

DUTIES

Responsibility, Obligations
and the Limits of Rights

SIMONE BENVENUTI, LIVIA SICLARI (eds)



Roma Tre Press
2026



Università degli Studi Roma Tre
Dipartimento di Giurisprudenza

1. P. CARNEVALE (a cura di), *La Costituzione riscritta. Saggi sulla revisione costituzionale in itinere*, 2016
2. E. BATTELLI, B. CORTESE, A. GEMMA, A. MASSARO (a cura di), *Patrimonio culturale: profili giuridici e tecniche di tutela*, 2017
3. R. BENIGNI (a cura di), *Libertà religiosa, diritti umani e globalizzazione*, 2017
4. A. MASSARO (a cura di), *La tutela della salute nei luoghi di detenzione. Un'indagine di diritto penale intorno a carcere, REMS e CPR*, 2017
5. V. ZENO-ZENCOVICH, *Comparative Legal Systems. A Short Introduction*, 2017 (I ed.) *Comparative Legal Systems. A Short and Illustrated Introduction*, 2019 (II ed.)
6. M. GAMBACCIANI, *Impresa e lavoro: il nuovo bilanciamento nei licenziamenti collettivi*, 2017
7. A. MASSARO, M. SINISI (a cura di), *Trasparenza nella P.A. e norme anticorruzione: dalla prevenzione alla repressione*, 2017
8. A.D. DE SANTIS (a cura di), *I profili processuali della nuova disciplina sulla responsabilità sanitaria*, 2017
9. V. VITI, *La locazione finanziaria tra tipicità legale e sottotipi*, 2018
10. C. CARDIA, R. BENIGNI (a cura di), *50 Anni dalla Populorum Progressio. Paolo VI: il Papa della modernità. Giustizia tra i popoli e l'amore per l'Italia*, 2018
11. G. NUZZO, *L'abuso del diritto di voto nel concordato preventivo. Interessi protetti e regola di correttezza*, 2018
12. G. GRISI, C. SALVI (a cura di), *A proposito del diritto post-moderno. Atti del Seminario di Leonessa, 22-23 settembre 2017*, 2018
13. G. MAESTRI, *L'ordinamento costituzionale italiano alla prova della democrazia paritaria*, 2018
14. G. CONTE, A. FUSARO, A. SOMMA, V. ZENO-ZENCOVICH (a cura di), *Dialoghi con Guido Alpa. Un volume offerto in occasione del suo LXXI compleanno*, 2018
15. E. PODDIGHE, *Comunicazione e "dignità della donna". Uno studio di genere*, 2018
16. G. GRISI (a cura di), *L'abuso del diritto. In ricordo di Davide Messinetti*, 2019
17. S. ANASTASIA, P. GONNELLA (a cura di), *I paradossi del diritto. Saggi in omaggio a Eligio Resta*, 2019
18. S. DEL GATTO, *Poteri pubblici, iniziativa economica e imprese*, 2019
19. R. BENIGNI, B. CORTESE (a cura di), *La "giurisdizione". Una riflessione storico-giuridica*, 2019
20. M. RUOTOLO (a cura di), *La Costituzione...aperta a tutti*, 2019 (I ed.); M. RUOTOLO, M. CAREDDA (a cura di), *La Costituzione...aperta a tutti*, 2020 (II ed.); M. RUOTOLO, M. CAREDDA (a cura di), *La Costituzione...aperta a tutti*, 2021 (III ed.); M. RUOTOLO, M. CAREDDA (a cura di), *La Costituzione...aperta a tutti*, 2022 (IV ed.)

21. N. POSTERARO, M. SINISI (a cura di), *Questioni di fine vita*, 2020
22. G. RESTA (a cura di), *L'Armonia nel diritto. Contributi a una riflessione su diritto e musica*, 2020
23. F. LATTANZI (a cura di), *Genocidio. Conoscere e ricordare per prevenire*, 2020
24. E. TOTI, *Diritto cinese dei contratti e sistema giuridico romanistico tra legge e dottrina*, 2020
25. B. CORTESE, *La tutela in caso di vizio della res empti e della res locata: inadempimento rispondenza ex fide bona*, 2020
26. M.S. BONOMI, *La motivazione dell'atto amministrativo: dalla disciplina generale alle regole speciali*, 2020
27. G. GRISI, F. RASSU (a cura di), *Perspectives nouvelles du droit. Thèmes, méthodes et historiographie en France et en Italie*, 2020
28. F. APERIO BELLA, A. CARBONE, E. ZAMPETTI (a cura di), *Dialoghi di Diritto Amministrativo. Lavori del Laboratorio di Diritto Amministrativo 2019, 2020*
29. S. CALDARELLI, *I vincoli al bilancio dello Stato e delle pubbliche amministrazioni. Sovranità, autonomia e giurisdizione*, 2020
30. A. MASSARO (a cura di), *Connessioni di Diritto Penale*, 2020
31. R. BENIGNI (a cura di), *Diritto e religione in Italia*, 2021
32. E. CALZOLAIO, R. TORINO, L. VAGNI (a cura di), *Liber amicorum Luigi Moccia*, 2021
33. A. CARRATTA (a cura di), *Limiti esterni di giurisdizione e diritto europeo. A proposito di Cass. Sez. Un. n. 19598/2020*, 2021
34. M. CATENACCI, R. RAMPIONI, V.N. D'ASCOLA (a cura di), *Studi in onore di Antonio Fiorella*, 2021
35. F. GRASSI, O. HAGI KASSIM (a cura di), *Vecchie e nuove certezze nel diritto amministrativo. Elementi essenziali e metodo gradualista. Dibattito sugli scritti di Giampaolo Rossi*, 2021
36. B. CORTESE (a cura di), *Il diritto dei beni culturali. Atti del Convegno OGIPAC in memoria di Paolo Giorgio Ferri. Roma 27 maggio 2021*, 2021
37. V. MANNINO, *Governo misto romano e repubblicanesimo americano*, 2022
38. V. BONTEMPI (a cura di), *Lo Stato digitale nel piano di ripresa e resilienza*, 2022
39. E. BATTELLI, M. LOTTINI, G. SPOTO, E.M. INCUTTI, (a cura di), *Nuovi orizzonti sulla tutela degli animali*, 2022
40. F. APERIO BELLA, A. CARBONE, E. ZAMPETTI (a cura di), *Dialoghi di diritto amministrativo. Lavori del laboratorio di diritto Amministrativo 2020-2021*, 2022
41. J.M. PERIS RIERA, A. MASSARO, *Derecho Penal, Inteligencia Artificial y Neurociencias. Diritto Penale, Intelligenza Artificiale e Neuroscienze*, 2023
42. A.D. DE SANTIS, *La disapplicazione dell'atto amministrativo nel processo civile. Premesse per uno studio*, 2023
43. F. RUGGERI, *Poteri privati e mercati digitali. Modalità di esercizio e strumenti di controllo*, 2023

44. E. RIGO (a cura di), *Per una ragione artificiale. In dialogo con Lorenzo d'Avack su Costituzione, ordine giuridico e biodiritto*, 2023
45. C. SALVI, *Cinquant'anni di scritti giuridici*, 2024
46. D. CHINNI, L. PACE (a cura di), *Il Referendum abrogativo dopo la tornata del 2022. Nuove tendenze e nodi irrisolti*, 2024
47. V. ZENO-ZENCOVICH, *Il futuro dell'Accademia. Scritti dedicati agli allievi*, 2024
48. F. APERIO BELLA, A. CARBONE, E. ZAMPETTI (a cura di), *Dialoghi di diritto amministrativo. Lavori del laboratorio di diritto Amministrativo 2022-2023*, 2024
49. F. RIMOLI, S. TALINI, *"Si vis pacem, para bellum"? La guerra e le democrazie europee. Atti del convegno annuale dell'OSDE, Roma 16 febbraio 2024*, 2024
50. G. FIORELLI, E. FRONZA, N. GUZMÁN, D. IPPOLITO, L. MARAFIOTI (a cura di), *Verità e giustizia nel processo penale. Atti del convegno di studi giuridici organizzato dalle Università di Bologna, Buenos Aires e Roma Tre (18-22 gennaio 2024)*, 2025
51. S. BENVENUTI, G. ROSSETTI (a cura di), *La Garanzia. Tradizioni storiche e modelli*, 2025
52. F. BORLIZZI, S. ZOLEA (a cura di), *Cliniche legali, culture giuridiche e trasformazioni sociali. Un dialogo italo-cubano*, 2025
53. B. BICHI RUSPOLI FORTEGUERRI, F. BONITO (a cura di), *Law and Social Change*, 2025
54. F. CARDARELLI, T.E. FROSINI, E. POILLOT, G. RESTA, S. SICA, A. ZOPPINI (a cura di), *Il valore del dissenso. Riflessioni con Vincenzo Zeno-Zencovich*, 2025
55. F. NAPPI, *Giuris-prudenza. Valore teoretico e formativo dell' "arte del giudice"*, 2026
56. A. CARRATTA, B. POZZO (a cura di), *Metodi innovativi per la didattica nei corsi di giurisprudenza. Un dialogo interdisciplinare*, 2026
57. M. SINISI (a cura di), *Territorio e digitalizzazione. Dialoghi italo-spagnoli di diritto pubblico*, 2026
58. P. ALVAZZI DEL FRATE, MARIA D'ARIENZO, P. LATTANZI, M. RICCI, E. ROSAFIO, R. TARCHI (a cura di), *Il futuro dell'università italiana. Problemi e prospettive*, 2026
59. V. ZENO-ZENCOVICH, *Upside Down, Inside Out, Back to Front. Stravaganze metagiuridiche*, 2026
60. S. BENVENUTI, G. FONTANA, S. ZOLEA (a cura di), *Le transizioni della Costituzione materiale nel XXI secolo*, 2026
61. F. RIMOLI, S. TALINI, *Democrazie e Costituzionalismi. Cura, amnistia e nuove prospettive*, 2026



Università degli Studi Roma Tre
Dipartimento di Giurisprudenza

COLLANA L'UNITÀ
DEL DIRITTO 62

DUTIES

Responsibility, Obligations
and the Limits of Rights

SIMONE BENVENUTI, LIVIA SICLARI
(eds)



Roma TriE-Press
2026

La Collana *L'unità del diritto* è stata varata su iniziativa dei docenti del Dipartimento di Giurisprudenza. Con questa Collana si intende condividere e sostenere scientificamente il progetto editoriale di Roma TrE-Press, che si propone di promuovere la cultura giuridica incentivando la ricerca e diffondendo la conoscenza mediante l'uso del formato digitale ad accesso aperto.

Comitato scientifico della Collana:

Paolo Alvazzi Del Frate, Roberto Baratta, Concetta Brescia Morra, Paolo Carnevale, Antonio Carratta, Mauro Catenacci, Alfonso Celotto, Carlo Colapietro, Emanuele Conte, Tommaso Dalla Massara, Carlo Fantappiè, Elena Granaglia, Giuseppe Grisi, Andrea Guaccero, Luca Luparia Donati, Francesco Macario, Luca Marafioti, Enrico Mezzetti, Giulio Napolitano, Giuseppe Palmisano, Annalisa Pessi, Giorgio Pino, Alberto Franco Pozzolo, Giampiero Proia, Giorgio Resta, Francesco Rimoli, Giuseppe Ruffini, Marco Ruotolo, Maria Alessandra Sandulli, Chris Thomale, Giuseppe Tinelli, Luisa Torchia, Mario Trapani, Vincenzo Zeno-Zencovich, Andrea Zoppini.

Collana pubblicata nel rispetto del Codice etico adottato dal Dipartimento di Giurisprudenza dell'Università degli Studi Roma Tre, in data 22 aprile 2020.

Il volume pubblicato è stato sottoposto a previa e positiva valutazione nella modalità di referaggio *double-blind peer review*.

Coordinamento editoriale:

Gruppo di Lavoro *Roma TrE-Press*

Elaborazione grafica della copertina: **MOSQUITO**, mosquitoroma.it

Caratteri tipografici utilizzati:

American Typewriter condensed, Brandon Grotesque, Gotham rounded (copertina e frontespizio)
Adobe Garamond Pro (testo)

Impaginazione e cura editoriale: Colitti-Roma colitti.it

Edizioni: *Roma TrE-Press*

Roma, ottobre 2026

ISBN: 979-12-5977-682-2

<http://romatrepress.uniroma3.it>

Quest'opera è assoggettata alla disciplina *Creative Commons attribution 4.0 International License* (CC BY-NC-ND 4.0) che impone l'attribuzione della paternità dell'opera, proibisce di alterarla, trasformarla o usarla per produrre un'altra opera, e ne esclude l'uso per ricavarne un profitto commerciale.



L'attività della *Roma TrE-Press* è svolta nell'ambito della
Fondazione Roma Tre-Education, piazza della Repubblica 10, 00185 Roma

Collana del Dipartimento di Giurisprudenza

L'unità del diritto

La Collana di studi giuridici promossa dal Dipartimento di Giurisprudenza dell'Università Roma Tre assume un titolo – quello de *L'unità del diritto* – che può apparire particolarmente impegnativo, perché il fenomeno giuridico riflette la complessità delle società che il diritto mira a regolare, si sviluppa intorno ad una molteplicità di articolazioni e sembra pertanto sfuggire ad una definizione in termini di unità. Anche la scienza del diritto, intesa come riflessione intorno al diritto, come forma di conoscenza che assume il diritto ad oggetto diretto e immediato di indagine, sia nella prospettiva teorica sia in quella storico-positiva relativa ad un singolo ordinamento, soffre a trovare una sua dimensione unitaria. La riflessione intorno al diritto, da qualunque punto di partenza si intenda affrontarla, ammette una pluralità di opzioni metodologiche, contempla una molteplicità di giudizi di valore, si caratterizza inevitabilmente per una pluralità di soluzioni interpretative. L'unico, generalissimo, elemento che sembra contraddistinguerla in senso unitario è dato dal suo essere rivolta alla conoscenza del diritto, dal suo carattere conoscitivo dell'esperienza giuridica complessivamente intesa, una unità, potrebbe dirsi, figlia della diversità e varietà delle scelte di metodo e del pluralismo interpretativo, ma pur sempre una unità quanto meno in questo suo nucleo irriducibile. Ed è allora questo il senso da attribuire al titolo della collana che prende l'avvio, ossia quello di dare ospitalità a contributi di studiosi diversi per formazione e interessi, ma che si riconoscono tutti nella comune esigenza di indagare il fenomeno giuridico applicando con rigore il metodo prescelto, nella consapevolezza della condivisione di un patrimonio formativo e culturale idoneo a creare un'adeguata coscienza di sé e sulla cui base costruire l'impegno scientifico del giurista.

In questa prospettiva, la Collana si ripromette di ospitare non solo contributi scientifici di tipo monografico, raccolte di scritti collettanei, atti di convegni e seminari, ma anche materiali didattici che possano proficuamente essere utilizzati nella formazione dei giovani giuristi.

La Collana entra a far parte della struttura di Roma TrE-Press, che, affiancando alla tradizionale pubblicazione in formato cartaceo quella in formato digitale in *open access*, contribuisce ad una nuova e più ampia diffusione del sapere giuridico.

Prof. Antonio Carratta
Direttore del Dipartimento di Giurisprudenza
Università Roma Tre

Indice

SIMONE BENVENUTI, LIVIA SICLARI, <i>Duties: Responsibility, Obligations and the Limits of Rights</i>	11
VINCENZO ZENO ZENCOVICH, <i>For a theory of duties: a road-map</i>	15
MATTHIAS BRACKE, <i>Non-binding interregional agreements: Unsatisfactory alternatives for interregional PCAs</i>	23
DYLAN COUCK, <i>Governing Universities: Autonomy, Duties and the Law in the Flemish Community</i>	39
LÉOPOLD DOUDOU-DROCOURT, <i>Animal Welfare: Between goods and Rights, a new approach of contractual Duties</i>	63
MAXIME DUPAN, <i>Do sibling rights imply sibling duties? Considerations concerning a (lack of) legal maintenance obligation between siblings in Belgium</i>	75
KRISTOF HEIDEMANN, <i>Mandatory deliberation day – An Antidote to Societal Divide?</i>	87
SAHAR KARIMI, <i>GDPR and Cross-border Data Transfer in Global Trade</i>	109
KRISZTIÁN RENNER-KIS, <i>Duty and Discretion: Principle of Opportunity</i>	125
LIU JIANLIN, <i>The Duty of Security of Processing Under the GDPR and PIPL</i>	147
MARYNA MANTEGHI, <i>LTDm Regulation in the EU: Compliance Challenges, Balancing Rights, and Shaping the AI Future</i>	159
HUGO NEUHAUSER, <i>Workers' Insurance, between Moral and Legal Duty: Debates about Compulsory Insurance in the International Office for Workplace Accidents (1889-1894)</i>	169
DAVIDE SILI, <i>Patent Pledges and Green Innovation: Evidence from the United States and Germany</i>	185
ESZTER ANNA ÜVEGES, <i>The Hungarian Preparatory Proceeding and the Rule of Law</i>	193

LOU VANBESELAERE, *Autonomous interpretation: The CJEU's duty to preserve effectiveness, consistency and coherence in EU law* 205

ANKE VANDER ELST, *The balance between family and state solidarity: need for reconsideration? Reflections on legal maintenance obligations and the recovery of social assistance from family members in Belgium* 221

ELS VYNCKE, *The Everlasting Balancing Act Between the Decedent's Children and the Surviving Spouse/Partner: The Case of 'Avantages Matrimoniaux'* 233

SIBEL YILMAZ COŞKUN, *Legislatures' Positive Obligations Regarding Environmental Disasters: Reflections on the Expected Istanbul Earthquake* 251

Simone Benvenuti, Livia Siclari

Duties: Responsibility, Obligations and the Limits of Rights

The essays collected in this volume originate from the Seventeenth Conference of the Legal Research Network (LRN), an international forum bringing together scholars from different jurisdictions, legal traditions, and research fields. As is often the case with interdisciplinary legal research, the contributions included herein address a wide variety of topics, ranging from family law and higher education governance to European Union external relations, digital regulation, copyright law, and legal theory. At first glance, such diversity may appear difficult to reconcile within a common framework. Yet a closer examination reveals the existence of a shared intellectual concern that runs throughout the volume: the evolving relationship between rights, duties, responsibilities, and collective interests in contemporary legal systems.

