State as the ultimate risk manager through law[1]

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Abstract

The paper explores the implied constitutional principle of the state as a risk manager by means of law. Using economic theory, Law & Economics approaches and various constitutional principles (e.g., the social state), we argue that the state's role as a risk manager is essential to the social contract. The principle is clearly articulated in various regulatory functions of the state, as was stipulated already by David A. Moss. We build on this theory of state as a risk manager and connect it with constitutional legal principles and expanding theories of financial constitution. The concept of financial constitution is nowadays typically reflected in states' constitutional frameworks and structure, including intergenerational aspects, risk isolation and sharing across levels of public administration and with supranational entities. We also entertain the idea of risk management of hard-to-know risks or rather uncertainty management well into the future, such as those posed by AI, going beyond original Moss' ideas.

Methodology

This study employs a hybrid methodology that integrates doctrinal legal analysis with theoretical insights from Law and Economics. Crucially, it builds upon and seeks to extend David A. Moss's theory of the state as the ultimate risk manager, by examining how law itself serves as the primary normative and institutional instrument for operationalizing this essential governmental function. The overarching aim is to empirically and conceptually support the hypothesis that risk management constitutes a core, and often constitutive, function of law. The doctrinal part focuses on selected provisions from Slovak private and public law, including the Civil Code, Labour Code, Civil Dispute Procedure Code, and constitutional financial norms. These legal texts are analyzed to uncover how they allocate, mitigate, or redistribute risk, both ex ante and ex post. Counterfactual reasoning is used to assess the functional necessity of these rules. The analytical part draws from economic and legal theory, including the framework of Law and Economics and Moss's work on risk governance, to evaluate how legal norms shape incentives and distribute social costs. Legal rules are interpreted not only for their internal logic but also for their contribution to social resilience under conditions of uncertainty. Rather than generating original quantitative data, the study relies on qualitative analysis, interpretation of legal texts, and illustrative examples to demonstrate how law systematically operates as a risk governance mechanism.

Introduction

What is the essence of law, and what is its fundamental purpose in society? These foundational questions have resonated through legal scholarship for centuries. Historically, the discourse has focused on urgent dilemmas, most

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notably, the complex relationship between law and morality, and whether there is any inherent link between what is legally binding and what is morally right. Equally intense has been the inquiry into the sources of law and the grounds of its legitimacy.

The pursuit of answers to these questions led to the emergence and differentiation of various legal traditions from iusnaturalism, which seeks universal principles of justice, through legal positivism, emphasizing the formal sources of law, to legal realism, which focuses on the practical application of law and judicial decision-making. Yet alongside these ontological and epistemological debates, we must also pose another question, one no less important: What is the function of law in modern society?

While legal philosophers have primarily addressed the normative aspects of law, such as the nature of justice, the legitimacy of power, or the interpretation of legal texts, they have often operated on a level of abstraction, somewhat removed from concrete socio-economic realities. Economic relations, the production and distribution of resources, market interactions, and the allocation of wealth constitute an inseparable part of social life and are fundamental to ensuring social welfare and stability. The law does not merely regulate these relations, it actively shapes them: it structures markets, defines property rights, and allocates resources, opportunities, and indeed, risks. Neglecting this economic dimension in the analysis of the functions of law leads to an incomplete understanding of its actual reach and significance.

This methodological narrowing may have contributed to the fact that certain key functions of law, including its role as a tool of risk governance, have long remained overlooked or insufficiently theorized in traditional jurisprudence. Economic relations are a given and an indispensable component of any human society. They are not an optional add-on but the very framework within which everyday life unfolds, from the satisfaction of basic needs, through complex industrial processes, to global financial markets. Social organization, prosperity, and even survival itself is inextricably tied to how a society organizes the production, exchange, and consumption of goods and services.

Law, as a key regulatory system, cannot exist outside of this reality, on the contrary, it is deeply embedded within it. It defines the rules of the game for economic actors, influences the distribution of wealth and power, and shapes expectations that are essential for investment and long-term planning. In this part of the text we need to understand the basics of understanding law as a tool that is linked to economics, because from this statement we can further evaluate how important law is precisely for risk optimization.

Recognizing this profound interconnection between law and economic life is, however, merely the first step. To fully grasp law's societal role, particularly its capacity for enhancing welfare and stability, it is crucial to evaluate how it addresses the pervasive challenge of risk. It is precisely this often overlooked yet essential dimension that the present paper will explore. This paper argues that risk governance is not merely an incidental outcome or a niche policy area, but a fundamental and constitutive function of law itself. Building on the premise, notably explored by David A. Moss, that the modern state acts as an "ultimate risk manager," this study will contend that law serves as the primary normative and institutional instrument through which this vital state function is realized. Our aim is to explore how legal rules and institutions systematically identify, allocate, mitigate, and redistribute risks, thereby contributing to social order and economic development. The subsequent analysis will first delve into relevant theoretical frameworks, including Law and Economics, before proceeding to demonstrate this risk

governance function through an examination of various legal domains, ultimately aiming to offer a reconceptualized understanding of law's active role in a world defined by uncertainty.

1. Reorienting Legal Theory: From Normativism to Risk Governance through Law and Economics

On the question of law and economics, it is evident that the original theses of legal normativists, such as Hans Kelsen's doctrine of pure legal science, are today both outdated and untenable. Kelsen argued that law should be understood purely as a normative system, autonomous from social and economic relations. In his Pure Theory of Law, he explicitly excluded psychological, sociological, and economic elements from legal analysis, dismissing them as "impure," that is, unrelated to the essence of law. Law was to be conceived as a hierarchical structure of norms, whose internal logical coherence was independent of the actual functioning of society or the economy.

