, financial, and institutional resources. As the number of members and the complexity of global economies increase, the number of trade-related problems and disputes also grows.
- Although the dispute settlement system has become more sophisticated, access to specialized legal advice on trade matters remains costly, creating difficulties for developing countries in achieving equitable participation.
- As the WTO has become nearly universal in membership, it has increasingly had to address more complex and cross-border trade-related issues.

The WTO faces several important challenges. First, the system continues to rely heavily on major rounds of negotiations to create new rules or clarify existing ones. This dependence makes institutional development slow and difficult, especially when member states cannot reach consensus. In addition, WTO negotiations require a considerable amount of time and institutional effort. Thousands of hours are spent in Geneva in general debates, meetings, and consultations among delegation heads, although many of the issues and national positions have already been discussed and examined since the Doha process.

Furthermore, governments do not always have the necessary capacity to take part in WTO activities at the level they desire. This difficulty is especially important for developing and least-developed countries, since these states frequently suffer from limited technical expertise, financial resources, and administrative infrastructure.

A further important problem relates to the WTO's restricted human, financial, and institutional capacity. These constraints have become increasingly apparent as the WTO legal order has expanded in scope, complexity, and economic importance. For this reason, the WTO should further develop its technical assistance and capacity-building activities in order to enable developing countries, least-developed countries, and transition economies to engage more effectively in WTO negotiations and in the multilateral trading system as a whole (Moore, 2005).

Another aim of the WTO is to support member governments use dispute settlement procedures more efficiently. From this perspective, the organization has supported the institutional development of international trade law by creating an organized dispute settlement framework, including appellate review. Nevertheless, the considerable expense of obtaining expert legal advice in trade disputes has raised questions about equal access to this mechanism, especially for developing countries (Moore, 2005).

The WTO has also faced difficulties in making sufficient progress on wider institutional issues, including the Doha Round and the successful integration of its expanding membership. Continuous delays and unmet deadlines in the Doha negotiations have led some members to consider bilateral and regional options instead. The challenge of reforming the WTO is closely linked to the increasing number of its members and the increasing complexity of the disputes that the system is expected to handle.

As world economies become more interconnected, the dispute settlement system is expected to address a rising number of trade conflicts. This, in turn, makes the overall functioning of the WTO more complex and places additional pressure on the organization (WTO, 2015).After resolving many relatively simpler issues in previous trade rounds, the WTO has today faced more complex and politically sensitive issues, including agriculture, which had remained unresolved in earlier negotiations. Although the system has significantly lowered traditional border barriers, such as tariffs and quotas, it continues to face difficulties in dealing with behind-the-border measures, including health standards, environmental regulations, and other domestic regulatory policies. (WTO, 2015). In brief, the WTO now faces more complex issues with increasingly cross-border dimensions than it did in previous decades.

In fact, although the WTO is an effective institution, it is also potentially fragile. The greatest pressure on the WTO comes from attempts to overload it with the responsibility to apply a wider set of rules. WTO's initiative to implement such wide-ranging rules would result in the withdrawal of selected governments.

While most governments are prepared to authorize private enterprises to compete internationally, many also call for the WTO to expand its involvement in matters such as labour regulation, environmental safeguards, and antitrust rules. In this respect, they seek to reduce harmful regulatory competition between states (Niskanen, 2000). According to this view, one of the greatest pressures on the WTO is the demand that it should enforce a wider set of rules. However, such an expansion of the WTO's mandate may also lead some governments to withdraw their support. Niskanen criticizes this tendency by arguing that governments, while supporting competition among private firms, such demands may also reflect an effort to convert the WTO into a quasi-cartel of governments, whose purpose would be to reduce intergovernmental competition over labour, environmental, and competition-law standards.Nevertheless, the success of the WTO dispute settlement system has encouraged some scholars to consider whether the WTO could perform broader functions in global governance. In this context, some authors argue that the WTO's distinctive features, such as package agreements and an effective dispute settlement mechanism, could make it a central institution of global governance with additional responsibilities in areas such as environmental protection, business regulation, investment, and competition law (Bronckers, 2001). Similarly, some scholars suggest that the WTO should not be limited only to international trade, but should also address wider economic and social issues connected to global trade governance (Breuss, 2001).

However, as the WTO has brought the world trading system into the public agenda, it has also become the focus of broader cross-border debates on globalization, development, climate change, and other transnational concerns. This has made the organization more visible, but also more controversial (WTO, 2015).

Although WTO reform has been discussed for many years and often becomes more visible during institutional crises, the current debate offers an important chance to modernize and strengthen the organization. Reform could help the WTO adapt to the realities of twenty-first-century trade governance and support least developed and vulnerable countries

in reaching the Sustainable Development Goals (SDGs) (Soobramanien, Vickers, & Enos-Edu, 2019). Transboundary trade and resource corridors are central to the relationship between development and the SDGs. Economic growth in one country often stimulates cross-border trade, infrastructure investment, and regional production networks, thereby affecting the development outcomes of neighboring countries. In this respect, trade functions not only as a source of economic expansion, but also as a mechanism through which sustainable development gains may spread across borders. This approach is consistent with Kara et al.'s analysis of spatial spillover effects, which shows that governance and institutional improvements may influence SDG progress beyond national boundaries (Kara et al., 2025).

The institutional issues requiring reform within the WTO have been clearly identified in the literature (Bronckers, 2001). In particular, greater internal and external transparency is needed, and the organization's decision-making processes should be improved.

Greater internal and external transparency is required within the WTO. In addition, its decision-making processes need to be improved, and the long-delayed review of dispute settlement procedures should be completed. Meanwhile the WTO does not have direct enforcement authority over agreements such as GATS, GATT, and TRIPS, the effectiveness of the dispute settlement system remains particularly important (Maggi, 1999). Therefore, this system should be strengthened. Moreover, the position of developing countries in the WTO requires special attention, as these countries often face difficulties in effectively participating in negotiations and making full use of the organization's mechanisms (Breuss, 2001). In other words, the WTO faces several institutional problems, including transparency deficits, difficulties in decision-making, and weaknesses in dispute settlement procedures. These are among the main issues that need to be addressed through reform.

The year 2019 marked a turning point for the WTO, as the paralysis of the Appellate Body pushed the organization into a serious institutional and existential crisis.

Furthermore, the rise of 'unilateralism' and national security-based tariffs (such as those on steel and aluminum) has tested the boundaries of the rules-based system through 2026.

Considering the most recent developments, the following assessment may be made: The adoption of a common implementation pathway for electronic commerce (e-commerce) at the 14th Ministerial Conference of the WTO, held in Cameroon on 26–29 March 2026, appears limited in substantive scope, yet it is institutionally significant. Indeed, this initiative demonstrates that, rather than relying exclusively on the traditional model of WTO agreements that are equally binding on all members, a more pluralist regulatory model is increasingly coming to the fore—one in which certain members reach agreement in specific fields (Hufbauer, 2026). In addition, international trade has increasingly evolved from traditional trade in goods toward digital and data-driven transactions. Digital technologies are transforming global trade; data, intellectual property, online platforms, and digital services are fundamentally changing the structure of trade (World Trade Organization, 2018). This has made e-commerce one of the central issues in WTO reform debates. Cross-border data flows, data localization policies, online platforms, and electronic transactions have generated new legal and institutional problems and debates concerning the scope and adequacy of existing WTO rules.

In the literature, Burri regards e-commerce as one of the few areas in WTO law capable of demonstrating a willingness to develop new rules. She also emphasizes that current negotiations are significant in terms of their capacity to meet the practical needs of the data-driven economy (Burri, 2023, pp. 565–568). Mitchell and Chin similarly note that, although the WTO Joint Statement Initiative on E-commerce aims to harmonize international digital trade rules, it faces difficulties relating to data flows, data localization, the development dimension, and the integration of any agreement into the WTO structure (Mitchell & Chin, 2023, pp. 971–992). Therefore, due to its distinctive nature, e-commerce deserves to be discussed among the WTO's institutional challenges, as it reveals the limits of traditional trade rules and the need for multilateral regulation. From this perspective, the e-commerce agreement shows that the WTO has moved beyond its function as an organization that merely produces universal and binding rules. It now also serves as a negotiating platform that facilitates normative convergence among willing members, particularly in emerging areas of trade. For states with limited capacity to negotiate bilateral or regional agreements separately, such plurilateral arrangements constitute a functional instrument in the enlargement of international trade law (Hufbauer, 2026).

6. Case Studies

For many years, the WTO dispute settlement system, based on panel proceedings and appellate review, functioned as a central instrument for maintaining expectedness and legal security in the multilateral trading system. Moreover, the paralysis of the Appellate Body has undermined this function and raised concerns about the future effectiveness of WTO dispute settlement. he paralysis of the Appellate Body and the failure to fully resolve some complex and politically sensitive disputes have shown that this system has certain limits. For this reason, the traditional panel and appeal procedures in the WTO should not be abolished; rather, alternative dispute resolution methods should be developed alongside them. Among these alternative methods, mediation offers an important opportunity because it can provide the parties with a more flexible, faster, and relationship-preserving way of resolving disputes. However, mediation also carries some risks, such as delay, confidentiality problems, due process concerns, and enforceability issues. Therefore, mediation should not be regulated as a temporary and random method within the WTO dispute settlement system, but as a complementary dispute resolution method with clearly defined rules, procedures, and institutional structure (Lee, 2025, p. 74).The Appellate Body has long functioned as a safeguard for ensuring legal certainty as one of the most significant elements of the WTO dispute settlement system. Since abandoning this institution completely is not a solution, addressing its existing problems is a more appropriate path. Until the Appellate Body becomes functional again, the MPIA is regarded as a practical solution that can protect the rights of members (Zwolankiewicz, 2022, p.42).

Among the numerous cases brought through the WTO dispute settlement system, retaliatory measures were authorized only in a limited number of cases. The relevant mechanisms include the Dispute Settlement Body (DSB), dispute settlement panels, the Appellate Body, arbitration procedures, and the surveillance mechanism concerning the implementation of rulings and the authorization of the suspension of concessions. According to Breuss, two particularly important cases in which retaliation became a central issue are known as the Hormones Case and the Bananas Case (Breuss, 2001). This part of the article first examines the Bananas Case, officially known as EC - Bananas III. The *EC — Bananas III* dispute stands as one of the most significant and long-standing legal battles in the history of the WTO, illustrating both the organization's judicial authority and the practical

difficulties of enforcing its rulings. The dispute centered on the European Union's (EU) preferential trade regime, which granted duty-free access The dispute concerned preferential treatment granted to bananas imported from prior colonies in Africa, the Caribbean, and the Pacific. (ACP countries), while imposing less favorable tariff and quota conditions on so-called "dollar bananas" from Latin America, a colloquial term referring mainly to Latin American bananas traded in US dollars and supplied outside the preferential ACP regime (FAO, 2005; Kox, 1998).

In the Bananas dispute, the WTO dispute settlement organs repeatedly found that the European Union's licensing system was inconsistent with WTO rules, particularly the Most-Favoured-Nation principle and certain obligations under the General Agreement on Trade in Services (GATS). The importance of the WTO dispute settlement system can also be observed in other major disputes beyond the Bananas case. In the Hormones case, the European Union's veto on hormone-treated meat products was challenged by the United States and Canada. This case was significant because it demonstrated how the WTO could review trade restrictions justified based on public health protection The EC — Hormones dispute illustrates the importance of scientific risk assessment under the SPS Agreement, particularly where member states adopt measures for the safety of human, animal, plant life or health. *(Hormones)*, DS26/DS48, 1998).

Similarly, in the Biotech Products case, the United States, Canada, and Argentina challenged the European Union's measures concerning the approval and marketing of genetically modified products. The Panel found that there had been undue delays in the approval procedures for biotech products between 1999 and 2003. This dispute showed that the WTO dispute settlement system could also address new and technically complex matters, including biotechnology, food safety, and scientific uncertainty (*European Communities — Measures Affecting the Approval and Marketing of Biotech Products*, DS291/DS292/DS293, 2006). Agricultural subsidies were also examined in important WTO cases. In the Upland Cotton case, Brazil challenged the subsidies granted by the United States to its cotton producers and exporters. This case was important because it showed the effects of agricultural subsidies on developing countries and international market prices (*United States — Subsidies on Upland Cotton, DS267, 2005*). In another important dispute, namely the Sugar case, Australia, Brazil, and Thailand claimed that the European Union's

export subsidies for sugar violated WTO rules and exceeded its commitment levels (*European Communities - Export Subsidies on Sugar, DS265/DS266/DS283, 2005*).

The WTO dispute settlement system has also played a role in non-agricultural sectors. In the Airbus–Boeing disputes, the United States and the European Union challenged each other's subsidies to large civil aircraft producers. These cases were important because they showed how the WTO could deal with industrial subsidies and competition between major economic powers.

The aircraft disputes between the European Union and the United States further show the wide scope of the WTO dispute settlement mechanism. These cases focused on government support and subsidy practices in the large civil aircraft industry and brought forward significant issues concerning the interaction between industrial policy, state aid, and fair competition in global trade (European Communities and Certain Member States — Measures Affecting Trade in Large Civil Aircraft, DS316, 2011; United States — Measures Affecting Trade in Large Civil Aircraft — Second Complaint, DS353, 2012). Similarly, the dispute concerning aluminium and steel products related to the additional tariffs introduced by the United States on imports of aluminium and steel under Section 232. This case showed that the WTO dispute settlement system must also address trade measures justified based on national security concerns (*United States — Certain Measures on Steel and Aluminium Products*, DS544, 2022).

Taken together, these cases show that the WTO dispute settlement system has not only addressed discriminatory trade practices, as seen in the Bananas dispute, but has also dealt with complex and sensitive issues such as food safety, biotechnology, agricultural subsidies, industrial support, and national security-based trade measures

The Banana dispute, discussed above, was a landmark case in the history of the WTO for two main reasons. First, it showed the capacity of the WTO dispute settlement system to deal with complex disputes involving several international agreements. Second, it demonstrated the practical importance of retaliatory measures, since the United States and Ecuador were later authorized to impose trade sanctions on EU products because of the European Communities' failure to comply with WTO rulings. Although the dispute continued for almost two decades before a final settlement was reached in 2012, it remains

an important example of the WTO's role in addressing discriminatory trade practices and strengthening the rules-based multilateral trading system (European Communities — Regime for the Importation, Sale and Distribution of Bananas, DS27, 1997).

The case concerned the European Communities' regime for the importation, sale, and distribution of bananas. The complainant countries argued that this regime granted more favorable treatment to bananas originating from ACP countries and placed bananas from Latin American countries at a competitive disadvantage. They claimed that the system was discriminatory and inconsistent with WTO rules. By contrast, the European Communities maintained that the preferential treatment given to ACP countries was justified by its historical relations and special legal arrangements with those countries. Therefore, the Banana dispute confirms the WTO's important role in maintaining and supporting a rules-based multilateral trading system.

The Panel and the Appellate Body concluded that some elements of the European Communities' banana import system were not compatible with WTO obligations, especially those arising under GATT 1994, GATS, and the Agreement on Import Licensing Procedures. The importance of this dispute lies in the fact that it illustrated the ability of the WTO dispute settlement mechanism to examine complicated cases in which several international trade agreements were relevant at the same time.It also illustrated the importance of retaliatory measures within the WTO framework, as the United States and Ecuador were later authorized to impose trade sanctions on EU goods due to non-compliance. Although the dispute continued for many years before a final settlement was reached in 2012, it remains an important example of the WTO's role in challenging discriminatory trade practices and supporting a rules-based multilateral trading system (*European Communities — Regime for the Importation, Sale and Distribution of Bananas*, DS27, 1997).While the Bananas Case highlighted issues of market access and preferential treatment, The EC — Hormones dispute also tested the capacity of the WTO dispute settlement mechanism to balance international trade rules against national measures adopted for the protection of health and safety.

"The Hormones Case" In 1996, the United States and Canada initiated discussions with the European Communities under the WTO dispute settlement system. The dispute arose from EC measures prohibiting the importation of meat and meat products obtained

from cattle treated with certain growth-promoting hormones. The United States submitted its demand for consultations on 26 January 1996, while Canada filed its request on 28 June 1996. The complainants claimed that the EC had inconsistent measures with WTO obligations, particularly under GATT 1994, the SPS Agreement, the TBT Agreement, and the Agreement on Agriculture. Following these requests, WTO panels were established to assess whether the EC measures complied with WTO law. The United States brought a complaint and the panel was requested on 25 April 1996 and established on 20 May 1996. The panel report was circulated on 24 September 1997, after which the European Communities appealed the findings before the Appellate Body. The Appellate Body report was circulated on 16 January 1998 and adopted by the Dispute Settlement Body on 13 February 1998.The case became significant because it clarified the relationship between public health regulation, scientific risk assessment, and members' obligations under the SPS Agreement. The Appellate Body observed that the scientific materials relied upon by the European Communities were relevant in general terms, but they did not specifically address the particular risk at issue in the dispute. In this respect, the reports indicated that the EC measures lacked a sufficiently specific scientific risk assessment. As a result, the Dispute Settlement Body recommended that the European Communities bring its measures into agreement with its duties under the SPS Agreement.

In the EC — Hormones dispute, the arbitrator granted the European Communities a reasonable period of 15 months to bring its measures into conformity with WTO obligations and to provide further scientific justification for its regulatory position.

The EC — Hormones dispute concerned European Communities measures prohibiting the marketing and importation of meat and meat products originated from cattle treated with certain growth-promoting hormones. The United States and Canada challenged these measures under the WTO dispute settlement system, claiming that the EC ban restricted their beef exports and was inconsistent with the SPS Agreement. The United States requested the establishment of a panel on 25 April 1996, and the panel was established on 20 May 1996. The Panel Report was circulated in 1997, while the Appellate Body Report was circulated on 16 January 1998. Both reports were adopted by the Dispute Settlement Body on 13 February 1998 (European Communities — Measures Concerning Meat and Meat Products (Hormones), DS26/DS48).

The plaintiffs argued that the EC measures were not supported by a sufficient scientific risk assessment and consequently violated the SPS Agreement. The European Communities, on the other hand, maintained that the measures were justified by public health considerations and by the need to protect consumers from possible risks connected with the use of hormones in meat production. However, the scientific studies relied upon by the EC were not regarded as sufficient to establish an adequate risk assessment under the SPS Agreement.

The Panel and the Appellate Body concluded that the EC measures were inconsistent with the SPS Agreement as they were not based on a proper assessment of risk. At the same time, the Appellate Body recognized that WTO members have the right to determine their own suitable level of health protection. Nevertheless, it emphasized that sanitary and phytosanitary measures must be supported by a risk assessment and based in scientific evidence. For this reason, the case became an important example of how the WTO dispute settlement system seeks to balance trade liberalization with national regulatory autonomy in matters of public health protection (World Trade Organization, 1997; World Trade Organization, 1998; Pauwelyn, 1999).

6. Conclusion

This article has examined both the main achievements of the World Trade Organization and the structural and operational challenges it faces. Undoubtedly, the WTO has performed an important role in the worldwide development of a rules-based multilateral trading system. It has contributed to the reduction of trade barriers, the increase of transparency and the creation of a legal mechanism for the settlement of trade disputes. In this respect, the WTO has made international trade more predictable and more stable.

However, the success of the WTO cannot be considered a complete and unlimited success. Although the WTO has been successful in creating common trade rules and a dispute settlement system, this success has become more limited in recent years under different factors. The Doha Round clearly shows this problem. The failure of the Doha Round was not only a negotiation failure. It also showed how difficult it is for all WTO members, which have different economic interests and different levels of development, to agree on one broad and standard package acceptable to all.

One of the strongest aspects of the WTO is the dispute settlement system it has established. Cases such as the Banana case and the Hormones case have shown that the WTO can deal with even complex and politically sensitive trade disputes and can produce legal solutions. The Banana case demonstrated the WTO's success in preventing discriminatory trade practices. The Hormones case showed the tension between free trade and the protection of public health, as well as the possibility of finding a reasonable balance between them. These cases show that the WTO is not only a trade organization, but also an important institution that tries to balance trade rules with other public interests.

On the other hand, the paralysis of the Appellate Body after 2019 shows that the WTO dispute settlement system has been seriously weakened. When the appeal stage does not function properly, legal certainty and trust in the functioning of the system decreases. For this reason, making the dispute settlement system functional again through the operation of the appellate mechanism is essential for the success of the WTO.

Recent developments show that the WTO still maintains its importance. The Agreement on Fisheries Subsidies is important because it connects trade rules with environmental protection and sustainability. Similarly, e-commerce negotiations show that the WTO can respond to new areas of global trade. These developments also reveal a change in the WTO system and its approach. Instead of broad multilateral agreements accepted by all members, the WTO increasingly encourages narrower, issue-based and plurilateral agreements among willing members.

Although the WTO provides developing countries with a legal forum where they can defend their trade interests, disadvantages continue for many developing and least-developed countries due to legal costs, technical capacity problems and differences in negotiation power. Therefore, WTO reform should pay special attention not only to institutional efficiency, but also to the principles of fairness, balance and effective participation.

As a result, the WTO is successful in terms of creating common trade rules, reducing trade barriers and supporting legal dispute settlement. Nevertheless, it is also clear that the WTO needs reform. The organization can become more successful if the Appellate Body is made functional again, transparency is increased, decision-making processes are

made more flexible and stronger support is given to developing countries. If these reforms are not made, the WTO's capacity to govern 21st-century trade will remain limited and it will not be able to meet expectations.

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CROSS-BORDER ENTREPRENEURSHIP: SEIZING OPPORTUNITIES IN THE EUROPEAN UNION'S DIGITAL AND GREEN TRANSITION

Hediye Günay *

Abstract

The article analyzes how existing or newly established companies can integrate into the transformations emerging from new climate change regulations and digitalization processes through the lens of cross-border entrepreneurship. Within the framework of the European Union's green transition regulations, it examines the European Green Deal (EGD), the Carbon Border Adjustment Mechanism (CBAM), the Emission Trading System (ETS), digital market strategies, and circular economy policies. The impacts of carbon pricing, renewable energy investments, green finance instruments, and sustainable economy strategies on businesses are evaluated alongside the digital transformation dimension, focusing on the Internet of Things (IoT), blockchain technology, e-commerce, and e-export. The central emphasis of the study is to demonstrate that, despite the presence of elements that initially increase costs and create compliance challenges, EU practices can be transformed into advantages in global market competition through an innovation-oriented approach. In particular, access to EU funds, sustainable production, and digital supply chain management stand out as factors that facilitate the adaptation of businesses to new markets. The study emphasizes that regulatory practices are not merely an obligation but a strategy for keeping pace with an evolving and changing world. It argues that institutions adopting these strategies can benefit from green transition and digital ecosystems, while contributing to the literature by establishing a link between policymakers and cross-border entrepreneurs. In order to realize the twin transition, facilitating access to finance, strengthening digital infrastructure, and ensuring compliance with regulatory frameworks emerge as key factors supporting SMEs' integration into cross-border markets. It provides a conceptual and policy-oriented perspective on how the EU's twin transition can reshape international business models and create new opportunity areas for sustainable and digital entrepreneurship.