For several decades, legal scholarship has largely been dominated by what may be described as a rights-centred paradigm. The constitutional transformations that followed the Second World War, the consolidation of international human rights law, and the progressive expansion of supranational legal orders contributed to placing rights at the center of legal and political discourse. Rights became the primary language through which legal systems articulated claims for freedom, equality, dignity, participation, and protection. This development undoubtedly represented one of the greatest achievements of modern constitutionalism. At the same time, however, the extraordinary success of rights-based reasoning has often obscured a complementary dimension of legal life: the network of duties, obligations, and responsibilities that makes the enjoyment and enforcement of rights possible.

The contributions gathered in this volume invite readers to revisit this neglected dimension. They do not challenge the centrality of rights in democratic legal orders. Rather, they suggest that contemporary law increasingly operates within contexts in which rights alone are insufficient to explain legal relationships, institutional arrangements, and regulatory choices. Across different legal domains, the focus is progressively shifting towards questions of responsibility, accountability, solidarity, cooperation,

and governance. In this sense, the volume reflects a broader transformation that can be observed across many areas of contemporary law: the gradual movement from an exclusively individualistic understanding of legal relations towards a more relational and systemic conception of legal order.

This development is particularly evident when considering the profound social, technological, economic, and political changes that have characterised the first decades of the twenty-first century. Digital platforms operate through complex ecosystems involving millions of users and interconnected actors. Artificial intelligence systems generate risks and benefits that transcend individual relationships. Environmental degradation affects present and future generations alike. Global supply chains distribute economic opportunities and regulatory responsibilities across multiple jurisdictions. Consumer harm increasingly manifests itself in collective, cumulative, and diffuse forms that cannot easily be reduced to the traditional paradigm of individual injury. In all these contexts, legal systems are compelled to confront forms of interdependence that challenge the assumptions upon which many classical legal categories were built.

The growing relevance of duties and responsibilities should therefore not be interpreted as a retreat from rights-based constitutionalism. Rather, it represents an attempt to adapt legal reasoning to social realities characterised by increasing complexity and interconnectedness. Rights remain essential instruments for the protection of individual dignity and autonomy. Yet their effective protection often depends upon the existence of corresponding obligations imposed on public authorities, private actors, institutions, and communities. More importantly, certain contemporary challenges require legal frameworks capable of addressing collective interests and shared responsibilities that cannot be fully captured through the language of individual rights alone.

The various contributions contained in this volume illustrate this phenomenon from different perspectives.

Several essays explore the role of duties within interpersonal and institutional relationships. For example, the analysis of sibling relationships in Belgian law examines the legal implications of the growing recognition of sibling rights and raises the question whether such recognition should eventually be accompanied by corresponding obligations of solidarity and support.

The relationship between autonomy and responsibility also occupies a central place in the contribution on higher education governance in the Flemish Community. Universities have historically been protected

by guarantees of institutional autonomy designed to preserve academic freedom and shield higher education from undue political interference. Yet contemporary governance increasingly relies on mechanisms of accountability, performance measurement, public oversight, and societal engagement. The resulting tension reveals a recurring feature of modern regulatory systems: autonomy is rarely conceived as the absence of obligations, but rather as a condition that coexists with expanding expectations of responsibility.

A similar dynamic can be observed in the sphere of international and European Union law. One of the papers analysing the relationship between Partnership and Cooperation Agreements and interregional trade relations highlights the importance of legal commitments, trust-building mechanisms, and regulatory obligations within contemporary external governance. The article demonstrates how international cooperation increasingly depends not only upon the recognition of mutual interests but also upon the establishment of enforceable responsibilities concerning human rights, labour standards, environmental protection, and democratic values. In this respect, duties function as essential instruments for sustaining legal and political cooperation beyond the boundaries of the state.

The digital environment provides perhaps the most striking illustration of the growing significance of duties within contemporary legal governance. The paper on text and data mining under the Copyright in the Digital Single Market Directive addresses one of the defining regulatory challenges of the digital age: how to reconcile technological innovation with the protection of intellectual property rights. The development of artificial intelligence systems, particularly generative AI models, depends upon large-scale access to data and copyrighted materials. As a result, legal systems are increasingly required to articulate responsibilities capable of balancing innovation, creativity, economic development, and the protection of authors' interests. The debate surrounding text and data mining therefore exemplifies a broader transformation affecting digital regulation as a whole, namely the growing reliance on *ex ante* obligations, compliance duties, and risk-management frameworks as tools for governing technological change.

The theoretical foundations of these themes are explored most explicitly in Vincenzo Zeno-Zencovich's contribution, which calls for a renewed theory of duties capable of complementing the dominant language of rights. Yet the significance of this reflection extends well beyond legal theory. Indeed, the various contributions demonstrate that the question of

duties is no longer confined to philosophical debates concerning citizenship, solidarity, or civic virtue. It increasingly arises in concrete regulatory contexts, shaping legislative choices, institutional design, and judicial reasoning across diverse fields of law.

Viewed collectively, the essays contained in this volume reveal a common concern with the governance of interdependence. Whether the subject matter is family relationships, university administration, international cooperation, or artificial intelligence, the underlying challenge remains remarkably similar: how should legal systems allocate responsibilities in increasingly interconnected societies? The answer cannot be found exclusively in the multiplication of rights. While rights remain indispensable, contemporary legal governance also requires mechanisms capable of structuring cooperation, distributing burdens, preventing systemic harms, and protecting collective interests.

In this respect, the volume reflects broader developments that are becoming increasingly visible within European and global legal orders. Recent regulatory initiatives in fields such as digital governance, environmental protection, consumer protection, data regulation, and corporate sustainability have all moved towards models based on accountability, due diligence, compliance obligations, and risk management. The centre of gravity of legal regulation is gradually expanding beyond the protection of individual entitlements to encompass the management of collective risks and shared vulnerabilities. This does not signal the decline of rights. Rather, it suggests that rights are increasingly embedded within regulatory architectures that depend upon corresponding duties and responsibilities.

The contributions assembled in this volume offer valuable insights into this ongoing transformation. By approaching the question from different methodological, doctrinal, and comparative perspectives, they collectively demonstrate that duties are not merely ancillary to rights but constitute an indispensable component of contemporary legal orders. If the twentieth century was largely defined by the constitutionalisation of rights, one of the defining challenges of the twenty-first century may well be the identification and articulation of the duties necessary to govern increasingly complex, digitalised, and interconnected societies.

Vincenzo Zeno-Zencovich

For a theory of duties: a roadmap

“Duties” is a highly unpopular term¹. The last 80 years – after WW2 – have been characterized by the exaltation of rights. This clearly is the response to the complete annihilation of every basic right – whether individual or collective, private or public – by the multiple dictatorships which flourished between the two wars and ultimately dragged the whole of Europe in a carnage in which over ten million civilians were willfully murdered or were killed in warfare operations.

“Rights” were the flag of restored liberty and democracy. A flag that must be hoisted not only in Europe but in the whole world. These rights are absolute, fundamental, universal, international and are enshrined first of all in the covenants signed in those first years and subsequently framed in post-war Constitutions, first of all the Italian (1948) and German (1949) ones, i.e. the two countries responsible for having unleashed the horrors of the war, after having put them into practice in their homeland. “Rights” is the *mot d’ordre* inspiring the United Nations Organization and is multiplied in the sectorial agencies which mushroom under its umbrella: right to food, to health, to a dignified living, to education.

One cannot avoid noting – in hindsight – that the “universalism” of rights had the very clear aim of “westernizing” the rest of the world. This aspect will not be investigated here but it is mentioned to point out that it has been (and still is) very difficult to counter the fascination of the ideology of rights also because these have for a long time – by now nearly

* I am grateful to Giuseppe Franco Ferrari, Tommaso Frosini, Giorgio Pino and Elise Poillot for their critical comments on a first draft of this paper.

¹ In recent years the term appears very sparsely in legal writings, overwhelmed – especially in these troubled times – by its international trade homonymous. For a general overview see G.F. FERRARI, *Duties*, 5 *Comparative L. Rev.* 1/2015. For some monographs by philosophers where one can find also a rich bibliography see D. SELBOURNE, *The principle of duty : An essay on the foundations of the civic order*, U. Notre Dame P. 2001; C. WELLMAN (ed.), *Rights and duties*, Routledge 2002. The philosophical approach obviously leads to the broader field of deontology: again, for further references see J. WOLFF, *An introduction to moral philosophy*, W.W. Norton 2021; P. RAWLING, *Deontology*, Cambridge U.P. 2023.

a century – been considered so universal and innate that challenging them has appeared as merely provocative and intimately anti-democratic.

The syllogism is that democracy has as one of its fundamental components individual rights. Democracies must grant and ensure rights and the more rights there are, the more democratic society is. *Ergo* denying rights is antidemocratic and those who deny them must be denounced and fought.

However – setting aside a critique (which, as already said, is mostly the result of hindsight and of the inexorable change in geopolitical seasons) of such ideology – in the apparently unstoppable thrust towards the amplification of the catalogue of rights, there are two internal – and therefore logical – contradictions.

Multiplying rights has – just as with a currency – a devaluating effect. And elevating some of them to a superior level (“fundamental rights”) in no way is a solution, but simply generates a competition – political, legislative, judicial – as to which rights are “fundamental” and which ones should prevail over another one (the typical example is the conflict between freedom of religion and worship, and equality between man and woman and non-discrimination among sexes).

The result is the trivialization of “fundamental” rights which at the end of the day must coexist with so many others that their actual value ends up by being simply symbolic, a flag waved among dozens of others.

But there is a second logical inconsistency in the multiplication of rights and which any legal scholar familiar with the basic notions of private law should have very clear: if someone holds a right there is – there must be – someone else – an institution, an individual, an entity – who is burdened with a duty – or to use the private law term – an obligation. Therefore, duties are functional to the existence of rights².

Multiplying rights – which appears to be an inescapable result of the democratic process – results in multiplying duties³. And here we come to our topic.

Most of the rights which have emerged in these decades come with –

² “The common, and in my view distorted, perception of duties which is supposed to make plain their subordination to rights, in fact leads to a belittling of the role of rights” (J. RAZ, *infra* at fn. 5).

³ D. SELBOURNE, *The principle of duty*, cited at fn. 1, at § 10 speaks of “the irreconcilability of any presumed ‘absolute’ rights in one citizen with the same presumed right in another” with the consequence that “There are no absolute rights, whether to life, liberty, property, happiness, or any other good” (*ibidem*).

if this crude expression is allowed – a price tag⁴. Someone must pay for their effectiveness: the best example are the absolutely fundamental rights to education and health which are the pillars of any State, whatever its ideology. We can – we must – surely discuss the contents, the level, the beneficiaries of these rights but it would be naïf to imagine that they are without a cost (generally and ultimately for the taxpayer).

The general trend in Europe (I will not consider the US) has been that these rights should be granted and guaranteed by the State.

It is a duty for a democratic State to ensure that these rights exist not only in some legislative text but are effectively enforced. Let us take for example a case on which no doubt, well beyond any political belief, basic principles of human decency should bring us to agree: the rights of people with physical or mental disabilities. It is sufficient to think at the multiple charitable (both public and private) institutions which flourished in the 19th century for the blind, the deaf and dumb, and which were very much places of segregation. Thankfully this attitude has significantly changed and we believe that is a basic duty of the State to ensure, inasmuch as it can, equal opportunities and treatment also for these less fortunate citizens.

However, one cannot ignore that such a right – fundamental, if one believes in basic human dignity – sees the State as provider of services, which must be paid by the whole community which on one side provides here and now the moneys through taxation, or indirectly and with effects on the future generations, through public debt.

But this is only one side of the coin. Increasingly, and especially after the expansive growth of the European Union welfare rights to do not impose a duty only on the State (with a subsequent transfer of its cost), but also and directly on its citizens, typically its enterprises.

This is the result of a legal principle – whose foundations cannot be appropriately analyzed in this paper – that of “horizontal effects”. The duty to ensure such rights is imposed not only on the State, but also on the private persons (mostly legal entities) who enter in a relation with the bearer of the right. A typical example is the right not to be discriminated on the workplace. There is no doubt that female employees “cost” more than male ones (maternity leave, caregiving for children and elderly relatives etc.), but if the right has any sense, it implies burdening the employer with expenses he would – if not bound by a legal duty – probably avoid.

The first conclusion is that rights and duties are inextricably inter-

⁴ See S. HOLMES, C. SUNSTEIN, *The Cost of Rights. Why Liberty Depends on Taxes*, W.W. Norton 1999; G. PINO, *Il costituzionalismo dei diritti*, Il Mulino 2017 (especially ch. VI).

twined. Increasing rights means increasing duties (and the costs that are related with them). Reducing duties – or even simply suggesting that they should be reduced because of their cost for the State or for individuals – implies reducing rights which are seen as vested. A move that has obvious and negative political and legal consequences.

The question therefore – which in the first place is theoretical – is if and how one can decouple the relationship between rights and duties and give to the latter an autonomous role⁵. This implies a different approach which is both grounded in political theory and in constitutionalism. The first step is qualifying duties as a prerequisite to bear rights⁶. If citizens are equal without distinctions of any kind, this implies that (setting aside differences in taxation, based on income and wealth), there are duties that all should comply with.

Let us take as example a duty that 80 years of extraordinary peace in western Europe has generally swept under the carpet: that of military conscription or, in a less conflict-oriented approach, community service. In this case we have a duty which has as counterpart the whole nation: a duty without a right. But one can try to reconstruct the category with a series of other situations which only apparently are hidden and *in incertam personam*. Let us take as a further example the duty to preserve natural resources, well beyond the pervasive legal (often criminal law) discipline. Again, here we have a duty towards the whole community and future generations which does not have an immediate counterpart⁷. Or to enter into a highly debatable field, should one have a duty to conduct a healthy

⁵ Not surprisingly J. RAZ titles his contribution on the topic “*Liberating Duties*” [8 *Law and Philosophy* 3 (1989)] and these few pages try to follow its path: “Ever since the Second World War, the march of rights has seemed unstoppable” with “various rights-oriented theories as the leading contender for the status of the moral and political orthodoxy of today”. Raz’s article wishes “to contribute a challenge to this orthodoxy by pointing out the inherent limitations of right-oriented doctrines, and to the need to regard rights as subsumable under and derived from a more fundamental doctrine of well-being on the one hand, and a complementary need to give duties a central role in our understanding of moral and political life, which is independent of their role in protecting and promoting rights”.

⁶ Which obviously leads (in a US context, which probably could be extended to Europe) to the notion of “ordered liberty”: see J. E. FLEMING, L. C. MCCLAIN, *Ordered Liberty. Rights, Responsibilities, and Virtues*, Harvard U.P. 2013

⁷ “Typically, individuals do not have rights to common goods (...) The continued existence of common goods depends on cooperative behaviour of many individuals” (J. RAZ, cited at fn. 5, p.10).

life-style by the fundamental right of individual freedom?⁸

A normative theory of duties-without-rights (or of duties as requisite to enjoy rights) therefore requires a thorough re-interpretation of our democratic constitutions in order to provide it with solid foundations⁹. Clearly this in no way is meant to belittle fundamental rights but is necessary to put duties on the same footing.

This approach not only implies drafting an open-to-discussion catalogue of duties¹⁰, their common and/or distinctive features and inter-relationships but also set their limits¹¹ (which we find already, *in nuce*, in the 1789 Declaration¹²), their functionality and in what manner the principle of proportionality applies¹³.

⁸ P. SCHOFIELD, *Duty to self: moral, political, and legal self-relation*, OUP 2021; J. RAZ, cited at fn. 5, p.15

⁹ Explicitly in the Italian Constitution, article 2 (which recognizes and guarantees fundamental rights and “requires the fulfilment of imperative duties of political, economic and social solidarity”); article 4 (“Every citizen has the duty, in accordance with their capability and choice, to perform an activity or function that contributes to the material or spiritual progress of society.”); article 48 (“Voting shall be a civic duty.”); article 52 (“The defense of the Fatherland is the sacred duty of every citizen”); article 54 (“All citizens shall have the duty to be loyal to the Republic and to comply with its Constitution and laws.”). The Spanish 1978 Constitution (which was inspired also by the Italian one) states at article 30 that “1. Los españoles tienen el derecho y el deber de defender a España.” And the same article states that “Mediante ley podrán regularse los deberes de los ciudadanos en los casos de grave riesgo, catástrofe o calamidad pública” ; article 45 focuses on environmental protection (“ Todos tienen el derecho a disfrutar de un medio ambiente adecuado para el desarrollo de la persona, así como el deber de conservarlo”). The German *Grundgesetz*, instead, does not explicitly state the duties of citizens, and refers, only and incidentally , in article 12, that “community services” are “a traditional duty”.

¹⁰ The parallel with rights suggests (in the US) a theory of “*Unenumerated Duties*” [R. WEST, 9 *U. Pa. J. Const. L.* 221 (2006)].

¹¹ “There are no absolute rights, whether to life, liberty, property, happiness, or any other good” (D. SELBOURNE, *The principle of duty*, cited at fn. 1, at § 10).

¹² Article 4 : “La liberté consiste a pouvoir faire tout ce qui ne nuit pas a autrui : ainsi, l’exercice des droits naturels de chaque homme n’a de bornes que celles qui assurent aux autres membres de la société la jouissance de ces mêmes droits. Ces bornes ne peuvent être déterminées que par la loi.” The principle can aptly be applied to duties. For some reference to other revolutionary texts see G.F. FERRARI, *Duties*, cited at fn. 1, p.5.

¹³ In Italian legal scholarship the literature is quite ample although not very recent: G. M. LOMBARDI, *Contributo allo studio dei doveri costituzionali*, Giuffrè, 1967; C. CARBONE, *I doveri pubblici individuali nella Costituzione*, Giuffrè, 1968; G. TARLI BARBIERI, “Doveri inderogabili”, in S. CASSESE (ed.), *Dizionario di diritto pubblico*, Giuffrè, 2006, vol. III, 2066; F. PIZZOLATO, C. BUZZACCHI, “Doveri costituzionali”, in *Digesto Discipline Pubblicistiche*, vol. I agg., UTET, 2008, 319; B. DE MARIA, *Etica repubblicana e costituzione*

At the same time – mirroring what we have fruitfully been doing in the last eight decades – it would be useful to understand if and to what extent international charters can be the source – or support – for paramount duties¹⁴.