This methodological sterility, however rigorous, led legal science to distance itself from reality, from economic rationality and from the questions of costs, benefits, and motivations that real actors consider in legal decision-making. Kelsen's vision effectively enclosed legal theory in a normative greenhouse (Kelsen, 1949), detached from the actual reasons for the existence and operation of law.

A somewhat improved approach was offered by H. L. A. Hart, who incorporated elements of sociology and language into legal analysis. Law was no longer a system of norms suspended in abstraction, but a set of rules operating in concrete social conditions. Hart's emphasis on so-called secondary rules, rules of recognition, change, and adjudication, marked a step toward understanding the legal system as a dynamic structure. According to Hart, the rule of recognition constitutes a complex social fact rooted in the accepted practices of legal officials (particularly judges), and it provides the criteria of legal validity within a given system.

This foundation differs from Kelsen's transcendental and "presupposed" Grundnorm, as the existence of a rule of recognition is an empirical matter. Hart's account also diverges from theories that locate the foundation of law solely in the coercive power of a sovereign (as claimed, for example, by normativist František Weyr), because Hart sees the rule of recognition as a more intricate social phenomenon grounded in the internal point of view of legal officials, not merely in habitual obedience or coercion (Hart, 1961). Although Hart's primary question was "What is law?", his analysis also touches on the reasons for the existence of law and its functions (albeit, as he acknowledged, on a descriptive level). He argues that a legal system. understood as a union of primary and secondary rules, arises as a remedy to the deficiencies of simpler social orders: uncertainty, stasis, and inefficiency.

Furthermore, Hart posits that, given certain basic facts about human nature and the world, certain rules are necessary for survival as a fundamental human goal. In the Postscript, however, he concedes that it is "futile" to search for any more specific purpose that law as such might serve, beyond providing guides for human conduct and standards for the criticism of behavior. Scarcity of resources is one of the key empirical facts or "truisms", that Hart identifies as the foundation for the minimum content of natural law in any viable legal system. He asserts that because the resources necessary for human survival, such as food and shelter, are not unlimited (i.e. scarce), there arises a natural competition and potential for conflict (Hart, 1961).

This condition, in combination with other human characteristics such as limited altruism, necessitates the existence of certain basic rules. Specifically, Hart contends that resource scarcity inevitably leads to the need for some institution of property and rules enabling the transfer of resources, in order to ensure a minimum level of stability, predictability, and cooperation necessary for social survival. These rules, dictated by the very conditions of human existence and the world, constitute for Hart a rational core that must be present in every viable legal order (Hart, 1961).

The scarcity of resources represents an objective social fact that lies at the core of economic theory, yet it must not be overlooked in legal scholarship either. As Mankiw points out in his Principles of Microeconomics, the very word "economics" derives from the Greek term oikonomos, meaning "one who manages a household." This etymology is more than a linguistic curiosity, it reveals the fundamental structure of economic reasoning. Just as a household must constantly decide how to allocate limited resources, who performs which tasks, who receives which goods, and how to divide time and effort, so too must a society decide how to distribute labor, goods, and opportunities under conditions of scarcity (Mankiw, 2024).

Economic analysis therefore investigates not only individual decision-making (such as how much to work, what to consume, or how much to save), but also the coordination mechanisms that structure society - prices, markets, and the interaction of supply and demand. At the heart of economic thinking lies the question of how to efficiently manage scarce resources. And thus, if we wish to understand the law, which frames, enables, or constrains these decisions, we cannot avoid grappling with the economic dimension of legal norms (Mankiw, 2024).

As Richard A. Posner compellingly argues in his Economic Analysis of Law, law cannot be understood in isolation from economic structures and incentives, because its function is, at its core, economic. Legal rules influence the distribution of resources, shape the incentives of individuals and institutions, and serve as a mechanism for optimizing behavior under conditions of scarcity. According to Posner, the law is efficient when it maximizes social wealth, a principle known as wealth maximization and minimizes costs, whether those be transaction costs, litigation costs, or the costs associated with undesirable conduct. Posner thus maintains that the purpose of legal norms should be evaluated primarily in terms of whether they lead to an efficient distribution of risk and a reduction in social costs (Posner, 2014).

From this perspective, law functions as a mechanism for the allocation of risk among actors through private liability regimes, regulatory interventions, or the design of property rights. In his analysis of tort law, he explicitly states that the aim of legal rules is not moral satisfaction, but the effective prevention of accidents and the minimization of their consequences within the bounds of practical feasibility. In other words, the law should ensure that the burden of risk is placed where it can be borne or mitigated at the lowest cost. Legal regulation is therefore not merely a framework within which economic relations take place, it is an integral part of those relations.

As Posner emphasizes, legal rules should be evaluated and crafted through the lens of economic efficiency, because social welfare is the most universal and measurable objective that legal norms can pursue. In this sense, economic analysis is not only a methodological approach but also an epistemological correction to legal science, one that brings it back from abstract formalism to the real functions of law within society (Posner, 2014). We share Posner's claim that welfare is one of the ends that law seeks to achieve, for if law had no such end or function, it would lose its deeper meaning as such. Already Karl Marx, in his critique of political economy, described law and legal

relations (part of the "superstructure") as phenomena that are fundamentally determined by the material conditions of life, i.e. economic relations and the productive forces (the "base").