Keywords: Digital transformation, entrepreneurship, EU, green transition, innovation.

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1. Introduction

The consequences of climate change are visibly manifesting worldwide. Consequently, the global fight against climate change is being reshaped through digitalization processes across economic, political, and strategic axes. The EU, as a pioneer in climate action, addresses this transformation through the Twin Transition approach, namely the green and digital transitions. Both transformations are viewed as interconnected, complementary processes that must be sustained simultaneously. While aiming for climate neutrality by 2050 with the European Green Deal (EGD), the Union is also building a technology-based economic structure through the digital single market strategy.

This study examines the advantages offered by the new regulations introduced by the EU through the perspective of cross-border entrepreneurship. By adapting to the green and digital transitions, it will be possible to maintain competitiveness in both the Union market and the global market. Consequently, it seeks to answer the question of how entrepreneurs can integrate into the global market through the twin transition and how they can turn competitiveness into an advantage by complying with new regulations during the transformation phase. Within the framework of this main question, the following sub-questions are explored:

- How do regulations such as the Green Deal and CBAM transform the production and export strategies of firms?
- How do digitalization tools facilitate cross-border activities?
- Does the regulatory compliance process increase innovation capacity?

The article demonstrates that integration into regulatory applications should be evaluated not as a passive requirement but as a strategic opportunity.

This study is based on the qualitative research method. European Commission reports, EU legislative texts, policy documents, and academic studies were utilized as data sources for the article. The primary reference points of the study consist of official documents regarding the EGD, the CBAM Regulation, digital transformation policies, and financing and grant programs. The evaluation framework of the study is constructed upon the PESTEL analysis, which systematically examines the transformation through its Political, Economic, Social, Technological, Environmental, and Legal dimensions.

The second section of the study evaluates CBAM, circular economy ventures, and renewable energy within the framework of green transition and sustainability opportunities. The third section examines digital transformation and technological adaptation, focusing on the digital single market and standards, digitalization in industry, e-commerce, and entrepreneurship. The fourth section details EU innovation funds and green finance mechanisms under the heading of financing and ecosystem supports. The fifth section

discusses the risks and challenges faced by entrepreneurial firms in local ecosystems. Finally, the sixth section concludes the study by summarizing the findings and policy implications.

2. Green Transition and Sustainability Opportunities

Climate change is evolving every year. This change is global and does not remain confined within national borders. In the context of combating climate change and seeking solutions to environmental problems, the Union has introduced the European Green Deal (EGD). One million of the eight million species on the planet are facing the threat of extinction. The atmosphere is warming, while forests and oceans are being polluted. The Green Deal serves as a solution to these challenges. It emerges as a growth strategy aiming to transform the Union into a more prosperous and fair society. The Deal targets zero emission rates by 2050, the transition to a circular economy, decoupling economic growth from resource use, and achieving a nature-friendly, resource-efficient economy (European Commission, 2019).

During the long-term implementation processes of the Green Deal, both geopolitical and political developments have created certain challenges in the establishment of both Union-wide and national policies. The first test faced by the Deal was Covid-19. Due to the economic contractions brought by the pandemic, the Deal lost political priority, and the implementation of some policies was postponed. However, the timeline for the fundamental targets regarding the climate crisis was maintained (Siddi, 2020, pp. 8–9).

New regulations brought by the green transition, such as the Carbon Border Adjustment Mechanism (CBAM) and the Emission Trading System (ETS), indirectly affect not only member states but also other countries outside the Union.

2.1. *Carbon Border Adjustment Mechanism*

CBAM was introduced to prevent carbon leakage in achieving the Union's climate targets and has become a next-generation tax established to protect competition between its own market products and imported goods, ensuring fair carbon pricing. The system covers emissions resulting from the production of imported goods and aims to direct the industry toward investments in decarbonization in production. CBAM was initially envisioned for emission-intensive sectors with a high risk of carbon leakage, such as iron and steel, fertilizers, aluminum, electricity, and hydrogen. It is planned to expand these sectors over time. The rules introduced by the system are compatible with the World Trade Organization. It aims to encourage developing countries to adopt production technologies with lower emissions. CBAM is implemented through regulatory and administrative tools such as declaration obligations, certificate pricing, and verification processes (European Union, 2023).

The high carbon prices accompanying CBAM increase costs, particularly in the field of electricity. This situation affects not only the industry but also households. Sub-producers

using the intermediate goods of sectors within the scope of the system face both rising prices of their resources and the carbon costs that must be paid for imported products. Through CBAM, the Union intends to protect its internal market power (Bellora & Fontagné, 2022, pp. 22-23).

Those expected to be most affected by the system are the regional and neighboring countries that export the most to the Union. Russia, Türkiye, and Ukraine are at the forefront of these. On the other hand, Egypt, Morocco, Algeria, North African countries, and Eastern European countries follow (European Commission, 2021).

CBAM is not merely a trade tool intended to prevent carbon leakage; it is also positioned as a significant law of global trade. Rather than exerting regulatory pressure on countries, it carries the potential for a different transformation. Through new formations such as climate clubs, it mandates cross-border entrepreneurs to integrate into a sustainable and clean production process (Mehling et al., 2022, p. 213).

2.2. Circular Economy Ventures

The most important economic growth strategy brought by the green transition has been the transition from a linear model to a circular economy. The traditional linear economic model was based on the "take, make, dispose" approach, assuming that resources were unlimited. The priority was the increase in productivity. The circular economy, by its nature, aims at restoration. Products must be designed to re-enter technical and biological cycles. Furthermore, it prioritizes resilience over the efficiency system. All stages of production must be provided by renewable resources. This includes human labor as well. In the service-oriented model of the circular economy, where ownership of the product remains with the producer and the consumer is seen only as a user, products support a system that is more durable, repairable, and continuously usable instead of being consumed (Ellen MacArthur Foundation, 2015, pp. 21-23).

To implement the circular economy, actions must be carried out in every field, from social to technological and from technological to commercial. It is the responsibility of states to introduce reusable products and to produce the necessary policies and strategies for this purpose. In this sense, it is of great importance to educate both consumers and producers with this awareness and to increase sensitivity. There is a need to support actions such as clothing rentals and jewelry sharing. Policy makers should support change by imposing a tax burden on the consumption of non-renewable resources—including human labor—rather than focusing on renewable resources. Growth should be measured and determined by stock and capital. For instance, by renovating old buildings, the stock quality of the buildings increases and energy savings are achieved (Stahel, 2016, pp. 436-437).

In the context of environmental protection and the climate struggle, most states in the world view this task as an individual duty. In addition to this, they produce environmental

policies and entrust the responsibility of protecting the natural balance to the constitution. Some constitutions even prioritize environmental elements over many rights. For example, they can limit property rights in favor of environmental policies. As seen in the Chilean constitution, restrictions can be imposed on the use of certain rights to protect nature (United Nations Environment Programme, 2018, p. 22).

While approximately 100 billion tons of material are consumed annually in the world, only 8.6% of this is recycled. Consequently, this situation leads to the depletion of resources, increased emissions, and environmental degradation. The new applications introduced by the EU within the scope of climate change force companies globally to radically change their production stages. The importance of redesign is immense in the stages of transitioning to a circular economy. The durability, quality, functionality, and environmental performance of the product are at the forefront of the design. Extending the life cycle of the product, having repairability features, and managing end-of-life to re-evaluate the product through recycling are considered important strategies (Favi & Marconi, 2025, p. 2).

2.3. Renewable Energy and Efficiency

The most significant obstacle to the implementation of renewable energy, one of the most vital elements of the climate struggle, has been the cost of capital. Unlike fossil fuels, the establishment of renewable energy systems requires large initial investments. Therefore, high costs slow down the use and development of clean energy technologies. On the other hand, advances in technology are reducing the costs of using solar and wind energy. Energy efficiency is being increased with necessary storage technologies, smart grids, and lithium-ion batteries. In addition to these, the risk perception of investors is influential. To reduce costs and lower the risk level, green finance and Blended Finance structures stand out. While green finance provides green bonds and loans, it offers long-term opportunities with lower interest rates as it considers sustainable projects less risky. Blended Finance is defined as a method where government and private sector stakeholders share risks to reduce costs. Policy structures are accepted as driving forces that increase investments, such as tax exemptions, subsidies, and energy efficiency codes. Renewable energy is also seen as a source of employment. While the establishment, maintenance, and manufacturing processes of the system contribute to the economy as new areas of employment, they also allow for the reduction of emission rates and the protection of natural resources from an environmental perspective (Yang, Zhou & Gao, 2025, pp. 1-4).

With the use of renewable energy systems, not only do governments and the private sector produce energy, but consumers also assume a "prosumer" identity, producing their own energy. While the most important factor in efficiency in traditional energy consumption was the preference for the low-cost option, this situation has changed in renewable energy systems. This paradigm has shifted, especially with the decrease in the costs of energy

obtained through solar and wind. In the last decade, there has been an 81% decrease in photovoltaic system costs and a 34% decrease in wind energy system costs. Regarding implementation constraints, it is recommended that commercial organizations and energy companies do not focus solely on efficiency but evaluate the relationship between supply and demand holistically (Senatla Jaane et al., 2024, pp. 1-18).

3. Digital Transformation and Technological Adaptation

Digital transformation is described as the integration process of elements such as labor, technology, strategy, and culture in the development of existing products and services. Although technology advances very rapidly, the pace at which organizations adapt cannot be as fast as that of individuals. Even when organizations are inclined to adopt new technologies, the alignment of their operations with this process can take time. For organizations, adopting technology is not merely about technical implementation; it is also crucial that it is accepted and integrated into daily activities. Especially for SMEs (Small and Medium-Sized Enterprises) in developing countries, individual acceptability within the institution plays a vital role in converting technology into productivity. Challenges such as lower or middle-income levels, low digital literacy, and limited infrastructure in developing countries hinder digital transformation. However, through digital transformation, developing countries can leapfrog industrialization stages, gaining direct access to education, healthcare, and finance, and acquiring a structure sensitive to socio-cultural dynamics by participating in the global chain (Díaz-Arancibia et al., 2024, pp. 2-4).

3.1. Digital Single Market and Standards

With the emergence of Bitcoin in 2008, blockchain technology entered our lives as a revolutionary development allowing secure data storage without a central authority. The immutability feature of blockchain technology creates conflicts with the EU General Data Protection Regulation (GDPR), which came into force in 2018, on three main points. First, the GDPR’s "Right to be Forgotten" grants individuals the right to have their data deleted, whereas the permanent and immutable storage of data in blockchain systems makes the exercise of this right impossible. Second is the determination of responsibilities; the GDPR clearly defines roles such as data processors and data controllers. However, in a blockchain network, it is unclear who controls the data and who is legally responsible. Finally, there is the possibility of data crossing borders. Since a copy of public data is kept on the blockchain network and nodes can be located anywhere in the world outside the EU, a violation regarding the cross-border transfer of data may occur (Belen-Sağlam et al., 2022, pp. 2-5).

3.2. Digitalization in Industry

Blockchain technology, with its features of transparency, traceability, and data integrity, has taken its place as a digital ledger that eliminates the need for auditors. This situation has provided various advantages to the increasingly complex supply chain. The

advantage of transparency and trust lies in maintaining a record of the process from the source of assets to the final stage of delivery. Another advantage is the reduction of costs by eliminating third-party verifiers and intermediaries. While ensuring timely access to data for all participants in chain management, it proves that products are original and prevents unauthorized access to the system. Internet of Things (IoT) technology emerges as an infrastructure that allows physical products to interact with each other over the internet through tools such as smart devices and sensors. In trade, it facilitates the tracking of products by being used to monitor logistics and production stages. The use of these technologies enables businesses to expand into the supply chain by carrying them across borders (Taşcı & Güzel, 2023, pp. 412-416). Besides the advantages of blockchain technology, there are difficulties and barriers in its implementation. Structural issues such as data fragmentation, different protocol regulations, and the lack of information resources appear as implementation challenges. Furthermore, the high costs of transforming existing systems, the inability of the technology to harmonize with current systems, and the presence of different partners increase complexity in international networks. Due to the legal uncertainties of the technology, commercial security and official recognition become difficult (Karagenç & Dedeoğlu, 2025, pp. 164-165).

3.3. E-Commerce and Digital Entrepreneurship

In the global arena, blockchain, artificial intelligence, and cloud computing technologies have taken their place as driving forces of the digital economy. While these technologies increase production efficiency and decision-making quality, risks such as R&D costs and easy imitability prevent businesses from taking necessary steps in innovation (Chen et al., 2024, pp. 1-3). These developments in the technological field enable businesses to participate independently in the global market across borders. Through e-commerce, businesses utilize an extensive infrastructure to conduct economic transactions over internet platforms. With e-export, orders placed by consumers in different countries via digital channels ensure the delivery of products outside geographical borders. Micro-export facilitates the entry of SMEs into the global trade arena as a faster and lower-cost shipping method via the Simplified Customs Declaration for transactions not exceeding a gross weight of 300 kg and a value of 15,000 Euros. Transitioning from traditional export to e-export makes it possible to reduce transaction costs, accelerate customer feedback, and perform digital tracking of the supply chain (Tüfenk, 2024, pp. 5-8).

4. Financing and Ecosystem Supports

In order to comply with the EU's twin transition policies, sustainable financing mechanisms are required for entrepreneurs. Within this scope, the integration of SMEs into cross-border markets and the support of innovative projects are facilitated through EU innovation funds and green finance instruments.

4.1. EU Innovation Funds

Horizon Europe, one of the Union's innovation supports, is among the most important financing programs for innovation. A budget of 93.5 billion Euros is envisioned for the 2021-2027 period. The program supports the dissemination of information technologies by strengthening the impact of research and innovation and facilitating cooperation to support, develop, and implement EU policies while combating climate change. While increasing employment, the program supports the EU's economic growth and enhances its competitiveness (European Commission, 2026). Another financing program, the European Innovation Council (EIC) Accelerator, is a funding source under Horizon Europe that provides support to SMEs and startups meeting specific criteria. These criteria include having a groundbreaking new product or service model capable of disrupting the global market and targeting significant growth (European Innovation Council, 2026).

4.2. Green Finance

Green finance involves supporting sustainable investments with low-interest loans, whereas sustainable finance is a concept that encompasses social values and corporate governance principles alongside environmental values. Environmental finance accepts environmental damage as a financial risk and prioritizes the protection of the ecosystem. Carbon finance is a funding program designed to support projects aimed at reducing emission gas rates. Climate finance holds its place among support programs and grants as financing that supports activities for combating climate change. The main objectives of green finance are the mitigation of climate change, the protection of water and marine resources, the strengthening of the circular economy, the preservation of nature and biodiversity, and the alignment of financial mechanisms with green growth policies (Yilmazcan, 2025, pp. 708-715). The EU's green loans are not merely investment products but the most important financing tools for supporting sustainable projects. For a loan to be classified as green, it is expected to fulfill principles set by the Loan Market Association, such as utilizing funds in projects with environmental benefits, analyzing the borrower's social risks, ensuring funds are used in line with objectives, and verifying the impact of investments with quantitative data. According to 2021 data from the European Banking Authority, the green asset ratio of EU banks stands at 7.9%. To make sustainability a corporate necessity, the Corporate Sustainability Reporting Directive (CSRD) has been implemented. This directive mandates that companies report on environmental, social, and governance (ESG) factors (Lapinskienė et al., 2025, pp. 2-5).

5. Discussion: Risks and Challenges for Entrepreneurial Firms

The bureaucratic obstacles during the establishment phase of small businesses force entrepreneurs who wish to start a new venture to struggle with local regulations, such as complex paperwork, high costs, and long waiting periods. Due to factors like a lack of transparency and insufficient guidance, this situation either discourages starting a business or directs entrepreneurs toward the informal economy. Removing these barriers would allow

new entrepreneurs to establish themselves without being hindered by legal legislation and regulators, thereby enabling economic revitalization (Institute for Justice, 2026).

The tendency of new entrepreneurship to lean toward traditional agriculture and trade sectors limits economic diversity while affecting the development of market perception. Additionally, the difficulties new entrepreneurs face in accessing financial resources are among the significant obstacles. If the entrepreneurship ecosystem in a region is not supportive, it causes entrepreneurs to migrate to different regions (Morales et al., 2022, pp. 6–8). The growth of established businesses depends on local ecosystems shaped by infrastructure, financing, technology, and skills. While institutions develop through intermediaries such as university collaborations and local clusters, they continue their activities within the legal framework. National rules directly affect the establishment of businesses at the local level; for instance, the speed of obtaining licenses and land use are among these reasons. The impact on businesses located in cities versus rural areas also occurs at different levels. Companies in rural areas face challenges due to limited resources and access to expert support. With an innovative approach and digitalization, platforms that centralize the establishment, licensing, and registration processes of companies, along with the presence of digital government services, ensure that data is entered between institutions without duplication. This particularly reduces costs for companies in rural areas. All of these factors—simplifying and digitalizing regulatory stages—limit the discretionary authority of officials, thereby allowing for a reduction in corruption (OECD, 2025).

6. Conclusion

The new regulations introduced by the EU in the fight against climate change act as steps of a transformation that are effective at a global level, sometimes indirectly and sometimes directly. In this context, twin transition policies also bring regulatory obligations for companies. Although fulfilling these obligations may initially cause high costs, it will later manifest as an advantage. In the medium and long term, these transformation steps involving sustainable production, reduction of emission levels, and the circular economy will ensure the preservation of competitiveness in the international arena. The linear economy approach of traditional production models will have no place in the new world market. While the Green Deal sets the conditions for the climate struggle, it simultaneously encourages organizations toward eco-friendly business models through green finance and renewable energy strategies.

During the integration process of businesses into digital transformation, certain duties fall upon policymakers. It is particularly important to facilitate access to green finance and loans and to further strengthen technical compliance support mechanisms for enterprises such as SMEs.

The digital component of the twin transition facilitates cross-border trade. Through applications such as blockchain, IoT, e-commerce, and e-export, it provides easy access to

and storage of data, supply chain transparency, and operational efficiency. However, these applications also have negative aspects, such as data protection concerns, legal uncertainties, and technical compliance issues.

The EU supports the innovation capacity of companies in terms of financing through the Horizon and EIC programs. Consequently, green loans and financing help reduce transformation costs. Nevertheless, companies still face difficulties such as bureaucratic hurdles, changes in local ecosystems, and problems accessing green finance.

In conclusion, it is evident that integrating into EU practices is the most important element for maintaining competitiveness and not falling behind in trade in both the European and global markets. Companies must carry out a holistic transformation—from production and technology to governance and finance—in accordance with regulations. By increasing their innovation capacities and ensuring the integration process, entrepreneurs hold the potential to turn the transformation stages into a competitive advantage.

Disclosure Statement No potential conflict of interest was reported by the author.

Funding No funding was received for this research.

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APPRAISAL OF LEGAL FRAMEWORK REGULATING TELEMEDICINE IN NIGERIA: CHALLENGES AND PROSPECTS

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Abstract

The COVID 19 pandemic has exposed the flaws of the Nigerian health sector. Patients and clients were affected by the lock down during (the hey-days) of the pandemic. Medical appointments between doctors and clients/patients were not actualized because there was no movement from one place to another. Patients on medical tourism could not access their foreign treatment centers because of global lock down. In light of these developments, what can the citizens do in order to access quality health care in times of public health emergency? Also, how has the Nigerian law provided enabling grounds for people that could not physically access health care providers to interface with their doctors? How ready is Nigeria to address the health security of its citizens against future pandemics? I t is in an attempt to answer these posers that this article derived its motivation. Therefore, the aim of this article is to appraise the efficacy or otherwise of the legal regime regulating the deployment of telemedicine in Nigeria. It is also an exposition on the imperative of telemedicine in access to health care. The writers of this article have established that Nigerian law did not sufficiently legislate on matters relating to telemedicine in Nigeria. Also, the state was not committed in the development of infrastructures and facilities to sustain the reality of telemedicine. This article deployed doctrinal reference where statutes and case laws were used. Equally, books and articles in journals were deployed in the course of this writing. The writers conclude that there is the need to bolster our laws and state's commitment in ensuring telemedicine is deployed to provide quality access to health care. It is the hope of these writers that this paper would inspire policy formulation and contributes to knowledge.

Key Words: Appraisal, legal framework, telemedicine, challenges, prospects

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1. Introduction

This article is structured into four parts. The first part examines the concept of telemedicine. Its classifications, functions and relevance to access to health care are discussed in this part of the work. In part two, this paper examines the legal frameworks regulating telemedicine in Nigeria. Here, national, regional and international laws were examined. In part three, this work examines the challenges affecting the deployment of telemedicine in Nigeria. These challenges include legal and non-legal challenges. The paper concludes with part four where recommendations and suggestions are made on how to utilize the concept of telemedicine in order to ensure proper access to health care for Nigerian citizens.

1.1. Meaning of Telemedicine

The word telemedicine has enjoyed definitions of international institutions as well as some scholarly works. The World Health Organisation in 2022, defined telemedicine to include:

*(a) **Teleconsultation**: consultation offered to the remote patient by health care provider;*

*(b) **Telemonitoring**: remote monitoring of the patient's health status and/or medical data by the health care provide;*

*(c) **Teleexpertise**: the remote exchange of medical opinions between two or more physicians for the purpose of confirming a diagnosis and/or establishing therapeutic management;*

*(d) **Teleassistance**: the provision of opinions or data in real-time by a doctor to a remote practitioner performing a medical act.(UNICEF, 2024).*

By the above definitions, telemedicine is a genre of health care that is responsible for delivering consultation services via remote interaction between doctors and patients. It also includes a situation where a doctor can monitor the health status of patients. Similarly, it implies an exchange of medical views from different remote locations by physicians for the purpose of reaching a medical verdict about a particular health situation.

Again, the World Health Organisation (WHO) further defined telemedicine as:

The delivery of health care services, where distance is a critical factor by all care professionals using information and communication technologies for exchange of valid information for diagnosis, treatment and prevention of diseases and injuries, research and evaluation, and for the continuing education of health care providers, all in the interest of advancing the health of individuals and their communities.(Mahar,Rosencrance & Rasmussen).