But side-to-side with this inspiring theory-building it is necessary to take into account a different view of the cathedral (or is it only a much humbler chapel?).

If one looks at it from the perspective of these pages, the whole construction of the theory of social norms concerns in its essence the existence of duties towards others – individuals or the community – which do not find their basis in some normative or judicial provision¹⁵. And this approach can be easily extended to very common non-egoistic economic behaviours which go against the abstract neo-liberal Chicago-school theory of perfectly informed and rational transactions.

Whatever the label we wish to affix on this behaviour (morality, altruism, solidarity¹⁶, social reputation, custom of the trade, etc.) it implies a duty on one side without there being a right on the other side. This means that the latter cannot claim enforcement of the duty on the former.

Also, here a tentative catalogue appears necessary, distinguishing between self-imposed duties within an economic activity, within a family group, or small communities, whether geographical, social, or in the workplace¹⁷. One should also consider duties that are not permanent but

dei doveri, Editoriale Scientifica, 2013. For references to Spanish literature see G.F. FERRARI, *Duties*, cited at fn. 1, at p. 16 and fn. 71; and G. PECES-BARBA MARTINEZ, “Diritti e doveri fondamentali”, in *Digesto discipline pubblicistiche*, UTET, vol. V, 1990, 152.

¹⁴ If one starts with the 1948 Universal Declaration of Human Rights the result is, however, rather meager. The only, very nuanced, reference, is in article 29: “Everyone has duties to the community in which alone the free and full development of his personality is possible.”. The term is absent in the ECHR (except for a generic reference to non-specified “duties and responsibilities” in article 10.2.).

¹⁵ Y. FELDMAN, *The law of good people. Challenging States’ ability to regulate human behavior*, Cambridge U.P. 2018.

¹⁶ The foremost reference is to G. ALPA, *Solidarity. A normative principle*, Wolters Kluwer 2023 and in particular to § 6.03 where the notion is inter-twined with the “dimension of duty”. And conversely G.M. LOMBARDI, *Contributo allo studio dei doveri costituzionali*, cited at fn. 13, concludes his lengthy monograph pointing out that “the three aspects of solidarity, the political one, the economic one, and the social one, which have been used to extract the notion of fundamental duties, cannot be considered as three different categories without reciprocal interferences” (at p. 465, my translation).

¹⁷ See with a general view on industrial relations G. PROIA, *La relazione “offuscata” tra diritti e doveri (nel diritto del lavoro per una ripresa sostenibile, ma non solo)* [“The ‘blurred’ relationship between rights and duties (in ‘labour law for a sustainable recovery’ but not

are triggered by external events such as personal tragedies of third parties, illnesses, poverty, natural disasters, conflicts¹⁸.

A possible taxonomy could also distinguish between unilateral duties, reciprocal duties, cooperative duties and collective duties, each of which present distinctive features. But most of all what appears necessary is a strong interaction between lawyers and social scientists to examine certain aspects which explain, justify, promote duties as social norms such as efficiency, cost reduction (typically those tied to enforcement and redress), flexibility according to the context, the persons involved, the effort or detriment required, and finally, the social cohesion effect that compliance can produce¹⁹.

Especially with reference to the aspects of enforcement, there is a striking difference between public duties (the typical example being that of taxes) and “social duties”. The former are surrounded by mammoth normative, procedural, administrative and judicial provisions and institutions in order to ensure compliance and enforcement against the never ending attempts of evasion and avoidance. The latter, because of their purely “social” nature, are free from such constraints and partake many of the issues one finds in continental private law concerning the “obligation naturelle” or the “Naturalobligation”.

Having underlined the importance of a social norms approach to duties, one cannot however ignore some of problematic issues.

Self-imposed duties may be effective when looking at individuals; one can raise doubts on their extension when considering businesses; and surely, they cannot apply to public institutions which must operate under strict rules of law and judicial and financial accountability.

Two final remarks: a theory of self-imposed duties appears to be – of necessity – very far away from the universalistic approach we have seen as typical of rights: they can survive in small and cohesive social environments as a sort of bio-diverse behaviour²⁰. A second point, that clearly cannot be

only”], in *Massimario Giurisprudenza del Lavoro* 2021, 924. The author focuses on the centrality of duties in relation to social rights and cohesion.

¹⁸ H.M. ROFF [18 *Jahrbuch Recht und Ethik* 533 (2010)] elaborates the notion of “*Kantian Provisional Duties*”.

¹⁹ This social and utilitarian understanding of duties is very clearly set out by J. RAZ (*retro* fn. 5, at p. 18 ff.): “Duties may be internally related to their justifying goods”: “Intrinsic goods have a normative aspect. They are not patterns of action and interaction which we stray into accidentally”; “Their [of duties] existence creates valuable opportunities, constitutes valuable options”.

²⁰ From a strictly legal point of view the English law of torts has as one of its fundamental

examined here but is unavoidable, is the question if charity – as practically all religions posit – is not only a transcendent duty, but also a civic one.

As a conclusion I feel that an Italian scholar has a duty to quote one of the most enlightened spirits of the 19th century who not only drew the path, from his exile, for the unity of a democratic Italian republic, but lit the torch for human dignity throughout Europe and the Americas:

“The theory of Rights may suffice to arouse men to overthrow the obstacles placed in their path by tyranny, but it is impotent where the object in view is to create a noble and powerful harmony between the various elements of which the nation is composed.(...) We have, therefore, to seek a Principle capable of guiding mankind onwards toward their own improvement and uniting them with their fellow-men, without making them dependent either on the idea of a single man or the force of the majority. This principle is DUTY”²¹.

principles, that of “proximity”. The duty of care is not owed *erga omnes* but only towards “your neighbour”, a notion which receives a restricted reply: see the landmark 1932 House of Lords decision *Donoghue v. Stevenson* (per Lord Atkin).

²¹ G. MAZZINI, *Essay on the duties on man*, 1858. Incidentally one should note that the repeated reference to duties in the Italian 1948 Constitution is due to the presence in its Constituent Assembly of a strong number of MPs of the Italian Republican Party (PRI) which explicitly inspired itself to Mazzini’s ideas.

Matthias Bracke*

*Non-binding interregional agreements:
Unsatisfactory alternatives for interregional PCAs*

ABSTRACT

Although Partnership and Cooperation Agreements (PCAs) are not a legal prerequisite for the conclusion of Free Trade Agreements (FTAs) under European Union (EU) law, they have traditionally served as the political foundation for the EU's trade relations by establishing enforceable commitments concerning human rights, labour standards, and environmental protection. This practice raises an important question in the context of the EU's relations with the Association for Southeast Asian Nations (ASEAN). While the European Parliament has characterised bilateral PCAs as a prerequisite for FTAs, the EU has pursued an interregional FTA with ASEAN without ever proposing an interregional PCA. This article examines why no such agreement has been pursued and whether an interregional PCA would add value to future EU-ASEAN trade negotiations. The article evaluates three possible substitutes for an interregional PCA: the 1980 EU-ASEAN Cooperation Agreement, the existing network of bilateral PCAs between the EU and individual ASEAN member states, and the ASEAN-EU Plan of Action to Implement the Strategic Partnership (2023-2027). It argues that none of these alternatives satisfactorily fulfils the traditional functions of a PCA. The 1980 Cooperation Agreement lacks substantive and enforceable commitments, the bilateral PCAs impose divergent obligations across ASEAN member states, and the non-binding Plan of Action contains political aspirations rather than concrete obligations capable of supporting an essential-elements clause in a future FTA. The article further considers whether an interregional PCA would still be desirable. It concludes that such an agreement could promote greater uniformity, facilitate future ASEAN accessions to an interregional FTA, and potentially complement the EU's Building Block Strategy by drawing on the existing network of bilateral PCAs. At the same time, it argues that developments in modern EU trade policy increasingly blur the traditional distinction between PCAs and FTAs. As contemporary FTAs routinely incorporate provisions on human rights, labour standards, and environmental protection, the rationale for negotiating a separate PCA is becoming less compelling. Rather than requiring a preceding PCA, future interregional FTAs may instead incorporate these commitments directly, rendering a separate supporting agreement unnecessary.

KEYWORDS

EU – ASEAN – Partnership and Cooperation Agreements – Free Trade Agreements – Interregionalism.

* Matthias Bracke is a PhD Researcher at Ghent University (Ghent European Law Institute). His research focusses on interregional agreements, specifically in EU-ASEAN relations.

SUMMARY: 1. The role of Partnership and Cooperation Agreements as a prerequisite for Free Trade Agreements – 2. EU-ASEAN relations: An FTA without a PCA – 3. Existing alternatives to an EU-ASEAN PCA – 4. The (non) sense of an interregional EU-ASEAN PCA – 5. Mercosur – 6. Conclusion.

1. The role of Partnership and Cooperation Agreements as a prerequisite for Free Trade Agreements

From a historic perspective, the European Union (EU) has prioritised the use of legally binding agreements in its external relations. Though these binding agreements can take many forms, most international agreements can be attributed to one of several categories, such as Association Agreements (AA), Free Trade Agreements (FTA), or Partnership and Cooperation Agreements (PCA). FTAs and AAs even have their own specific legal basis in the Treaty on the Functioning of the European Union (TFEU) – Articles 207 and 217 TFEU respectively – while PCAs are not specifically mentioned in the treaties and simply fall under the general provisions for international agreements of Articles 216 to 219 TFEU.

The founding treaties do not impose any particular relation between these different categories of agreements. There is no hierarchy between them, nor does the conclusion of one agreement depend on the previous conclusion of another. However, there are clearly identifiable trends noticeable in the EU's external relations. One such well-established trend is the tradition to conclude a PCA with a third state before an FTA can be concluded,¹ and in its resolution of 8 May 2008 on trade and economic relations with the Association of South East Asian Nations (ASEAN), the European Parliament explicitly stated that '*a Partnership and Cooperation Agreement (PCA), containing enforceable human rights clauses, is a prerequisite for the Union to conclude an FTA with any country*'.² It is worth noting that the resolution itself is not binding in nature, and that this particular remark was not based on any other legally binding source of EU law. In other words, the 'prerequisite' nature of a PCA is politically encouraged, but not a strict legal requirement under current EU law. For example, it is notable that the EU has concluded a collective trade agreement with Colombia and

¹ A. ESTABILLO, *EU to Fast-Track FTA Talks with ASEAN Member-States* (2 April 2012) <<https://mindanews.com/top-stories/2012/04/eu-to-fast-track-fta-talks-with-asean-member-states/#gsc.tab=0>>.

² European Parliament resolution of 8 May 2008 on trade and economic relations with the Association of South East Asian Nations (ASEAN), (2007/2265(INI)) [2009] OJ C271E/38, point H.

Peru in 2012³ – later joined by Ecuador in 2016 – without any PCA being in place between the EU and either of these three Latin-American countries.

In essence, an existing PCA has the purpose of reassuring EU institutions and EU Member States that the third state will comply with important non-trade aspects such as human rights, labour laws, and environmental standards.⁴ Ideally, this then translates into a specific provision in the later FTA, which would allow the parties to ‘*take appropriate measures relating to [that FTA]*’ in case the other party breaches (an essential element of) the PCA.⁵ In this context, the existence of a PCA of which the breach can have repercussions for the implementation of the FTA, should establish or increase the trust between the EU and third state in light of the latter’s standards in human rights, labour laws, and environmental standards.

2. EU-ASEAN relations: An FTA without a PCA

Anno 2026, the EU has been unable to conclude, sign, and ratify any interregional FTA. ‘Interregional’ FTAs are concluded between the EU on the one hand, and another Regional International Organisation (RIO) on the other hand. It is generally understood that the category of ‘inter-regional agreements’ also includes international agreements that are concluded between the EU and the member states of another RIO, as long as it is concluded within the context of that RIO.⁶ That no interregional FTA has ever been concluded, has not been the result of a lack of effort, as the EU has initiated negotiations for several interregional agreements since the 1990’s, most importantly with the Gulf Cooperation Council (GCC) since 1990,⁷ the Southern Common Market (*Mercado Común del*

³ Trade Agreement between the European Union and its Member States, of the one part, and Colombia and Peru, of the other part [2012] OJ L354/3.

⁴ J. WONG, *Repairing the EU-ASEAN Disconnect in Trade Relations* (Friends of Europe, 14 May 2024) <<https://www.friendsofeurope.org/insights/critical-thinking-repairing-the-eu-asean-disconnect-in-trade-relations>>.

⁵ Examples of this can be found in Article 17.18 (2) EU-Vietnam FTA and Article 27.4 (3) EU-New Zealand FTA.

⁶ See as an example the EU-ASEAN Comprehensive Air Transport Agreement, which was concluded between the EU and all ten member states of ASEAN at the time (before Timor-Leste joined as an eleventh member state in October 2025).

⁷ European Commission, Gulf Region <https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/gulf-region_en>.

Sur, or Mercosur) since 2000,⁸ and the Association for Southeast Asian Nations (ASEAN) since 2007⁹. The reasons why these negotiations have failed to materialise into successfully concluded FTAs¹⁰ are too diverse and too complicated to discuss at length in this paper, though it is at the very least an interesting observation that no negotiations were ever initiated for an interregional PCA between the EU and any of the previously mentioned RIOs, or with any other RIO for that matter. Even though the European Parliament and several EU scholars argue that a bilateral PCA is a prerequisite for the conclusion of a bilateral FTA, they remain completely silent on the potential need for an interregional PCA as a prerequisite for the conclusion of an interregional FTA.

The purpose of this paper is to provide an answer to the very simple question: why? Why are no efforts made to pursue an interregional PCA with ASEAN? Additionally, based on the conclusion to the first question, a secondary question will be answered: Would there be any additional value to an EU-ASEAN PCA in light of future EU-ASEAN FTA negotiations?

Even though the same question could be asked in relation to any other RIO – the EU has not concluded PCAs with Mercosur or the GCC either – the particular focus on EU-ASEAN relations can be justified based on two reasons. One, the 2008 resolution of the European Parliament which made this political prerequisite explicit related specifically to EU-ASEAN relations (though the wording that was used hinted at a more general application of the principle). Two, a potential EU-ASEAN FTA finds itself in an ideal situation to discuss the matter of a ‘supporting interregional PCA’. Interregional FTA negotiations with Mercosur are already far more advanced – on 6 December 2024 the EU and Mercosur reached a political agreement on an improved EU-Mercosur Partnership Agreement,¹¹ and on 9 January 2026 the European Council adopted two decisions authorising the signature

⁸ European Commission, Mercosur (8 October 2025) <https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/mercosur_en>.

⁹ European Commission, EU Trade Relations with Association of South East Asian Nations (ASEAN) <https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/association-south-east-asian-nations-asean_en>.

¹⁰ A nuance should be made in relation to EU-Mercosur relations. The negotiations for an interregional EU-Mercosur FTA are significantly further advanced than any of the other envisioned interregional agreements. A political agreement has been reached on 6 December 2024, but at the time of writing it is unclear whether a Commission proposal to ratify the agreement would pass through the EU Council.

¹¹ European Commission, EU-Mercosur: Text of the Agreement <https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/mercosur/eu-mercosur-agreement/text-agreement_en>.

of the EU-Mercosur Partnership Agreement (EMPA) and of the Interim Trade Agreement (iTA)¹² – and is therefore less in need of a ‘supporting agreement’. On the other end of the spectrum, EU-GCC FTA negotiations have been suspended since 2008 and, unlike in the case of ASEAN, they have not been replaced by an overarching alternative strategy. Although the EU has agreed to launch bilateral FTA negotiations with the United Arab Emirates (UAE) on 10 April 2025, the Commission merely states that this envisaged bilateral FTA ‘may’ serve as a building block for a future regional FTA with the GCC.¹³ The EU Special Representative for the Gulf, Luigi Di Maio,¹⁴ explicitly states that the agreement represents a building block, yet the bilateralisation appears to reflect an ad hoc decision rather than an interregional EU-GCC strategy. It is furthermore telling that, at the time of writing, the EU has not opened bilateral negotiations with any other GCC member state. In any case, the water between the EU and the GCC appears to be far too deep for the time being,¹⁵ and the potential impact of a supporting interregional PCA would probably be negligible in any scenario. EU-ASEAN relations therefore hit the sweet spot, by being neither too far advanced nor too far away, placing a hypothetical interregional PCA in a position where it could potentially change the course of negotiations.

3. Existing alternatives to an EU-ASEAN PCA

The most obvious explanation why there are no calls for an interregional EU-ASEAN PCA, is because there could be another interregional agreement that essentially fulfils the same purposes. At first sight, there appear to be three potential alternatives that could fill the gap that is left by the absence of an EU-ASEAN PCA: The 1980 EU-ASEAN Cooperation

¹² European Council, EU-Mercosur: Council Greenlights Signature of the Comprehensive Partnership and Trade Agreement (Consilium) <<https://www.consilium.europa.eu/en/press/press-releases/2026/01/09/eu-mercotur-council-greenlights-signature-of-the-comprehensive-partnership-and-trade-agreement/>>.

¹³ European Commission, EU-United Arab Emirates Free Trade Agreement <https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/gulf-region/eu-united-arab-emirates-agreement_en>.

¹⁴ E. KARACSONY AND OTHERS, *EU-UAE Trade Negotiations: A Potential Path to Gulf-Wide European Trade* (ORF Middle East, 25 July 2025) <<https://orfme.org/expert-speak/eu-uae-trade-negotiations-a-potential-path-to-gulf-wide-european-trade/>>.

¹⁵ E. MENICETTI AND OTHERS (eds.), *Bridging the Gulf: EU-GCC Relations at a Crossroads*, Edizioni Nuova Cultura 2014.

Agreement (A), the collective grouping of bilateral PCAs between the EU and various ASEAN member states (B), and the EU-ASEAN Plan of Action to Implement the ASEAN-EU Strategic Partnership (2023-2027) (C).

A. The 1980 EU-ASEAN Cooperation Agreement

Based on the title alone, one could be forgiven for equating the 1980 EU-ASEAN Cooperation Agreement with a type of agreement that today we would call a PCA. However, being concluded as far back as 1980, the EU-ASEAN Cooperation Agreement is a remarkably short document with hardly any obligations for the ASEAN member states. The agreement encourages commercial (Article 2), economic (Article 3), and development cooperation (Article 5), but does not even mention human rights or labour laws. Article 3(2) briefly mentions that the parties ‘*shall [...] encourage and facilitate [...] cooperation in the fields of [...] environment*’, but it does not associate that provision with a specific obligation to which ASEAN and its member states must commit. In fact, unlike PCAs, this agreement does not include any concrete obligations for any party, and is instead limited to vaguely ‘promoting’ and ‘encouraging’ deeper cooperation between the two blocks.