Although the two perspectives, Posner's (often normative and efficiency-oriented) and Marx's (historical-materialist and critical), are based on different assumptions and goals, both agree in emphasizing the fundamental interconnectedness of law with the economic structure of society. For the purposes of our analysis, however, we assess this relationship between law and economics as mutual and dynamic, not unilaterally deterministic, as a rigid interpretation of Marxist base-superstructure theory might suggest. Law not only reflects existing economic relations and power structures, but also actively shapes, stabilizes or transforms them.

Having answered the question of the relationship between law and economics, we need to say what the purpose of law in the environment of economic relations is. In Law and economics, we are faced with the question of how best to allocate resources, and we are also concerned with issues such as transaction costs and efficiency. It is the analysis of transaction costs that has become crucial thanks to the groundbreaking work of Ronald Coase, in particular his article 'The Problem of Social Cost'.

Coase pointed out a fundamental point: in a theoretical world without transaction costs, the initial allocation of legal claims (e.g., who is responsible for damage caused by an externality such as pollution) would have no impact on the ultimate efficiency of resource allocation. Indeed, parties would always be able to agree, through seamless bargaining, on a solution that maximizes the total value of production, regardless of how the law initially allocated rights or responsibilities. In the real world, however, transaction costs - the costs associated with finding partners, negotiating, contracting, and enforcing contracts - exist and are often significant. And it is here that Coase (and subsequently the entire L&E movement) sees the key purpose of law (Coase, 1960).

If transaction costs are too high to allow efficient private bargaining, then the legal system should set the rules (especially property rights and liability rules) to mimic as closely as possible the outcome that would be achieved in the market without transaction costs. In other words, the purpose of law is to allocate rights and responsibilities to the party that values them most, or to the party that can most cheaply avoid harm (the so-called "least cost avoider," although this term is more fully developed by Calabresi).

The law should be designed to minimize obstacles to efficient transactions, and, where those obstacles are insurmountable, to allocate entitlements in a way that leads to the most efficient use of resources. Coase also emphasizes the reciprocal nature of harm; the problem is not just that A harms B, but that preventing harm to B may mean harm to A. The purpose of law is thus to decide which harm is "more serious" and how to set the rules for the optimal outcome from a society-wide perspective (Coase, 1960).

A significant criticism of the Law & Economics debates is their primary focus on Common Law countries, a criticism acknowledged by Posner, who was of the view that the Anglo-American legal system was the most ideal for the application of this analysis. We disagree with this and will attempt to explain in what sphere Law & Economics is particularly represented in the continental legal system, and that is through risk management. Let us try to explain this theory with a practical example, so we will use a case that is well known in American universities

and is considered as a prime example. It is the court case of Boomer v. Atlantic Cement Co. (a 1970 decision of the New York Court of Appeals).[2]

In this case, a group of property owners (the plaintiffs, including Boomer) sued a large cement plant (the defendant was Atlantic Cement) for damages to their property caused by air pollution (dust, smoke) and vibrations from the plant's operations. The lower court (and later the appellate court) found that the cement plant's operations caused nuisance (immissions, nuisance) and damage to the plaintiffs' property. The plaintiffs sought not only damages, but also injunctive relief, which is an injunction to stop the cement plant's nuisance-causing activities. The court was faced with a dilemma. On the one hand, it upheld the existence of the nuisance and the plaintiffs' damages. Under long-established New York case law (citing the Whalen case), if the nuisance causes substantial harm, the court should issue an injunction, regardless of the so-called "balancing of equities" or balancing of economic consequences to both parties.

However, application of this traditional rule would have meant the immediate closure of a large cement plant with a huge investment (over $45 million at the time) and the loss of hundreds of jobs, while the total damage to the plaintiffs' property was quantified as relatively small (approximately $185,000 in permanent damages). The court, led by Judge Bergan, decided to depart from the traditional rule and not issue the injunction unconditionally. Instead, it chose an innovative solution: it issued an injunction, but that injunction would be lifted if the defendant (the cement plant) paid the plaintiffs permanent damages for all past and future injuries caused by the plant's operation.

In so ruling, the court essentially allowed the cement plant to continue operating, but at the cost of internalizing the costs it was inflicting on its neighbors through its externality. The court argued that this solution was fair to the litigants (the plaintiffs were fully compensated) and also avoided disproportionate economic losses associated with the closure of the plant. It also emphasized that the technical solution to complete dust removal was not economically or technically feasible in the short term at the time.

The case of Boomer v. Atlantic Cement Co. serves as a paradigmatic example of the application of Law and Economics principles to the resolution of conflicts arising from externalities and the allocation of resources. At the core of the dispute was a negative externality: pollution and ground vibrations caused by the cement plant, which inflicted harm upon neighboring property owners. Under traditional New York nuisance law, the appropriate remedy for a continuing and substantial nuisance would have been a judicial injunction—effectively enforcing the plaintiff's rights through a property rule. However, the court explicitly considered the economic inefficiency of this remedy, emphasizing the stark disparity between the relatively modest harm sustained by the plaintiffs (approximately $185,000 in permanent damages) and the substantial economic value of the defendant's operations (an investment exceeding $45 million and associated employment benefits).

Enforcing a strict property rule in this context would have led to the cessation of a high-value economic activity due to a comparatively minor harm. This is where the insights of Coasean analysis and the role of transaction costs become salient. While, in theory, the parties could reach a private agreement e.g., the plaintiffs accepting compensation or the defendant investing in mitigation technologies, the practical reality of coordinating

[2] Decision Oscar H. Boomer et al. v. Atlantic Cement Company, Inc., available at: https://www.nycourts.gov/reporter/archives/boomer_atlantic.htm

negotiations between a single industrial actor and numerous individual property owners would entail prohibitively high transaction costs. Given the unlikelihood of efficient private bargaining, the court's decision to award damages instead of an injunction effectively shaped the legal entitlement and thus had a decisive impact on resource allocation.