From the above definition telemedicine is the use of technology for the purpose of delivery of health care services, exchange of information regarding diagnosis and treatment of patients and also educational purpose. Also, by this definition telemedicine could be used to deliver health care services including counseling, prescription and instructions to patients/clients by health care professionals. Telemedicine is also a means of information intercourse between the health care provider and the patients for the purpose of treatments of a particular injury or ailment. Telemedicine could also be implied as means of information dissemination and enlightenment for the purpose of creating awareness to an audience in academic or research institutes as well as public health sensitisation. It is a means of creating public awareness during public health crises.

Again, the Oxford Dictionary defines telemedicine as "the remote diagnosis and treatment of patients by means of telecommunication technology." (Oxford Dictionary, 2024).By this definition, telemedicine is the use of technology for treatment purpose where the health care professionals are separated by distance. It is a means of giving and receiving instructions for the purpose of treatment. Here, the health care provider gives out instructions through technology (phones, video-conferencing, etc.,) to the patients/clients to the patients.

Telemedicine is also used to describe terms that cover the use of technology to deliver clinical care at a distance.(Rachael, 2022). It is the use of technology to ensure that patients/clients receive health care as when due. It could be used via different media such as video-conferencing, telephone calls, text messages, etc., to help those with limited access to health care and medical treatments.

Telemedicine is further defined by Nakajima and Hamano, as "medical assistance using communication methods (medical information distribution, consultation, patient information distribution, conference, home care assistance, and so on" (Science Direct, 2024). By this definition, telemedicine is seen as the communication concerning the sharing

of information between doctor and patient using technology. Here, both the health care providers and the patients share information relating to treatments via technology.

The above definitions view telemedicine as the use of technology to render health care services where the doctor and the patients are separated by distances. In a nutshell, telemedicine involves a distant treatment or rendering of medical services via the use of technology. The adoption of technology for remote treatment of patients by different health care professionals has further given birth to proliferations of seemingly similar terms such as telehealth, telecare and digital health that are used interchangeably with telemedicine. But does telemedicine mean the same thing as telehealth, telecare and digital health? In an attempt to answer this question, this article examines the relationship between telemedicine and other related concepts.

1.2. Telemedicine and other related concepts.

Telemedicine shares affinity with certain concepts like telehealth, telecare and digital health because all rely on the use of technology for remote treatment and prescription. However, these terms do not have the same meaning. They have some conceptual nuances. These slight differences are examined at the subsequent part of this paper.

(a) Telemedicine and Telehealth

Telemedicine restricts its operation to remote clinical services based on patient-doctor relationship, while telehealth is broader in scope (HealthIT, 2024). Telehealth involves providing non-clinical services like providing training, administrative meetings and medical education.

(b) Telemedicine and Telecare

While telemedicine deals with the use of technology by health care providers to treat patients and provide health care services, telecare deals with the use of artificial intelligence to provide healthcare services to consumers from different remote locations. Telecare may include consumer-oriented health care and fitness apps, sensors and tools connecting consumers with care givers(Federal Communications Communications, 2024). It also includes medical apparatus that helps in early detection and early warnings

technologies. Thus, in Telemedicine health care providers facilitate contacts and communication with audience while in telecare, the audience can dispense with the instruction of health care provider, and placed reliance on technology.

(c) Telemedicine and Digital health

Telemedicine is a subset of digital health because it relies on technology to deliver distant medical care. However, digital health is wider in scope in that it encompasses a wide range of health care technologies such as wearables, mobile health apps, electronic health records, and patient portals(Medium, 2024). Telemedicine engages patients occasionally remotely, while digital health engaged the patients daily because patients can actively interact with their patient portals which help them to track their progress and communicate their health team.

1.3. Classification of Telemedicine

Telemedicine has been classified into three (3) types. These include remote monitoring, Store-and-forward, real-time interactive services(Yolinda,2023). However, there are other classifications such as teleneuropsychology, telenursing and telerehabilitation, telepharmacy and mobile health platforms (District Weekly, 2020).

Remote monitoring is also known as self-testing or self-monitoring. This type of telemedicine consists of the use of technological devices to monitor clinical signs and health of a patient. This method is effective in the remote treatments of chronic diseases such as Asthma, diabetes mellitus, and cardiovascular disease.

The store-and-forward allows the health care provider to acquire medical images of the patients and other bio-data. These information are then stored and sent to an expert who can rely on such data to prescribe treatment or counseling to the patient without meeting him physically(District Weekly, 2020a). When the expert is through, he will then forward his medical findings/prescription to the patient or users no matter the remoteness of the location. This method is widely deployed in the fields of pathology, radiology or dermatology(District Weekly, 2020b)

The real-time interactive services provide immediate consultation services to the patient in need of medical attention It is an avenue for an interactive forum between the health care and the patients. Here, interaction is effected via a live communication between the doctor or the patient either through videoconferencing, telephone and other online means of communication(District Weekly, 2020c).

Teleneuropsychology is used to assess patients who have, or are suspected of having, a neurological disorder. It could be deployed via consultation and assessment over the phone for patients with cases of neuropsychology. It is assessed to provide a reliable option to traditional in-person consultations(.(District Weekly, 2020d).

In telenursing and telerehabiltation, technology is deployed to aid the health care provider to do consultation in order to provide a diagnosis and monitor health symptoms and conditions (Yolinda, 2023 a). It avoids healthcare providers the opportunity to relate with the patients, evaluate their health conditions, and after that administered them remote treatment. Today, contemporary health care practice is imbibing telenursing and telerehabilation as an alternative to physical nursing and rehabilitation counseling.

Telepharmacy provides virtual pharmaceutical advice and instructions to patients and clients where it is impossible to meet them physically with the pharmacists(Yolinda, 2023 b). This is mostly used by pharmacist to prescribe drugs and give instructions to patients on how to use such drugs. Telepharmacy is important for remote patients who might experience a lot of stress before accessing a health care provider.

The last one is the Mobile health platforms.This is given to patients to help in the monitoring of their own health. Here gadgets like Smartphones, patient portals and other wearables help patients to monitor their health situations and then update the health care provider as to whether there is an improvement or not the health situation.

1.4. Relevance of Telemedicine

Telemedicine helps a lot in promoting quality access to health care in some ways. One of the areas it helps is that it reduces the tendency of exposure to illness (William 2024). Since telemedicine is remotely done, it helps to shield the health care

professional from contracting any diseases from the patients. By this it reduces the likely ratio of the spread of the disease to the public.

Again, telemedicine provides convenient avenues for both the health care provider and the patient. In using telemedicine, there is the benefit of ease on the part of the health care provider to interface with the patient. On the part of the patient, telemedicine affords him easier access to the health care provider as well as treatment. Thus, telemedicine precludes the patient from stresses attributed to conventional hospital settings which is characterized by strict bureaucracy. In the same vein, the stress of travelling from long distance to join a hospital queue to see a health care provider is reduced, due to telemedicine.

Accessibility to health care is another advantage (Every Day Health Care, 2024).Through telemedicine, people in remote areas with poor road networks and mobility challenges are spared from the rigours associated with travelling to health care facilities. Thus, telemedicine is able to deploy technology to ensure that people have access to quality health care.

Because of the ability of telemedicine to promote distant treatment, it could be said that it is also helpful in cross-border medical care and medical tourism. This is possible because during public health emergency where movement was restricted, patients can receive treatment from another country, different from their state of residence. As such telemedicine helps to promote inter-state treatment in situation of public health crises (Godfree, 2020).

Closely linked to the above reason, is the fact that telemedicine could also help to facilitate virtual medical tourism (Godfree, 2020b). This concept envisages the use of telemedicine by patients to meet health care professional outside their state of residence, in a situation where the patient chooses not to physically travel to the country where the health care provider or the institution is established. This could also be achieved especially where the concepts of inter-state telemedicine is recognized among member state. For example, European Union recognised the concept of Cross-Border Telemeicine whereby the right of the patient to access health care can be realised via healthcare

services delivery (Campiglio, 2025). It allows healthcare providers to engage in inter-state treatments of patients among member States via telemedicine. It operates based on the ‘ Country of Origin’ principles , which means that digital telemedicine are governed by the laws of the country where the healthcare provider resides.

The above principle is given recognition in the recent case of *UJ v Österreichische Zahnärztekammmer* [C-115/24(CJEU) 11 September, 2025]. The Court of Justice of European Union. In this case, an Australian Dentist (UJ) worked with German based entities that offer dental care. The patients initially had an in-person consultation and scans was taken in Australia using Remote provision of Dental aligner treatment for via German ICT tools(Unyer,2025). The Austrian Dental chamber challenged the German Entities for engaging in telemedicine in Austria. The question before the Court of Justice of European Union whether the meaning of healthcare in the case of telemedicine under Directive 2011/24/EU and whether a country-of- principle applies in respect of telemedicine services (Unyer, 2025a).

The Court of Justice of European Union held as follows:

(a) The concept of telemedicine applies only when a health service is service is provided entirely through ICT, without patient’s physical presence before the healthcare provider,

(b) Services that are hybrid(partly in-person, partly digital) do not fall within the Directive’s framework on cross-border healthcare (Unyer, 2025 b).

Continuity of care is another advantage of telemedicine (Williams, 2024b). Regular medical checks can be continued between the doctor and the patients through online or telephone communications. Also, digital apps such as Smartphone’s and patient’s portal could assist the patient in regular check up about his health condition and then report to the health care professionals.

However, despite its advantages, telemedicine is not totally free from some defects. Some of its challenges include technical problems, data security, and limited physical examination of the patients. Despite, these challenges, telemedicine is necessary

for contemporary medical practice and public health practice. Thus, states like Nigeria are enjoined to take every measure necessary to ensure that access to quality health care is a realizable right. The question then is to what extent has the Nigerian government promoted the practice of telemedicine in law and national policy? The answer to this question will take us to the next part of this article- appraisal of the legal frameworks regulating telemedicine in Nigeria.

2. Legal Frameworks Regulating Telemedicine in Nigeria

In regulating telemedicine, certain indices are taken into account. These include the technical standards, certifications and existing legal fundamental laws regulating telemedicine (Stapic, Vrcek & Hadjin, 2008).These indices are the parameters that will be used to explore how effectively Nigerian laws have regulated the practice of telemedicine in Nigeria. In examining how Nigerian laws regulate the practice of telemedicine in Nigeria, this paper shall examine the national legal frameworks.

The national laws that will be examined here include both the federal laws relating to telemedicine as well as rules adopted by the various health professionals in Nigeria as their code of conduct relating to telemedicine. This paper is only concerned with the specific laws that govern telemedicine, and not the generic law. Some of the National laws that will be examined here include, the Constitution of the Federal Republic of Nigeria 1999 (2010 as amended), Medical and Dental Practitioners Act (CAP M8,LFN, 2004), Medical Laboratory Science Council of Nigeria Act, 2003, National Health Act ,2014, National Health Insurance Authority Act, 2022, National Data Protection Act, 2023. Code of Medical Ethics,2008 and Rules of the Professional Conduct for Medical Laboratory Scientist, Laboratory technicians and Laboratory Assistants, 2018.

Reference to the Constitution as one of the legal frameworks regulating telemedicine is relevant here because of its status as the supreme law of the land. Equally, its status as the grundnorm upon which other laws derive their validity is imperative to this discourse. Regulation of telemedicine by the Nigerian Constitution can be gleaned from the fact that chapter two of the Constitution of the Federal Republic of Nigeria 1999 (2010 as Amended) (hereinafter known as the 1999 Constitution), enjoins States to take adequate measures to

promote the health of its citizens.Thus, section 17(3) of the 1999 Constitution enjoined States to direct their policies towards the provisions of adequate medical and health facilities for all persons. By this provision, the law obliges the States to ensure that necessary and adequate facilities (including telemedicine) are provided in order to ensure that citizens' right to health care is realised.

The Medical and Dental Practitioners Act, is vital in the regulation of telemedicine for two reasons. The first reason is that since telemedicine is an aspect of medical practice that involves remote medical care, the person engaged in telemedicine must be a person who is qualified to practice as a medical doctor or a dental surgeon. It is for this reason that section 8 of the Medical and Dental Practitioners Act, states that a person seeking to become a medical doctor must be qualified to do so after having been trained by an approved institution and must have his name registered with Registers of medical practitioners. This means that before any person can practice medicine, he must first pass through an approved institution and then have his name registered with medical practitioners. Secondly, the law requires the medical practitioner to register their health equipments that are imported into Nigeria (Guidelines for Registration of Imported Medical Devices in Nigeria, 2018). Thus, since telemedicine could be termed as a specialized area of practice in fields like radiology and pathology, there is the need for the specialized registration of telemedicine. It is from this prism that one can see how the Medical and Dental Practitioners Act, regulates telemedicine in Nigeria.

Another law that governs telemedicine in Nigeria is the Medical Laboratory Science Act, 2003. This law governs the qualifications of person who can be admitted to practice as Lab Scientist in Nigeria. They do that by determining the standard of knowledge that one is expected to acquire before being admitted to practice as Lab Scientist section 4 of the Medical Laboratory Science Act, 2003). The law also ensures that such person is trained from a qualified and approved institution (section 15 of the Medical Laboratory Science Act, 2003). This law also mandates the Board to inspect Medical laboratory to ensure that they are well equipped and of standard to operate as health institutions. They must ensure that the equipments and other facilities are of the standard required by law. It is from this ground that one can see how the Medical Laboratory Science Act, 2003, regulates telemedicine.

The National Health Act, 2014, could be said to regulate telemedicine from its provisions. Section 12 provides for the powers of the minister of health to regulate health technologies with respect to their functions, size and community locations, as well as their geographical locations and demographic reach. To ensure that health technology includes telemedicine, section 64 , the interpretation section of the National Health Act, defines health technology thus,

"health technology" means machinery or equipment that is used in the provision of health care services but does not include medicine as defined in the drug as and related products Registration etc Act. No. 19 of 1993

The above definition clearly shows that Nigerian law recognized telemedicine. It went further to expound on the fact that health technology (telemedicine) is not the same as medicine, rather, it is a medium through which medical treatment is delivered where health care professionals and patients are affected by distance.

In order to ensure that health technologies are properly and efficiently utilized, section 13(1) of the National Health Act, 2014, provides for the requirements of certificates of Standards. By this Certificate, all government or private health care institutions are mandated by law to obtain the Certificates of Standards before they can commence operation as health care institutions. Section 14 (1) of the National Health Act, 2014 , provides that the failure to do so, will qualify as an offence that is punishable by conviction of N500, 000, 00 (Five Hundred Thousand Naira) in case of corporate body. Where an individual is the offender, he will be liable to the N500, 000, 00 (Five Hundred Thousand Naira, or imprisonment for a period not exceeding 2 years or both.

National Health Insurance Authority Act, 2022, regulates telemedicine in the area of ensuring that information communication technology is deployed to enable citizens to have access to quality health care.Thus, in determining the function of the Authority, section 3(l) of the National Health Insurance Authority Act, 2022, provides that:

Provisions and maintenance of Information and Communication Technology (ICT) infrastructure and capability for the integration of data on health Schemes in Nigeria including the State Health Insurances schemes

By the above provision, this law authorizes the Authority to provided information communication technology (ICT) facilities to assist in promoting health care services. By reference to information communication technology, this law contemplates the use of telemedicine not only for the purpose of remote treatments, but for information dissemination in public health crises. Thus, by this provision, this law could be deemed to have contemplated regulating telemedicine in Nigeria.

Also, the National Data Protection Act, 2023, regulates telemedicine in Nigeria. This could be deduced from the main purpose of the Act, is to protect the privacy and rights of data subjects (section 1 one of the National Data Protection Act, 2023). This law further expound certain terms that are relevant to the concept of telemedicine as medico-legal concepts. These concepts are data subjects, data controller and data processor. A data subject is defined in section 65 of the National Data Protection Act, 2023 as an individual whose personal data relates to the subject of request or inquiry. He/she is the person whose personal data is the subject of engagement which is sought. Data controller means an individual, private entity, public commission, agency or any other body who, alone or jointly with others, determines the purposes and means of processing personal data. This definition implies that a data controller is a person or an entity that approves process of the information about an individual (Section 65 of the National Data Protection Act, 2023). It is the approving authority that allows certain information on an individual to be accessed. Data controller controls when information about a data subject can be accessed and when it cannot be accessed.

Data processor is an individual, private entity, public authority, or any other body, who processes personal data on behalf of or at the direction of a data controller or another data processor (Section 65 of the National Data Protection Act, 2023). This means that a data processor is the mechanism which processes the needed or requested information about an individual. It is the engine that searches and made information about an individual available and accessible to the person looking for it.

The data subjects by the definition of the Act could be equated with information about patients. Data controller could be equated with health technologies or equipment which is owned and managed by the Health institutions at their respective information technology

departments which is responsible for controlling the information relating to the patients. The data processor could qualify as one of the health technologies controlling access to the health of patients.

Therefore, where a hospital deploys its health technologies in telemedicine, it has the duty of ensuring that such information about their patients are not accessed by third parties without due authorization. Doing so will amount to a breach of medical confidentiality of the sensitive personal data of the patient. The phrase, “sensitive personal data’, is defined in section 65 of the National Data Protection Act, 2023, to mean the information relating to “genetic and biometric data, for the purpose of identifying a natural person as well as his health status.” In the course of telemedicine, the law enjoins the users of health technologies to ensure security of ‘sensitive personal data’ by health institutions (section 40 of the National Data Protection Act, 2023). That is why section 29 (2) (h-j) of the National Health Act, mandates health establishments to protect the health records including data of patients and clients from unauthorized access by third parties.Failure to protect the health data of patients is an offence punishable by imprisonment for a period not exceeding two years or by a fine of N250, 000, or both.

2.1. The Professional Rules regulating telemedicine in Nigeria

The health profession whose Rules of professional ethics will be examined here are medical doctors and medical laboratory scientists. The professional rules regulating telemedicine in Nigeria is the Code of Medical Ethics, 2008, and Rules for Professional Conduct for Medical Laboratory Scientist, Laboratory Technician and Assistant, 2018.

2.1.1. Code of Medical Ethics, 2008

The code of medical Ethics, 2008, is made pursuant to section 1 (2) (c) of the Medical and Dental Practitioners Act, which mandates the Medical and Dental Council to make a revised stament to regulate the conducts of its members. Thus, Rule 22 of the Code of Medical Ethics, 2008, made elaborate provision about telemedicine in the following words:

Telemedicine, a professional opportunity outcome of modern advances in computer and telecommunication technology, is steadily creeping into professional practice in Nigeria.

It is medicine requested and practised at distance, and it is particularly useful for patient care and management by general practitioners and specialists in accessing tele-support in their daily practices on the basis of requirements for specialist consultation in various specialties of medicine and dentistry.

It is of ethical significance for registered practitioners to continuously assess and avoid medico-legal pitfall in area such as confidentiality, professional competence, legal and registration status of the specialist being consulted, equipment reliability, sustainable continuity of patient management and timely referral of patient.

(A) Electronic processing

-Practitioners must make appropriate arrangements for the security of personal information when it is stored, sent or received by fax, computer, e-mail or other electronic means.

- Information must be kept secure before connecting to a network

-You should ensure that data sent cannot be intercepted or seen by anyone other than intended recipient

-Practitioners should however be aware that information sent by e-mail through the internet may be intercepted.

The above provision clearly reveals that the notion of telemedicine in medical practice in Nigeria is an emerging norm. It sees telemedicine as an avenue for facilitating distance treatments and other health care services by doctors to patients/clients via the use of technology. It regulates deployment of telemedicine in medical practice by obliging doctors to ensure that they discharge their duty in that regards with competence and diligence devoid of any professional pitfalls or malpractice.

Therefore, the Code of Medical Ethics, 2008, enjoins doctors to take due diligence before deploying telemedicine in their contractual engagements with patients. For this reason

doctors are expected to ensure adequate data security about patients 'details when it is stored, sent or received during telemedicine. As such the security of the patients' information must be certain before connecting to internet. It is also the contemplation of the law that they should take precautionary measures to ensure that patients' data cannot be intercepted or accessed by unauthorized persons (Rule 22 (a) Code of Medical Ethics, 2008 &Section 49 (1) of Data Protection Act, 2023).

2.1.2 Rules for Professional Conduct For Medical Laboratory Scientists, Laboratory Technicians and Assistants, 2018

The Rules for Professional Conduct For Medical Laboratory Scientists, Laboratory Technicians and Assistants, 2018 (hereinafter known as the "Rule") is a regulation that guides the conduct of Lab scientist and practitioners in Nigeria. This rule was made pursuant to the power of the board to make a periodic statement to regulate the conduct of its members in the discharge of their profession as spelt out in section 4(b) of Medical Scientists Laboratory Act, 2023. Telemedicine is actively practiced by medical and laboratory scientists in areas of blood sampling, sputum, skin, urine and other related health issues. In doing so, they are mandated by this Rule to ensure that in their duty to patients/clients they are to maintain strict confidentiality of the patients' information and his privacy under Rule 13(c-d). Failure to do so could constitute professional negligence and offence under Rule 22 of the Rules of professional Conduct, 2018. Under the same Rule, scientists are mandated to ensure that they maintain health equipment in their control. Failure to do so will constitute professional negligence under the Rule 16(1)(h of Rules of Professional Conduct, 2018.

3. Challenges

The challenges affecting the deployment of telemedicine in Nigeria can be categorized into non-legal and legal challenges. Each of these challenges is examined in the subsequent sub-headings.

3.1.1. Non Legal Challenges

The main non legal challenges affecting deployment of telemedicine include infrastructural deficits, institutional inefficiency, inadequate skilled manpower, poor budgeting, and corruptions. Infrastructural deficits are some of the major blows to the realization of the effective use of telemedicine. Nigerian terrains could be challenges of

access to internet and network. Poor power supply and energy crises are another infrastructural deficit that negates the effective use of telemedicine. This is coupled with bad road networks which could affect communications. These infrastructural deficits affect the use of telemedicine in Nigeria(Akpan , 2024).

Closely linked to the above are institutional challenges. Nigerian information and communication sector is bedeviled with a lot of challenges, including inability to fight cyber crime (Trusted Advisors, 2023). This deficiency also extends to the health institutions that are not enabled to ensure data security of patients/clients from third party interference or unauthorized access. Equally, these challenges can affect the quality of medical interaction between doctors and patients, especially, when the nature of telemedicine, involves video-conferencing.