Though slightly outside the scope of this paper, it can also be noted that the 1980 EU-ASEAN Cooperation Agreement is particularly ill-suited to serve the same purpose as a PCA, even when compared to similar agreements with other RIOs, such as the 1988 EU-GCC Cooperation Agreement and the 1995 EU-Mercosur Interregional Framework Cooperation Agreement. The EU-GCC agreement is similarly limited in concrete obligations, entirely silent on human rights and labour laws, and only includes a brief mention on the ‘*protecting the environment and [...] wildlife*’, but interestingly, it does include a provision that explicitly calls for opening negotiations on an interregional FTA.¹⁶ By contrast, the EU-Mercosur agreement does not include any specific provision referencing future FTA negotiations, but it does explicitly state that ‘*[r]espect for the democratic principles and fundamental human rights established by the Universal Declaration of Human Rights inspires the domestic and external policies of the Parties and constitutes an essential element of this Agreement*’,¹⁷ emphasising the importance of these fundamental human rights and the manner in which they can be mobilised to suspend international agreements if these essential provisions are not complied with. These elements are both entirely absent in the 1980 EU-ASEAN Cooperation Agreement. Unlike the 1988

¹⁶ Article 11 (2) EU-GCC Cooperation Agreement.

¹⁷ Article 1 EU-Mercosur Agreement.

EU-GCC Cooperation Agreement, this agreement did not explicitly call for the initiation of interregional FTA negotiations – which only began 27 years later – nor did it include any essential elements with regard to human rights as the 1995 EU-Mercosur Interregional Framework Cooperation Agreement did. To the extent that it is the purpose of a PCA to create enforceable insurances with respect to the compliance with fundamental rights, and to lay the groundwork for subsequent FTA negotiations, the 1980 EU-ASEAN Cooperation Agreement is ostensibly less suited than even its most comparable interregional cooperation agreements.

B. *Bilateral PCAs*

At the time of writing,¹⁸ the EU has concluded bilateral PCAs with six out of eleven ASEAN member states, though not all have fully entered into force yet.¹⁹ From the five remaining ASEAN member states, four – Cambodia, Lao PDR, Myanmar, and Timor-Leste – qualify as ‘least developed countries’ (LDC) and therefore fall under the Everything but Arms (EBA) scheme (in principle),²⁰ which removes tariffs and quotas for all imports of goods (except arms and ammunition) coming into the EU. As such, it is not a given that these countries would even be interested in being part of the envisioned EU-ASEAN FTA, since they already enjoy unrestricted access to the European market without having to comply with any of the conditions that the EU usually includes in FTAs.²¹ Lastly,

¹⁸ 10 September 2026.

¹⁹ Indonesia (signed 9 November 2009, not yet in force), Vietnam (signed 27 June 2012, into force 1 October 2016), the Philippines (signed 27 June 2012, into force on 1 March 2018), Singapore (signed 19 October 2018, not yet in force), Thailand (signed 14 December 2022, provisionally into force on 20 October 2024), and Malaysia (signed 14 December 2022, not yet in force).

²⁰ In 2020, the Commission partially withdrew Cambodia’s preferential access to the EU market ‘due to the serious and systematic violations of the human rights principles enshrined in the International Covenant on Civil and Political Rights’. However, it also stated that ‘the Commission may review its decision and reinstate tariff preferences under the EBA arrangement’ if Cambodia ‘shows significant progress, notably on civil and political rights’: European Commission, ‘Trade/Human Rights: Commission Decides to Partially Withdraw Cambodia’s Preferential Access to the EU Market’ <https://ec.europa.eu/commission/presscorner/detail/en/ip_20_229>.

²¹ Timor-Leste’s participation in an EU-ASEAN FTA is particularly questionable, given the fact that it is also a member state of the OACPS, see for example: M BRACKE, *Op-Ed: “Timor-Leste at the Crossroads: What Dual ASEAN–OACPS Membership Means for the EU”* (EU Law Live, 27 October 2025) <<https://eulawlive.com/op-ed-timor-leste-at-the-crossroads-what-dual-asean-oacps-membership-means-for-the-eu/>>.

Brunei Darussalam is by far the least populated ASEAN member state (less than half a million) and a Gross Domestic Product (GDP) that is twenty-six times less than the next ASEAN member state, not including the LDCs. Given these facts, the EU has shown no interest in concluding any bilateral PCA or FTA with that country, and the weight that Brunei has in overarching interregional agreements should not be overestimated either. Taking these circumstances into account, it is perhaps not exaggerated to state that all 'relevant' bilateral PCAs are already in place – though not necessarily in force – anno 2026.

An argument could therefore be made that these bilateral PCAs are already sufficient to warrant compliance with fundamental human rights, labour laws, and environmental standards within ASEAN. At first sight, this argument makes perfect sense. Given the fact that ASEAN differs from the EU in the sense that it does not have any 'exclusive competences', the actual compliance with these standards would always be the responsibility of the individual member states, even when the agreement would be concluded on an EU-ASEAN level. In other words, both a hypothetical interregional EU-ASEAN PCA and bilateral PCAs between the EU and ASEAN member states would infer obligations on the member states, not on the RIO of ASEAN as such.

The difficulty with using bilateral PCAs to support an interregional FTA however, is that these PCAs are not identical. Through separate PCAs, individual ASEAN member states are bound to somewhat similar yet ultimately distinct legal obligations when it comes to fundamental human rights, labour laws, and environmental standards. If a future interregional EU-ASEAN FTA would include an essential element concerning compliance with the respective PCAs of the individual ASEAN member states, then it would create the unequal scenario where certain ASEAN member states are bound to more stringent obligations than others, in order to enjoy the same provisions in the same FTA. While this is legally possible and therefore not inherently problematic, it would perhaps not be ideal from a more political point of view.

Furthermore, making use of bilateral PCAs also limits the scope of a potential FTA to those ASEAN member states that have concluded such an agreement with the EU. While, for previously established reasons, it is not unrealistic that Cambodia, Lao DPR, Myanmar, and Timor-Leste would not be part of a final interregional EU-ASEAN FTA either way, the same cannot be said about Brunei. Though the country itself is not a priority at the moment given its limited size, population, and economy, there is currently no reason to assume that Brunei would actively be excluded from

future interregional negotiations. If the EU relies on these bilateral PCAs, then an effort will have to be made to conclude such an agreement with the relatively ‘insignificant’ nation of Brunei as well. If the EU insists – against better judgement – to include the LDCs in the interregional agreement – as it regrettably did in the Economic Partnership Agreement (EPA) with the East African Community (EAC)²² – then this strategy would require five more bilateral PCAs on top of the six existing ones.

C. The EU-ASEAN Plan of Action to Implement the ASEAN-EU Strategic Partnership (2023-2027)

On 1 December 2020, the EU and ASEAN elevated their relationship by becoming Strategic Partners.²³ Unlike the Strategic Partnership between the EU and, for example, Canada,²⁴ this decision was not underpinned by a Strategic Partnership Agreement, but instead took the form of a simple announcement following the online 23rd ASEAN-EU ministerial meeting.²⁵ Instead, the specifics were included in the subsequent Plan of Action, which is the method through which the two regions consistently agree on their mutual relations and intentions. Importantly, these Plans of Action are limited in time (often a duration of four years) after which they are updated and renewed, and crucially, they are not legally binding and impose no legal duties on either side. A Plan of Action between the EU and ASEAN should therefore be considered as a political statement of intent, rather than a legally enforceable agreement. Though this has always been the case for all Plans of Action, this lack of legal obligations was explicitly recognised in the latter two Plans of Action: *‘The [...] Plan of Action [...] does not, nor is it intended to create any legal obligations on either side under*

²² The EU-EAC EPA eventually failed to materialize since, from the EAC side, it was only signed and ratified by Kenya, which is not coincidentally the only non-LDC of the East African RIO. Including the ASEAN LDCs in an interregional EU-ASEAN FTA might risk the same outcome, jeopardising the entire agreement.

²³ European Union External Action Service, EU and ASEAN Elevate Relations to a Strategic Partnership (1 December 2020) <https://www.eeas.europa.eu/eeas/eu-and-asean-elevate-relations-strategic-partnership_und>.

²⁴ European Union External Action Service, EU-Canada Strategic Partnership Agreement (1 April 2017) <https://www.eeas.europa.eu/node/13529_en>.

²⁵ European Council, Co-Chairs’ Press Release of the 23rd ASEAN-EU Ministerial Meeting (Consilium, 1 December 2020) <<https://www.consilium.europa.eu/en/press/press-releases/2020/12/01/co-chairs-press-release-of-the-23rd-asean-eu-ministerial-meeting/>>.

domestic or international law'.²⁶ The current Plan of Action is entitled 'Plan of Action to Implement the ASEAN-EU Strategic Partnership (2023-2027)', and as the name suggests, it is intended to give concrete form to the Strategic Partnership that was formed in 2020. While the provision on human rights is identical to the one in the previous Plan of Action,²⁷ the new document explicitly mentions labour standards²⁸ for the first time and is far more extensive on the topic of the environment.²⁹

The obvious follow-up question is then whether this non-binding document can fulfil the same function as a PCA, at least in so far that it could and should facilitate the conclusion of an FTA. Though it would be tempting to say 'yes', given its focus on the three main elements that are considered the most important in any PCA, the non-binding nature of the Plan of Action is a severe obstacle. The compliance of ASEAN member states with these provisions cannot be enforced, neither through any dispute settlement procedure, nor by suspension of the Plan of Action through an essential element clause. As such, the compliance with human rights, labour laws, and environmental standards is entirely of political nature: Can the EU trust that third States, from their own free will, live up to the high threshold that Europe upholds in these matters? The odds that the EU would have sufficient trust in the ASEAN member states that they would comply with these matters in the same way they would have if they were legally enforceable, are unlikely to be high. In that respect, it should be kept in mind that the Parliament's resolution of 8 May 2008 specifically referred to 'enforceable' human rights clauses, thereby seemingly excluding non-binding clauses as a suitable alternative to the PCAs they envisioned.

Lastly, and perhaps more importantly, though the most recent Plan of Action emphasises human rights, labour laws, and environmental standards, these matters are discussed broadly and vaguely. Since the Plan of Action was never meant to be legally binding, no effort was made to provide concrete (political) commitments that could verifiably be 'complied with' or, alternatively, 'breached'. If the Plan of Action had included well-defined obligations, even if they would not have been legally binding as such, the Plan of Action could still have fulfilled the functions of a PCA. A future interregional FTA could always include compliance with a Plan of Action

²⁶ Article 6 (d) ASEAN-EU Plan of Action (2018-2022); and Article 5 d) Plan of Action to Implement the ASEAN-EU Strategic Partnership (2023-2027).

²⁷ Compare Article 1.8 Plan of Action 2023-2027 to Article 1.7 Plan of Action 2018-2022.

²⁸ Article 2.1 Plan of Action 2023-2027.

²⁹ Article 3.5 Plan of Action 2023-2027.

as an essential element to the new agreement, whether or not the original document itself was intended to have legal effects. Given the vague nature of the commitments in the Plan of Action, they cannot be made 'binding' retroactively, and this option must therefore be excluded from the list of possible options.

4. The (non)sense of an interregional EU-ASEAN PCA

As an interim conclusion, it must therefore be deduced that there is currently no suitable alternative in place for an interregional EU-ASEAN PCA, at least not one that is fully satisfactory. The 1980 EU-ASEAN Cooperation Agreement and the latest Plan of Action are both far too vague on actual commitments to be enforceable in any meaningful way, while the reliance on bilateral PCAs would create discrepancies among different ASEAN member states. The latter is not an insurmountable obstacle – the suspension of the FTA for one ASEAN member state would probably not lead to the suspension of the entire agreement, meaning that different obligations as essential elements for different ASEAN member states is not *in se* problematic – but the secondary question of this paper still remains: would the conclusion of an interregional EU-ASEAN PCA be beneficial in light of future EU-ASEAN FTA negotiations?

Compared to the existing bilateral PCAs, an interregional PCA would have the benefit of uniformity, obliging all ASEAN member states to comply with the same obligations in order to enjoy the same benefits in the FTA. This would of course require that the PCA in question is not too differentiated, which is possible since a single interregional agreement could very well impose different obligations on different parties.³⁰ The uniformity in their obligations could also make the interregional PCA far more accessible for new ASEAN member states. As previously mentioned, certain ASEAN member states currently fall under the EBA scheme and are therefore not likely to prioritise participation in an EU-ASEAN FTA, though it must be said that the LDC-status (and the preferential access to the EU market that comes with it) is not permanently attributed to a third State. For example, Samoa graduated from its status as an LDC in 2014,³¹ and was consequently removed from the Generalised Scheme of

³⁰ Consider for example the Samoa Agreement with the OACPS.

³¹ UNGA Res 62/97 (17 December 2007) UN Doc A/RES/62/97; in combination with

Preferences (GSP) in 2020 (into effect since 2021) by the Commission.³² In the long term, third States such as Cambodia, Lao DPR, Myanmar, and Timor-Leste could graduate from this category too, after which the prospect of concluding an FTA with the EU might become significantly more enticing. Making the assumption that the EU indeed manages to conclude an interregional FTA with ASEAN (which is a generous assumption to make), these four states might then seek to accede to the already existing agreement. If the FTA follows the expected path and refers to a previously concluded interregional PCA as an essential element, these four states would undoubtedly be required to first accede to that agreement. In the case where this interregional PCA provides uniform obligations for all parties – at least for those on the ASEAN side – then this accession can be a fairly simple procedure. However, if the interregional PCA provides different obligations for different ASEAN member states, then specific negotiations would have to be opened between the EU and the acceding ASEAN member state to determine the exact scope and depth of their specific obligations. A practical ‘middle ground’ could be that specific obligations for specific states are included via annex or protocol, and only consist of precise derogations from the general rules that are formulated in the agreement itself. This could significantly facilitate accession by new states, while also providing a certain level of flexibility between very diverse states.

Furthermore, using the Commission’s own reasoning, the conclusion of an EU-ASEAN PCA might actually be significantly more realistic than an EU-ASEAN FTA, of which negotiations are currently suspended. Since the suspension of EU-ASEAN FTA negotiations in 2009, and confirmed in a 2022 speech by Commission president Ursula von der Leyen,³³ the EU has applied the so-called ‘Building Block’ strategy with regards to EU-ASEAN trade relations. Briefly put, the Building Block strategy implies that the EU will first attempt to conclude individual FTAs (and IPAs) with individual ASEAN member states. The idea is that these bilateral FTAs will serve as ‘building blocks’ towards an EU-ASEAN FTA, and they are specifically designed to be mostly similar in scope and obligations, so the EU-ASEAN FTA can be based on the agreements which the individual ASEAN

UNGA Res 64/295 (7 September 2010) UN Doc A/RES/64/295.

³² Commission Delegated Regulation (EU) 2020/128 of 25 November 2019 amending Annex II to Regulation (EU) No 978/2012 of the European Parliament and of the Council applying a scheme of generalised tariff preferences [2020] OJ L27/6.

³³ European Commission, Speech by the President at the EU-ASEAN Commemorative Summit (*Speech*, 14 December 2022) <https://ec.europa.eu/commission/presscorner/detail/en/speech_22_7729>.

member states had already agreed upon. As it stands, bilateral FTAs have been concluded with Singapore³⁴ and Vietnam³⁵, and negotiations with Indonesia on a Comprehensive Economic Partnership Agreement (CEPA) were concluded on 23 September 2025.³⁶ While this Building Block strategy has been criticised in legal doctrine,³⁷ it could potentially be far more useful for PCAs than for the FTAs it is currently used for. The main factor to this effect would be the simple fact that six bilateral PCAs are already in place, compared to a mere two FTAs (and one pending approval by the Council). This larger network of bilateral agreements provides more building blocks on which the strategy relies. On the other hand, the previously mentioned discrepancies in obligations between the different bilateral PCAs could complicate their function as potential building blocks. This is not particularly surprising. Bilateral FTAs between the EU and individual ASEAN member states are specifically designed to be ‘coherent’ with each other,³⁸ while no such efforts were made during individual PCA negotiations. In the end, whether the existing bilateral PCAs could harness the supposed power of the Building Block strategy is far from a certainty, though the possibility cannot be excluded either.

Lastly, a final question must be asked and answered: is there still a need for any PCA – or a PCA substitute – at all? The previously mentioned instructions by the European Parliament already date from 2008, and EU trade policy has developed significantly since then. Specifically, the scope of FTAs has consistently broadened in the last decades, with an increasingly intensive focus on human rights³⁹ and sustainable

³⁴ Free Trade Agreement between the European Union and the Republic of Singapore [2019] OJ L294/3.

³⁵ Free Trade Agreement between the European Union and the Socialist Republic of Viet Nam [2020] OJ L186/3.

³⁶ European Commission, EU and Indonesia Conclude Negotiations on Free Trade Agreement <https://ec.europa.eu/commission/presscorner/detail/en/ip_25_2168>.

³⁷ From a practical perspective: G. GAGLIANI, *The European Union and Asean Countries Trade Relations: “Building Blocks” or “Stumbling Blocks?”* in Y. MA (ed), *Chinese (Taiwan) Yearbook of International Law and Affairs*, Brill | Nijhoff 2019); M. BRANDT, *Towards an EU-ASEAN Interregional Free Trade Agreement? An Analysis of the “Building Block” Strategy Potential*, Master’s thesis, Ghent University 2024). From a theoretical perspective: M. BRACKE, *The Supposed Resilience of the EU-ASEAN Building Block Strategy under Scrutiny*, in *Edited volume: Conference “The European Union and international fora: Does the European Union serve multilateralism?”*, 2025.

³⁸ See for example: Report from the 1st round of negotiations for a Free Trade Agreement between the European Union and Indonesia.