A significant criticism of the Law & Economics debates is their primary focus on Common Law countries, a criticism acknowledged by Posner, who was of the view that the Anglo-American legal system was the most ideal for the application of this analysis. We disagree with this and will attempt to explain in what sphere Law & Economics is particularly represented in the continental legal system, and that is through risk management.

2. Risk, Uncertainty, and Legal Order: The State and Law as Risk Managers

Risk constitutes a central category in economic theory, the conceptual foundations of which were significantly shaped by Frank H. Knight in his seminal work Risk, Uncertainty, and Profit. Knight introduced a fundamental distinction between risk and uncertainty, a distinction that remains essential for understanding economic decision-making and the nature of entrepreneurial profit. According to Knight, risk pertains to situations where the outcome of a future event is uncertain, yet the probabilities of various possible outcomes are either known or can be objectively quantified and measured. These are cases that can be grouped into homogeneous classes, and based on enough observations, the probability distribution of outcomes can be determined (Knight, 1921).

A typical example involves insurable risks, such as fire or personal injury, where insurance companies are able to set premiums on the basis of extensive data. Knight argues that such measurable risks can, in essence, be eliminated or transformed into fixed costs through risk consolidation, for example, via insurance mechanisms or the operational scale of large enterprises. For this reason, measurable risks do not constitute a source of „pure“profit.

In contrast, uncertainty, which Knight describes as „true“ uncertainty which characterizes situations in which the probability of possible outcomes cannot be objectively determined. These are unique, non-replicable events for which no adequate statistical data exist to construct a reliable probability model. Examples include decisions to introduce a new product to the market, the impact of major technological innovations, or the consequences of unpredictable political or social changes. It is precisely under these conditions of immeasurable uncertainty that, according to Knight, genuine entrepreneurial decision-making occurs (Knight, 1921).

The role of the entrepreneur lies in exercising judgment and assuming responsibility for the consequences of decisions made in such singular and uncertain circumstances. Profit (or loss), then, is not a reward for bearing measurable risk, which represents a calculable cost, but rather a return earned through successful navigation of true uncertainty and the effective use of judgment where probabilistic calculation is impossible. Knight thus contends that the key to understanding profit and the dynamics of competitive systems lies not in risk understood as quantifiable probability, but in this deeper, incalculable uncertainty, which places demands on foresight, judgment, and a willingness to confront unquantifiable contingencies (Knight, 1921).

One of the most basic and widespread mechanisms for managing risk is insurance. As illustrated by Mankiw in his analysis of the randomness of health care expenditures, most individuals exhibit risk aversion. That is, they

prefer a certain outcome over an uncertain one with the same expected value. In his example, an individual faces a 2 percent chance of incurring a high cost of $30,000, which translates into an expected cost of $600. A risk-averse person will prefer to pay a certain premium of $600 rather than face even a small chance of catastrophic loss. (Mankiw, 2024)

Economic theory explains this aversion primarily through the concept of diminishing marginal utility of wealth, originally formulated by Daniel Bernoulli. According to this principle, a given monetary loss (e.g., $30,000) causes greater disutility than the equivalent gain would generate in additional utility, especially if the loss significantly reduces the individual's standard of living. In contrast, a certain, though smaller, insurance premium represents a relatively minor loss of utility compared to the potential large disutility associated with the realization of risk. Insurance thus enables individuals to smooth utility across different states of the world, accepting a small certain cost in place of a potentially large uncertain one.

On the other hand, the existence of insurance markets depends on the ability of insurers to aggregate and diversify risks. Insurers pool a large number of individual risks that are ideally mutually independent or only weakly correlated. By applying the law of large numbers, insurers are able to predict total losses within a portfolio of insured risks with a high degree of accuracy, even if they cannot predict which specific individual will suffer a loss. Through this process of risk pooling, large, uncertain individual risks are transformed into relatively predictable and manageable collective costs. The insurer then sets premiums to cover expected losses, administrative costs, and a reasonable profit. Insurance markets therefore constitute a useful instrument for reducing individual risk by enabling its transfer and redistribution.

However, as Mankiw notes, and Moss explores in greater detail, the efficiency of these markets may be undermined by problems such as moral hazard, where the insured party alters behavior due to the existence of coverage, and adverse selection, where primarily high-risk individuals seek insurance due to asymmetric information. These phenomena are the subject of further economic analysis and often necessitate specific contractual mechanisms or even regulatory intervention (Mankiw, 2024). Insurance, however, is not the only available instrument. In our view, legal regulation, as designed and implemented by the state, represents another essential and institutionally embedded tool for managing risk and for that matter even uncertainty.

As noted in the previous section, legal scholarship and practice are inextricably linked to economic reality and societal welfare. In this context, the analysis offered by David A. Moss acquires particular significance. In his work When All Else Fails: Government as the Ultimate Risk Manager, Moss compellingly argues that one of the key, though often overlooked, functions of government, and implicitly of law as its instrument, is the management of risk. He asserts that this function is not peripheral but rather constitutes a powerful and pervasive form of public policy, without which the modern economy would be unrecognizable, if not entirely unworkable.