Furthermore, there is the problem of inadequate health care personnel and experts using telemedicine. Nigerian health care practitioners have not been exposed to such aspect of medical practice. Research has found that there is lack of health care providers who specializes in telemedicine (Ajayi, Adetunji & Akande , 2015). Also, it shows there is apathy on parts of some health care providers to deploy telemedicine in health care profession.[1]

Deploying Telemedicine requires finances(Ukaoha & Eghokare,2012). This is because technology and internet facilities that will be deployed have to be purchased and installed. This of course, requires financial commitments. This problem is more visible in public sector where government's financial commitment is low. Thus, poor budgeting and lack of true commitment by the government is another blow to the deployment of telemedicine in Nigeria.

Digital illiteracy is another problem. Apart from the general problem of illiteracy, many Nigerians are not ICT literate (Ukaoha & Eghokare,2012). They will find it difficult to imbibe telemedicine. It will take time for them to acclimatize with the new normal. This negative trend is a set-back to the promotion of the 21st century health care delivery via telemedicine.

56.Ibid

Lastly, corruptions could be adduced as one of the reasons for lack of success of deployment of telemedicine in Nigeria(Akkuwebe & Erhabor, 2023).Corruption in Nigeria is the axis upon which all the other factors previously discussed revolve. Corruption in the health sector gave birth to infrastructural and institutional deficits. Corruption also is the reason behind poor budgeting and lack of commitment by government to ensure that telemedicine is not succeeding in Nigeria.

3.1.2. Legal Challenges

The major legal challenges have been the non-justiciability of matters relating to health care in Chapter Two of the 1999 Constitution. The provisions relating to state obligations are to ensure that health care institutions are properly equipped to guarantee the use of telemedicine to ensure access to health care. Ideally, public interest litigation or advocacy could be used to make the government facilitate health institutions to the full capacity of using telemedicine. The present legal regimes appear to oblige private health care institution to be more liable for any act connecting to telemedicine than the public health sector.

Another challenge is jurisdictional issue (Trusted Advisor,).This is because telemedicine operates in cyberspace. Thus, a situation of medical interaction could arise between a doctor and a patient who are from two different countries. The problem of jurisdiction could arise in a situation where there is an instance of medical negligence or breach of confidentiality by the health care provider. In such a situation there could be jurisdictional issues on which court can try the health care provider? Is it the court in the country of the health care provider who committed the negligent act or that of the victim? These are some of the challenges that are associated with telemedicine.

There is no specific legislation governing telemedicine in Nigeria (Dirisu , 2024). Most laws attempting to regulate telemedicine are from the realms of other laws such as telecommunications, digital and Information technology laws. Leaving telemedicine under the general regulation of other laws will create a problem of interpretation, especially, where there is an inter-statutory conflict between the general laws on telemedicine, the court may find it difficult to arrive at a just and binding decision. However, if a specific legislation is

made to regulate telemedicine, the court will adopt the principle of *genaralibus specialibus non derogante (Benjamin V Kalio, 2014).*

4. The Way Forward

Despite the challenges examined at the previous part of this paper, it is the position of these writers that there are positive prospects for effective use of telemedicine in Nigeria. One of these prospects is the need to facilitate the Nigerian health sector through modern health equipment and sound health care facilities. This will help in access to quality health care, especially during emergencies relating to public health of international concern. Internet services providers should up their games to ensure that customers' interests are protected. For example, studies have shown that deploying telemedicine during COVID 19 pandemic has been of great benefit in promoting access to health care (Adeyemi A., Ogunleye S. & Oyelakin O., 2024)

The need for accountability and good governance is very imperative in ensuring effective use of telemedicine in Nigeria. Government should be able to place priority on the welfare of its citizens, including access to quality health care. In doing these, corruption should be combated and the perpetrators should be dealt with lawfully. It is through transparent and responsible leadership that the Nigerian health sector can be well equipped with facilities that will enhance telemedicine. Government should be responsive and deliberate about making quality access to health care a reality. They should be able to make it a reality and not policy statements.

Public enlightenment about the deployment of telemedicine should be encouraged. This measure should apply to both literate and illiterate Nigerians. This will help to encourage the adaptation to telemedicine. The more enlightened and digitally literate people are, the more they are likely to adapt to telemedicine. This will facilitate easier access to health care on time.

Lastly, Nigerian government should adopt the concept of global health diplomacy to effectively utilize telemedicine. Global health diplomacy is essential for Nigeria in order to combat health public health crises (Godfree M., 2021). Thus, Nigeria should enter into bilateral agreement or treaty with the other countries that Nigerians patronized for medical

tourism. There is the need for inter-state collaboration and partnership with other foreign stakeholders. This law allows for inter-state collaboration where doctors in one European country can attend to his patient in another state.

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DEFECTIONS BY LAW MAKERS IN NIGERIA: IS LEGISLATING AGAINST IT THE PANACEA?

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Abstract

The practice of party defections where law makers switch political allegiance during their tenures have become prevalent in Nigeria raising concerns about the erosion of democratic mandates and voter trust. While party defections are neither peculiar to nor new in Nigeria's political landscape, the resulting constitutional and governance crisis it breeds underscores the urgent need for a tweaking of both the law and the political culture to ensure political stability and safeguarding of its nascent democracy. Employing a doctrinal research methodology, it examines the legal framework governing party defections in Nigeria, with a focus on the constitutional provisions and judicial interpretations of them with a view to exposing their effectiveness or otherwise in curbing the practice and interrogating whether anti- defection legislations alone is the panacea to this ugly trend. It concludes by recommending reforms to enhance democratic accountability, protect the integrity of elections, and rebuild public trust in the legislature.

Keywords: Party defections, Democratic process, Political parties, Voters, Legislators.

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1. Introduction

Nigerian's political journey began during the colonial era. The 1922 Clifford's Constitutional which introduced the Legislative Council that required four of the unofficial members to be elected necessitated the formation of political parties, the first of which was formed in 1923 named the Nigerian National Democratic party. It has been said that the political parties formed before the independence of Nigeria and those of the first, second and third Republics were patterned along regional and ethnic ideologies. (Daniel and Leke, 2024, pp 477-491) While the political parties in the current Fourth Republic in Nigeria cannot be strictly said to be along regional and ethnic lines, there are parties who had predominant presence only in particular geo political zones. The Alliance for Democracy was popular in the South West and the All Progressive Grand Alliance is predominant in the South East. Nigeria's return to civilian rule in 1999 ushering in the Fourth Republic brought hopes for democratic progress through a multiparty system, but persistent challenges have continued to obstruct the development of a truly effective democratic framework. (Onah & Azoro 2022, p 130). Nigeria's political terrain as a result of the multiparty system has been shaped by frequent changes in party allegiance, especially around election periods. These shifts often timed before or after elections, have become a regular feature of the political process. Rather than being unusual, defections have come to reflect a calculated move by politicians seeking to preserve influence, reposition themselves, or escape political decline. (Dappa, Enyioko and Henry, 2025, p 99)

Party defections are not peculiar to Nigeria or Africa. In India, defections are rife necessitating the Tenth Schedule to India's Constitution that contains anti defection provisions. *Articles 103* and *194* of Kenyan's Constitution 2010 made provisions to curtail unscrupulous party defections. Our West African neighbor Ghana also experiences party defections. The more developed democracies are not spared. There have been party defections in the United State of America during stable times of the three major two party systems in the country's history but more defections were experienced during periods of high ideological polarization. (Nokken and Poole, 2002, p 545) However, it is observed that party defections are rare in developed economies and usually they occur because of ideological differences. This work seeks to examine the practice of party defections by legislators in Nigeria, the applicable law regulating it, how the court has interpreted the law with a view to

determining its efficacy and whether or not there is need to steer the conversation away from seeing anti defection laws as a sole panacea for the practice and looking at the need for a paradigm shift in Nigeria's political culture. The work is divided into seven parts. The first part introduces the work, the second part deals with the conceptualization of keys words used in the work, the third part deals with reasons and rationale behind defections by legislators. Part four analyses the effect of defection by a law maker on democratic processes and values. Part five x-rays the laws regulating defections in Nigeria and undertakes a critique of the effectiveness of the constitutional provision on defection while Part six examines whether legislation alone is the panacea to the problem. Part seven concludes the work and makes recommendations.

2. Conceptualization of keys words

A political party is an organization of voters formed to influence the government's conduct and policies by nominating and electing candidate to public office. (Garner, 2004, p 1197)

A Political party is required to be registered and subject to regulations. The political parties also have their own internal law regulating the conduct of members. Political parties select members of the party to executive positions. In Nigeria, the executive head of a political party is the National chairman of the party.

In Nigeria's current democratic context, party defection has been described using various terms. It is commonly referred to as "party-switching", "carpet crossing", "party hopping" or "floor crossing". Regardless of the terminology adopted, the fundamental nature and implications of the practice remain unchanged. (Ulu and Okogbue 2024, p 171) More broadly, it involves abandoning a person, cause or some tie, as of allegiance or duty. (Ulu and Okogbue 2024, p 172) Defection has been defined by the Black's Law Dictionary (Garner, 2014) as an 'abandonment of allegiance, duty, the forsaking of a person or cause or desertion. The term 'political party defection' denotes the act of a member abandoning their current political party to align with another, often motivated by dissatisfaction or internal disagreements within their original party. The term 'political party defection' refers to the departure of a member from a political party to join another political party, typically because of discontent in the existing party. (Obani, 2020, p 162) It is defined as "…a shift of active political support or membership either by politicians, ordinary party members, or voters from

one political party to another in search of political power, public office or material gains without recourse to political ideology or principles.'' (Ibrahim, 2023, p 84) In this context, the term party defection is employed as a broad concept encompassing any shift in party affiliation, whether by a sitting public officeholder, a candidate seeking elective office, or an individual appointed under the auspices of a political party. (Daniel and Leke, 2024, p 479)

A party defection may be formal or informal. A formal defection typically occurs when a duly registered member of a political party officially withdraws their membership, often by submitting a resignation letter to the appropriate party or legislative authorities. An informal party defection is when lawmakers vote contrary to the official position or directive of their political party in the legislature. Considering the notoriety of party defections in Nigeria, it is only apposite that answers be provided to the question 'why party defections among law makers'? This will in the next part would examine the causes of party defections.

3. Causes of political defection in Nigeria

Several factors have been identified as drivers of political defection in Nigeria. They include:

3.1 Weak Political Institutions: In Nigeria, political parties are often not grounded in clear cut and consistent party ideologies. (Akpambang and Oniyinde 2020, p 13) Rather than promoting structured political beliefs they tend to operate as tools for personal or strategic political gain. This lack of ideological depth, combined with weak internal democratic practices such as limited transparency, lack of inclusiveness, and dominance by party elites frequently leads to dissatisfaction among members. (Akpambang and Oniyinde 2020, p 13) When individuals feel excluded or believe they are being denied fair political opportunities, they are more likely to switch allegiance to rival parties in search of better prospects. (Dappa et al, 2025, p 102) For many politicians, defection is driven less by ideological conviction and more by the pursuit of access to power, resources, or political relevance. (Reuben, 2025)

3.2 Personal Political Ambition and Opportunism: defection is commonly driven by individual ambition rather than loyalty to party ideology or collective interest. Politicians often change party affiliation primarily to enhance their prospects of securing nominations or electoral victories, especially when they believe a rival party offers a better platform for achieving their personal political goals. (Akpambang and Oniyinde, 2020, p 13) Some

politicians become deeply involved in politics and commit to particular parties primarily out of self-interest, gravitating toward platforms that best serve their personal ambitions. (Edet, 2017, p 382) Defections from one party to another are often justified by citing the declining fortunes of their former parties frequently attributed to leadership struggles, absence of internal democracy, and perceived favoritism in the allocation of political opportunities. (Aleyomi, 2013, p 114)

3.3 Electoral Realignment and Survival Strategy: In the lead-up to elections, party switching becomes a widespread tactic among Nigerian politicians. Many defects not because of a change in values, ideology or urgent national concerns, (Dappa et al, 2025, p 102) but to align themselves with parties that appear more likely to win and the increasing belief that aligning with the ruling party offers the most assured path to political survival, influence, and security. This pattern reveals that defection is often less about principle and more about preserving political relevance and securing electoral success. (Akpambang and Oniyinde, 2020, p 13)

3.4 Crisis and Factions within Political Parties: Internal conflicts such as leadership tussles and the breakdown of consensus-building processes frequently trigger defections within Nigerian political parties. (Akpambang and Oniyinde, 2020, p 13) In numerous instances, unresolved disputes have led to the emergence of factional party structures and the large-scale departure of members who are dissatisfied. (Akpambang and Oniyinde, 2020, p 13)

3.5 Internal Democracy within Political Parties: The absence of internal democracy within political parties remains a significant driver of defections in Nigeria. (Anikwe, Ogbuka and Udenta, 2025, p 28) Frequently, disenchanted politicians attribute their exit from parties to a lack of transparency, the imposition of candidates, or systemic marginalization in party affairs. Such internal deficiencies underscore the urgent need for reform and genuine democratization within political parties, as a means of curbing defections and fostering greater cohesion and stability in the political system. (Anikwe et al, 2025, p 28)

3.6 Influence of ‘godfatherism’ and Political Patronage: An informed observer of Nigerian politics would readily recognize the pervasive role of political godfathers who are wealthy or influential individuals who guide the political aspirations of their protégés, often

referred to as godsons. This guidance is typically based on the assumption that the godfather's influence will confer electoral advantage. To sustain this influence, the godfather must remain politically relevant, even if it means switching party allegiance. In most cases, such defections are collective, with the godfather, godson, and their loyal supporters migrating to a new political platform, often with little regard for the larger democratic or public interest. (Nweke-Love, Muhammad, Ake, Iseolorunkanmi and Oladapo, 2025, p 134)

Additionally, financially disadvantaged individuals in the political arena tend to operate from a position of vulnerability, making them more susceptible to manipulation. This economic dependency fuels patronage politics, where loyalty is exchanged for material or political gain. As a result, such individuals are easily lured into defecting, further entrenching a culture of political instability and self-interest over principled party loyalty. (Nweke-Love et al, 2025, p 134)

3.7 The Supremacy of Ruling Party Syndrome: The "winner-takes-all" ideology that underpins Nigeria's political system has transformed ruling parties into attractive platforms, much like sweet-smelling flowers that draw swarms of insects. In this metaphor, the ruling party represents the alluring flower, while the "insects" signify opportunistic and vulnerable politicians eager to benefit from the privileges associated with aligning themselves with those in power. (Nwoko and Nweke, 2023, p 26) In practice, ruling parties often exploit their control over state resources to entice political actors into their ranks, particularly at the national level. This dynamic is most evident following presidential elections, where the party of the elected president tends to dominate the composition of the National Assembly through a bandwagon effect. (Nwoko and Nweke, 2023, p 27) The prospect of political patronage and access to state benefits makes defection to the ruling party highly attractive, creating a legislative landscape shaped not by ideological conviction, but by strategic alignment with the executive arm of government. (Nwoko and Nweke, 2023, p 27)

4. Effects of defection by a law maker on democratic processes

Party defections in Nigeria have negatively impacted the legislative arm of government by fostering hostility among lawmakers. It breeds unhealthy rivalry amongst law makers which undermines constructive debates and objective lawmaking. It has sometimes resulted to situations where there are factions in a legislative house and each faction sits

differently to make laws. The resultant effect is that governance is hampered. Frequent self-serving defections also erode public trust, causing many Nigerians to view their representatives with cynicism, distrust and ridicule. Such defections appear to the electorates as a betrayal given that they elected such a defector on the platform of a political party whose "ideology" they believe in only for the elected to switch allegiance to another party. The trend shows that some politicians in Nigeria frequently switch party affiliations, not out of principle, but based on where the personal or political rewards appear greater. (Nwoko and Nweke, 2023, p 27) This behavior reflects a deeper crisis in political leadership, where self-preservation and short-term benefits override any genuine dedication to democratic values or public service. (Nwoko and Nweke, 2023, p 27) Party defections weaken democratic values in a country. It undermines Nigeria's multi-party system by exposing the lack of ideological commitment and strengthening personal interests over party principles. This ultimately hampers the consolidation of democracy in the country. (Badejo, Agunyai and Buraimo, 2016, p 11)

Frequent defections especially towards the ruling party drain opposition parties' strength, and fuel political instability. It provides an environment that is conducive for the ruling party to be unaccountable and hampers the development of a truly competitive democracy. (Badejo et al, 2016, p 11) This undermines the essence of democracy and weakens the role of opposition parties. A healthy democracy requires a vibrant opposition to keep the ruling party in check and ensure good governance. Defection by politicians also enable them switch party allegiance to evade responsibility for their actions, which in turn poses a serious threat to accountability in governance. This practice which disrupts the clear link between a politician's conduct and electoral consequences, making it increasingly difficult for the electorate to assess and hold public officials accountable for their performance, undermines transparency and weaken democratic oversight. (Osezua and Olumide, 2023, p 60)

It has been argued that the frequent incidence of political defection in Nigeria casts the country in a negative light within the international community. (Nweke-Love et al, 2025, p 136) The persistent movement of legislators across party lines raises concerns about the stability and maturity of Nigeria's democratic institutions. (Nweke-Love et al, 2025, p 136) This perception could, in turn, lead to skepticism from foreign investors and trade

partners, potentially hindering economic relations. It has also been argued that such political inconsistency may tarnish Nigeria's image on the global stage, portraying the nation as politically unstable and lacking seriousness in its democratic commitments. (Nweke-Love et al, 2025, p 136) This work agrees with the position that frequent defections have hindered the development and stability of political parties and has led to increased political fragmentation. While some parties may benefit temporarily from such defections, others risk collapse as key members leave. (Nweke-Love et al, 2025, p 136) This is because defections weaken parties' human and material resources, impairing their ability to perform vital democratic roles. The political parties get their financing from their members. Where there is mass defection from a political party it will certainly affect its funding ability. There is no gainsaying that funds are required for a vibrant party and more so for a formidable opposition capable of putting the ruling party in check.

5. The law regulating party defection by a law maker in Nigeria

The position of the law on the defection of a lawmaker in Nigeria is set out primarily in s*ections 68(1)(g) and 109(1)(g)* of the Constitution of the Federal Republic of Nigeria (CFRN) 1999. These provisions apply respectively to members of the National Assembly (Senate and House of Representatives) (*Section 68(1)(g),* CFRN, 1999) and members of State Houses of Assembly (*Section 109(1)(g),* CFRN, 1999)

Under both sections, the law mandates the forfeiture of a seat by a lawmaker who defects to another political party during the term for which they were elected. *Section 68 (1)(g)* provides:

68 (1) A member of the Senate or of the House of Representatives shall vacate his seat in the House of which he is a member if-

(g) being a person whose election to the House was sponsored by a political party, he becomes a member of another political party before the expiration of the period for which that House was elected...

Provided that:

His membership of the latter political party is not as a result of a division in the political party of which he was previously a member or of a merger of two or more political parties or factions by one of which he was previously sponsored.

Thus, a lawmaker does not lose their seat if the defection occurs due to a division in the original political party; or as a result of a merger between parties involving his original party. The term 'merger of two or more political parties' is clear and has not been subject to controversy or diverse judicial interpretations but the term "division" has been the subject of litigation and has received narrow interpretation by the courts. The Supreme Court in *Ifedayo Abegunde v. Ondo State House of Assembly* (2025) held that the division must be substantial, fundamental, and national in scope, not merely an internal conflict or leadership crisis. A minor dispute within a party or disagreement at the state level does not qualify as a division that justifies defection. The division must be "so deep and intractable" as to make the functioning of the party impracticable. It is not sufficient that there is a mere disagreement among members or between party factions. The division must be fundamental and affect the national structure of the party. (Ozuo, 2022, p 07) The court also held that "a division envisaged by the Constitution must be one that makes it impossible for the party to function as a cohesive unit''(Ozuo, 2022, p 07) The court stated further that:

> …the division envisaged by *section 68(1)(g)* of the CFRN refers to division in the party at the top or center and not division at the State or Local Government level as contended by the appellant. Since a political party is recognized as one corporate entity, division must be one that affects the entire structure of the political party at the center, that is, the national leadership of the party. A political party has to be looked at as a whole and not in piecemeal… it must be a serious division not the type of division relied upon by the appellant. The national officers of the Party must be involved.

In recent cases involving Governors, such as *PDP v. Umahi & Anor*, (2022) the court affirmed that the votes belong to the political party, not the candidate and the Governor and his deputy, having defected from the PDP to the APC, had vacated their offices although the appellate court stayed the order. In fact, the Court of Appeal (*Delta State House of Assembly & Anor v Democratic Peoples' Party & Ors*, (2014) in interpreting the section as it relates to members of the State House of Assembly supported this position when it held thus:

> My humble view is that for the person defecting to another party to be able to take advantage of the proviso in section *109(1)(g),* he must prove that the party

he is leaving has been divided into two or more. That is to say, the party must be so polarized as to have two chairmen, two or three different Boards of Trustees each claiming to be the authentic one and each still bearing the same party name. That is the type or extreme division envisaged by the Constitution.'

5. A critique of the effectiveness of the constitutional provisions on defections

It is rather astonishing to say that, political defection is not only legitimate but is provided for in the CFRN, albeit with exceptions. (*Section 68 and 109,* CFRN 1999) The legitimacy of political defections in Nigeria is derived from the right to freedom of association enshrined in the CFRN, particularly in *Section 40* which provides thus; "Every person shall be entitled to assembly freely and associate with other persons, and in particular he may form or belong to any political party, trade union or any association for the protection of his interests." Notwithstanding the provisions of the above section, it is imperative to note that the right to freedom of association is not absolute for law makers in Nigeria. There are circumstances where a politician will be deterred from defecting even though he has a right to freedom of association.