³⁹ I. Zamfir, *Human Rights in EU Trade Agreements: The Human Rights Clause and Its*

development⁴⁰, including as essential elements. The notion that these political elements should be concluded in a PCA while the subsequent FTA should solely focus on trade aspects, has been outdated for quite some time already, and is increasingly becoming more so. An interesting approach to an interregional EU-ASEAN FTA would be to use the network of bilateral PCAs with individual ASEAN member states as a foundation of trust during negotiations, while simultaneously including similar provisions in the interregional FTA. Instead of referring to previous PCAs, the essential elements of the FTA could then be incorporated into the FTA itself. Considering that these provisions would necessarily overlap with existing bilateral PCAs, it would either have to supersede the previous agreements, or – in case it does not fully transpose the full content of all PCAs – establish a clear hierarchy between the interregional FTA and the individual PCAs. For obvious reasons, should there be a conflict between the two agreements, the interregional FTA would have to take precedence in order for the self-contained essential element clauses to have full effect.

5. *Mercosur*

While the prospect of an interregional PCA is particularly relevant with respect to EU-ASEAN relations – as previously argued – it still bears some significance to briefly extend the conclusion of this paper to other RIOs, most notably Mercosur. At the time of writing, the EMPA (as well as the iTA) is approved by the EU Council, but still requires the approval of the European Parliament, which is far from a certainty.⁴¹ The reasoning that an EU-Mercosur agreement would not necessarily require a supporting interregional PCA, particularly when compared to the EU-ASEAN FTA, would lose some of its credibility if the EMPA were to fail to pass through the European Parliament, given that the negotiating process itself has already been finalised. However, EU-Mercosur relations are highly ambitious, and the interregional agreements are significantly more substantial than merely trade-related agreements. Instead, the EMPA

Application 2019 PE 637.975 Briefing to the European Parliament.

⁴⁰ The EU – New Zealand FTA, into force since May 2024, was the first FTA to include an enforceable Sustainable Development Chapter.

⁴¹ P. CORLIN, *EU Member States Back Mercosur Deal, French MEPs Vow Fight in Parliament*, *Euronews*, 9 January 2026 <<http://www.euronews.com/my-europe/2026/01/09/eu-member-states-back-mercotur-deal-french-meps-vow-fight-in-parliament>>.

consists of both a political and cooperation pillar, as well as a trade pillar. The latter is currently isolated in the iTA, while the EMPA contains both pillars and is intended to supersede the 'smaller' iTA as soon as it enters into force.⁴² In essence, the political and cooperation pillar of the EMPA fulfils the traditional function of a PCA, for example by including human rights as an essential element to the agreement (Article 1.2), referring multiple times to concrete obligations regarding labour laws (Article 7.1(11), Article 8.15, Article 16.1(1), Article 26.2(1), and Article 26.4) and environmental protection (Article 26.5 on multilateral environmental agreements, Article 26.6 on climate change, Article 26.7 on biodiversity, Article 26.8 on the sustainable management of forests, and Article 26.9 on the sustainable management of fisheries and aquaculture).

Rather than concluding a PCA previous to an FTA, the EU strategy toward Mercosur consisted of incorporating traditionally PCA-provisions in the larger trade agreement itself. Interestingly, as a result of the Commission's splitting strategy, the trade pillar of the agreement should enter into force before the larger EMPA does (since the former does not require the ratification of all individual EU Member States). Instead of introducing enforceable provisions on human rights, labour laws, and environmental protection in an agreement to set the groundwork for trade negotiations, the trade-centred iTA should enter into force before the provisions on fundamental rights will be legally enforceable. The EMPA therefore reverses the traditional order of trade and fundamental rights provisions. While this is an interesting reversal, the concerns in the EU Parliament are centred on the EMPA's (and iTA's) impact on the European agricultural sector, rather than the fact that trade would be liberalised before the entry into force of the PCA-substituting provisions. This indicates that there is little additional value in an EU-Mercosur PCA, since the inclusion of the relevant provisions in the EMPA itself has gathered broad support.

6. Conclusion

While the conclusion of a PCA is not a legal requirement for the conclusion of an FTA – as demonstrated by the Trade Agreement between the EU and Colombia, Peru, and Ecuador – it has been politically preferable to conclude a PCA before starting proper negotiations for an FTA. Despite this, the EU has not explicitly motivated its decision to pursue

⁴² Article 23.10 EU-Mercosur iTA.

an interregional FTA with ASEAN while at the same time showing no intention whatsoever to commence negotiations on an interregional PCA. The most obvious explanation would be that there are already one or more agreements in place that would fulfil the same purpose, but this explanation has proven unsatisfactory. All three potential alternatives have shown themselves lacking in one way or another. Firstly, the 1980 EU-ASEAN Cooperation Agreement includes very little of substance. Secondly, the network of bilateral PCAs with individual ASEAN member states provide similar yet ultimately distinct obligations for each ASEAN member state, which would complicate their usage in essential element clauses. Thirdly, the most recent Plan of Action is a non-binding agreement. This fact alone is not problematic, but as a result of its non-binding nature, the language of the agreement reflects intents rather than obligations. Because of this, the Plan of Action is not only non-binding, it is also incapable of being made binding via another agreement. Though it would technically be possible for European institutions to be satisfied with a political intention to uphold human rights, labour laws, and environmental standards, this would be a surprising and uncharacteristic break from the traditional approach, where enforceability is still the preferred method of keeping its partners accountable. All in all, the absence of an interregional PCA cannot easily be attributed to an existing alternative.

The conclusion of interregional PCA between the EU and ASEAN could therefore still have certain advantages in light of future interregional FTA negotiations. It could help build trust between the parties, but more importantly, it would provide a much more effective tool to serve as the basis for an essential element in a future FTA, since it would provide a much more equal footing for the different ASEAN member states. In fact, the EU could attempt to use the Building Block strategy – which is currently used to build the foundations for a future interregional FTA – to build on existing bilateral PCAs.

It should be noted however that the very notion of a PCA-requisite could be outdated by now. FTAs are consistently broader in scope than previous generations, and the inclusion of provisions concerning human rights, labour laws, and environmental standards – traditionally the terrain of PCAs – are more and more included within the FTAs themselves, as is the case in the proposed EMPA. Though this inclusion would increase the workload of the diplomats – having to agree on a broader scope of subject matters – it would also negate the necessity for a separate interregional PCA. As such, the essential elements in the FTA would not have to refer to a previously concluded agreement, but could be integrated in the agreement itself.

Dylan Couck*

*Governing Universities:
Autonomy, Duties and the Law in the Flemish Community*

ABSTRACT

Institutional autonomy is widely regarded as a cornerstone of higher education, safeguarding universities against undue state interference and enabling academic freedom. At the same time, contemporary universities are increasingly expected to demonstrate accountability, respond to societal needs and contribute to broader public, economic and social objectives. This chapter examines how the Flemish higher education system seeks to reconcile these competing imperatives. The chapter analyses the constitutional, European and international legal foundations of institutional autonomy before examining how the concept of institutional responsibility has become embedded in higher education governance. It then traces the transformation of the Flemish higher education system since the 1990s, showing how increased institutional autonomy has been accompanied by new forms of governmental steering. Particular attention is paid to four mechanisms through which institutional responsibilities are operationalised: political discourse, open legal norms, quality assurance and ex post oversight, and funding arrangements.

The chapter argues that these governance instruments, while intended to strengthen institutional accountability without reverting to detailed state regulation, often lack the legal certainty, transparency and democratic legitimacy required to define institutional responsibilities effectively. As a result, governmental steering increasingly operates through flexible and indirect mechanisms that may expand public control while obscuring the normative content of universities' duties. This gives rise to a fundamental paradox: the more governments seek to strengthen institutional responsibilities, the greater the risk of undermining the institutional autonomy upon which those responsibilities ultimately depend.

The chapter concludes that autonomy and accountability should not be conceived as competing values but as mutually reinforcing principles. Achieving this balance requires institutional duties to be articulated through transparent, legally certain and participatory governance arrangements that preserve constitutional guarantees while enabling universities to fulfil their public mission.

* Dylan Couck is doctoral assistant at the Department of European, Public and International Law at Ghent University (Belgium). His research focuses on education law, constitutional law and higher education governance, with particular emphasis on institutional autonomy, academic freedom and the legal regulation of universities. He holds an LL.M. from Ghent University and an M.Sc. in Educational Sciences from the University of Antwerp. His work combines legal and educational perspectives on the governance of higher education and has been published in national and international journals and edited volumes. Alongside his academic research, he contributes to higher education governance and quality assurance through appointments in several advisory and review bodies.

KEYWORDS

Institutional Autonomy – University Governance – Public Accountability – Government Steering – Flemish Community (Belgium).

SUMMARY: 1. Introduction – 2. Legal foundations of autonomy and duties – 3. University reforms since the 1990s – 4. The operationalisation of duties in Flemish Higher Education – 5. The paradox: strengthening duties erodes autonomy – 6. Conclusion

1. *Introduction*

The governance of higher education institutions in the Flemish Community is characterised by a delicate interplay between constitutional autonomy and evolving legal duties.¹ Reconciling these two dimensions is far from straightforward. Autonomy is traditionally framed as a shield against state interference, enabling universities to pursue their academic mission free from political or economic pressures. Responsibilities, by contrast, introduce expectations of responsiveness, efficiency and accountability – values that often require external steering and oversight. This tension is not merely theoretical: it manifests in concrete policy choices, where governments seek to safeguard institutional autonomy while simultaneously demanding measurable outcomes and societal impact. Historically anchored in the foundational principles of Belgian constitutional law, the freedom of education has long served as a stronghold against undue state interference, safeguarding the rights of institutions to self-govern and define their pedagogical missions. Yet, this autonomy is not absolute. Over time, mainly international legal instruments have recognised that institutional freedom must be balanced against broader societal responsibilities, particularly in light of the public mandate and funding that universities receive. The challenge lies in ensuring that government interventions aiming at strengthening institutions' responsibilities do not erode their independence, which underpins academic freedom, innovation, critical inquiry and other academic values. In the Flemish context, this balancing act is particularly complex, given the constitutional guarantee of freedom of education. This chapter therefore asks: how can the Flemish higher education system reconcile constitutional guarantees of institutional autonomy

¹ This text has previously been published in the *Law and Criminology Journal*, see D. COUCK, *Governing Universities: Autonomy, Duties and the Law in the Flemish Community*, in *Law & Criminology Journal*, 2025, 2(1), pp. 40–57.

with the evolving legal and policy instruments that seek to operationalise higher education institutions' societal duties?

This chapter first examines the legal and policy frameworks that shape the duties of universities – for the purpose of this text, encompassing both universities and university colleges (*hogescholen*) – in Flanders, with a particular focus on the tension between autonomy and accountability (section 2). Throughout this chapter, the terms “duties”, “responsibilities”, and “obligations” are used interchangeably to denote the normative expectations placed upon higher education institutions by law and policy. While these concepts differ in nuance, they all refer to the same underlying idea of institutional accountability towards society and the state. In the same section, we also explore how constitutional provisions, soft law instruments and international declarations have contributed to a normative landscape in which universities are expected to fulfil roles that extend beyond the mere provision of education and research. These expectations encompass responsiveness to societal needs, economic relevance and the efficient use of public resources. The chapter then turns to the changed policy context in which the responsibilities of higher education institutions are shaped. Since the 1990s, the governance model has been revised, new steering instruments have been introduced, and greater attention has been paid to university duties (section 3). Different mechanisms are used by the Flemish government to enhance these responsibilities, such as political discourse, open legal norms, *post hoc* control and quality assurance processes, and funding mechanisms (section 4). While such mechanisms aim to enhance institutional flexibility and responsiveness, they also raise concerns about legal precision, enforceability and the potential erosion of institutional autonomy. Indeed, the operationalisation of duties through vague or informal instruments may result in inconsistent expectations and diminished legal protection.

The chapter further interrogates the paradox whereby efforts to strengthen institutional duties may inadvertently undermine the very autonomy that enables universities to innovate and fulfil their societal missions (section 5). Moreover, the increasing administrative burden and potential misalignment between policy objectives and academic realities threaten institutional autonomy. The potential for diminished trust between the government and the higher education sector, as well as the unintended consequences of legislative interventions, are also noted. In addressing these issues, the article advocates for a governance model that respects constitutional guarantees while promoting transparent, participatory processes for defining institutional responsibilities. Through such

a balanced approach, the Flemish higher education system can ensure its legitimacy and uphold the academic freedoms essential to democratic society.

2. Legal foundations of autonomy and duties

The principle of institutional autonomy in Flemish higher education is deeply rooted in constitutional tradition. Its origins trace back to the foundational moment of Belgian independence, when the newly formed state explicitly rejected the monopolistic educational policies of rulers like Napoleon and Willem I.² The Belgian Constitution of 1831 enshrined in article 24 the phrase “*Het onderwijs is vrij*” (“Education is free”), marking a decisive break from past restrictions and affirming the right of private actors to establish and organise educational institutions. It protects the autonomy of educational providers to establish institutions (freedom of foundation), define their pedagogical or ideological orientation (freedom of direction) and organize internal governance and the education they offer (freedom of organisation). This constitutional protection of institutional autonomy is referred to as the active freedom of education.

These freedoms are not absolute. The government may impose restrictions, provided they meet constitutional criteria, meaning such restrictions need a legal basis, have to pursue a legitimate aim and should be relevant for and proportionate in the light of that aim.³ Regulatory measures such as accreditation standards, funding conditions and regulations concerning the access of students to higher education exemplify justified limitations. While the Constitution primarily imposes a negative obligation on the state to refrain from undue interference, jurisprudence has evolved to recognise certain positive obligations. The Belgian Constitutional Court has ruled that autonomy must be supported

² A. GIRON, *Dictionnaire de droit administratif et de droit public*, Tome deuxième, Brussels, 1895, p. 278; P.J.J. ZOONTJENS, *Vrijheid van onderwijs in Vlaanderen en Nederland*, in *Tijdschrift voor Onderwijsrecht en -beleid*, 2006–07(2-3-4), p. 336; L. VENY, *Compendium van het Vlaamse onderwijsrecht*, I. *Dragende beginselen van het onderwijsbestel*, Brugge, 2010, pp. 3-4; J. LIEVENS, *De vrijheid van onderwijs*, Antwerp, 2019, p. 21; G. CRAENEN, *Vrijheid en recht volgens artikel 17 van de Grondwet*, in *Tijdschrift voor Bestuurswetenschappen en Publiekrecht*, 1990(1), p. 36.

³ J. VANDE LANOTTE – G. GOEDERTIER – Y. HAECK – J. GOOSSENS – T. DE PELSMAEKER, *Belgisch publiekrecht*, 1, Brugge, 2015, pp. 273 and ff.

by adequate public funding, lest it become purely theoretical.⁴ However, the extent of these positive obligations remains debated, with some scholars advocating for stronger state protection of institutional autonomy.⁵

Freedom of education is not the sole provision safeguarding institutional autonomy. First and foremost, article 27 of the Belgian Constitution provides for the freedom of association. This freedom also applies to independent school boards: they may invoke this right to establish themselves and subsequently organise themselves internally.⁶ Additionally, the Belgian Constitution contains another fundamental right protecting the autonomy of higher education institutions, namely academic freedom. Although this right is not explicitly enshrined in the Constitution, the Belgian Constitutional Court interprets it as inherent in the combination of the freedom of education and the freedom of expression.⁷ Traditionally, this freedom is considered to belong to the individual researcher. This interpretation aligns with the case law of the European Court of Human Rights, which grants academic freedom a high level of protection as a specific application of freedom of expression.⁸ Institutional autonomy is essentially linked to, and is a necessary precondition for, safeguarding the individual component of academic freedom. For this reason, recent jurisprudence has placed greater emphasis on the institutional component of academic freedom. In particular, the Court of Justice of the European Union has recognised an institutional dimension to academic freedom. In its judgment of 6 October 2020 concerning Central European University,

⁴ E.g. Constitutional Court 4 March 1993, no 18/93, B.3.4; Constitutional Court 18 December 1996, no 76/96, B.4.3; Constitutional Court 1 March 2005, no 48/2005, B.9; Constitutional Court 26 July 2007, no 110/2007, B.7.1.

⁵ G. CRAENEN, *Vrijheid in gebondenheid. Het onderwijs in België*, in *Jura Falconis*, 1989–90(4), p. 569; J. DE GROOF, *Het onderwijs is vrij (art. 24 §1, al. 1 G.W.). Zienwijzen van het Arbitragehof en van de Raad van State omtrent de onderwijsvrijheid*, in *Tijdschrift voor Onderwijsrecht en -beleid*, 2006–07(2-3-4), p. 141.

⁶ Here, internal organisation is to be understood as the governance and participatory structures; this protection does not extend to the actual organisation of the education provided but is limited to the administrative aspect.

⁷ E.g. Constitutional Court 23 November 2005, no 167/2005, B.18.1; Constitutional Court 13 October 2009, no 157/2009, B.7.1; Constitutional Court 13 October 2011, no 155/2011, B.8.

⁸ *Sorguç v Türkiye* App no 17089/03 (ECtHR, 21 January 2010) para 35; see also: *Lombardi Vallauri v Italy* App no 39128/05 (ECtHR, 20 October 2009) para 43; *Mustafa Erdoğan et al. v Türkiye* App nos 346/04 and 39779/04 (ECtHR, 27 May 2014) para 40; *Magyar Helsinki Bizottság v Hungary* App no 18030/11 (ECtHR, 8 November 2016) para 168; *Kula v Türkiye* App no 20233/06 (ECtHR, 19 June 2018) para 38; *Šeks v Croatia* App no 39325/20 (ECtHR, 3 February 2022) para 41.

the Court held that academic freedom “also incorporates an institutional and organisational dimension, a link to an organisational structure being an essential prerequisite for teaching and research activities”.⁹ Thus, the European Convention on Human Rights (ECHR) and the Charter of Fundamental Rights of the European Union, together with their interpretation in case law, should be read in conjunction with the Belgian Constitution.

Numerous sources of international (soft) law similarly prioritise the protection of the autonomy of higher education institutions as a fundamental value. This is particularly the case within the framework of the Bologna Process, a European intergovernmental initiative aimed at creating a coherent and compatible higher education area by standardising degree structures, promoting mobility and enhancing quality assurance across participating countries.¹⁰ Institutional autonomy has consistently been a key consideration in the communiqués agreed upon by the ministers of the participating countries. The Bologna Declaration of 1999 emphasised the importance of autonomy to enable universities to continually adapt to the evolving needs of society and advances in science.¹¹ From 2007 onwards, institutional autonomy has been explicitly recognised as an underlying principle of the European Higher Education Area and as one of the core values upheld by the participating countries, alongside academic freedom, the involvement of students and staff in the governance of higher education and the public responsibility for and of higher education.¹² The ministers

⁹ Case C-66/18 *Commission v Hungary* (ECJ, 6 October 2020) para 227.