According to Moss, the government undertakes risk management through two fundamental approaches. First, it seeks to reduce risk directly, for example, through safety regulations or the imposition of minimum standards. Second, it attempts to reallocate risk, either by shifting it from one party to another, as in the case of product liability, or by diffusing it across a broader population, for instance through insurance schemes or public disaster relief. Moss also traces the historical development of this governmental role in the United States, identifying three

main phases that reflect changing societal priorities and the evolving nature of risks confronting society. (Moss, 2002).

To fully understand why the state engages so systematically in risk management, Moss directs attention to the inherent limitations of the private sector in addressing certain types of risk. He argues that risk markets are often incomplete, inefficient, or altogether absent, for reasons that extend beyond the traditional problem of asymmetric information. Among the obstacles he identifies are perception problems, where individuals systematically misjudge the likelihood or severity of risks, due to excessive optimism or a cognitive inability to process low-probability, high-impact events (Moss, 2002).

Another major constraint involves commitment problems, whereby private actors may struggle to credibly commit to covering long-term, large-scale, or correlated risks, while governments themselves may fail to credibly commit to non-intervention in the face of crises, thereby undermining incentives for private risk preparation. Equally significant are externalization problems, in which the costs of risky behavior are not borne by those who generate the risk but are instead shifted onto third parties or society at large. This includes so-called feedback externalities, in which individual responses to risk may paradoxically exacerbate the underlying problem. Naturally, Moss also acknowledges the classical information-related failures, such as adverse selection and moral hazard, which further complicate the functioning of private insurance markets (Moss, 2002).

It is precisely in the context of these market failures and limitations that Moss emphasizes the unique capabilities and comparative advantages of the state, which render it the most viable candidate for the role of 'ultimate risk manager'. Central to this role is the state's coercive power, which enables it to mandate participation in collective risk-pooling mechanisms and thereby overcome issues of adverse selection or under-insurance arising from individuals' misperceptions of risk. Moreover, the state holds both fiscal and monetary powers, including taxation and, where necessary, currency issuance. These provide it with an unmatched financial capacity to absorb catastrophic losses and to distribute their costs across the population and over time. Such instruments also lend credibility to state-backed guarantees.

Lastly, the state possesses superior monitoring and enforcement mechanisms for shaping behavior and internalizing externalities, for example through regulation, the articulation of liability standards, or direct oversight. For Moss, state intervention is thus not merely a matter of political discretion, but often a necessary response to the nature of certain risks and the structural limitations of market-based solutions. In exercising this role, the state employs distinctive legal and institutional tools to secure broader social stability and economic welfare (Moss, 2002).

David A. Moss's findings on the role of the modern state as the "ultimate risk manager" hold significant implications for legal scholarship and for the reconceptualization of the law's functions. If we accept Moss's thesis, then law cannot be understood merely as a passive framework or as a set of norms that incidentally or secondarily reflect the state's risk management function. On the contrary, we argue that law constitutes the primary and essential normative and institutional instrument through which this function is systematically and purposefully carried out in society.

Law, as a complex system of rules, principles, and procedures, inherently determines the allocation of risk. It defines who bears which risk, to what extent, and under what conditions, for example through standards of due

care, causal nexuses, or the construction of liability relationships. It also establishes mechanisms for remedy and redistribution of loss when risk materializes. In this way, law does not merely respond to existing risks. Through its ex ante rules, it significantly shapes the behavior of individuals, corporations, and other actors under conditions of uncertainty, encouraging prevention, prudence, or the transfer of risk. It is therefore justified to assert that risk governance is not only the aim of specific public policies, as described by Moss, such as social insurance or guarantee schemes. It is also an integral and constitutive function of the legal system.

This function is evident across a broad range of legal fields. It is especially prominent in private law, including tort and contract law, where liability and the allocation of risk between parties are addressed. It is equally present in insurance law, in the complex regulation of financial markets and institutions aimed at financial stability, in corporate law through the rules on limited liability, in the regulation of hazardous activities and technologies, in consumer protection, and in environmental law. It is also found in public law, where the state responds to various crisis situations or regulates the conditions of crisis preparedness.

Across all these domains, legal norms directly or indirectly identify, evaluate, allocate, minimize, or transfer risks. This perspective of law as an instrument of risk management provides a robust analytical framework for assessing both existing and proposed legal norms. It enables us to ask not only whether a norm is just or legitimate in the traditional sense, but also how effectively it contributes to the internalization of risks. In other words, whether it ensures that the costs associated with risk are borne by those who benefit from the risky activity or who are best positioned to control it. It also allows us to evaluate how the norm reduces overall societal uncertainty and strengthens collective resilience in the face of diverse threats. Recognizing risk management as a core function of law opens new perspectives for both theoretical analysis and the practical design and application of legal norms.

Our endorsement of David A. Moss's thesis, that the state, or more precisely, the government, functions as the ultimate risk manager does not rest solely on its undeniable empirical and historical accuracy, which Moss documents in considerable detail. Its principal added value lies in its analytical strength for understanding the contemporary role and essence of law. Moss convincingly demonstrates that risk management is not merely an episodic or supplementary feature of select public policies. Rather, it constitutes a foundational function of the modern state, without which the current complex economy and society could not operate in a stable and predictable manner. This contribution seeks not only to adopt Moss's framework, but also to expand and systematize it, with a specific focus on its legal dimension.