Under the Nigerian Constitution political party defection is controlled rather than prohibited. The first impression created by *section 68(1) or 109(1)* is one of prohibition. However, this is qualified by the requirement in the proviso. To further demonstrate the "control" as against prohibitive nature of the provision, the constitution makes vacation from office conditional on one hand on the decision of the President of the Senate or Speaker of the House of Representative based on evidence received by them. In essence, the Senate president or Speaker is the only person so authorised to bring to effect *Section 68(1) or 109 (1).* It can only be done (a) if evidence is adduced and (b) the House finds the evidence satisfactory. (*Section 109 (2),* CFRN, 1999)

It is submitted that *Section 109 (2)* only increased the ineffectiveness of *Section 109 (1).* It is the opinion of the writers that *sub section (2)* is totally unnecessary having made *section 109 (1)* a mandatory provision viz 'A member of a House of Assembly SHALL vacate his seat….' Going through the full gamut of this section, the vacation of a seat not covered under the proviso of *Section 68 or 109* should be automatic upon defection. The question now remains: what happens where after a defection, neither the Speaker, President

or a member of the House brings an evidence of a defection before the House? Invariably where the House turns a blind eye to a defection, a law maker guilty of a defection will nevertheless continue to hold his office as if he never defected. Other questions that beg for answers are where according to *sub Section 2,* the House does not find the evidence of defection satisfactorily enough to give effect to *Sections 68(1) or 109(1),* what is the resultant effect? What happens where the House is divided as to the satisfactoriness of such evidence? The CFRN does not give a definitive provision as to what amounts to a 'satisfactory evidence' and has left it to the subjective minds of the law makers who make up a Legislative House. Just like the term 'division' that is enough to excuse a defection, the interpretation of 'satisfactory' is ultimately left in the hands of the judiciary. The position of this work is that the proviso to both sections under review provides an escape route for politicians to defect since there are always divisions within the political parties. It provides the platform for many legislators who intends to defect to justify their actions on the ground of division within their political parties since the 1999 constitution is not definitive on the kind of division that could justify a defection. Even the type of division required is still a cause for debate. The reason, for instance, the late senator, Ifeanyi Ubah, gave for his defection to APC on the floor of the Senate in December 2024, puts this issue in bold relief. He had cited "irreconcilable differences" between him and the leadership of the Young Progressives Party (YPP). This excuse is incongruous with the provisions of the Constitution. Yet, he did not vacate his seat. Instead, he was received with open arms by the President of the Senate, Godswill Akpabio, who read his letter of defection. (Premium Times, 2025) It is unfortunate that law makers will continue to take advantage of the loopholes in *Section 68 (1) (g) and 109(1).* Although both sections provide that a legislator who defects to another party other than the one on which he was elected shall vacate his seat, the proviso in the sections and subsection 2 of both sections makes it near impossible for a legislator to vacate his seat after defecting to another party. The president of the Senate or the Speaker of the House of representative or House of Assembly who the law puts the responsibility on to give effect to the law is usually a member of the ruling party. The trajectory of the defections is usually from a party into the ruling party. So, expecting the President of the Senate, a member of the ruling party to declare the seat of a senator who has defected into his party is akin to passing a camel through the eye of a needle. But the reverse can easily be the case as the provision of the law would easily have been given effect if the defector was defecting from the ruling party. It is noted that the

aggrieved political parties can approach the courts seeking declarations to the effect that such defectors have lost their seats in the relevant legislative House. Hopefully the political parties would explore this window and the aftermath would certainly enrich the jurisprudence in this area. The Constitution only makes provision on defection of legislators and is silent on members of the executive branch of government. The provision appears discriminatory since Nigeria practices a presidential system of government. It is in parliamentary system of government, that defection law basically targets legislators to maintain party discipline and stability of government. This is due to the fact that members of the executive are drawn from the legislature as is practiced in the United Kingdom and defections can easily be used to destabilize the government. Perhaps the rationale behind limiting the anti -defection laws to the legislators in Nigeria lies in the fact that the relationship between the executives with political parties is different from the one the legislature has with the political parties and may not be subject to the same party discipline as their legislative counterparts. Also, the executive function with a level of independence from the legislature. An erring member of the executive can easily be disciplined by internal mechanism of the party or constitutional provisions like impeachment. Whether members of the executive arm of government in Nigeria say for example a governor can be disciplined internally by his political party is left to be seen. Recently, the governors of two states in South- South Nigeria defected to the ruling party taking with them a substantial number of members of the party they defected from including the legislature. Who will discipline such governors? What is the possibility of them being impeached? Assuming anti- defection laws applies to the executive, in the case of these governors who would assume their seats if it is declared vacant? Since there cannot be vacuum in power, what happens? The peculiarities of the executives perhaps necessitate their exception from the law regulating defections.

The effectiveness of the provisions against defections also depends on the judicial arm of government who has the responsibility of interpreting the provisions of the law in line with the spirit of the law. There is a mischief that the law was made to remedy. It is the view of this work that the mischief is the prevention of situations where defections are used to destabilize the legislature and scuttle democratic processes and values. The law therefore should be interpreted to achieve such purpose. The Nigerian courts have risen to the occasion and its decision in most cases has been in line with the purpose of the provisions.

6. Is legislation alone a panacea for the problem of indiscriminate defections by Nigerian legislators?

It is the posture of this work that anti defection laws alone are not the panacea for the challenge of legislators defecting from the party that sponsor them to a legislative house to another. In various countries of the world, anti- defection laws have not served as sufficient deterrent to would be defectors. Kenya has anti- defection laws. (*Articles 103* and *194* of Kenyan Constitution 2010 and *Section 14A (1) (c)* of Political Parties Act 2011 of Kenya) clearly prohibits cross carpeting from a political party to another within an election cycle. The courts in Kenya have also consistently upheld the spirits of the law in this regard (*Council of County Governors v the AG &Anor*, 2017) yet party defections are rife in Kenya. The anti- defection laws in Ghana (*Art 97 (1) (g)* of Ghana's Constitution, 1992) have not deterred cross carpeting nor has the laws in India (The Tenth Schedule to the Indian Constitution 1985) stop politicians from defecting. Here in Nigeria, it is not the lack of anti – defection laws that has allowed the practice to fester. Even where the loop holes in the law identified earlier are addressed, there is no 100 percent guarantee that the phenomenon will abate.

There is the need to look beyond legislation alone for a panacea to this challenge. Cross- carpeting based on ideological differences is rare in Nigeria. Even the reasons given for the defections in the cases discussed earlier in this work were not ideological differences but rather due to purported divisions within the party in questions. The question then is why are there so many divisions within our political parties? When is it that after every election cycle, massive defection from other parties into the ruling party is witnessed? Why is it that before any general elections defections becomes common place? Why is it that we see politicians' defect from one party to another in an election cycle and by the next election cycle they defect back to the party they earlier defected from? The answer lies in the kind of political culture we have as a nation. Politicians do not see going into public office as a call to service. Rather it is viewed as a means to enrich oneself. So, getting an elective position becomes a 'do or die' affair. It is submitted that if that political culture is addressed and politicians see election to public office as opportunity to serve, the desperation to get elective offices at all cost will be removed. There will be readiness and willingness to wait for another

opportunity. If the reason for seeking political office is what one can get, then not getting an elective position is not an option. Such will do anything to get into office.

But the bigger question is how do we change this political culture? The answer in our view lies in making public office very unattractive. A country with a political culture where persons in elective positions live larger than life with the majority of the citizenry living in abject poverty should not be surprised that politicians throw caution to the wind in search of election positions. The reason is glaring. Public office is too attractive. Many of the persons parading as politicians today will naturally fizzle out if the largess they are getting from public office is no longer there. It is only those who are interested in contributing to society that will remain when the perks of office are no longer there.

7. Conclusion

Political parties play a vital role in democratic societies by facilitating representation, fostering leadership, encouraging public participation, and promoting accountability. In many developing democracies, however, the frequent switching of allegiance by politicians has reduced the effectiveness of parties. This study argues that such political defections dilute party ideology and hinder the ability of parties to be held accountable to the electorate. (Daniel and O. Leke, 2024, p 489) The recurring pattern of party switching in Nigeria reflects a significant deficiency in democratic commitment and ideological conviction among the political elite. Many politicians prioritize personal ambition over public service, treating politics as a means for personal advancement rather than a platform for meaningful governance. (Onah and Azoro, 2022, p 140) This behavior undermines the credibility of opposition parties, marginalizes alternative viewpoints, and weakens the democratic process by limiting genuine political choice. Such practices erode the foundational values of democracy and reduce electoral competition to a mere struggle for power. To address this issue, the Nigerian Constitution includes anti-defection clauses in *Sections 68(1)(g)* and *109(1)(g),* aimed at restricting arbitrary defections and preserving the integrity of electoral mandates. (Onah and Azoro, 2022, p 140) Yet, the law is deficient as it also provides escape route for law makers who defect from being caught up with the law. The work concludes that it is very easy for a defector to get away with his actions under the existing laws. There is need to rejig the law to provide for the remedy to the mischief that it

seeks to cure. The work also found that legislating against indiscriminate party hopping alone cannot curb the menace. That it is needful to reshape the political culture of seeing public office as a means of self-enrichment rather than a call to serve. Consequently, the work makes the following recommendations:

First, there should be a review of *Sections 68 and 109* of the CFRN to clearly define 'division' that can justify a defection from a political party. The law should be so clear as to limit judicial interference as it relates to judicial interpretations which could be subject to the idiosyncrasies and frailties of the human mind. Second, the provision should be reviewed to include a provision to the effect that where the President of the Senate or Speaker of the House of Representatives or Speaker of a State House of Assembly as the case may be fails to give effect to the provisions of *Sections 68 (1)* and *109(1)* in line with subsection 2 of these sections, the 'aggrieved' political party can approach the court to compel such presiding officer to comply. Third, there should be a time frame within which the electoral commission should conduct bye-elections to fill legislative positions declared vacant. Fourth, enact a legislation that formally recognizes the electoral mandate as belonging to the political party, not the individual candidate. This will shift focus from personality-driven politics to party-based representation and strengthen party ideologies. There should also be continuous civic re-orientation and mandatory ideological training for aspirants and office holders. Lastly, public office should be made unattractive so that only persons who want to serve are drawn into the electoral process and eventually take up elective offices.

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THE PROTECTION OF FUNDAMENTAL CONSTITUTIONAL RIGHTS AND GUARANTEES THROUGH DIGITAL MEANS

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Abstract

This article examines the constitutional and human rights implications of digitalization in criminal procedure, arguing that the deployment of data-driven tools and artificial intelligence in criminal justice does not constitute a sphere of constitutional exceptionalism but demands the strict—and in some contexts heightened—application of established fundamental rights safeguards, including legality, proportionality, legal certainty, protection of the essential core of rights, and human dignity. Drawing on a four-scenario analytical framework derived from constitutional scholarship, the article assesses how digitalization simultaneously expands access to justice and generates novel forms of rights interference through surveillance, algorithmic profiling, and automated decision-making. It examines the doctrinal significance of "fourth-generation rights" as a normative category responding to technologically mediated threats to privacy, personal autonomy, and informational self-determination, and argues that these must be operationalised through concrete procedural safeguards in criminal proceedings. The article further addresses the structural dimension of the digital divide, contending that exclusion from digital infrastructure constitutes a rights-relevant inequality that triggers positive state obligations concerning accessibility, digital literacy, and inclusive system design. In this context, Regulation (EU) 2024/1689 (EU AI Act) is assessed as a normative reference point that translates constitutional requirements of proportionality, transparency, human oversight, and contestability into enforceable compliance standards for high-risk AI systems deployed in law enforcement and criminal justice. The article concludes that the legitimacy of digital criminal procedure depends on a rights-based equilibrium in which technological capability remains subordinate to constitutional justification and procedural fairness, and that digital

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inclusion must be treated as a constitutional precondition for the effective enjoyment of fundamental rights—not merely as a policy aspiration.

Keywords: digital criminal procedure, fourth-generation rights, EU Artificial Intelligence Act, digital divide, fundamental rights.

1. Introduction

As public authority increasingly operates through data-driven governance and automated decision-making, the constitutional foundation for interferences with fundamental rights becomes both more explicit and more contested. In this setting, any limitation of rights must rest on a clear constitutional and legal basis, satisfy the applicable conditions for restriction, and be accompanied by safeguards calibrated to the risks of digital processes. The restriction of rights is possible within the framework of the powers arising directly from the Constitution or through "restriction by law" provisions or contextual restrictions (Gören, 2007, p. 45); in any case, this process is subject to established constitutional thresholds such as legality, prohibition of excess and proportionality, protection of the essence (core), certainty, human dignity and the requirements of the democratic social order (Gören, 2007, p. 50). Every intervention to fundamental rights in digital processes must meet the same thresholds.

Efficiency, innovation and administrative convenience cannot, by themselves, justify a relaxation of constitutional guarantees in digitally mediated governance; if anything, they underscore the need for a clear legal basis, proportionate and reviewable limits, and effective safeguards. Digitalization therefore does not constitute a sphere of constitutional exceptionalism, but calls for the ordinary tests for restricting rights to be applied with at least the same—if not heightened—stringency. Within this framework, scholarship often organizes the constitutional position of fundamental rights in the digital age into a set of analytical scenarios that capture both rights-enhancing possibilities and rights-threatening dynamics, offering a structured lens for evaluating how technologies may reshape the scope, substance, and practical enforceability of those rights.

The systemic intersection of digital technology and constitutional jurisprudence does not yield a monolithic transformation of the legal order; rather, it activates a multi-dimensional paradigm shift wherein the operational baseline of fundamental rights is simultaneously expanded, recalibrated, and threatened along four distinct conceptual coordinates (Boyar & Kama Işık, 2019, p. 102) : (i) the strengthening of fundamental rights on the online basis and the expansion of the protection area, (ii) the introduction of new categories of rights in line with the risks and needs arising from technological innovations, (iii) the deepening and increasing influence of citizens' participation channels in governance

through digital tools, and (iv) and (iv) the exposure of fundamental rights to new and severe threats arising from pervasive surveillance, data exploitation, and algorithmic manipulation enabled by these very technologies. By framing the digital transition through these deeply interconnected conceptual coordinates rather than viewing it as a mere administrative evolution, the legal order can better comprehend that technology functions as an ambivalent constitutional catalyst, establishing a complex landscape where novel avenues for individual empowerment are permanently tethered to sophisticated mechanisms of automated state coercion.

The normative challenge posed by digital technologies is not merely technological but fundamentally constitutional, as smart environments and algorithmic architectures reconstitute the conditions under which rights are exercised and enforced, requiring legal frameworks to adapt their conceptual tools accordingly (Hildebrandt, 2017b, p. 5). Similarly, this analytical taxonomy is situated within the broader project of algorithmic regulation, which posits that the governance of digital systems must be attentive to their capacity to reshape social behaviour at scale through architectures of automated control (Yeung, 2018, pp. 509–510). Taken together, these perspectives indicate that digitalization is not inherently rights-enhancing or rights-reducing; it creates an ambivalent constitutional landscape in which new forms of empowerment may coincide with new forms of exposure. A sound constitutional assessment should therefore address both dimensions at once: the ways digital tools may broaden the assertion and exercise of rights, and the ways technology can generate novel interferences capable of diminishing the real and effective protection of fundamental rights.

This article employs a doctrinal and comparative methodology, drawing on constitutional theory, supranational jurisprudence—encompassing the case law of the European Court of Human Rights and the Court of Justice of the European Union—and an analysis of the EU regulatory framework, with a view to developing normative criteria for the rights-compatible governance of digital criminal procedure.

2. Reflections of Digitalization on Criminal Procedure, Fourth-Generation Rights

Within criminal procedure, the structural shifts brought by digital transformation serve not merely as descriptive typologies but as normative benchmarks for assessing how state enforcement recalibrates its relationship with the protection of fundamental rights.

Given the inherently coercive character of criminal proceedings, any digital measure implemented within this domain must be stringently evaluated against its compatibility with due process guarantees, the right to an effective remedy, and the systemic requirements of the rule of law. The systemic reflection of digitalization on the criminal procedure apparatus manifests through a taxonomy of four distinct scenarios, each presenting unique constitutional implications for the co-existence of state authority and individual liberty.

Under the first scenario, digitalization encourages individuals to participate more consciously and actively in democratic and judicial processes by expanding access to information and proliferating communication channels, thereby strengthening the freedom to seek justice through accelerated judicial mechanisms, electronic notification systems, online hearings, and digital archiving applications. The second scenario necessitates the recognition of new categories of rights and the definition of robust procedural safeguards, as rapid developments in communication and information technologies risk being utilized against the individual. In the third scenario, digitalization acts as a catalyst that expands the opportunities of citizens to participate in governance and increases public demand for transparency in judicial activities, reinforcing public accountability through electronic case monitoring systems and open data applications (Boyar & Kama Işık, 2019, pp. 102–104).

Conversely, the fourth scenario reveals that technological advancements simultaneously introduce severe systemic vulnerabilities, transforming digitalization into a serious threat to fundamental rights through pervasive state surveillance, algorithmic profiling, and data-driven risk analysis executed via individuals' digital traces. This threat is structurally embedded within the design of smart technologies that profile, predict, and pre-empt individual conduct without transparent legal justification (Hildebrandt, 2017a, p. 16; Hildebrandt, 2017b, p. 13) , establishing critical constitutional boundaries in contemporary jurisprudence regarding the strict necessity of proportionality reviews for secret surveillance legislation (*Szabó and Vissy v. Hungary, 2016*) and the human rights limitations imposed upon the systematic retention of biometric data (*S. and Marper v. the United Kingdom, 2008*). These supranational concerns regarding digital rights interferences have been authoritatively consolidated by the European Court of Human Rights Grand Chamber in *Big Brother Watch and Others v. the United Kingdom*, which determined that bulk interception programs and intelligence-sharing arrangements violated Articles 8 and 10 of the European Convention on Human Rights due to the absence of end-to-end safeguards governing the

selection of bearers, the deployment of selectors, and the subsequent examination of intercepted data (*Big Brother Watch and Others v. the United Kingdom [GC], 2021*). This landmark ruling underscores that mere formal lawfulness is inherently insufficient; the proportionality and controllability of the entire operational cycle—including data collection, storage, access, and deletion—must be secured, providing a foundational benchmark for modern criminal justice systems evolving into hybrid models that must balance technological efficiency with effective fundamental rights protections.

This judicial demand for end-to-end operational oversight closely interfaces with the broader intellectual emergence of fourth-generation rights, providing a concrete jurisprudential anchor for what would otherwise remain abstract constitutional concepts.

As a continuation of Karel Vasak's (1977) basic classification of generations of human rights, fourth-generation rights have emerged, particularly to counter the new threats to human dignity posed by rapid technological and scientific advancements. Unlike the first three generations, these rights form a distinct category in terms of both temporal evolution and normative quality, representing the contemporary boundary of human rights catalogues. As twentieth- and twenty-first-century advancements in biotechnology and information technologies create unprecedented risks to human nature and privacy, these rights have developed as a dedicated shield against scientific overreach (Boyar & Kama Işık, 2019, pp. 605–606). By cutting across doctrinal distinctions to push human rights beyond the traditional dichotomy of negative and positive liberties and into the realm of what the European Court of Human Rights (ECHR) terms "effective and practical" rights, this categorization reflects a broader scholarly recognition that technologically mediated power asymmetries require specialized normative responses beyond the scope of traditional first-, second-, and third-generation frameworks (Hildebrandt, 2017a, s. 16; Hildebrandt, 2017b, s. 4–5). While this conceptual framework functions as a macro-level constitutional response to technological overreach, its most acute and high-stakes application manifests within the coercive architecture of the penal state. In this domain, the abstract systemic risks of algorithmic governance materialize into concrete disruptions of established procedural balances, demanding a localized doctrinal adaptation.

A coherent conception of "fourth-generation rights" within digital criminal procedure must move beyond mere narratives of technological efficiency to directly confront the structural procedural fragilities that data-intensive governance and algorithmic inference

introduce for the equality of arms, confidentiality, and the effective capacity to challenge state action. While comparative constitutional scholarship exhibits a definitional schism regarding this category—with some authors limiting its scope to bioethical and genetic advancements (Andorno, 2009, p. 9) and others expanding it to encompass protections against algorithmic surveillance, data exploitation, and the erosion of informational privacy (see González Fuster, 2014) —this article adopts the broader formulation, treating these rights as dedicated legal responses to the power asymmetries generated by advanced digital technologies that traditional rights catalogues did not originally contemplate. From a constitutional standpoint, the operational value of this doctrinal bridge lies in establishing a disciplined procedural architecture where technological modernization functions as a vehicle for rights-realization rather than an instrument of discretionary state restraint. To ensure that human dignity remains practical and enforceable rather than merely declaratory in the digital age, these rights must be operationalized through specific procedural guarantees, including elevated standards for digital evidence collection, strict protections for informational self-determination, and clear avenues to contest automated risk assessments. This constitutional imperative finds a powerful, structurally analogous anchor in the context of forensic data processing; in *S. and Marper v. the United Kingdom*, the European Court of Human Rights Grand Chamber authoritatively held that the blanket, indiscriminate, and indefinite retention of biometric profiles of unconvicted individuals constituted a disproportionate interference with Article 8 ECHR, failing to reconcile with the principle of proportionality and the presumption of innocence (*S. and Marper v. the United Kingdom [GC], 2008*). Consequently, this landmark jurisprudential standard remains directly instructive for contemporary digital criminal procedure, dictating that the processing and tracking of digital trace evidence by law enforcement must be stringently governed by binding time limits, strict purpose limitations, and individualized necessity assessments, rather than administrative convenience or prophylactic risk management.

Ultimately, the integration of fourth-generation rights into the criminal procedure framework signifies a paradigm shift from a purely technological narrative of digital efficiency toward a normative commitment to constitutional resilience in the algorithmic age. By addressing the structural power asymmetries inherent in data-driven governance and mass surveillance, these rights function as a vital doctrinal bridge, transforming abstract concerns over technological overreach into enforceable procedural safeguards. As evidenced

by the rigorous proportionality and necessity standards established in supranational jurisprudence, the legitimacy of the modern penal state now depends on its ability to balance investigative efficacy with informational self-determination. Consequently, the evolution of criminal justice into a hybrid model must ensure that technological modernization serves to realize, rather than diminish, the protection of human dignity, providing a practical shield against the pervasive and pre-emptive reach of digital enforcement.

3. Digitalization, Vulnerability, and Remedies

In digitally mediated justice and governance, the "digital divide" represents not merely a technical deficit but a structural inequality that fundamentally shapes the real and effective exercise of fundamental rights, meaning that the constitutional legitimacy of digitalization turns on whether diverse groups can navigate these tools without enduring systemic disadvantages. This structural imperative directly interfaces with foundational legal philosophy; as Immanuel Kant posits, an action or systemic framework is inherently right only if its underlying maxim allows the freedom of choice of each individual to coexist with the freedom of everyone under a universal law (Kant, 1785/1998, s. 31). When transposed to the digitized penal state, an uncritical over-reliance on automated platforms that alienates or excludes vulnerable populations—who face disproportionate systemic risks due to intersecting factors such as age, disability, socioeconomic status, or migration background (World Health Organization, 2022)—directly violates this universal equilibrium of freedom by reproducing social divisions and institutional mistrust rather than expanding access to justice (Alrwishdi, 2021). Consequently, to counter the threats of algorithmic bias, automated exclusion, and digital disenfranchisement, contemporary constitutional frameworks must transition from a passive non-discrimination stance toward an affirmative model of positive state obligations. This paradigm shift mandates the direct embedding of explicit procedural safeguards and capacity-building mechanisms into the normative core of criminal and administrative procedure, thereby ensuring that marginalized subjects are provided with the essential, enforceable capabilities required to resist being structurally alienated or disproportionately penalized by a digitized justice apparatus (Erol, 2024, pp. 420–441).