¹⁰ Bologna Declaration – Joint declaration of the European Ministers of Education, 19 June 1999, https://www.ehea.info/Upload/document/ministerial_declarations/1999_Bologna_Declaration_English_553028.pdf.

¹¹ *Ibid.*

¹² Towards the European Higher Education Area: responding to challenges in a globalised world – London Communiqué, 18 May 2007, https://www.ehea.info/Upload/document/ministerial_declarations/2007_London_Communique_English_588697.pdf; The Bologna Process 2020 – The European Higher Education Area in the new decade. Communiqué of the Conference of European Ministers Responsible for Higher Education – Leuven/Louvain-la-Neuve Communiqué, 28-29 April 2009, https://www.ehea.info/Upload/document/ministerial_declarations/Leuven_Louvain_la_Neuve_Communique_April_2009_595061.pdf; Budapest-Vienna Declaration on the European Higher Education Area – Joint declaration of the European Ministers of Education, 12 March 2010, https://www.ehea.info/Upload/document/ministerial_declarations/Budapest_Vienna_Declaration_598640.pdf; Making the Most of Our Potential: Consolidating the European Higher Education Area – Bucharest Communiqué, 26-27 April 2012, https://www.ehea.info/Upload/document/ministerial_declarations/Bucharest_Communique_2012_610673.pdf;

first clarified the scope of this autonomy in the Tirana Communiqué of 2024:

“We further understand institutional autonomy as the will and ability of higher education institutions to fulfil their missions without undue interference and to set and implement their own priorities and policies concerning organisation, finance, staffing and academic affairs.”¹³

This definition emphasises that the government should, in principle, exercise restraint regarding higher education. At the same time, “undue interference” allows considerable scope for interpretation.

Non-binding international legal instruments also emphasise the importance of institutional autonomy. The Parliamentary Assembly of the Council of Europe (PACE) confirmed in Recommendation No. 1762 of 2006 that, alongside academic freedom, there exists a right to institutional autonomy. According to the text of the recommendation, this autonomy “should be a manifestation of an independent commitment to the traditional and still essential cultural and social mission of the university”.¹⁴ UNESCO likewise considers institutional autonomy essential, particularly for the realisation of academic freedom. According to UNESCO, autonomy is the degree of self-governance necessary to take effective decisions concerning academic work, standards, management and related activities.¹⁵ In addition to texts issued by international organisations dependent on states, university associations themselves have produced declarations to safeguard their autonomy. One such document is the Lima Declaration of 1988 concerning academic freedom and institutional autonomy in higher education.¹⁶ In the same year, representatives of 80

Yerevan Communiqué, 14-15 May 2015, https://www.ehea.info/Upload/document/ministerial_declarations/YerevanCommuniqueFinal_613707.pdf; Paris Communiqué, 25 May 2018, https://www.ehea.info/Upload/document/ministerial_declarations/EHEAParis2018_Communique_final_952771.pdf; Rome Ministerial Communiqué, 19 November 2020, https://www.ehea.info/Upload/Rome_Ministerial_Communique.pdf; Tirana Communiqué, 29-30 May 2024, <https://www.ehea.info/Immagini/Tirana-Communique.pdf>.

¹³ Tirana Communiqué, 29-30 May 2024, <https://www.ehea.info/Immagini/Tirana-Communique.pdf>.

¹⁴ Recommendation 1762(2006) of the Parliamentary Assembly of the Council of Europe Academic freedom and university autonomy, 30 June 2006, para 4.2.

¹⁵ Recommendation of UNESCO on the Status of Higher-Education Teaching Personnel, 11 November 1997, para 17.

¹⁶ The Lima Declaration on Academic Freedom and Autonomy of Institutions of Higher Education, World University Service, 6-10 September 1988, <https://www.cesaer.org/>

universities adopted the first version of the Magna Charta Universitatum. This text places freedom of research and teaching at the foundation of all university activity. Universities must therefore be intellectually and morally independent from political and economic powers.¹⁷

The binding instruments discussed above do not expressly refer to the responsibility that ought to accompany institutional autonomy. The opposite, however, is true for various soft law texts. Within the framework of the Bologna Process, the ministers of the European Higher Education Area do not promote an unqualified or unfettered form of autonomy. On the contrary, the autonomy of higher education institutions is explicitly linked to a societal responsibility on the part of those institutions. Indeed, the responsibility of higher education is one of the core values underpinning the Bologna Process.¹⁸ It denotes “the obligations of the higher education community to the broader society of which the higher education community is a part”.¹⁹

The aforementioned PACE recommendatio on the freedom universities should enjoy, entails a social and cultural responsibility on the part of universities regarding their own mission – essentially to conduct research and provide education – and to society at large. More concretely, this means that universities must respond to societal and political objectives and even to market demands, while maintaining the freedom to decide themselves how to pursue these goals both in the short and long term.²⁰ UNESCO likewise emphasises that autonomy entails responsibilities. Especially when public funding is involved, autonomy entails obligations with regard to quality, transparency and accountability to society.²¹ The texts drafted by university representatives connect autonomy to responsibility. In 2020, the Magna Charta Universitatum was updated to include the principle that universities have a responsibility to contribute knowledge to the world and the societies in which they are embedded. The Magna Charta Universitatum thus does not espouse absolute freedom; rather, freedom is

content/7-administration/legal-affairs/values/lima-declaration.pdf.

¹⁷ Magna Charta Universitatum, 18 September 1988, principle 3, <https://www.magna-charta.org/magna-charta/en/magna-charta-universitatum/mcu-1988>.

¹⁸ See footnote 11.

¹⁹ Tirana Communiqué, 29-30 May 2024, <https://www.ehea.info/Immagini/Tirana-Communiqué.pdf>.

²⁰ Recommendation 1762(2006) of the Parliamentary Assembly of the Council of Europe Academic freedom and university autonomy, 30 June 2006, para 11.

²¹ Recommendation of UNESCO on the Status of Higher-Education Teaching Personnel, 11 November 1997, para 17.

purposive. Although the responsibility universities bear under this text is broadly articulated, the text does not specify who determines the scope of such responsibility.²² The fact that these texts address the responsibilities of educational institutions can hardly be separated from the historical context in which they were produced. From the 1980s and especially during the 1990s, university reforms in numerous Western countries placed increasing emphasis on such duties.

3. University reforms since the 1990s

For a long time, legislation served as the predominant steering mechanism in Western European higher education. However, inspired by insights from New Public Management theories, governments have increasingly adopted alternative mechanisms to supplement or replace legal regulation. Since the 1990s, a general trend towards deregulation has emerged, aimed at enhancing the autonomy of higher education institutions. Decision-making powers were transferred from central political authorities back to the academic sphere.²³ In parallel, greater emphasis has been placed on the responsibilities and obligations of higher education institutions.²⁴ It was never the intention of governments that institutions, upon being granted greater autonomy, should exercise that autonomy without limits. Rather, institutions carry a public mandate that entails specific responsibilities – such as managing public funds efficiently and transparently, ensuring the quality of education and fulfilling broader societal and social roles as universities or colleges. These obligations are not necessarily incompatible with constitutional protections of academic freedom or institutional autonomy, though the balance between the two remains delicate. In recent decades, governments have continued to pay attention to institutional responsibility and accountability in

²² Magna Charta Universitatum 2020, July 2020, <https://www.magna-charta.org/magna-charta-universitatum/mcu2020>.

²³ T. CHRISTENSEN, *University governance reforms: potential problems or more autonomy*, in *Higher Education*, 2011, 62, p. 511; J. SALMI, *Autonomy from the State vs. Responsiveness to Markets*, in *Higher Education Policy*, 2007, 20, p. 224.

²⁴ A. ROMO DE LA ROSA, *Institutional Autonomy and Academic Freedom: A Perspective from the American Continent*, in *Higher Education Policy*, 2007, 20, p. 278; G. NEAVE, *Autonomy, Social Responsibility and Academic Freedom*, in *World Conference on Higher Education in the Twenty-first Century: Vision and Action*, Paris, 1998, pp. 8–9.

higher education. This focus should not be viewed solely within the context of reforms aimed at increasing autonomy. Christensen argues that a heightened sense of political responsibility for education has led governments to demand greater accountability from higher education institutions – both to political authorities and to society at large.²⁵ Given the societal role of education, the public itself has also come to expect a greater degree of accountability from higher education institutions.

To ensure that higher education institutions assumed this responsibility, these university reforms often coincided with the introduction of new steering mechanisms and increased central oversight.²⁶ These may take the form of direct control mechanisms, such as mandatory reporting, supervision by a government commissioner, or audits. Control may also be exerted through other means, including quality assurance processes, accreditation requirements, mandated staff qualifications, or centralised assessments. Governments may also increase control through the compulsory inclusion of external representatives on governing bodies or through imposed forms of stakeholder participation, thereby guiding institutional behaviour. Financial instruments likewise serve as a powerful means of steering.²⁷ The volume of funding allocated to institutions influences the extent to which they can fulfil certain roles; earmarked funding can restrict institutional discretion; and project-based funding allows governments to promote specific policy objectives. These steering and control mechanisms were often introduced with the intention of improving institutional efficiency and enhancing (inter)national competitiveness.²⁸ However, they have also

²⁵ T. CHRISTENSEN, *University governance reforms: potential problems or more autonomy*, in *Higher Education*, 2011, 62, p. 508 and 511; J. SALMI, *Autonomy from the State vs. Responsiveness to Markets*, in *Higher Education Policy*, 2007, 20, p. 238-239.

²⁶ T.J. KALLIO – K.-M. KALLIO – M. HUUSKO – R. PYYKKO – J. KIVISTO, *Balancing between accountability and autonomy: the impact and relevance of public steering mechanisms within higher education*, in *Journal of Public Budgeting, Accounting & Financial Management*, 2022, 34(6), p. 47; N. FRØLICH – T. CHRISTENSEN – B. STENSAKER, *Strengthening the strategic capacity of public universities: the role of internal governance models*, in *Public Policy and Administration*, 2019, 4, p. 475.

²⁷ J.C. SHIN – X. LI – I. NAM – B.-K. BYUN, *Institutional Autonomy and Capacity of Higher Education Governance in South Asia: A Comparative Perspective*, in *Higher Education Policy*, 2022, 35, p. 415; N. DAVIDOVITCH, *Legislation and Social Policy in the Higher Education System*, in *Asian Social Science*, 2011, 12, p. 129; T. CHRISTENSEN, *University governance reforms: potential problems or more autonomy*, in *Higher Education*, 2011, 62, pp. 510-512; J. SALMI, *Autonomy from the State vs. Responsiveness to Markets*, in *Higher Education Policy*, 2007, 20, p. 224.

²⁸ N. FRØLICH – T. CHRISTENSEN – B. STENSAKER, *Strengthening the strategic capacity of public universities: the role of internal governance models*, in *Public Policy and Administration*,

been employed to align institutional actions more closely with political objectives and to increase the socio-economic responsiveness of higher education institutions.²⁹

A similar trend towards deregulation has been observed in Flemish (higher) education since the 1990s. When education became a competence of the federated entities in 1988, the Flemish Community used this newly acquired authority to bring about a significant turning point in education policy.³⁰ The University Decree of 12 June 1991 and the University College Decree of 13 July 1994 represented a shift.³¹ To prepare Flemish higher education for emerging trends, the Flemish Executive deemed that improving educational quality and internationalisation should take precedence over all private and regional interests. This necessitated a comprehensive revision of university legislation to better define university missions, modernise degree regulations, enhance quality assurance, reform staffing policies, introduce a new funding system linked to institutional autonomy and harmonise regulations with European standards. Achieving these aims required a shift in governmental steering, characterised by less prescriptive regulation and greater institutional autonomy, supported by more flexible funding and oversight mechanisms.

This change was not unique to higher education. Verckens and others describe how, in compulsory education, the government revised the legislative framework and adopted a more hands-off approach, while granting school boards the responsibility and autonomy to determine how education was organised.³² Deregulation went hand in hand with

2019, 4, p. 475; L. MATEI – J. IWINSKA, *Diverging Paths? Institutional Autonomy and Academic Freedom in the European Higher Education Area*, in A. CURAJ – L. DECA – R. PRICOPIE (eds), *European Higher Education Area: The Impact of Past and Future Policies*, Springer., 2018, p. 345; T. NOKKALA, *Institutional Autonomy and the Attractiveness of the European Higher Education Area. Facts of Tokenistic Discourse*, in A. CURAJ – P. SCOTT – L. VLASCEANU – L. WILSON (eds.), *European Higher Education at the Crossroads*, Dordrecht, 2012.

²⁹ P. MAASSEN – Å. GORNITZKA – T. FUMASOLI, *University reform and institutional autonomy: A framework for analysing the living autonomy*, in *Higher Education Quarterly*, 2017, 71(3), pp. 239–240.

³⁰ K. DE WIT – J. VERHOEVEN, *Hoger onderwijs en economie: autonome instellingen of een sturende overheid?*, paper presented at the 5th VFO-Congress, Leuven, 26 October 2000, 4.

³¹ Decree of 12 June 1991 concerning the universities in the Flemish Community, BG 4 July 1991; Decree of 13 July 1994 concerning the university colleges in the Flemish Community, BG 31 August 1994.

³² A. VERCKENS – M. SIMONS – G. KELCHTERMANS, *Welke overheid voor welk onderwijs? Een kritische studie van Vlaamse beleidsdocumenten*, in *Pedagogische Studiën*, 2009, 86, pp. 23–24.

control and the introduction of new quality assurance systems, such as attainment targets and the establishment of the education inspectorate. Government communication also became more important. Authorities focused on communication to guide education institutions and clarify policy objectives; at the same time, they required information and feedback from the education sector to underpin policymaking. Simons distinguishes several ways in which the government seeks to steer schools via communication: by presenting good practices (“governing through what works”), by emphasising schools’ responsibility to deliver quality and performance (“governing through responsabilisation”) and by enabling schools to compare themselves, sometimes through data (“governing by comparison/governing by numbers”).³³

De Wit and Verhoeven describe a similar approach in higher education as “management by speech”.³⁴ A more explicit political discourse about higher education and about what higher education institutions were expected to do, was developed to partially fill the policy space created by deregulation. Such steering reportedly functioned in Flemish higher education through the close involvement of institutions in shaping higher education policy, although its effectiveness is generally contested.³⁵ This reduced the necessity for direct government intervention due to the path dependency that had been created. By establishing cross-institutional policy agreements between the government and universities and colleges, institutions were encouraged to align their own policies with these agreements. In this way, the government was able to pursue its (implicit) objectives without the need for formal legislation.

The increased autonomous decision-making space for higher education institutions requires nuance. Firstly, the “returned” autonomy was tied to the intention of improving educational quality, along with accompanying regulations and oversight mechanisms. Moreover, the new legislation introduced elements that limited institutional autonomy, such as restrictions on which programmes institutions could offer and the reduction in the number of institutions and courses.³⁶ Furthermore, the difference in steering approaches before and after the reforms should not be overstated.

³³ M. SIMONS, *Governing education without reform: the power of the example*, in *Discourse: Studies in the Cultural Politics of Education*, 2014, 36(5), p. 717 and ff.

³⁴ K. DE WIT – J. VERHOEVEN, *Hoger onderwijs en economie*, cit., p. 21.

³⁵ *Ibid.*; E. GROSS – A. ETZIONI, *Organisations in Society*, Englewood Cliffs (New Jersey), 1985; L. VAN DEN BOSSCHE, *Strategieën voor de hervorming van de universiteiten in de Vlaamse Gemeenschap*, in *Tijdschrift voor Onderwijsrecht en -beleid*, 1996-97(3), p. 181.

³⁶ K. DE WIT – J. VERHOEVEN, *Hoger onderwijs en economie*, cit., 8.

The description of the Flemish Community as a cautious or “reticent” government is relative. From an international perspective, Song characterises Belgian higher education as operating under a state control model, marked by a medium to high level of government regulation alongside substantial public funding.³⁷ A state control model essentially implies that the state exercises control over nearly all aspects of higher education and acts as the principal funder; by contrast, a state supervising model sees the government playing a minimal role.³⁸ Nonetheless, historically speaking, Flemish education has undeniably become less regulated than it was in the past. At the same time, as previously noted, there has been growing attention to the responsibility of higher education institutions. The government defines the societal responsibilities of these institutions in various ways, which will be discussed in the following section.

4. *The operationalisation of duties in Flemish Higher Education*

This section examines four key mechanisms through which the Flemish government seeks to shape and enforce the societal duties of universities and university colleges: political discourse, open legal norms, *post hoc* control and quality assurance processes, and funding instruments. For each mechanism, we will not only describe its operational logic but also assess its advantages and limitations, highlighting how these approaches influence institutional autonomy and accountability. It is important to note that these mechanisms are not unique to the enforcement of responsibilities; rather, they reflect broader patterns of lawmaking and policy implementation commonly applied in the governance of the higher education sector.

One of the primary ways in which the duties of universities in the Flemish Community are shaped is through the political discourse of the Flemish Government, particularly that of the Minister of Education. Since the 1990s, the Flemish authorities have developed a more explicit and

³⁷ S.-Y. SONG, *New patterns of governance in higher education: Predictors of the shift toward academic capitalism*, in *KEDI Journal of Educational Policy*, 2019, 16(1), pp. 38-39.

³⁸ F. VAN VUGHT, *Policy Models and Policy Instruments in Higher Education: The Effects of Governmental Policy-Making on the Innovative Behaviour of Higher Education Institutions*, Institut für Höhere Studien Wien, 1995, pp. 14–17, https://www.ssoar.info/ssoar/bitstream/handle/document/26695/ssoar-1995-vught-policy_models_and_policy_instruments.pdf?sequence=1&isAllowed=y&lnkname=ssoar-1995-vught-policy_models_and_policy_instruments.pdf.

directive policy narrative concerning higher education.³⁹ This discourse often articulates expectations regarding the social and economic roles of universities, their contribution to innovation, their accessibility and their responsiveness to labour market needs.⁴⁰ While these signals are not legally binding, they nonetheless exert considerable influence, as they are frequently reflected in funding mechanisms, strategic priorities and public accountability frameworks.