We argue that law is the fundamental and primary instrument through which the state performs this essential function of risk governance. In this context, law is not simply a passive legislative framework that enables the implementation of isolated insurance or regulatory schemes. On the contrary, it must be understood as an active normative and institutional mechanism. As a normative mechanism, law defines ex ante the standards of conduct, rights, and obligations of subjects in relation to potential risks (i.e. default rules). Ex post, it determines who bears responsibility, who is entitled to compensation, and what remedial mechanisms apply. As an institutional mechanism, law establishes and empowers public bodies - courts, regulatory authorities, executive branches, to enforce these rules. It thereby determines who ultimately bears the risk, who may legitimately transfer it, and who will bear the consequences when the risk materializes.

We consider this legal dimension of Moss's hypothesis not only accurate, but necessary for its full understanding and application in legal scholarship. Without a comprehensive legal apparatus, from constitutional foundations through statutory regulation to judicial interpretation and enforcement, the state could not effectively carry out risk governance policies. It would not be possible to mandate insurance coverage, to enforce environmental standards with real impact, to authoritatively define the scope of liability for harm caused, or to prescribe the complex obligations and guarantees of banks under deposit protection schemes. Law is therefore not merely a surface-level regulator of risk. It normatively allocates, redistributes, and ultimately enforces the burden of risk on designated subjects. In this sense, we view Moss's analysis as a critically important impetus for a new understanding of the state's role in a risk society.

At the same time, we propose to extend his thesis by explicitly asserting that risk governance is not merely an abstract function of the state as a political entity. Rather, it is specifically and inextricably a function of law, which serves as the state's central operational system and medium. This leads to a necessary reconceptualization of law not primarily as a set of norms passively reflecting the existing social order or moral imperatives, but as a dynamic and active system for anticipating, identifying, evaluating, and authoritatively distributing risks in conditions of permanent uncertainty and the complexity of the modern world.

In the following section, we aim to further develop the validity of our previous claims concerning law as an essential instrument of state risk governance, both empirically and analytically. We do not intend to remain solely on the level of theoretical abstraction. Rather, our objective is to demonstrate, through abstraction and careful analysis of specific legal norms across various branches of law and levels of regulation, that risk governance is not a mere by-product of these norms, but a constitutive principle and inherent function that shapes their internal logic and practical application.

3. Embedded Risk Governance in Legal Systems: Empirical and Normative Evidence

Having established the theoretical foundation for the hypothesis that risk management constitutes a core function of law, we now proceed to its empirical and doctrinal substantiation. This part of the study aims to demonstrate that legal norms, far from being passive regulatory instruments, actively shape the allocation, redistribution, and containment of risks across various domains of law. We argue that risk governance is not an incidental by-product of legal regulation, but rather a constitutive logic that pervades the design, interpretation, and application of legal rules. To that end, this chapter is divided into two parts. In the first part, we analyze selected provisions from the field of private law, in second from public law. In each case, we examine how the given provisions function to identify, distribute, or reduce risks and how they influence behavior under conditions of uncertainty.

In the second part, we turn our attention to public law, where we extend the analysis to regulatory and procedural frameworks, including model scenarios designed to illustrate how the state governs systemic, administrative, or institutional risks through legal means. Throughout, the analysis is informed by both doctrinal reasoning and insights from Law and Economics, with particular attention to the normative structures that shape ex ante and ex post behavior. By applying a functional and counterfactual lens to these legal rules, we aim to demonstrate that risk governance is not merely an analytical framework imposed from the outside, but a latent functional orientation embedded within the internal logic of the legal system itself. The case studies that follow are illustrative rather

than exhaustive, yet they offer robust evidence in support of the broader claim: law is used as tool for state risk management. And one of core functions of law is risk moderation.

First of all, we start with Slovak Civil Code.[3] We did choose one specific norm from this Act. The Slovak Civil Code, particularly through Sections 420 and 420a, offers a clear illustration of how legal frameworks function as sophisticated instruments for risk management. These provisions establish a dual regime of liability: Section 420 lays down the general principle of fault-based liability, stipulating that any person is liable for damage caused by the breach of a legal obligation, which typically implies unlawful conduct.

More pointedly for risk governance, Section 420a introduces a strict, no-fault liability standard for damages arising from specified operational activities. This latter provision explicitly shifts the burden of risk onto the party undertaking an activity inherently prone to causing harm, irrespective of demonstrable fault. While the law does provide for enumerated exceptions where liability might be excluded, such as unforeseeable events (vis maior) or conduct attributable to the injured party, the default allocation places the economic risk squarely on the actor engaged in the operational activity.

This legal architecture embodies a core tenet of risk governance and economic efficiency: risk should ideally be borne by the party best positioned to prevent the harm at the lowest cost, often referred to as the "least-cost avoider." By imposing strict liability on those in control of operational activities, the law presumes these actors are also optimally situated to evaluate, mitigate, or insure against the potential risks inherent in their endeavors. Consequently, Section 420a, and similar strict liability regimes, are designed not merely to compensate for losses ex post, but more fundamentally, to shape behavior ex ante. The norm creates powerful incentives for potential injurers to adopt preventive measures, to internalize the externalities of their activities (i.e., to bear the full social costs they generate), and to engage in their operations with a higher degree of care and responsibility.

From a Law and Economics perspective, such provisions are more than mere rules of liability; they represent formal legal mechanisms for the systematic distribution and containment of social and economic risks. The logic is straightforward: if a legal rule consistently assigns responsibility for potential damage to the party best able to control or manage the associated risks, it is effectively channeling those risks towards entities that can most efficiently handle them. Given that Section 420a of the Slovak Civil Code assigns liability to those engaged in inherently risk-generating operational activities regardless of fault, it clearly functions as a legal instrument whose significant purpose is risk governance.