In the contemporary legal order, the digital divide must be conceptualized not as a transient technical deficit of connectivity, but as a permanent matrix of structural exclusion that directly impairs the constitutional principles of equality before the law, non-

discrimination, and the effective accessibility of remedies. When the state increasingly mediates public power and adjudicative processes through digital interfaces, access to technology transforms into a determinative factor of constitutional capacity, dictating who can practically reach public authorities and protect their rights. Consequently, as documented in comparative literature, this systemic deprivation creates entrenched disadvantages that effectively bar marginalized groups from the substantive enjoyment of their constitutional entitlements (Sanders & Scanlon, 2021, p. 131, 136). To prevent digitization from rendering formally guaranteed rights entirely illusory for resource-deficient populations, states must move beyond passive non-interference and actively fulfill their positive human rights obligations. As articulated by the European Court of Human Rights under Article 8, these duties demand a dual-layered approach encompassing both substantive mechanisms—such as the deployment of affordable broadband infrastructure, universal service tools, and digital literacy initiatives—and procedural guarantees that secure meaningful participation and effective remedies for all citizens (*Söderman v. Sweden [GC], 2013, §§ 78–80*). In the digital context, this mandate dictates that states cannot merely refrain from conducting exclusionary digital practices; they must actively cultivate the operational conditions under which individuals can exercise digital access to justice without being structurally disadvantaged by connectivity gaps, device limitations, or deficits in digital literacy.

Crucially, when these structural barriers are effectively mitigated, digital access to justice yields significant temporal and financial economies for the public, lowering systemic hurdles and accelerating overall processing times (see ter Voert et al., 2022; Erol, 2024, p. 66). While the migration of traditional legal activities to digital platforms—such as online mediation and virtual consultation—legitimately reinforces the functional framework of online dispute resolution (Katsh et al., 2025, p. 80), a rigid constitutional boundary must be maintained between the procedural flexibility permitted in private law and the immutable due process guarantees required in criminal proceedings. The administrative temptation to prioritize speed and cost reduction must never corrode uncompromised technical protocols, transparent workflows, or core procedural protections. This demand for unyielding safeguards becomes exceptionally acute where digital justice intersects with invasive state investigative powers and algorithmic surveillance. As the European Court of Human Rights authoritatively established in *Benedik v. Slovenia*, the non-consensual disclosure of subscriber data linked to a dynamic IP address without prior judicial authorization constitutes

a severe violation of privacy under Article 8 ECHR (*Benedik v. Slovenia, 2018, §§ 118–123*). This landmark ruling serves as a foundational paradigm for modern digital procedure by recognizing that digital traces can piece together an intimate map of an individual's personal activities, habits, and associations. Crucially, it cements the rule that even routine digital-trace investigations must remain anchored within a strict framework of prior judicial oversight, robustly defeating any administrative rationale that treats virtual intrusions as categorically less invasive than their physical counterparts.

The normative task is twofold: to prevent digitalization from making access to justice dependent on connectivity, devices, or digital literacy, and to ensure that efficiency-oriented reforms remain constrained by constitutional requirements of due process, equality of arms, and effective defence. In criminal proceedings, any digitally enabled acceleration must therefore be matched by clear, verifiable legal and technical safeguards, so that digital infrastructures strengthen—rather than diminish—the practical and effective protection of fundamental rights.

4. Fundamental Rights in Artificial Intelligence and Digital Criminal Procedure: A Framework-Based Approach

While the preceding analysis delineates the socio-structural risks of the digital divide for vulnerable populations, the systemic integration of artificial intelligence into the coercive apparatus of the state requires a dedicated, framework-based approach to ensure that algorithmic decision-making remains stringently bound by fundamental procedural guarantees. As criminal justice bodies increasingly deploy data-driven tools, the use of artificial intelligence within procedural decision-making has become a central concern of contemporary constitutionalism. It calls for a rights-based framework that can carry established safeguards—legality, proportionality, and effective defence—into the design and operation of algorithmically assisted processes. In this context, the European Court of Human Rights has increasingly scrutinized the systemic deployment of automated tools under these exact vectors. For instance, in relation to legality and proportionality, the Court in *Glukhin v. Russia* underscored that highly intrusive algorithmic mechanisms, such as artificial intelligence-driven facial recognition, demand stringent statutory foreseeability and must satisfy an elevated standard of proportionality to prevent arbitrary state surveillance. In *Sigurdur Einarsson and Others v. Iceland)*, the European Court of Human Rights, while finding no violation of equality of arms arising from the prosecution's exclusive use of the

Clearwell eDiscovery system to electronically screen a large volume of digital evidence, nonetheless recognized that adequate procedural safeguards must accompany the prosecution's data-sifting process in digitally-intensive criminal cases (*Sigurdur Einarsson and Others v. Iceland, no. 39757/15, ECtHR 2019*).

The constitutional legitimacy of AI-assisted criminal procedure cannot be measured merely through the prisms of speed, administrative uniformity, or structural efficiency; instead, it fundamentally hinges upon whether these predictive and analytical tools operate within transparent, auditable, and robustly contestable procedural frameworks. This baseline requires maintaining substantive human responsibility for consequential decisions, establishing rigorous standards of explainability to enable adversarial challenge, and erecting institutional safeguards against the quiet entrenchment of automated risk-reasoning that threatens individual liberty, privacy, and the presumption of innocence. The constitutional dangers of algorithmic opacity within contemporary criminal justice are well-documented, characterized by a systemic "black box" problem where algorithms governing high-stakes outcomes—including pretrial risk ratings and evidentiary profiling—remain completely impenetrable to affected individuals, thereby eroding public accountability and the rule of law (Pasquale, 2020, p. 18). To counter this structural distortion, the paradigm of "technological due process" mandates that automated systems deployed in adjudicative settings must satisfy core constitutional guarantees, most notably by providing defendants with a meaningful, practical opportunity to confront and challenge adverse automated findings (Citron, 2008, p. 1249), ensuring that the legal evaluation of automated systems proceeds along strict coordinates of efficiency, accuracy, non-discrimination, and transparency (see Zarsky, 2016). Crucially, this theoretical demand for strict proportionality and procedural oversight is deeply anchored in established jurisprudence, where supranational courts have systematically invalidated indiscriminate data retention and unauthorized administrative access to electronic archives (*Digital Rights Ireland, 2014; Prokuratuur v. H.K., 2021; Tele2 Sverige, 2016*), while domestic tribunals have fiercely resisted absolute algorithmic deference to preserve the integrity of due process hearings (*State v. Loomis, 2016*). These cumulative constitutional tenets have found their most systematic regulatory expression within the risk-graduated compliance architecture of Regulation (EU) 2024/1689 (EU AI Act).

To operationalize this constitutional vision, a framework-based approach must reject the conception of artificial intelligence as a monolithic legal entity, opting instead for a granular taxonomy that addresses context-specific procedural risks across the entire criminal justice continuum. In contemporary practice, AI systems are increasingly deployed within vastly different operational settings, ranging from pretrial risk assessment instruments—such as COMPAS, the Public Safety Assessment (PSA), or the Harm Assessment Risk Tool (HART)—and automated facial recognition networks for suspect identification, to natural language processing tools applied to evidentiary communications data and automated sentencing advisory frameworks. Each of these distinct applications introduces localized vulnerabilities that threaten specific procedural guarantees: pretrial risk tools frequently compromise the presumption of innocence by anchoring detention decisions in historical, socio-economically biased statistical patterns; computer-vision and facial recognition systems present volatile demographic error rates that disproportionately impact marginalized groups; and automated sentencing aids risk hollowed-out judicial discretion by substituting individualized assessments of culpability with group-based statistical correlates. Consequently, a legally resilient framework cannot rely on generalized normative responses; it must be sufficiently itemized to govern the precise procedural fractures activated by each distinct technological intervention, ensuring that the unique technical parameters of every tool remain tightly subordinated to uncorrodible fair-trial standards.

In this context, it is emphasized that AI governance should be restructured on the basis of a human rights-oriented approach. In particular, the explicit recognition of equal access to the internet and digital technologies as a fundamental right, the introduction of mandatory and independent impact assessments for high-risk AI systems, the establishment of independent ombudsman mechanisms capable of examining individual complaints, and the integration of technical expertise into judicial processes are identified as key safeguards. In addition, it is argued that ethical design and data governance rules aimed at preventing algorithmic discrimination should be adopted, that digital literacy should be strengthened especially for vulnerable groups, and that digital inclusion indicators should be incorporated into national AI strategies. Ultimately, these recommendations are intended to promote a more inclusive, fair, and human rights-sensitive digital order, one that enables societies to benefit from the transformative potential of artificial intelligence without creating new forms of inequality and exclusion (Alakbarzade, 2025, p. 19).

5. The Regulatory Framework Under Regulation (EU) 2024/1689: Translating Constitutional Safeguards into Enforceable Design Standards

Regulation (EU) 2024/1689 of the European Parliament and of the Council laying down harmonised rules on artificial intelligence, commonly known as the EU AI Act, constitutes the most comprehensive legislative response to date to the constitutional challenges posed by artificial intelligence operating within criminal justice contexts. Its normative significance for digital criminal procedure lies in three interconnected structural contributions: the articulation of absolute prohibitions grounded in human dignity and non-manipulation; the construction of a risk-graduated compliance architecture for high-risk applications; and the institutionalization of transparency, human oversight, and contestability as enforceable ex-ante design requirements rather than merely aspirational ex-post principles. By shifting the burden of fundamental rights protection from retrospective judicial corrections to the primary stages of system design and deployment, the Regulation serves as a pioneering normative anchor for the digitized penal state. It insists that rights protection must be seamlessly built into the entire system lifecycle—encompassing design, deployment, and post-market monitoring—thereby operationalizing due process by securing traceability, enabling meaningful legal confrontation, and maintaining human responsibility where liberty interests and fair-trial guarantees are actively engaged.

The proportionality requirements that the EU AI Act now seeks to instantiate at the engineering stage of AI systems had already been substantially elaborated by the Court of Justice of the European Union within its foundational data retention jurisprudence. In *Digital Rights Ireland Ltd v. Minister for Communications*, the Court of Justice annulled Directive 2006/24/EC on communications data retention, finding that the measure entailed a wide-ranging, particularly serious interference with the fundamental rights to privacy and data protection without being strictly limited to what was necessary (*Digital Rights Ireland Ltd v. Minister for Communications, 2014*). The Court identified the absence of clear, precise, and accessible rules governing data access, the lack of objective limiting criteria, and the failure to mandate prior review by an independent judicial or administrative authority as fatal constitutional deficiencies. The technical infrastructure required by the EU AI Act for high-risk systems can be understood as a direct legislative response to precisely these structural absences, effectively transposing the strict judicial proportionality framework of Digital Rights Ireland into the domain of contemporary AI governance.

At the national level, the complex constitutional challenges posed by algorithmic risk assessments in criminal sentencing have been prominently litigated within comparative jurisprudence, most notably in *State v. Loomis*. In this case, the Wisconsin Supreme Court addressed whether a sentencing tribunal's consideration of a proprietary COMPAS risk-assessment instrument violated the defendant's constitutional due process guarantees (*State v. Loomis, 2016*). Although the court ultimately upheld the use of the tool as one localized element within a holistic sentencing assessment, it articulated profound anxieties regarding proprietary algorithmic opacity and the risk of discriminatory outcomes arising from group-based statistical correlates. Crucially, the court established a vital safeguard by dictating that algorithmic scores must never be determinative and that substantive human judicial responsibility for the final decision must remain entirely intact. This early judicial articulation of the limits of algorithmic deference precisely prefigures the mandatory human oversight frameworks subsequently codified under the Regulation, illustrating a clear doctrinal convergence between constitutional due process analysis and European regulatory standards.

In the scholarly debates immediately preceding the codification of the EU AI Act, the legal adequacy of a formalized "right to an explanation" as an effective remedy for algorithmic decision-making had been critically interrogated. Legal scholars argued that a nominal explanation right, absent accompanying positive duties of systemic design and independent oversight, is structurally incapable of providing meaningful protection to individuals adversely affected by automated outputs (Edwards & Veale, 2017, p 21-22, 39, 81). Furthermore, comparative research proposed that counterfactual explanations—statements delineating what specific data inputs would need to change for an alternative outcome to obtain—offer a far more practically useful and legally workable mechanism for accountability than retrospective, highly technical narratives of how a machine-learning model arrived at a specific output (Wachter et al., 2018 pp. 843-844, 878). Read in light of this critical scholarship, the transparency and logging requirements of the EU AI Act represent a deliberate attempt to institutionalize a minimum standard of explainability that moves beyond superficial disclosure to enable genuine adversarial contestation, thereby establishing a lex specialis of procedural fair-trial guarantees calibrated to AI-assisted criminal procedure.

The Regulation's most consequential provisions for digital criminal procedure are concentrated within Article 5, which establishes an itemized catalogue of AI practices deemed to pose an unacceptable risk and therefore prohibits them outright. Of particular relevance to the coercive mechanisms of law enforcement are the absolute prohibitions on AI systems that deploy subliminal or deliberately manipulative techniques to distort human behavior in ways that cause harm, and AI-enabled social scoring systems that lead to detrimental treatment in unrelated social contexts. More granularly, Article 5 explicitly prohibits the use of AI systems by law enforcement authorities to conduct predictive individual risk assessments based solely on profiling or personality traits rather than objectively verifiable facts, alongside real-time remote biometric identification systems in publicly accessible spaces, subject only to narrowly tailored and judicially controlled exceptions related to severe criminal offenses. These absolute prohibitions operationalize the fundamental principle that certain automated interferences with human autonomy are unconditionally excluded from the permissible scope of state action, directly resonating with the constitutional threshold of "essence protection" as a non-derogable constraint on digitized justice.

Beyond absolute prohibitions, the EU AI Act deploys a tiered risk architecture whose second tier—"high-risk AI systems"—is directly and systemically applicable to the daily operations of digital criminal procedure. Annex III to the Regulation explicitly designates as high-risk any AI systems intended to be used by competent law enforcement authorities as polygraphs, for evaluating the reliability of evidence in criminal proceedings, or for predicting the occurrence or reoccurrence of an actual or potential criminal offense (Regulation (EU) 2024/1689, Annex III). For such systems, Articles 9 through 15 impose a rigid, structured compliance regime requiring the continuous maintenance of a lifecycle risk management system and data governance practices that ensure training, validation, and testing datasets are sufficiently representative and free from discriminatory patterns. Furthermore, these provisions mandate the generation of technical documentation enabling regulatory conformity assessments, automatic logging capabilities to ensure operational traceability, and transparency obligations designed to enable human deployers to correctly interpret and question the system's analytical outputs.

From the specific perspective of criminal procedural guarantees, these high-risk technical mandates carry profound, direct constitutional implications that reshape the

traditional adversarial baseline. The logging and traceability obligations established under Articles 11 and 12 create an indispensable infrastructural precondition for the effective exercise of the right to challenge evidence and confront adverse information—an operational necessity that courts have long recognized in relation to conventional discovery and disclosure mechanisms. Concurrently, the human oversight obligations codified under Article 14 directly respond to the structural danger of "automation bias"—the documented psychological tendency of judicial decision-makers to defer uncritically to algorithmic outputs—by legally mandating that the human element in consequential decisions must remain active and substantive rather than merely nominal. Finally, the strict transparency requirements of Article 13 supply the essential informational basis without which the constitutional principle of the equality of arms in algorithmic-evidence scenarios simply cannot be maintained.

It must nonetheless be emphasized that the EU AI Act operates primarily as an ex-ante market compliance and product regulation instrument; it does not, by its own terms, supply individual procedural remedies within criminal proceedings or replace the independent constitutional and human rights obligations of member states. Its constitutional value is therefore best conceptualized as a normative floor—establishing minimum technical and design standards below which rights-incompatible AI tools cannot lawfully operate—rather than a ceiling or a substitute for particularized, case-by-case constitutional review of individual AI-assisted decisions by competent courts. Consequently, the complex interaction between the market-based requirements of the Act and the real-time judicial review of algorithmic evidence in criminal trials remains a critical frontier requiring further doctrinal development. Legal orders must urgently establish domestic procedural rules to determine how non-compliance with these mandatory logging and transparency obligations will affect the ultimate admissibility and probative weight of AI-generated outputs within the evidentiary matrix.

6. Conclusion

The constitutional issue confronting contemporary legal orders is no longer whether digitalization will reshape public power and criminal justice, but on what normative terms that transformation can remain consistent with a democratic society governed by the rule of law. This study demonstrates that the ongoing digital transition represents a profound paradigm shift that actively reconstitutes the boundaries of state coercion and individual

liberty. The core crisis identified herein lies at the complex intersection of fourth-generation rights, systemic digitalization, and the proliferation of the digital divide. When the state migrates its investigative and adjudicative mechanisms into algorithmically mediated environments, the resulting digital divide ceases to be a marginal deficit of technological access. Instead, it morphs into a profound domain of structural inequality that systematically disenfranchises vulnerable populations—marginalized by age, socioeconomic status, disability, or migration background—from the actual and effective enjoyment of due process guarantees. Because these technologies inherently possess the capacity to profile, predict, and pre-empt human conduct, they generate severe power asymmetries that traditional constitutional catalogues did not originally contemplate, making digital criminal procedure the primary normative site where these fourth-generation rights must be operationally codified.

The foregoing analysis of judicial developments at supranational and national levels confirms that the constitutional framework applicable to digital criminal procedure is neither nascent nor indeterminate. The European Court of Human Rights has consistently held that the retention and use of personal and biometric data by law enforcement authorities must comply with strict standards of proportionality, purpose limitation, and temporal necessity—standards that blanket data retention regimes have repeatedly failed to satisfy (*S. and Marper v. the United Kingdom, 2008; Benedik v. Slovenia, 2018*). The Court of Justice of the European Union has reinforced this position by annulling legislative instruments that enabled mass access to communications data without individualized justification, prior judicial oversight, or data minimization safeguards (*Digital Rights Ireland Ltd, 2014; Tele2 Sverige, 2016*). Taken cumulatively, this established body of case law supplies a robust set of judicially validated benchmarks demonstrating that fundamental rights are not collateral considerations of technological modernization, but binding constraints that condition the legitimacy of the digital penal state.

Crucially, this supranational oversight has expanded to directly confront automated investigative mechanisms and algorithmic data processing. In *Glukhin v. Russia,* the European Court of Human Rights established that highly intrusive, artificial intelligence-driven tools, such as automated facial recognition networks, demand explicit statutory foreseeability and an elevated threshold of strict proportionality to prevent arbitrary, systemic surveillance (*Glukhin v. Russia, 2023*). Similarly, regarding the right to an effective

defence and the principle of equality of arms under Article 6 ECHR, the Court's jurisprudence in *Sigurdur Einarsson and Others v. Iceland* validates that when state authorities employ digital databases and algorithmic queries to filter and construct criminal evidence, the defence must be granted equivalent technological facilities to cross-examine and challenge the underlying data and search methodologies effectively (*Sigurdur Einarsson and Others v. Iceland, 2019*). At the national level, courts confronting AI-assisted sentencing have recognized that algorithmic opacity and the risk of discriminatory outcomes require, at minimum, the preservation of substantive human responsibility for consequential decisions, thereby resisting absolute algorithmic deference to safeguard due process hearings (*State v. Loomis, 2016*).

The entry into force of Regulation (EU) 2024/1689 (EU AI Act) marks a significant—though not conclusive—step toward a constitutionally disciplined architecture for artificial intelligence within the criminal justice apparatus (Regulation (EU) 2024/1689). Its primary value for digital criminal procedure lies in its innovative regulatory strategy: it translates established ex-post judicial remedies into mandatory, ex-ante design and lifecycle compliance standards. The prohibition catalogue under Article 5 gives enforceable legal form to the principle that certain AI-enabled interferences with human autonomy—such as predictive risk assessments based solely on profiling or personality traits under Article 5(1)(d)—are absolutely impermissible, translating the constitutional concept of the "essential core" into operational constraints. Furthermore, its compliance framework for high-risk systems under Articles 9 through 15 operationalizes the procedural requirements—traceability, transparency, logging, and meaningful human oversight—that fair trial and effective defence guarantees have long demanded, but which the inherent opacity of "black-box" algorithmic systems has hitherto made exceptionally difficult to enforce.

However, because the EU AI Act operates primarily as an ex-ante market compliance and product regulation instrument, it cannot substitute for individualized judicial review, nor does it automatically supply individual procedural remedies within specific criminal trials. Formal compliance with its product requirements does not guarantee that outcomes will, in practice, be procedurally fair in concrete proceedings, nor does it replace the independent constitutional and ECHR obligations of member states. Consequently, the next frontier of legal scholarship and legislative action must focus on the domestic integration of these rules. States must urgently develop complementary procedural codes

governing the strict admissibility of AI-generated or algorithmically filtered evidence, establishing clear parameters for its adversarial examination and defining the precise legal consequences—including evidence exclusion—when law enforcement authorities fail to comply with mandatory logging and transparency obligations.

Furthermore, the state's positive obligations must be articulated with absolute clarity to transform digital inclusion into a constitutional precondition for the effective exercise of justice. Digital transformation should be structured to strengthen, rather than contract, the protection of rights, which necessitates a holistic strategy wherein states do not merely refrain from engaging in exclusionary digital practices, but actively cultivate digital literacy, secure affordable and accessible broadband infrastructure, and implement equitable accessibility. Only by treating digital access as an inherent element of the right to a fair trial and access to justice can the legal order ensure that the digitized state apparatus does not reproduce, amplify, or normalize existing patterns of social and procedural inequality. Tailored safeguards and effective remedies for technology-enabled interferences must be woven into public policy to secure meaningful participation for resource-deficient persons and vulnerable groups.

Ultimately, the long-term sustainability of digital criminal procedure depends on maintaining a strict, rights-based equilibrium where technological capability never replaces constitutional justification, and efficiency rationales never displace human dignity. A defensible path forward requires embedding transparency, reviewability, and human responsibility throughout the entire lifecycle of AI-supported decision-making, ensuring that the human element remains active and substantive rather than nominal. The full constitutional integration of artificial intelligence in criminal justice remains, in that sense, a project still in progress—one that demands unyielding judicial vigilance, legislative precision, and ongoing, critical scholarly engagement. Legal frameworks must continually adapt their conceptual tools to ensure that technology functions as a vehicle for rights-realization rather than a vector of unaccountable state coercion, preserving the delicate balance between effective enforcement and individual liberty in the digital age.