However, relying on political discourse to define university duties poses significant challenges. Such duties are often only vaguely outlined, lack legal precision and may shift with changing political agendas, resulting in inconsistent or ambiguous expectations. This creates uncertainty not only for institutions but also for society in general regarding what universities are actually responsible for. Moreover, when duties are communicated primarily through policy speeches or informal guidance, rather than through democratic, legislative processes, there is limited opportunity for debate, scrutiny, or contestation. As a result, universities may be held accountable for aims they were never formally mandated to pursue. Clear and legitimate duties require transparent definition within stable legal or regulatory frameworks, based on broad consultation and public reasoning. Without such grounding, the concept of duty risks being reduced to a rhetorical instrument – flexible for policymakers, but difficult to operationalise and evaluate in practice.

Another approach used to define the duties of universities in the Flemish Community is the use of open norms within legislation. Rather than prescribing specific obligations, these legal provisions often set out broad, general objectives without specifying how these goals are to be achieved or measured. This approach reflects a legislative intent to provide flexibility and allow for contextual interpretation, while still asserting a normative framework within which universities are expected to operate. The Codex Higher Education stipulates that “University colleges and universities are active in the field of social and scientific services, as well as in the transfer of knowledge to strengthen the innovative capacity of social and economic sectors”.⁴¹ While it seems unlikely that anyone would object to such a mission, the question remains as to what added value its legal

³⁹ K. DE WIT – J. VERHOEVEN, *Hoger onderwijs en economie*, cit., 21.

⁴⁰ E.g. Draft decree concerning the universities in the Flemish Community, *Parliamentary documents Flemish Parliament* 1990-91, no 502/1, 1; Policy memorandum on Education and Training 1999–2004 (M. Vanderpoorten), *Parliamentary documents Flemish Parliament* 1999-2000, no 139/1, 7.

⁴¹ Codex Higher Education, art II.18, para 3.

codification actually provides. A comparable example is the obligation for universities to develop a code of conduct concerning teaching language for staff and students, or the requirement to offer academic counselling to students demonstrating insufficient study progress.⁴² The intent behind such provisions is often clear and understandable and they articulate the expectations placed upon universities.

However, defining duties through open legal norms presents important limitations. Although such norms may offer adaptability, they often lack the precision needed to guide concrete institutional practices or to enable consistent interpretation across contexts. This vagueness can lead to uncertainty about what universities are actually expected to deliver and under what conditions they might be held accountable. Crucially, open norms offer limited protection for the rights of students or staff, as vague institutional obligations make it difficult to assert clear entitlements or contest shortcomings in provision or treatment. Furthermore, open norms shift interpretive authority to administrative bodies or policymakers, which may result in duties being shaped in practice by informal expectations rather than transparent and deliberative processes. As a result, universities may be evaluated against evolving standards that were never clearly defined or democratically debated. For duties to be meaningful, enforceable and subject to fair evaluation, they require more than open-ended formulations.

A third way in which the duties of universities in the Flemish Community are shaped is through *post factum* control mechanisms, most notably quality assurance processes. Rather than setting out duties *ex ante* in precise legal or policy terms, this approach relies on monitoring and evaluating outcomes after the fact. Instruments such as accreditation procedures, external reviews, periodic audits and reporting mechanisms are intended to assess whether institutions meet broadly defined expectations concerning educational quality, research relevance and societal engagement. These mechanisms have become increasingly formalised and important to the governance of higher education in Flanders. Universities are required to report on numerous aspects of their educational activities in their annual reports, including student support services, the organisation of flexible learning pathways and the provision of academic and career guidance.⁴³ With regard to quality assurance, universities are primarily responsible for their own internal mechanisms. However, these institutional quality assurance systems are periodically reviewed by an external agency

⁴² Codex Higher Education, art II. 246, para 11 and art II.272.

⁴³ E.g. Codex Higher Education, art. II.119 and art IV.84.

established by the government. This agency is tasked with verifying whether the criteria established by the legislature are being met, although the operational interpretation of these criteria is further elaborated by the agency itself. The criteria that programmes should meet include, for example, “the curriculum of the programme is aligned with the most recent developments in the field” or “the programme provides students with adequate and easily accessible facilities and academic support”.⁴⁴ In doing so, the government is able to monitor – through the work of the quality assurance agency – whether universities are fulfilling their responsibilities.

While control mechanisms and quality assurance can play a valuable role in safeguarding standards, they are limited tools for clearly defining or enforcing institutional duties. *Post hoc* evaluations often operate with general benchmarks rather than binding obligations and rely heavily on peer review and self-assessment, which may lack transparency or consistency. As a result, universities may receive feedback or recommendations without a clear understanding of the underlying duties they are presumed to have fulfilled or failed to fulfil. This ambiguity weakens accountability and makes it difficult for students and staff to assert their rights when institutional provision falls short. Quality assurance mechanisms also tend to focus on processes and documentation, potentially diverting attention from substantive issues such as equity, accessibility, or pedagogical innovation. To be effective in defining and upholding duties, control mechanisms must be complemented by *ex ante* clarity about institutional responsibilities, grounded in transparent, participatory processes that allow duties to be known, contested and enforced.

Finally, the funding mechanism is also employed to hold higher education institutions accountable and to guide their actions accordingly.⁴⁵ The mechanism in the Flemish Community, for instance, includes various parameters designed to encourage universities to enrol and support first-time students. Each first-time student is funded regardless of their academic success.⁴⁶ Furthermore, students with disabilities or working students – who are expected to require additional support and therefore represent a higher cost to the university – carry greater weight in the funding formula, so as to ensure that universities do not deny them opportunities.⁴⁷ Students

⁴⁴ Codex Higher Education, art II.171/1.

⁴⁵ Draft decree concerning the funding of the operations of universities and university colleges in Flanders, Parliamentary documents Flemish Parliament 2007-08, no 1468/1, 7.

⁴⁶ Codex Higher Education, art. III.12.

⁴⁷ *Ibid.*

who are further along in their studies are funded based on their academic progress, thereby incentivising universities to guide students efficiently towards graduation and subsequently into the labour market.⁴⁸

While the funding mechanism in the Flemish Community introduces financial incentives aimed at influencing institutional behaviour – such as encouraging the enrolment and support of first-time students or promoting timely graduation – it remains a relatively indirect and limited form of steering. According to research by the OECD, the effectiveness of this accountability mechanism is rather weak.⁴⁹ Much like quality assurance mechanisms, which rely on post hoc evaluations and general benchmarks, funding instruments often lack the normative clarity necessary to define and enforce specific institutional duties. Financial incentives can shape behaviour in aggregate but do not necessarily provide a transparent account of the responsibilities universities are expected to uphold. This approach assumes that aligning funding with desirable outcomes will automatically lead institutions to fulfil their broader obligations. However, it risks reducing complex educational duties to calculable outputs, thereby overlooking substantive issues such as the quality of student support, equity, accessibility, or the specific needs of marginalised groups. Moreover, because funding formulas are typically based on measurable indicators, they may incentivise compliance with quantifiable targets rather than meaningful engagement with institutional missions.

5. The paradox: strengthening duties erodes autonomy

From the above, a dilemma can be discerned: the more a government seeks to operationalise the responsibilities of higher education institutions – which in itself is not necessarily problematic – the more institutional autonomy comes under pressure. On this basis, one might assume that the Flemish universities are not in favour of acknowledging or assuming such responsibilities. This is however, not supported by previous research. As part of my doctoral research, I examined how higher education institutions in Flanders perceive these responsibilities. To this end, I conducted interviews

⁴⁸ *Ibid.*

⁴⁹ OECD, *Resourcing Higher Education in the Flemish Community of Belgium*, 6 December 2021, pp. 17 and 21, https://www.oecd.org/content/dam/oecd/en/publications/reports/2021/12/resourcing-higher-education-in-the-flemish-community-of-belgium_897da034/3f0248ad-en.pdf.

with 21 institutional leaders (rectors, vice-rectors, general directors, ...). The findings indicate that institutions themselves recognise and accept their responsibilities. To illustrate this, a selection of representative quotations – translated from Dutch – is presented in this section.⁵⁰ They recognise that institutional autonomy is inherently accompanied by certain responsibilities. These responsibilities, according to the respondents, stem primarily from the societal mission that higher education institutions fulfil. In light of this mission, institutions are expected to provide accessible education, guide and support students where necessary, contribute to the personal development of young people and promote social mobility.

“The funding decree was introduced to support democratisation, to ensure that certain underrepresented groups [...] and to ensure that we, as institutions, actively work towards increasing participation in higher education. Personally, I don’t see that as particularly intrusive, because on the one hand there is freedom of education, but on the other, there is also a societal mission. We are publicly funded to fulfil a certain role.”

They also acknowledge that the institutions bear the obligation to provide high-quality education. Respondents generally agree that the definition of “quality” may – and even should – be determined, at least in part, by government. This includes aspects such as the learning outcomes of programmes, qualification levels (e.g. bachelor’s or master’s degrees) and macro-efficiency – the extent to which programmes address labour market needs. Furthermore, given the significant public investment in higher education and the legal effect attached to awarded degrees, respondents consider it entirely reasonable that such support entails certain obligations. These include, for example, the careful and efficient use of public resources and the ability to justify expenditure.

“I don’t think it’s unreasonable that we make agreements about certain things in Flanders. For me, freedom of education doesn’t mean we get to do whatever we want – we’re too heavily subsidised for that.”

“Resources are scarce, so we’re not going to be able to expand without limits. And we’re not going to invest in programmes we don’t believe in.”

The difficulty arises, however, when the government believes that the institutions are failing to act – or might fail to act – in accordance with

⁵⁰ For details regarding the methodology and further information about the interviews, see: D. COUCK, *De vrije organisatie van het Vlaamse hoger onderwijs. (Niet langer) een grondrecht van de onderwijsinstellingen*, PhD thesis, Ghent University, 2025, pp. 34 and ff.

the responsibilities they bear or ought to bear. As outlined above, the various ways in which the responsibilities of the Flemish universities are defined are subject to limitations: they may be of limited effectiveness, lack enforceability, or be overly susceptible to divergent interpretations. When the government identifies these issues, it often amends the legislation to include concrete provisions for the governance of institutions. Several of the examples discussed in the previous section were the result of parliamentary decisions based on the perception that universities were failing to adequately assume their responsibilities. By doing so, responsibilities are transformed into binding behavioural guidelines and institutional autonomy is compromised. While these policy aims may be legitimate and even widely supported, problems emerge when the mode of steering is overly rigid, bureaucratic, or fails to respect the diversity and complexity of the higher education sector. In the Flemish context these tensions are particularly salient.

First, there is the risk of erosion of institutional autonomy, especially when legislation goes beyond setting broad policy objectives and ventures into determining academic content, organisational structures, or modes of operation. This can lead to tensions with the principle of academic freedom, which includes the freedom to design curricula, determine research agendas and manage internal affairs. In a system that prides itself on the constitutional guarantee of educational freedom, state overreach, however well-intended, can be perceived as undermining the very foundations of a democratic and pluralistic higher education landscape. Such developments may contribute to institutional isomorphism, whereby universities increasingly come to resemble one another. This tendency is further reinforced by the massification of higher education and internationalisation, through which institutions converge to facilitate cooperation.⁵¹ A comparison of the Flemish universities reveals few remaining fundamental differences in terms of educational organisation.

Second, the introduction of new legal obligations often brings with it an increased administrative burden. Institutions may find themselves devoting disproportionate amounts of time and resources to compliance activities, such as reporting, auditing and performance monitoring. While accountability is a legitimate concern particularly in light of the substantial public investment in higher education, there is a danger that administrative obligations overshadow substantive engagement with teaching, research and public service. This issue

⁵¹ T. CHRISTENSEN, *University governance reforms: potential problems or more autonomy*, in *Higher Education*, 2011, 62, p. 508; A. BLADH, *Institutional Autonomy With Increasing Dependency on Outside Actors*, in *Higher Education Policy*, 2007, 20, p. 252.

should certainly be put into perspective within the Flemish context, with the exception of project-based funding. In such cases, institutions are often faced with extensive reporting requirements that demand significant organisational resources. Given that institutional leaders perceive this form of funding to be on the rise, it warrants close monitoring.⁵²

A related concern is the misalignment between centrally imposed legislation and the institutional realities on the ground. Uniform legislative approaches may fail to account for these differences, resulting in a one-size-fits-all framework that inadequately reflects institutional missions. There are, for instance, significant differences between universities and university colleges. Programmes at the former typically last one or two academic years longer. Nevertheless, students are subject to the same regulations regarding study progress, regardless of the type of institution at which they are enrolled.⁵³ Another example concerns the procedure for obtaining approval to offer a new degree programme. A key component of this process is the macro-efficiency assessment, which requires institutions to demonstrate the societal and economic added value of the proposed programme.⁵⁴ Requirements related to graduate employability may be less applicable to programmes rooted in the humanities or fine arts, but institutions are often evaluated against the same indicators. This raises questions about macro-efficiency versus academic diversity and whether the state should dictate uniform performance metrics. Moreover, when regulation becomes overly prescriptive, there is a risk of tokenism or performative compliance. Institutions may comply with the letter of the law while circumventing its spirit. In order to enrol in certain programmes, students are first required to take a diagnostic entry test. The legislature obliges universities to offer a feedback programme to students who do not pass this test.⁵⁵ While this requirement is certainly justifiable, it is one of many obligations imposed on universities with regard to incoming students. As a result, financial constraints often limit the ability to provide effective feedback options.

Another significant issue is the potential for diminished trust between the government and the higher education sector. If institutions perceive legislation as an instrument of political control rather than an enabler of quality and innovation, they may become defensive or disengaged. In

⁵² D. COUCK, *De vrije organisatie van het Vlaamse hoger onderwijs. (Niet langer) een grondrecht van de onderwijsinstellingen*, PhD thesis, Ghent University, 2025, p. 246.

⁵³ Codex Higher Education, art II.246.

⁵⁴ Codex Higher Education, art II.153, para 3.

⁵⁵ Codex Higher Education, art II.188/1, para 3.

Belgium's consociational political culture, where education policy is deeply intertwined with ideological and community-based divisions, the risk of politicisation is not negligible. A lack of trust can undermine cooperative governance structures and reduce the willingness of institutions to engage in policy dialogue. Although, for example, institutions formally have the right to determine their own language of instruction, the regulations governing this matter are particularly strict.⁵⁶ There is, however, little political willingness to address the concerns raised by the institutions about the restricted scope for the use of languages other than Dutch.⁵⁷ As a result, universities are increasingly reluctant to continue engaging in this debate.

Additionally, legislative interventions, particularly those tied to funding, can have unintended consequences for access and equity. Performance-based funding, for instance, may incentivise institutions to focus on students who are more likely to succeed, thereby marginalising vulnerable or underrepresented groups. While the Flemish funding decree explicitly aims to promote democratisation and participation in higher education, its implementation can produce perverse effects if not carefully monitored. The funding model for Flemish universities, for example, takes into account the number of incoming students. This was originally intended to encourage universities to provide opportunities to as many students as possible. However, this funding mechanism has had the effect of making student recruitment – rather than student performance – one of the primary drivers of institutional income.⁵⁸ As a consequence, the marketing budgets of the various institutions have increased significantly over the past decades. Several institutional leaders have pointed out that while they accept the responsibilities that come with public funding, the logic of accountability should not be allowed to undermine broader societal goals.⁵⁹

⁵⁶ Codex Higher Education, art II.260ff.

⁵⁷ Flemish Education Council (Vlaamse Onderwijsraad), *Advisory Report on the Implementation of the New Language Regulation in Higher Education*, 20 March 2013, <https://www.vlor.be/adviezen/advies-over-de-implementatie-van-de-nieuwe-taalregeling-het-hoger-onderwijs>; Flemish Education Council (Vlaamse Onderwijsraad), *Advisory Report on Language Policy in Higher Education*, 14 February 2017, <https://www.vlor.be/adviezen/advies-over-taalbeleid-hoger-onderwijs>.

⁵⁸ Codex Higher Education, art III.12.

⁵⁹ D. COUCK, *De vrije organisatie van het Vlaamse hoger onderwijs. (Niet langer) een grondrecht van de onderwijsinstellingen*, PhD thesis, Ghent University 2025, p. 244.

6. Conclusion

This chapter has examined how the Flemish higher education system can reconcile constitutional guarantees of institutional autonomy with the evolving legal and policy instruments that seek to operationalise higher education institutions' societal duties. As shown, there remains the enduring issue of legal and constitutional ambiguity. Although the Belgian Constitution enshrines the freedom of education, the precise demarcation between legitimate governmental steering and impermissible interference continues to be the subject of debate. Ambiguous terms such as "societal responsibility" or "public mission" are inherently open to interpretation and their translation into legal norms frequently gives rise to contestation. In the absence of clearly delineated legal parameters, such measures may engender uncertainty and in some instances, give rise to constitutional challenges, at least in theory. Such case law remains rare in the context of Flemish higher education;⁶⁰ universities generally prefer not to initiate legal proceedings against the government.⁶¹

The responsibilities of universities are not derived from a single legal or policy instrument, but emerge through an evolving interplay of political discourse, open-ended norms embedded in legislation, external (*post hoc*) control and quality assurance procedures, and funding mechanisms. While each of these instruments contributes to defining what is expected of universities, none is sufficient on its own. Political discourse shapes the broader societal expectations placed on higher education but is not binding; open norms in legislation provide a formal but often indeterminate basis for obligations; control mechanisms assess compliance but typically only after the fact; and funding mechanisms steer behaviour through incentives without necessarily articulating the underlying duties. Effective steering therefore requires more than behavioural incentives; it demands *ex ante* clarity regarding institutional responsibilities, articulated through transparent, participatory processes that make these duties visible, contestable and enforceable. Without a transparent, participatory process that brings these elements together, there is a risk that steering remains fragmented and ambiguous. In such a context, the different steering

⁶⁰ D. COUCK, *De toetsing aan de vrijheid van onderwijs door het Grondwettelijk Hof. De wijze van toetsen onder de loep genomen*, in *Tijdschrift voor Onderwijsrecht en -beleid*, 2024–25(1-2), p. 11.