To further underline the risk-governing function of Section 420a, we may ask what would happen if such a provision did not exist. In the absence of a strict liability rule for operational activities, individuals harmed by ongoing industrial, commercial, or even routine operations would bear the burden of proving fault on the part of the operator. This would increase litigation costs, delay compensation, and potentially leave significant harms uncompensated. Moreover, without the incentive effect of no-fault liability, actors engaging in risky activities would have less reason to internalize the social costs they create. They might underinvest in preventive measures or in insurance, leading to a misallocation of risk and a higher incidence of harm. The absence of this norm would therefore not only weaken the position of the injured party but also disrupt the ex ante alignment of incentives

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[3] Act No. 40/1964, the Civil Code, as amended.

necessary for efficient and socially responsible behavior. This counterfactual consideration confirms that Section 420a is not merely a distributive rule. It is an indispensable component of the legal system's broader function of organizing and stabilizing risk.

In the area of Labour Law, the Slovak Labour Code[4] provides a highly illustrative example of how legal norms in employment law serve the function of risk governance. Sections 147 and 195 demonstrate a systemic effort to identify, allocate, and mitigate risks associated with occupational activity. Section 147 imposes a general duty on employers to ensure the safety and health of their employees at work. It obliges employers to undertake preventive measures, provide adequate resources, and establish appropriate systems for occupational safety management. This obligation is framed not as a static requirement, but as a dynamic duty to continuously improve and adapt safety standards in light of changing circumstances.

Section 195 then operationalizes the consequences of a failure to meet such obligations. It establishes strict liability of the employer for harm suffered by an employee in connection with the performance of work, even in the absence of demonstrable fault. Specifically, if an employee suffers a workplace injury or develops an occupational disease under qualifying conditions, the employer is liable for the resulting damage. This legislative structure embodies a model of forward-looking risk regulation. Section 147 functions as an ex ante preventive instrument, incentivizing employers to anticipate and reduce risks before they materialize. Section 195 complements this with an ex post compensatory mechanism, ensuring that the costs of occupational harm are not borne by the injured worker but are internalized by the employer, who is best positioned to prevent the harm or insure against it.

If these provisions did not exist, the burden of proof and the financial consequences of workplace injuries would likely fall on employees, who are often in a weaker evidentiary and economic position. The absence of strict employer liability would lead to underinvestment in workplace safety, a higher incidence of harm, and a misalignment of incentives that encourages short-term cost-cutting at the expense of long-term risk reduction. In this light, the Labour Code does not merely regulate employment relationships. It constructs an institutional environment in which risk is managed, redistributed, and governed through legal norms that are both prescriptive and compensatory. The employer is not merely an economic actor but a designated bearer of occupational risk, as defined by law. The legal framework thus aligns private incentives with public safety objectives, making the management of workplace risks an integral function of labour law.

Next is our analysis of Slovak civil procedure. The Slovak Code of Civil Dispute Procedure[5] offers a compelling illustration of how procedural norms serve the function of risk governance, particularly through Section 90, which mandates attorney representation in selected categories of complex legal disputes. These include proceedings related to insolvency, competition law, trade secrets, and intellectual property rights. If the party fails to secure legal representation within the prescribed period, any procedural acts undertaken without such representation are deemed legally ineffective. This requirement reflects more than a formal procedural constraint.

It addresses a systemic form of procedural risk, namely the high probability of substantive legal failure in disputes where complexity, specialized legal knowledge, and asymmetric capabilities between parties are especially pronounced. Section 90 effectively reallocates the burden of procedural competence onto licensed attorneys,

[4] Act No. 311/2001, the Labour Code, as amended.
[5] Act No. 160/2015, the Code of Civil Dispute Procedure, as amended.

recognizing them as the agents best positioned to navigate the legal and technical challenges inherent in these domains. In this framework, Section 90 functions as an ex ante protective mechanism. By requiring professional representation, it aims to prevent procedural breakdowns before they occur. It thereby minimizes the risk of litigants making irreversible legal errors due to lack of expertise and safeguards the integrity of adjudication in high-stakes legal environments.

If this provision were absent, litigants could pursue legally complex and procedurally demanding cases without adequate capacity to understand or satisfy formal requirements. This would likely lead to higher rates of invalid claims or defenses, prolonged litigation, and systemic inefficiencies that erode legal certainty and trust in the judicial process. Furthermore, it would expose vulnerable parties to disproportionate legal risks, reinforcing structural inequalities in access to justice. Seen in this light, Section 90 does not merely regulate courtroom procedure. It establishes an institutional safeguard by governing who may participate in particularly risk-sensitive legal proceedings and under what conditions. The rule thus manages procedural risk by embedding professional competence as a precondition for valid legal action. In doing so, it reinforces the structural resilience of the civil justice system and aligns individual procedural rights with the broader objective of efficient, equitable adjudication.

Approaching public law, especially the realm of constitutional law, we see the principle of state as the ultimate risk manager clearly present as well. For instance, the concept of social contract manifested through a set of rights constitutionally guaranteed to all represents a minimal standard of healthcare or social care provided by the state. Many of the economic, social and cultural rights embody risk management measures by the state to the benefit of its citizens, to provide certain future transfers of economic value.