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JUSTICE FOR TUZLA YOUTH - IS IT POSSIBLE?

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Abstract

Achieving justice in post-conflict societies represents a fundamental and complex challenge, particularly when state mechanisms fail in their primary duty to protect citizens from systemic war crimes, thereby irrevocably rupturing the established social contract. This paper examines the theoretical and practical limitations of transitional justice in Bosnia and Herzegovina (BiH) following the 1992–1995 armed conflict. The central dilemma addresses whether "absolute justice" a utopian concept aiming to completely erase the trauma and consequences of mass atrocities—is achievable, or if victims and a fractured society must pursue a flawed but attainable alternative. Utilizing a critical qualitative approach, this research thoroughly analyzes the May 25, 1995, Tuzla Gate (Tuzlanska kapija) massacre, wherein an artillery shell fired by the Army of Republika Srpska (VRS) killed 71 young civilians and injured over 100. The analysis evaluates the efficacy of post-conflict judicial and social responses, specifically focusing on the trial of VRS commander Novak Đukić.

The findings clearly demonstrate that retributive criminal justice, while fundamentally necessary for establishing historical truth, is drastically insufficient on its own. The Đukić case illustrates severe systemic deficits: the limitation of legal prosecution to a single individual rather than the comprehensive chain of command, the evasion of penal execution due to the convicted perpetrator's flight to Serbia, and the persistent proliferation of aggressive revisionist campaigns that continuously deny judicially established facts. Furthermore, the manuscript identifies critical structural failures across other transitional justice pillars. State reparations remain deeply discriminatory and inherently fragmented along regional and ethnic lines, truth-seeking is paralyzed by segregated educational narratives, and institutional reforms have failed to dismantle the ethno-political divisions that originally fueled the conflict.

The study ultimately concludes that demanding "absolute justice"—which seeks to undo the irreversible damage of mass crimes—is an unattainable illusion that inevitably leads to cynicism and social paralysis. Instead, post-conflict societies must dedicate themselves to

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"possible justice," a multidimensional mosaic comprising rigorous criminal accountability, inclusive memorialization, equitable material compensation, and deep institutional restructuring designed to uproot ethno-nationalist ideologies. This synergy of imperfect mechanisms provides the only realistic framework to restore victim dignity, counteract historical denial, and guarantee the non-repetition of violence in deeply divided societies.

Keywords: transitional justice, Tuzla Gate, Bosnia and Herzegovina, justice, war crimes

1. Introduction

This work confronts one of the most difficult, thankless and demanding tasks, but one that is of essential value for any post-conflict society. This task encompasses the fundamental question: how to achieve justice for victims of war crimes who have already been exposed to the ultimate injustice? An injustice that they did not cause, nor could they have avoided. An injustice that, according to all the postulates of the social contract, was supposed to be prevented by the very society in which they joined with others, believing in its protective role. However, this question goes beyond individual destiny and inevitably spills over to the collective. It is not just about what to do with a society that has failed in its primary function, but also about a more fundamental dilemma: does society itself, as such, have a right to justice, or is it exclusively the individual right of its suffering members?

However, this analysis must go a step further, asking a difficult but necessary question: is absolute justice in a post-conflict society, wounded and imbued with trauma, even possible? And, if not, what is left for the victims and society itself? Should they give up on this quest and come to terms with the bitter reality, or is it necessary to search for new, perhaps imperfect, but achievable paths to justice? Is such a possibility, rather than absolute justice, still justice at all? Does it satisfy the essential needs of victims? These are questions that every post-conflict society, but unfortunately, also every individual victim, must ask themselves.

First, it is necessary to deconstruct the very concept of "justice" in this context. In stable, peaceful societies, justice is often identified with retributive justice - punishment for the perpetrator. Criminal prosecution and conviction represent the foundation, a clear act by which society confirms its moral norms and provides satisfaction to the victim by punishing the one who caused her harm. In post-conflict realities, this model, although necessary, proves to be drastically insufficient. What does it mean to convict one or a hundred perpetrators, when the crimes were systemic, when thousands of people participated in them, and the entire social and political infrastructure was harnessed to their perpetration? Here, criminal justice, no matter how important it is for establishing the facts and individual responsibility, cannot heal either the victim or society on its own.

This is where other, complementary forms of justice come into play. Restorative justice, for example, shifts the focus from punishing the offender to repairing the harm caused (Moffett, 2026). It asks: what do victims need to regain their dignity and sense of security?

The answers are complex and multi-layered. This can be material reparation for destroyed property, but also symbolic, such as a public and unequivocal recognition of the crime by the state or the community from which the perpetrators originate. It is right to the truth - to know the full extent of the crime, the locations of mass graves, the fate of the missing. It is the right to memory, to memorials that will not be the subject of political fights, but dignified places of commemoration. Without these elements, the court's judgment against a general or soldier remains an isolated legal act, not the beginning of social healing.

On the other hand, a society that has allowed or even organized mass crimes against part of its members is not just a passive observer; it itself is deeply diseased. Its fabric is torn apart, its trust destroyed, and its moral compass lost. Therefore, "justice for society" is not an abstract right, but an existential need for healing. This treatment implies deep institutional reforms (reform of the security and judicial sectors above all) to ensure that the mechanisms that made crime possible are dismantled. This implies a reform of the education system, so that future generations learn about the past based on facts, not nationalist myths. Justice for society, therefore, is its obligation to transform itself and become a safe home again for all its members, not just for those who belong to the "winning" or majority group.

In this complex relationship, the most painful conclusion is reached: absolute justice, in which every crime is punished, every victim is compensated and every injustice is corrected, remains an unattainable ideal. Faced with this truth, society has two choices: cynicism and giving up or accepting other ways of "possible justice". Giving up means surrendering to oblivion, denial and, ultimately, the risk of repeating the conflict. The search for "possible justice", on the other hand, represents the difficult path of building a mosaic. That mosaic consists of pieces - some court verdicts, reparations programs, establishment of truth commissions, public apologies, joint commemorations. Each piece is imperfect and insufficient on its own. But together, they can create an image that, although it does not erase the scars, provides recognition, builds the foundations for coexistence and sends the message that, although the crime happened, it is not and will not be forgotten or accepted as the norm. Such "possible justice" may not bring “perfect” peace to the victims, but it restores their dignity and acknowledges their suffering, while giving society a chance for moral renewal and a different future.

2. Justice for victims of war crimes

The definition of the term “justice” implies a dual meaning. On the one hand, it denotes a social state in which there is no discrimination against members of society, but they enjoy their rights unhindered and without restrictions (Britannica, 2026). On the other hand, if such a state happens to be violated, justice would imply a return to a state that eliminates the imbalance (injustice), so that society and its members continue to live with the elimination of such a compromising state.

When justice defined in this way is viewed through the prism of war crimes committed in Bosnia and Herzegovina from 1992-1995 and their victims, two lines of conclusion clearly emerge. First, society has clearly failed to create social conditions in which all its members will be equal and will not be discriminated against, and their rights violated. The reasons for this are known. The war that lasted in BiH for four years destroyed social mechanisms of protection, and the guiding ideas of war policies were discriminatory in themselves, resulting in genocide, war crimes, ethnic cleansing, and systematically prepared and committed crimes. The expected result of such crimes was precisely discriminatory, with the clear aim of achieving social goals based on discrimination against a certain part of society and its citizens.

Since the first is irrefutably established by almost 1,000 judgments of competent courts (War Crimes Trials Database), the second question is answered almost by itself in Bosnia and Herzegovina. The crimes that were committed in BiH during the past war did not only destroy the lives and bodies of people and their material possessions. They destroyed the social fabric that connected its members, as well as the institutions they created to make that society function on a just basis. Divided along several lines (ethnic, territorial), the post-war Bosnian society can hardly correct the injustices it created during the war. If for no other reason, it is due to the fact that the enemies of yesterday, even after the signing of the "peace agreement" in 1995, remained so, using all social resources to continue waging war far after the formal end of the war.

In all this, finding and giving justice to the victims of war crimes seems more like a utopia and an impossible social mission. A mission that may be a utopia for society, but for the victims it is a matter of vital importance.

The issue of justice for victims is therefore not one-dimensional and cannot be reduced solely to the judicial prosecution of perpetrators of war crimes. Although criminal

justice is a fundamental pillar, it is only one part of a much broader and more complex mechanism known as transitional justice. This concept includes four key elements: prosecution (criminal justice), reparations (compensation), the search for truth, and institutional reforms that guarantee that crimes will not be repeated. In the context of Bosnia and Herzegovina, each of these pillars faces enormous obstacles stemming from the very structure of post-Dayton Bosnian society (Mertus, 2007).

Although the International Criminal Tribunal for the former Yugoslavia (ICTY) and domestic courts have convicted a significant number of individuals, thus formally satisfying part of criminal justice, the actual social impact of these judgments remains limited (Clark, 2014). Instead of judgments being the basis for collective confrontation with the past, they have become a weapon in the continuation of the ethno-political conflict. Convicted war criminals are often celebrated as heroes in their communities, their murals decorate public areas, and political leaders openly deny the court facts, including the adjudged genocide. In this way, justice is annulled on a symbolic level, and the victims are traumatized and humiliated anew, because it turns out that their suffering was a legitimate act in the eyes of part of society (Nettelfield, 2010).

In the part that refers to reparations, i.e. compensation of victims, the full depth of systemic discrimination in BiH is shown. Bosnia and Herzegovina has never adopted a single state law on the rights of victims of war torture, so their status and rights depend on their place of residence (entity or canton) and often on their ethnicity. In this way, the state, which was supposed to correct the injustice, itself continues it, creating a hierarchy of victims where some are recognized and taken care of, while others remain invisible and disenfranchised. Material compensation is insufficient, and psychological and social support are fragmented and left to the enthusiasm of the non-governmental sector, instead of being part of the systemic care of the state and society.

The search for the truth turned into a "war of memories". Instead of one, based on facts and court rulings, three parallel and mutually exclusive "truths" coexist in Bosnia and Herzegovina, or rather, interpretations of the truth. Educational systems are ethnically segregated, and children are taught narratives in which "our" side is exclusively the victim and "theirs" exclusively the aggressor. There is no common day of remembrance, there are no common places of commemoration. The fight for the truth is thus reduced to a fight for memorials, for the right to remember, where erecting a monument to one group of victims is

often perceived by the other side as a provocation. Without consensus on the basic facts of the past, it is impossible to build trust and reconciliation (Šimić, 2024).

Finally, institutional reforms, which should ensure that crimes do not recur, have remained largely superficial. The security and justice sectors have been reformed, but the political system, based on the ethnic division of power and territory, remains a generator of the same tensions that led to the war. Institutions are weak and captured by ethno-national interests, unable to protect the rights of the individual over the collective.

Therefore, returning to a "state of equilibrium", as stated at the beginning, for Bosnia and Herzegovina is not only a question of correcting past injustices, but also of dismantling the system that keeps those injustices alive in the present. For victims, justice is not an abstract ideal; it is a concrete recognition of their suffering, punishment for the perpetrators, material security, the right to remember and, above all, the guarantee that their children will not suffer the same fate. If society and its political elites consider this mission a utopia, real and lasting peace will remain elusive.

3. Crime at the Tuzlanska kapija (Tuzla Gate)

The crime at the Tuzla Gate is one of the most serious war crimes committed in Bosnia and Herzegovina during the armed conflict from 1992 to 1995, and this sad epithet is not easy to bear in a country where thousands of war crimes were committed. A country where hundreds of people have been convicted of the most serious and heinous war crimes. In a country where all war crimes from the catalog of international law, including genocide, were committed. However, the war crime against the civilian population at the Tuzla Gate stands out for its bestiality, consequences and intent to kill and injure not only those who represent the present of a country but also its future. Although this crime killed 71 people and more than 100 were seriously or slightly wounded, it is not difficult to make an overview of the judicial practice for this crime because in Bosnia and Herzegovina, before all its courts, only one case against only one person was conducted and concluded (Case of the Court of BiH against the Đukić Novak, S1 1 K 015222 14 Krž.). In that case, the accused Đukić Novak was found guilty in a trial held before the court of Bosnia and Herzegovina and sentenced to 20 years in prison. He never served that sentence, because he fled to Serbia before he started serving his sentence.

To understand the full gravity of this crime, it is necessary to go back to May 25, 1995. That date, once celebrated as Youth Day in the former Yugoslavia, was just another day

of apparent respite in Tuzla in a city that had been declared a United Nations protected zone. This status gave citizens, especially young people, a false sense of security. Kapija, a small square in the city center, was a traditional gathering place, a promenade where love was born and friendships were made. On that warm spring evening, the square was filled with hundreds of young people, children and teenagers who, despite the war, were trying to live a semblance of normal life. At 8:55 p.m., that illusion of normality was shattered by a deafening explosion. A grenade fired from the position of the Army of Republika Srpska (VRS) on Mount Ozren, some 27 kilometers away, fell directly into the hearts of the gathered youth. The consequences were horrific. 71 people died on the spot and in the days that followed. The average age of those killed was barely 23, and the youngest victim, Sandro Kalesić, was only two and a half years old. More than a hundred wounded bear permanent physical and psychological scars. It was a targeted attack, not on a military target, but on the civilian population, on the future of a city, carried out with the clear intention of terrorizing and killing.

The investigation began immediately, but only years later, with the establishment of the Prosecutor's Office and the Court of Bosnia and Herzegovina, the conditions for the prosecution of this crime were created. The indictment was brought against Novak Đukić, at that time VRS general and commander of Tactical Group "Ozren", whose area of responsibility included the artillery positions from which the grenade was fired. The court proceedings that followed were thorough. The prosecution presented a series of evidence, including the testimonies of survivors, material evidence from the scene, and key expert reports from ballistics and military experts. Ballistics expert Berko Zečević, through a precise analysis of craters and tracks on the ground, was able to reconstruct the trajectory of the projectile and determine with almost absolute certainty that the 130 mm caliber shell was fired from the VRS position in the village of Panjik in Ozren. Military experts, analyzing the command structure of the VRS, unequivocally determined that the unit that fired the grenade was under the direct command of the accused Đukić, and that such an attack could not have been carried out without his order or approval.

But even though this case has been legally concluded, it is still necessary to emphasize some illogicalities.

First, related to the sentence to which the accused was sentenced. When observed at the first-instance verdict, it is evident that he was sentenced according to the provisions of

the BiH Criminal Code, article 173., to a long-term prison sentence of 25 years (the maximum sentence according to this law is 45 years in prison), which, although serious, qualifies this crime in the milder segment of the most serious crimes (the range is 21-45 years in prison). In the appeal procedure, however, the court applied the Criminal Code of the SFRY, article 142., and reduced the sentence to 20 years in prison. Although this appears to be a reduced sentence, it is the maximum sentence that could be imposed under that law. It remains an open question, although it is legally easily explainable, how the first-instance panel characterized this offense as "milder" and determined a punishment for it in the lower segment of punishment, while the appeals panel determined this punishment as the maximum and thus, indirectly, took the position that this offense is the most serious possible. This legal entanglement resulted from the decision of the European Court of Human Rights in the case " Maktouf and Damjanović v. Bosnia and Herzegovina", which established that the Court of Bosnia and Herzegovina cannot retroactively apply the Criminal Code of Bosnia and Herzegovina from 2003 for crimes committed during the war, but a milder law that was in force at the time of the commission must be applied - the Criminal Code of the SFRY (Applications no. 2312/08 and 34179/08). While the first-instance panel, judging by the length of the sentence (25 years), considered the crime at Kapija to be serious, but not the most serious, the second-instance panel, by imposing a maximum of 20 years under the old law, sent a message that within the framework of that law, the crime had reached the absolute peak of seriousness. Paradoxically, although the punishment was numerically reduced, its symbolic and legal qualification became more difficult.

Another issue worth considering is how everything remained on only one indictment against one person. Without going into the independence of the prosecutor's work, some things are not logical. Namely, during the trial of Novak Đukić, evidence was clearly presented (and accepted by the court) indicating that several persons participated in the commission of this criminal act. Moreover, they are clearly marked. However, even decades later, not a single other indictment was brought, reducing this crime to the work of one man, which absolutely does not correspond to the truth, nor to the facts already established in the court proceedings. Novak Đukić, as commander of the tactical group, was a key, but not the only, link in the chain of command. Below him were the commanders of the artillery units, and at the very end the artillery crew who physically loaded the cannon, aimed and fired the deadly grenade. Above him were his superiors in the First Krajina Corps of the VRS, up to

the Main Staff and the Supreme Commander. The shelling of Tuzla was not an isolated incident, but part of a wider military strategy of terrorizing the civilian population in UN protected zones, identical to the one used in Sarajevo, Bihać and other cities. Reducing responsibility to one man is a dangerous relativization that obscures the systemic nature of the crime and absolves all other participants in the chain of command, from those who issued the orders to those who unquestioningly executed them, but also those who did nothing to punish those who committed this crime. Why the Prosecutor's Office of Bosnia and Herzegovina never expanded the investigation remains a painful question for the families of victims and survivors.

The peak of the defeat of justice in this case happened after the verdict became final. Taking advantage of the procedural loophole created after the aforementioned decision of the European Court, Đukić was released pending a new decision on the amount of the sentence. He used that moment to flee to Serbia, whose citizenship he also holds. From that moment, the final judgment of the Court of Bosnia and Herzegovina becomes a dead letter. Serbia, citing the constitutional ban on extradition of its citizens, refuses to extradite him to Bosnia and Herzegovina. Although a protocol on cooperation in the prosecution of war crimes was signed between the two countries, which enables execution of the sentence, the Serbian judiciary initiated a process that turned into a farce. For years, the hearings have been postponed due to Đukić's "allegedly" bad health, and the whole process acts as a deliberate delay with the goal of the convict never serving his sentence.

In parallel with the obstruction of the execution of the sentence, an aggressive media and political campaign to deny the crime was launched from Serbia and Republika Srpska. So-called "expert teams" were established, which put forward alternative theories, claiming that the explosion at the Gate was caused by a planted bomb, not an artillery shell. These revisionist theses, although completely rejected and exposed as unfounded during the court proceedings, are continuously promoted in public space, causing additional pain to the survivors and the families of the victims. The goal of this campaign is not to establish the truth, but to create confusion, relativize judicially established facts and finally, political and moral amnesty of the perpetrators. The crime at the Tuzla Gate thus becomes a case study of the limits and defeats of transitional justice in a post-conflict society: from one verdict for the massacre of 71 people, to the unprocessed chain of command, unexecuted punishment and

finally, to the aggressive denial of the crime itself. Justice for the victims of the Gate was not only partially served - but it was also, ultimately, cheated.

4. Justice for the youth of Tuzla

After the end of every war, the victims cry out for justice. However, usually they themselves are not sure, except that they want it, what it would be. Regardless of that, the same question is asked every time: "Then how to achieve justice for the victims of such crimes", and it would be fair to extend that question to two more questions. The first would be: "Can it be realized as such", while the second would read: "Is it possible at all". Is it possible to find and achieve justice for those who were killed, tortured, abused and injured? Is it possible to achieve justice for those left behind? Is it possible to achieve justice for a society whose members are injured and thus indirectly damage the society itself, which as a result suffers as a whole? If so, who will achieve that justice and how? If not, then what?

To break all this down, it is necessary to analyze each of the possibilities.

First, the realization of absolute justice for individuals and society. Such a way of realizing justice would imply that it is possible to take measures and activities that can erase the consequences of the crime at the Tuzla Gate, and to grant all the victims (individuals and society) justice that will completely remove the injustice inflicted on them and return their lives to the level they were before the event that caused them this injustice. Bearing in mind the circumstances of the event in question and its consequences, it is obvious that such justice cannot be achieved. Neither on an individual nor on a collective level, it is possible to take measures that would bring the murdered back to life, nor is it possible to return body parts or souls to those who lost them in this act. It has been medically proven that it is impossible to erase their trauma. Likewise, it is not possible to erase the traumas of all those who were present at that event, as well as the parents, friends and the entire society to which the victims belonged. Finally, it is not possible to erase such an event or its consequences from individual or collective memory. Therefore, it is justified to conclude, unfortunately, that absolute justice for the victims of the Tuzla Gate (and all those who are individually or collectively) connected with this crime cannot be achieved.

When this is so, should victims and society give up the search for another, more imperfect (but possible) justice?

The answer to this question is a resounding no, they don't. Victims need to demand and receive justice for what happened to them, no matter how imperfect it may be. It

is worth analyzing what kind of justice is possible for them and society, drawing on (but not limited to) the available mechanisms of transitional justice (Barria & Roper, 2010).

Criminal justice, as the most dominant form of transitional justice mechanisms, is an indispensable and essential part of any post-conflict society. Its goal would be to conduct trials for committed crimes, determine the individual responsibility of the accused persons, determine the facts and qualify and call their actions by their right name. Sometimes, although exceptionally, these courts will also award some form of compensation for the victims. In the specific case of the Tuzla Gate victims, the value of this approach is indispensable. Although it does not have the possibility to remove the consequences of the act, the court in every society has the authority that no other body has, which is to make a final and binding decision regarding some event in life. In this sense, the court's decisions on responsibility for this crime, its legal (and human) qualification, and the irrefutably established facts about the event, represent the starting point for any conversation about justice for the victims.

The next point are the mechanisms that deal with telling the truth and the culture of remembrance. They aim to speak about established facts, but also to supplement them (without assuming the role of courts) with less strict forms (art, etc.), so that facts about events are transmitted in society and reach the widest number of its members. Lasting peace and mutual understanding and respect for yesterday's enemies cannot be built on lies and deception, but only on the truth (established facts), no matter how bitter and painful they may be for its members (Šimić, 2025). As a continuation of that process, commemorations and the marking of the place of suffering are logically imposed. In the specific case of the Tuzla Gate victims, it is necessary that the established facts reach the widest possible number of people to get to know them and witness the severity of that suffering. As people usually don't read court judgments in large numbers, these facts are easier to make available in any society through the media, documentaries, art or the education system (Šimić, 2025). In this way, people will be able to remember and build a future in which such unworthy acts will not be committed. And this will not be the case only on an individual basis. On the contrary, in this way, society itself will be able to participate in achieving justice for itself as a collectivity to which the individual victims belonged, and which undoubtedly suffered enormous loss and damage itself through the suffering of its members (Zupan, 2006).