To exemplify, article 35 of the Slovak Constitution requires the state to provide certain minimum standard of living to those citizens who are unable to work through no fault of their own. Article 36 requires the minimum working standards or minimum wage standards set by the law. A minimum social security for pensioners or incapacitated persons is mandated by the article 39. The social security for pensioners is provided through a pay-as-you-go pension scheme (which implies risk sharing among pensioners and between pensioners and current labour force) and a retirement savings scheme (which implies privately organized scheme with risk diversification). Article 40 furthermore requires a health insurance as a prerequisite for healthcare (beyond a constitutionally guaranteed basic treatment).

To further conceptualize the constitutional principle of state as a risk manager, we need to recognize the state's authority to raise taxes provided by the constitution. Taxes raising authority allows the state to actively redistribute values and risks across various constituencies through public budgets. The principle is also clearly visible in interaction with the concept of financial constitution (Babeck, 2022). It allocates the authority to tax to a certain federal, national or subnational authority, and sets out the recipients of these taxes (i.e. which public authority possesses the tax revenue). In a wider sense, the financial constitution also deals with basics of monetary policy, fiscal policy, including fiscal rules, and relatedly financial aspects of the administrative structure of the state.[6]

[6] See for instance our brief overview of the Slovak financial constitution in: Ján Mazúr, Tibor Hlinka: Changing Nature of the Financial and Economic Constitution of the Slovak Republic [article in Slovak language]. In: Collection of Papers from the International Academic Online Conference Bratislava Legal Forum, 2021, p. 105.

All of these financial aspects of constitutional order on the basic level manage risks primarily through allocation of taxing authority and taxes themselves, but also through conscious exclusion of risk taking by a certain public authority. Let us consider the following example. The Slovak constitution prescribes that taxing authority rests solely with the national parliament, which can however, to a limited extent, allow municipalities or regions to raise certain local taxes. Moreover, the constitution, together with the 2011 budgetary responsibility constitutional act (further as “BRCA”) provides guarantees to municipalities and regions to receive additional funding sources if the government (or rather parliament) provides them with additional competences.[7] Also, the BRCA clearly states that the state does not financially guarantee, nor is responsible for the solvency of municipalities or regions.

This constitutional framework, together with the statutory framework, created a situation wherein certain municipalities effectively could not escape their financial problems, as their taxing authority was either very limited or maxed already, and the interest payments far exceed their revenues. Yet, the national government (state) was allowed to take any action, due to no bailout clause mentioned above.

Another example consists of classic debt brakes, which strengthened European countries’ constitutional order after the European sovereign debt crisis in 2010s. The typical structure of debt brakes (or deficit rules) consists of levels of debt as a percentage of GDP of given economy (typically ≤ 60 %) which trigger certain sanctions or actions, such as freezing of salaries of government officials, duty to propose a balanced budget to the parliament or, most strictly, confidence vote. These rules aim to strengthen fiscal governance by limiting debt, which however also limits the government’s ability to invest and more importantly to take on certain risks, when needed. Such situations typically involve *vis maior* events, such as banking crisis, large environmental crisis or recently occurred global pandemics.

In these situations, it is expected that the state plays a major role to mitigate the negative effects. In fact, even the fiscal rules normally include a classic set of so-called escape clauses, which allow the government to take on more debt during these external crises while not triggering the sanctions. For instance, the BRCA postpones the most severe sanctions for triggering the debt levels in cases of severe economic crisis (i.e. > 12 p.p. decline in GDP) or in case of large costs related to recovering the banking sector or environmental and natural disasters (i.e. > 3 p.p. of GDP). It is therefore quite clear that the state is in fact an underwriter of risks of last resort and while the rules of engagement may not be constitutionally or procedurally always clear, there are many constitutional hints towards this capacity of state. Had this capacity to manage risks not existed, the whole social contract may vanish as the credibility of the state and the law would evaporate.

Conclusion & discussion

The contemporary society faces many risks, some that are relatively known, some relatively obscure, almost uncertain, some we knew and have almost forgotten about, such as recently experienced global pandemics. New technologies, such as AI, or climate crisis bring in deep uncertainties that go way beyond normal risk models. Philosophers and AI specialists talk of existential threat in connection with AI, which should warrant a careful approach, under the precautionary principle. An example of relatively careful approach towards AI development

[7] The Constitutional Act no. 493/2011 Col. On Budgetary Responsibility.

and deployment is the EU's AI Act.[8] On the other hand, the approach of the USA is more deregulatory and *laissez fair*.

Similarly, we can observe various approaches towards climate crisis as well. As the unpredictable natural catastrophic events grow in frequency, even the insurance companies start getting increasingly cautious about the risks they underwrite and claims they accept. Even today, the concept of uninsurable risks, i.e. *vis maior* events, is getting more and more prominent. Although the costs of uninsurable risks may not be borne by the insurance companies, these risks are still borne by someone. And if the magnitude or frequency of these events grow, we can only expect that states would more often foot the bill or be politically expected to do so.

These phenomena are high-impact risks with relatively hard-to-predict consequences, outcomes and probabilities, with possibly intertwined systemic complexity, a Knight's true uncertainty. These cases may be even better examples of state's risk management function than mere distribution of risks among private parties in tort law or creation of public insurance schemes. The state's role extends beyond managing these relatively predictable and measurable risks within a society, into a proactive and structural role in governing uncertainty. Such role requires a state to have greater adaptive capacity and resilience, embeded within the legal and institutional tools.

Yet, it is hardly possible to set a detailed legal framework of governing uncertainty precisely due to its uncertain character. It is right here where we can identify a constitutional principle of risk and uncertainty management, which guides the state's actions and policies in face of *vis maior* events.

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[8] Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act) (Text with EEA relevance).