The question of whether killing and violence cause any harm to people and their property is, of course, only a rhetorical question. The tragic events at the Tuzla Gate caused enormous damage, both on an individual and collective level. On an individual level, 71 lives were lost, but the consequences were not only for those people whose lives were lost. They were also for their loved ones. Parents, spouses, children. They were also for all those who knew them, but also for all members of society who cannot remain silent in the face of such injustice. And while life cannot be replaced, something can still be done. Those who were killed can be remembered. Their suffering can be commemorated. Monuments can be erected for them. Those left behind can and must be helped to continue their lives in the best possible way. Society too often speaks of justice as some abstract, disembodied creation, but for victims of crime it is very concrete and materialized. Those left behind by the murdered are traumatized. Spouses are left without loved ones. Children without parents. A society without its present and future. They all have specific needs, which are not met by sending one general to prison. This is something that the divided and often insensitive Bosnian society should always keep in mind when, if at all, it remembers the victims of war crimes and the consequences that these acts caused.

Finally, society should implement reforms that will remove from social reality those (people and politicians) who led to tragic events, and who, ironically in the fate of Bosnia and Herzegovina, decide in peace precisely about justice for the victims of war crimes, including those at the Tuzla Gate.

5. Conclusion

The analysis presented in this paper confronted one of the most difficult and painful questions facing any post-conflict society: how to achieve justice for the victims of war crimes in a world already defined by ultimate injustice? Starting from a philosophical dilemma, through a concrete analysis of the Bosnian context, and all the way to the case study of the Tuzla Gate massacre, one central, albeit deeply disturbing, conclusion crystallizes: absolute justice, the one that would completely cancel the crime and return the world to the state before it, is a tragic and unattainable illusion. Acknowledging this fact is not an invitation to cynicism or giving up. On the contrary, it is the necessary first step towards the only true and morally correct alternative – a dedicated, comprehensive and constant search for possible justice.

The text has consistently and argumentatively shown why the ideal of absolute justice is unattainable. No trial can bring back to life the 71 people killed at the Gate; no material compensation can erase the trauma of the survivors, restore lost limbs, or fill the void in the hearts of parents, children, and friends. The social contract, fundamentally broken now when the state failed to protect its citizens, cannot be retroactively "repaired." The injustice of mass crime creates a scar on the individual soul and the collective fabric of society that is indelible. Insisting on absolute justice is therefore not only unrealistic, but also dangerous, because it sets a bar that can never be reached, which inevitably leads to frustration, hopelessness, and ultimately, to giving up any search for responsibility.

It is at this point, faced with the painful truth of irreparability, that society finds itself at a crossroads. One path leads to nihilism, oblivion and denial - a path which, as the experience of Bosnia and Herzegovina shows, is only a continuation of war by other means and a sure recipe for future conflicts. The second path, the one that this paper advocates, is the path of accepting imperfection and building a "mosaic of possible justice". This mosaic is no less valuable; it is the only realistic and humane response to the evil committed. Its strength lies not in the perfection of individual parts, but in their synergy and comprehensiveness.

The first and indispensable part of that mosaic is criminal justice. Its role, as shown, goes beyond mere punishment. In societies poisoned by propaganda and the "War of memory", court verdicts, based on evidence and testimony, become the anchor of truth. The sentence against Novak Đukić for the crime at Tuzla Gate, although tragically not carried out, represents an undeniable fact that serves as a barrier against aggressive revisionism and false narratives. However, the case of Tuzla Gate also serves as a dark warning about the limits of this mechanism. Reducing the systemic crime to the responsibility of one man, not prosecuting the entire chain of command, and the eventual escape of the convicted and the obstruction of the execution of the sentence, show that even this basic pillar of justice can be fatally undermined by a lack of political will and regional cooperation.

Because of these limitations, the second part of the mosaic – the search for truth and the construction of a culture of remembrance – becomes crucial. Judicial truth, often technical and inaccessible to the public, must be translated into collective consciousness. This is achieved through the work of the media, documentaries, art, commemorations and, most importantly, through the education system. In Bosnia and Herzegovina, where three

conflicting “truths” coexist, this process is blocked. Instead of confronting the facts, there are segregated narratives that deepen mistrust. The fight for truth becomes a fight for memorials, and the memory of victims is instrumentalized for political purposes. Without a consensus on the basic facts of the past, genuine reconciliation remains elusive, and society remains trapped in cycles of mutual accusation.

The third, often most neglected, piece of the mosaic are reparations. It needs to be emphasized again that justice for victims is not an abstract ideal, but a very concrete and materialized need. While society is preoccupied with high politics and legal formulations, survivors and victims' families live with the real consequences: destroyed health, permanent trauma, and loss of breadwinner. The state's systemic care through material and symbolic compensation is not an act of mercy, but an acknowledgment of responsibility and the most direct way to restore dignity to victims. The fragmented and discriminatory approach to reparations in BiH, where victims' rights depend on place of residence and ethnicity, represents a second, post-war injustice that the state inflicts on those it has already failed once.

Finally, the fourth part of the mosaic turns its gaze towards the future – institutional reforms as a guarantee of non-repetition. Justice is not complete unless it is ensured that the mechanisms that made the crime possible are dismantled. This implies profound changes in the political, security and educational system. In Bosnia and Herzegovina, where the ethno-political structure resulting from the "peace agreement" maintains the tensions that led to the war, this segment of justice was almost completely absent. Institutions remain weak and trapped, unable to protect the individual, and society remains vulnerable to the same ideologies that once destroyed them.

Ultimately, the story of justice for victims in Bosnia and Herzegovina, perfectly summed up in the tragedy of the Tuzla Gate, is a story of a profound gap between what is necessary and what has been achieved. It is a story of an unfinished mission. The conclusion of this paper is therefore neither optimistic nor pessimistic, but realistic and a call to action. It argues that giving up on the search for justice is not an option. Instead, it is necessary to work with renewed energy and perseverance on building each individual piece of this complex mosaic. Every trial that is concluded, every fact that enters school textbooks, every victim support program, and every reform that strengthens the rule of law represents a small victory over the forces of destruction. This "possible justice", composed of thousands of such small

victories, may never bring final peace to the souls of the victims, but it is the only one that can offer hope to the living and give society a chance to morally renew itself and build a future worthy of the memory of those who are no longer there. It is a difficult, long, and often thankless path, but it is the only path that leads from the darkness of the past to the possibility of a shared future.

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THE MECHANISM OF LEGAL RESOLUTION OF ENVIRONMENTAL CONFLICTS IN THE BALKAN COUNTRIES

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Abstract

This article analyzes the current situation regarding environmental conflicts in the Balkan countries, based on the specifics of their development and the implementation of EU legislation norms. The study reveals the current state of environmental legal relations in the region. The authors outline the directions for resolving environmental conflicts, identify pathways, and enumerate the characteristics of legal regulation of environmental disputes. Special emphasis is placed on the harmonization of legislation and the development of national mechanisms for handling complaints and mediation.

Keywords: environmental conflict; environmental dispute; legal regulation; mediation.

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1. Introduction

Environmental conflicts in the Balkan countries represent a growing challenge at the intersection of ecological concerns, economic interests, and legal frameworks. This article addresses the following research question: what are the existing legal mechanisms for resolving environmental conflicts in the Balkan countries, and how effectively are they implemented within the context of EU accession and the Aarhus Convention framework?

The methodology of this study combines comparative legal analysis and doctrinal research. It examines national environmental legislation in six Western Balkan countries — Albania, Bosnia and Herzegovina, Kosovo, Montenegro, North Macedonia, and Serbia — alongside relevant EU directives and international conventions. The analysis draws on academic scholarship, institutional reports, and specific case examples to assess both the formal legal architecture and its practical implementation.

The critical state of the environment, along with the clash of economic and ecological interests, often exacerbates environmental issues, leading to social protests and conflicting interests, which do not always have a clear legal definition of "environmental conflicts." The six Western Balkan countries are actively incorporating key EU laws related to hydropower projects into their national legislation; however, specific systemic failures in compliance with EU environmental frameworks are observed, hindering effective protection of the region's rivers (Pravuljac & Smolak, 2024, p. 4).

Conducting research on the legal category of "environmental conflict" is crucial in contemporary legal science, as it ensures a uniform understanding of this phenomenon and allows for the development of a sustainable concept for resolving environmental conflicts. Instead of the term "environmental conflict," the EU more frequently uses the concepts of "environmental disputes" and "environmental crimes," and the resolution of these disputes occurs within the framework of national judicial systems and administrative procedures. This article examines examples of legislative regulation of conflicts in the Balkan countries concerning environmental information, public access to decision-making, and justice, along with certain elements of the economic-financial mechanism in environmental protection and natural resource management.

2. The Mechanism of Resolving Environmental Conflicts in the Balkan Countries

In the Balkan countries, especially those on the path to EU accession, national legislation is actively harmonized with European norms. The legislation of the Balkan countries is aligned with EU directives concerning environmental protection, including air and water quality standards, waste management, and biodiversity protection. This alignment is a key element of their integration into the European legal space. For example, the general provisions of Albanian legislation state that the system of national environmental legislation largely follows the structure for transposing the relevant sectoral EU directives concerning environmental components and factors. The Environmental Impact Assessment (EIA) procedure, as well as procedures under special laws, represent administrative approvals for environmental interventions with a similar legal characterization as environmental permits.

The EU aims to transform former socialist countries by encouraging them to establish fully-fledged democracies and consolidated market economies. Europeanization in domestic policies and institutions for the effective implementation of EU environmental legislation provides a powerful tool for shaping the pathway of political transformation (Fagan & Sircar, 2015, p. 2).

In Europe, various conceptual approaches to environmental issues exist. The concept of "environmental justice" is actively discussed in terms of the divide between the center and the periphery of the EU. Distributive, procedural, and corrective injustices are identified, whereby peripheral EU countries bear a greater environmental burden despite being less responsible for historical and contemporary environmental damage and having less influence on environmental decision-making (Petrić, 2019, p. 222). Petrić identifies three main types of injustice: distributive (unequal distribution of environmental benefits and burdens), procedural (unequal access to the environmental decision-making process), and corrective (insufficient or unjust mechanisms for remedying already inflicted harm) (Petrić, 2019, pp. 218–222).

The concept of "environmental democracy" has developed in Europe over the past three decades based on three pillars: free access to information about environmental issues and quality; participation in decision-making; and ensuring compliance with environmental legislation. These indicators are regarded as fundamental rights of citizens.

Europeanization impacts environmental governance in the Western Balkan countries, particularly in the context of limited statehood.

Despite the adoption of numerous legislative acts in the post-Yugoslav countries since 1991, there is a noticeable lack of participation from NGOs and the academic sector in the preparation, definition, and implementation of the legislative framework. This indicates potential gaps in the effective implementation and enforcement of environmental legislation (Vukadinovic, 2023, p. 4). Analysis shows that despite significant differences in the adoption of environmental legislation among the countries, some progress has been made. In Serbia, the national budget for environmental protection and climate actions was increased by 50% in 2022 compared to 2021; however, implementation and enforcement require further improvement, particularly through strengthening administrative capacities at both central and local levels (Vukadinovic, 2023, p. 5).

In EU member states, there is a diversity of national mechanisms for handling complaints and mediation in the environmental sphere. At the EU level, there is currently no common framework that clearly defines how national authorities should respond to complaints regarding EU environmental legislation. Relevant provisions in EU primary law are contained in Articles 191–193 of the Treaty on the Functioning of the European Union (TFEU), which define the EU's environmental policy, including the precautionary principle, the principle of prevention, and the "polluter pays" principle. Due to the complexity of environmental law and the frequent absence of directly and individually affected persons, special complaint procedures are necessary.

The Aarhus Convention (UNECE, 1998) holds particular significance in regulating environmental conflicts. The Convention recognizes three pillars that form the basis for preventing and resolving environmental conflicts: (1) Access to Information; (2) Public Participation in Decision-Making; and (3) Access to Justice in Environmental Matters. Article 1 obliges the Parties to ensure that every individual is granted the right of access to environmental information, public participation in decision-making, and access to legal remedies, with the aim of preserving an environment that supports human health and well-being. Article 9(3) requires that members of the public be able to initiate administrative and judicial proceedings against acts or omissions that infringe environmental regulations. Pursuant to Article 3(1), the Parties are required to adopt the necessary legislative measures

to establish a consistent and transparent system for the implementation of the Convention. Article 4(1) stipulates that public authorities must make environmental information available to any requester without an obligation to provide reasons.

In the EU, Regulation (EC) No. 1367/2006 (the Aarhus Regulation) is in effect, aligning EU law with the provisions of the Convention and establishing mechanisms for resolving disputes between citizens, organizations, and EU institutions regarding environmental issues. The monograph by Barritt (2020, p. 13) analyzes how access to justice in environmental matters is ensured in the Balkans — a region at the epicenter of extreme climate events — examining how well the Balkan countries comply with the requirements of Article 9 of the Aarhus Convention.

Epstein (2011) analyzes national laws and enforcement practices in Southeast European countries concerning access to justice in environmental matters, including administrative and judicial systems, the role of courts, procedural remedies, and conditions for judicial injunctions. The researcher details various procedural remedies available in these countries, such as the possibility of appealing administrative decisions, the right to file claims for damages, and the application of judicial injunctions. Epstein (2011, p. 18) notes that the effectiveness of these remedies may vary depending on national legal traditions and the level of implementation of the Aarhus Convention. Todorović & Caranta (2025, p. 10) suggest that one can speak of the Europeanization of access to justice in environmental matters, yet point to existing challenges and potential gaps in the effective implementation of the Aarhus Convention's provisions. The ClientEarth report (Pravuljac & Smolak, 2024) highlights that despite the existence of legislative provisions, their practical implementation often faces obstacles.

Key legal documents regulating the resolution of environmental conflicts include the Directive on the Protection of the Environment through Criminal Law (Directive 2008/99/EC, as amended in 2024), which expands the list of environmental crimes and increases penalties for offenses such as illegal logging, unauthorized waste disposal, and violations of chemical handling regulations. The EU is also actively promoting Alternative Dispute Resolution (ADR) methods, such as mediation, for settling disputes outside of court. Precautionary measures and arbitration are considered in cases of potentially serious environmental harm as protective measures; however, the standard six-month arbitration

procedure applies without provision for expedited proceedings to prevent imminent environmental harm (UNECE, n.d., p. 166).

The number of non-governmental organizations (NGOs) in the Balkan countries addressing environmental issues has significantly increased in recent years, leading to heightened awareness of environmental matters and intensified debates regarding the transition from fossil fuels to more sustainable and green energy sources (Vukadinovic, 2023, p. 4). In some countries, such as Bosnia and Herzegovina and North Macedonia, mechanisms exist for citizen participation in processes that affect the environment; however, their effectiveness may be limited by implementation challenges.

The Strategic Environmental Assessment (SEA) Directive requires an assessment of the likely significant environmental effects of plans and programs, as well as any reasonable alternatives. Prior to the adoption of a plan or program, the draft plan or program and the environmental report must be evaluated by environmental authorities, and the public — including those affected or having an interest in the decision-making processes, including relevant NGOs — must be provided with early and effective opportunities to express their opinions.

3. National Legal Frameworks in the Balkan Countries

An examination of national legislation in the Balkan countries reveals broadly similar frameworks for environmental protection, largely shaped by the EU accession process. The Republic of Serbia's Law on Environmental Protection (Article 1) establishes a comprehensive framework for environmental safeguarding, guaranteeing the human right to a healthy environment and balancing economic development with ecological imperatives. Article 2 delineates system components, including sustainable resource management, biodiversity preservation, and pollution prevention, mitigation, and remediation.

The Environmental Protection Law of the Federation of Bosnia and Herzegovina articulates in Article 1 its overarching regulatory purpose as the preservation, protection, restoration, and enhancement of the quality and capacity of the environment. Article 3 of the same law affirms the right to a healthy and ecologically sound environment as a constitutionally protected right, explicitly recognizing that every individual is entitled to live in an environment conducive to health and well-being, thereby imposing both individual and

collective obligations to safeguard and improve environmental quality for present and future generations.

Significant jurisprudential developments in Bosnia and Herzegovina illustrate the potential for effective adjudication of environmental disputes. A prominent example is the case initiated in Tuzla by the Aarhus Center and Eko Forum Tuzla concerning excessive air pollution, which resulted in the partial annulment of the environmental permit issued to the Tuzla Thermal Power Plant — constituting the first judicial instance in which a major energy facility was deprived of its permit due to exceeding legally permissible emission levels. This case represents an important precedent in the domestic enforcement of environmental law.

Article 5(31) of North Macedonia's Law on the Environment provides a statutory definition of "interested public" as the segment of the public that possesses or may reasonably be expected to possess an interest in environmental decision-making processes. This category encompasses environmental civil society organizations established for the purposes of environmental protection, as well as individuals who are likely to be directly or indirectly affected by the outcomes of such decisions. Article 4(1) further includes ensuring the provision of environmental information to the public and facilitating their participation in activities related to environmental protection.

The purpose of Albania's Law on Environmental Protection, as articulated in Article 1, is to secure a high level of environmental protection and conservation, to prevent and mitigate risks to human life and health, and to promote quality of life for present and future generations. Article 4 of the same law proclaims that the prevention and mitigation of environmental pollution and degradation constitute a national priority, imposing this obligation upon all residents of the Republic of Albania, state authorities, and all natural and legal persons conducting activities within its territory.

The principles of environmental protection under Bulgaria's Law on Environmental Protection include the priority of pollution prevention over subsequent damage remediation, public participation and transparency in decision-making, the "polluter pays" principle, and access to justice in environmental matters. The role of the public in resolving environmental disputes is further regulated through specific provisions. Article 10 of the Law on Environmental Protection of the Federation of Bosnia and Herzegovina stipulates that every person and organization must have adequate access to environmental information held by administrative authorities, including information on hazardous

substances and activities in their communities, and the opportunity for participation in the decision-making process.

At the national level, the economic-financial mechanisms for natural resource management and environmental protection are established through the "polluter pays" principle. Article 11 of the Law on Environmental Protection of the Federation of Bosnia and Herzegovina affirms that the polluter pays for the costs of supervision, pollution prevention, and compensation for damage caused. Article 12 of the Law on Environmental Protection of Albania confirms that a natural or legal person whose actions or omissions affect environmental pollution bears financial responsibility, covering the costs incurred as a result of damage, expenses for assessing environmental damage, and evaluating necessary measures, including rehabilitation costs.

The legislation of the Balkan countries also contains provisions concerning the management of specific natural resources and levels of environmental pollution. The Water Law of Albania transposes Directive 2000/60/EC of the European Parliament and Council, establishing a framework for Community action in the field of water policy. Article 5(11) of the Law on the Environment of North Macedonia declares that environmental pollution means emissions into the air, water, or soil that may harm environmental quality, human life and health, or emissions that may damage material property or degrade biological diversity. Article 5(3) of the Law on Environmental Protection of Albania introduces the concept of "Environmental Damage" as damage caused by loss of any environmental components, human interference in ecological relationships, and/or the natural course of their development.

4. An Example of the Resolution of an Environmental Dispute in Bosnia and Herzegovina

Balkan authors note that conflicts often arise due to ineffective law enforcement and corruption, and attempts to resolve them through court or public participation face resistance. A specific example is the "Grgić Case" in Croatia, in which environmental activist Vesna Grgić, the head of the organization "Green Squad" (Zeleni odred), was sued for defamation by the state-owned company "Croatian Forests" (Hrvatske šume) for reporting on forest destruction. Commenting on this situation, Dušica Radojčić, chair of the Croatian Parliamentary Committee for Environmental Protection, emphasized the unlawful nature of

such conflict "resolution": defamation lawsuits — known as SLAPP suits (Strategic Lawsuits Against Public Participation) — are employed by financially powerful entities to intimidate those fighting for their environment and silence those who speak out about corruption and destruction (Radojčić, 2025).

The disputes surrounding the construction of small hydropower plants on the Kasindolska River in East Sarajevo constitute a salient example of contemporary environmental conflicts in which administrative and judicial proceedings intersect with pressures on civic activism. Environmental activist Sara Tuševljak, acting in cooperation with the Aarhus Center, engaged in public advocacy and legal action that resulted in the annulment of environmental and construction permits for certain small hydropower projects on this watercourse.

Subsequently, civil proceedings for alleged defamation were initiated against her in connection with public statements in which she raised concerns about a possible link between the small hydropower developments and the worsening of flood events. These proceedings have been characterized by civil society organizations as a SLAPP — a retaliatory measure aimed at intimidating an activist for her involvement in a matter of clear public interest. The proceedings against Sara Tuševljak remain pending and are being monitored by international organizations dedicated to the protection of human rights defenders and environmental activists, underscoring broader implications for freedom of expression and public participation in environmental decision-making (Ofak & Turudić, 2025, p. 157).

5. Conclusion

This article has examined the legal mechanisms for resolving environmental conflicts in the Balkan countries, demonstrating that the existing legislative framework is theoretically sound but practically constrained. The analysis reveals three principal findings.

First, the Balkan countries have developed legislative frameworks broadly aligned with the Aarhus Convention and EU environmental acquis, providing formal tools for access to information, public participation, and access to justice. National laws in Serbia, Bosnia and Herzegovina, Albania, North Macedonia, and Bulgaria all enshrine the right to a healthy environment, the "polluter pays" principle, and mechanisms for public participation in environmental decision-making.

Second, the practical effectiveness of these mechanisms is severely undermined by poor transposition into national legislation, a lack of political and judicial will to apply laws against influential interests, and the strategic use of SLAPP suits to silence environmental activists, as illustrated by the cases from Croatia and Bosnia and Herzegovina. Conflict resolution frequently requires international intervention — from the Compliance Committee of the Aarhus Convention, UN Special Rapporteurs, and civil society organizations — rather than the smooth functioning of internal legal systems.

Third, reports from the European Commission indicate that, although Western Balkan countries demonstrate a relatively high level of formal compliance with EU legislation, they lack an effective institutional structure for implementation and enforcement (Vukadinovic, 2023, p. 4; Börzel & Fagan, 2015, p. 8). The EU accession process imposes the adoption of over 450 legislative acts as a condition for membership, a burden accompanied by limited resources in countries managing complex political and economic transformations.

The original contribution of this article lies in its comparative mapping of formal legal provisions across six Balkan jurisdictions and its demonstration of the gap between legislative commitment and enforcement reality. Future research should examine the role of civil society organizations and international bodies in bridging this implementation gap, as well as the potential for harmonized ADR mechanisms at the regional level. Strengthening administrative capacities, judicial independence, and anti-SLAPP protections emerges as the most pressing requirement for achieving effective environmental conflict resolution in the Western Balkans.

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