⁶¹ D. COUCK, *De vrije organisatie van het Vlaamse hoger onderwijs. (Niet langer) een grondrecht van de onderwijsinstellingen*, PhD thesis, Ghent University 2025, p. 248.

mechanisms may inadvertently obscure rather than illuminate the societal and legal obligations of universities towards their students, staff and society. Ensuring accountability, therefore, requires not only coherence across these instruments but a commitment to clarity and normative rigour in how institutional duties are defined and upheld.

In sum, although there is broad consensus in Flanders that higher education institutions must assume their societal responsibilities, any form of legislative steering must be approached with prudence. Such steering should be proportionate, contextually informed and rooted in a relationship of mutual trust between public authorities and academic institutions. Above all, it must remain anchored within the constitutional framework that underpins the higher education system in the Flemish Community. This obligation extends beyond formal legal compliance to encompass the recognition of institutional autonomy as a prerequisite for safeguarding academic freedom and fostering innovation. Striking a careful balance in this regard ensures that public accountability does not come at the expense of institutional vitality, nor erode the core academic values that underpin the legitimacy of the higher education sector.

Léopold Doudou-Drocourt*

*Animal Welfare:
Between goods and Rights, a new approach of contractual Duties*

ABSTRACT

The elevation of animals to the status of “sentient beings” in French law crystallises a long philosophical and legal evolution, from a purely anthropocentric conception of duties towards animals to an ethics grounded in their sensitivity and vulnerability. Yet this theoretical recognition remains counterbalanced by the animal’s continued submission to property law and its classification as a “product” under EU law. This paper explores the tension inherent in this dual status and argues that contract law, long overlooked, offers an underused mechanism for reconciling the economic exploitation of animals with the moral and legal duties owed to them. Drawing on Roman contract law, the study first shows that animals have historically been regulated by contracts for their economic value rather than for their intrinsic worth, so that duties towards them appeared only as indirect duties towards their owners. It then demonstrates how the modern concept of animal welfare, consolidated by the Brambell Report, the 2006 Animal Welfare Act and Article 13 TFEU, reshapes this legacy. The recognition of the animal’s specific status reinforces traditional contractual obligations: the duty of care in deposit and boarding contracts, the salaried nature of the deposit of a living being, and the enhanced duty of the professional seller to inform and advise, now supplemented by the “certificate of commitment and knowledge” required for the sale of pets and equines. Beyond reinforcing existing obligations, the paper contends that the contract can generate genuinely new duties directed at the animal itself, transforming an instrument of exploitation into a tool of protection. Because animal welfare is a matter of public order, and because criminal law intervenes only in cases of cruelty, contractualising owners’ duties offers anticipatory mechanisms that complement criminal sanctions and convert moral duties into enforceable obligations adapted to each species’ biological and emotional needs. This “ethical contractualisation” nonetheless raises unresolved questions concerning the enforceability of such obligations, their possible conflict with the owner’s interests, and the persistence of informal acquisition channels such as online platforms. Ultimately, the paper proposes a new reading of contractual duties in which, between the animal and its owner, it is the contract that protects and animal welfare that grounds this protection.

* Léopold Doudou-Drocourt is a third-year PhD candidate at the University of Lille. His research focuses on animal law and, more broadly, on the adaptation of contract law to the specificities of animals. Contact: leopold.doudoudrocourt.etu@univ-lille.fr.

KEYWORDS

Animal Welfare – Contract Law – Sentient Beings – Property Law – Contractual Obligations.

SUMMARY: 1. Animals as a source of duties. – 2. From moral duties to contractual obligations. – 3. Between rights and duties: a living being subject to property law. – 4. From moral duties to contractual obligations. – 5. Contracts as a tool for balancing economic interests and moral duties toward animals. – 6. The reinforcement of contractual obligations arising from the status of animals. – 7. Harmonizing contractual and animal welfare requirements.

1. *Animals as a source of duties*

“Men have forgotten this truth” said the fox. “But you must not forget it. You become responsible, forever, for what you have tamed”.¹ The domestication of animals justifies the existence of a moral, if not legal, duty towards them. Humans therefore have a general responsibility towards them, which is the price they must pay for their domestication. This moral duty is rooted in a long philosophical tradition, nourished by the recognition of the uniqueness of animals, which were recently elevated in French law to the status of “sentient beings”.² Before being addressed by law, various schools of thought attempted to justify a specific duty to care for and protect animals in their vulnerability asserting the construction of a moral duty towards animals. Although Pythagoras is considered the precursor of Western vegetarianism, this duty of conscience towards animals remained fundamentally anthropocentric. Thus, while it was later recognized that humans had duties towards animals, these duties were only “indirect duties towards humanity”.³ The moral duty towards animals, which lack self-awareness, was therefore not an end in itself but a means to an end for humans. Another school of thought subsequently developed, moving from an ethics based on consciousness to an ethics of suffering.⁴ It is because humans can affect their conditions of life and death according to

¹ A. de SAINT EXUPÉRY, *Le Petit Prince*, Chapitre XXI, Folio, 2007.

² Art. 515-14, Civ. Code.

³ “Animals are not self-aware and are therefore merely a means to an end. That end is human beings (...) The duties we have towards animals are only indirect duties towards humanity”, É. KANT, *Leçons d'éthique* (1760), trad. L. Langlois, Paris, Le livre de poche, 1997, p. 391-393.

⁴ “The question is not, Can they reason ? or, Can they talk ? but, Can they suffer ?”, J. BENTHAM, *An introduction to principles of morals and legislation*, chap. 17, sect. 1.

their desires that they have a moral duty to make a special place for them: they are “morally accountable for the suffering they inflict on those who endure it, when they could avoid it”.⁵ We thus move from an ethical duty based not only on domestication or the search for consciousness, but also on suffering⁶ and therefore on the sensitivity of the animal, which will find a relative echo in law. In France, in the 19th century, the “Grammont Law» demonstrated the existence of behavioral duties sanctioned by criminal law as it enforced the prohibition of public mistreatment of domestic animals.⁷ Although this first law protected human sensibilities more than those of animals, it was later extended to all forms of abuse and was no longer limited to public mistreatment.⁸ This evolution in animal protection, based on both moral and legal grounds, had the primary effect of strengthening the duties of owners, who could no longer take full advantage of their *abusus* and dispose of animals as they wish without facing criminal penalties. This recognition of legal duties, or obligations, towards animals has been reinforced by the recognition of a duty to respect their ethological needs.

2. From a moral duty to a “duty to care”

The French Rural Code requires animal owners to maintain them in conditions “compatible with the biological requirements of their species”.⁹ The recognition of animal sentience reflects the legacy of the Brambell Report,¹⁰ which laid the foundations for the modern concept of animal welfare and was subsequently consolidated in the United Kingdom by the 2006 Animal Welfare Act.¹¹ The first explicit reference to animal welfare

⁵ R. LIBCHABER, *La souffrance et les droits*, in *Recueil Dalloz*, 2014, p. 380.

⁶ B. SCHNECKENBURGER, *L'animal et l'animalité en cours de philosophie*, in *L'Enseignement philosophique*, 2019, 3, pp. 21-33.

⁷ Loi n° 2261 du 2 juillet 1850 relative aux mauvais traitements exercés envers les Animaux domestiques, *Bulletin des lois de la République française*, 2 juillet 1850, n° 283, p. 1.

⁸ Décret «Michelet» du 7 septembre 1959, *JORF*, 11 septembre 1959, p. 8884.

⁹ Loi n° 76-629 du 10 juillet 1976 relative à la protection de la nature, *JORF*, n° 0162, 13 juillet 1976, p. 4203.

¹⁰ R. BRAMBELL, *Report of the Technical Committee to Enquire into the Welfare of Animals kept under Intensive Livestock Husbandry Systems*, 1965, p. 84.

¹¹ The Animal Welfare Act 2006 is the principal law relating to animal welfare, protecting all vertebrate animals. Under the Act, owners and keepers have a duty of care to their animals and must make sure they meet their needs (<https://www.legislation.gov.uk/ukpga/2006/45/contents>).

in European law, though, was back in 1977, in a directive on protecting animals during transportation.¹² More recently, Article 13 of the Treaty on the Functioning of the European Union established that, as sentient beings, “full regard should be paid to animals’ welfare requirements”.¹³ Animal welfare has recently been recognized as one of the values of our contemporary democratic societies.¹⁴ However, this concept can be applied relatively broadly. Indeed, welfare requirements will vary depending on the legal category of the animal.

Whether farm or companion animal, the animal will be subject to a utilitarian interpretation that translates into specific protections. Animal pets, which are meant to receive “affection from their owners” “will be protected for their “unique and irreplaceable nature”,¹⁵ whereas farm animals are more protected for sanitary reasons, as they are intended for production and consumption.

3. Between rights and duties: a living being subject to property law

Although various ideas have emerged that seek to challenge traditional dogmas of ownership¹⁶ or to grant animals rights,¹⁷ animals remain subject to property law. In France, it is only very recently that the Civil Code has recognized animals as “sentient beings”.

This theoretical elevation of animals is nevertheless immediately counterbalanced by their “submission to property law”,¹⁸ a reification confirmed by their classification as “products” under EU law.¹⁹

¹² Council Directive 77/489/EEC of 18 July 1977 on the protection of animals during international transport.

¹³ Art. 13, Treaty on the Functioning of the European Union.

¹⁴ Judgment *Executief van de Moslims van België and Others v. Belgium*, ECHR, 13 February 2024.

¹⁵ Cass. 1^{ère} civ., 9 déc. 2015, n° 14-25.910, rejet pourvoi c/ TI Vannes, 28 août 2014.

¹⁶ T. REGAN, *The Case for Animal Rights*, U. of California P., 1983.

¹⁷ P. SINGER, *Animal Liberation*, HarperCollins, 1975.

¹⁸ Art. 515-14, Civ. Code.

¹⁹ Article 2 of Directive (EU) 2019/633 of the European Parliament and of the Council of 17 April 2019 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain defines agricultural and food products as “the products listed in Annex I to the Treaty on the Functioning of the European Union (TFEU), as well as products not listed in that Annex but which are processed for use in human food using products listed in that Annex.”

Thus, although animals are recognized as possessing a certain degree of sentience, they remain legally classified as property. The owner therefore enjoys the prerogatives associated with the *usus*, although to a limited extent.²⁰ However, the mere fact that objective law limits the owner's prerogatives over the animal does not mean that the animal itself can assert rights against the owner: it therefore remains a subject to the right of property.²¹ As such, within our economic system, they are inherently destined for commercial exploitation and circulation, much like other goods. This is highlighted by the fact that animals are the category of goods "most frequently and historically regulated by contracts",²² placing them at the core of contractual obligations.

4. *From moral duties to contractual obligations*

The use of the concept of "duty", rather than that of "contractual obligation", highlights the moral dimension behind them.²³ However the line between these two concepts becomes particularly blurred when an obligation appears to blend with a moral duty. This convergence becomes particularly evident when a contractual obligation imposes behavior that benefits the animal, thus reflecting the growing influence of ethical considerations in the legal field. The ambivalence inherent in the status of animals is therefore naturally reflected in contract law. A meticulous study of Roman Contract law reveals the anthropocentric legacy of animal law. Historically, animals have always been considered for their economic value. In Roman contract law, as with other valuable goods, the sale of animals was subject to numerous formalities.²⁴ For example, the sale of draft animals or horses, which were essential agricultural tools (*res mancipi*), offered the purchaser a number of rights and privileges that were not

²⁰ M.-C. PIATTI, *Droit, éthique et condition animale*, in *LPA*, 1995, 60, p. 4.

²¹ J.-B. SEUBE, *Le droits des biens hors le Code civil*, in *LPA*, Juin 2005, 118, p. 4 : «le fait que le propriétaire d'un immeuble classé ne puisse le détruire ne confère pas de droits à l'immeuble».

²² J.-P. MARGUÉNAUD, *L'animal en droit privé*, Thèse de Doctorat en droit privé, Université de Limoges, 1992, p. 157.

²³ M. FABRE-MAGNAN, *Droit des obligations*, t. I, Contrat et engagement unilatéral, Coll. Thémis, 6^e éd., PUF, 2021, p. 237.

²⁴ P.-Y. GAUTIER, *Retour aux sources: le droit spécial de la garantie de conformité emprunté aux édiles curules*, in *RDC*, 2005, p. 925.

available for the sale of animals of lesser economic value (*res nec mancipi*).²⁵ It was therefore not so much for the value of the animal as a living being, but rather as an object of a certain economic value, that the sales contract required such formalities to be observed. An examination of Justinian's "Institutes" also reveals that, through the clause known as "*arbitratus boni viri*", the contracting parties requested the judge to assess the usufructuary's behavior as a "reasonable person" would have done, particularly in the case of a lease involving an animal.²⁶

This duty to behave reasonably appears to be implicitly justified by the value and vulnerability of the animal, with a view to greater legal certainty, which requires special attention. It was therefore not so much the desire to protect the animal for its own sake that influenced contractual practices, but rather the economic value it represented for its contractors. Animals were therefore considered solely in terms of commercial interests: their status has thus been proportional to their usefulness to humans since the beginning.

Today, this perspective is tempered by the emergence of the concept of animal welfare, which aims to protect animals not only for their economic value, but also in recognition of their individuality. This development raises the question of whether animals have interests of their own, independent of their commercial value, which may sometimes conflict with those of their owners. A closer examination of Roman law suggests that contractual agreements have long been an underused mechanism for protecting animals and ensuring human responsibility for their welfare.

5. Contracts as a tool for balancing economic interests and moral duties toward animals

As a matter of fact, the contract legally structures the entire cycle of the animal's exploitation: from its breeding to its slaughter, including its transport and sale. The contract is therefore the basis for the appropriation of the domestic animal as a resource, but can this purely economic function of the contract be transcended? Although contracts have traditionally been designed to organize the trade of animals, they can also serve as mechanisms through which humans assume obligations towards animals. Given the fact

²⁵ A. CASTALDO – PH. LEVY, *Histoire du droit civil*, Précis, 2^e éd., Dalloz, 2010, p. 294.

²⁶ E. GIANNOZZI, *Le renvoi à l'arbitratus boni viri dans la caution fructuaria*, in *RDC*, 2016, p. 145.

that animal welfare has been largely marginalized in contractual practice, contract law could serve as an invaluable tool for balancing commercial interests with humans' moral and legal obligations towards sentient beings.

While a contract primarily reflects the freedom of the parties, it is nonetheless subject to constraints related to public order and broader social objectives. The evolution of the legal status of animals and the recognition of their welfare have not only led to the reinforcement of existing contractual obligations but have also given rise to new obligations. This tension highlights the importance of directly integrating animal welfare into the content of contracts: the contract thus moves from being a mere instrument for the exploitation of animals to, paradoxically, a potential mechanism for their protection. Accordingly, this analysis will examine how animal status frames and reinforces the traditional obligations incumbent on the parties and then demonstrates how this also gives rise to new contractual obligations, making the contract a real instrument for the protection of animals and affirming a new approach to contractual obligations.

6. The Reinforcement of contractual obligations arising from the status of animals

The adaptation of contract law to the special status of animals has gradually led to an increasing responsibility on the part of the contracting parties. In practice, the inherent vulnerability of animals requires a further reinforcement of traditional contractual obligations, particularly in the context of deposit and sale contracts. When a contract relating to an animal involves its transfer, particularly in the context of boarding or keeping, the obligation to return the animal in the condition specified in the contract implies a duty to return it in a proper condition.²⁷ The fact that animals are living creatures means that the contractor must provide for their basic needs, making this duty of care a direct consequence of the obligation to return the goods in the same condition.

This analysis also applies to feeding contracts, whereby the operator of a pasture undertakes, in return for remuneration, to take cattle "and is responsible for providing them with healthy food"²⁸. This interpretation of

²⁷ Cass. civ. 1^{re}, 10 janv. 1990 : *Bull. civ.*, n° 6, *RTD civ.*, 1990, p. 517, obs. Ph. RÉMY, *RTD com.*, 1990, obs. B. BOULOC.

²⁸ Cass. civ., 1^{re}, 31 mars 1992 : *Bull. civ.*, n° 93, D., 1993, somm., p. 64, obs. E. MARTINE.

the deposit contract is to be welcomed, as placing an animal in a pension requires care and expenses on the part of the depositary, which logically explains the salaried nature of the deposit. The specific nature of the animal necessarily influences the characteristics of the deposit. “Essentially free of charge” according to the Article 1917 of the Civil Code, the deposit has indeed a price when it has a definite cost when its object is a “sentient being”. Thus, the custody (the essence of the operation) and the return of the item (the purpose of the operation) borne by the depositary is not without cost, which justifies its salaried nature and “an active attitude on the part of the depositary” due to the mobile nature of its object, as opposed to what is required of a traditional depositary. Case law concludes that the depositary is therefore subject to an increased duty of supervision, which technically translates into the imposition of a reinforced obligation of means or a mitigated obligation of result.²⁹ With regard to necessary deposits, pursuant to Articles 1936, 1944 and 1948 of the Civil Code, foals are considered to be fruits: the return of the fruits of the deposited item must be concurrent with the return of the item itself. The fruits cannot therefore be retained, even if the fees owed to the depositary have not yet been paid.³⁰ The obligations traditionally attached to the deposit contract are thus reinforced by the animal’s inherent vulnerability.

In addition to the traditional obligations attached to any sale, such as the obligation to deliver the goods, the warranty against hidden defects and the warranty of conformity, case law imposes a duty on professional sellers to inform and advise buyers about these requirements, so that the goods are fit for their intended use.³¹ Animals are no exception to this rule. In the context of a sale, if the buyer is required to specify the use they intend to make of a pet, the seller has a duty to advise them on the suitability of such a use. Given that the transaction involves a sentient being, the seller may legitimately refuse the sale if the animal proves to be unsuitable for the intended use, in order to protect its wellbeing.³²

This enhanced duty to advise is meant to ensure that the purchaser of the animal provides all the necessary assurances regarding compliance

²⁹ G. PIGNARRE, *Contrat de dépôt : la détermination de l’étendue de l’obligation du dépositaire est subordonnée à la preuve par le déposant du manquement contractuel de celui-là*, note sous Cass. Civ. 1^{re}, 30 octobre 2007, n° 06-19.390, in *LPA*, 110, p. 12.

³⁰ O. ROBIN-SABARD, *Caractérisation du dépôt nécessaire*, Obs sous Cass. 1^{re} civ., 24 mars 2021, n° 19-20.962 F-P, in *LEDC*, mai 2021, 200, p. 5.

³¹ Cass. com., 5 déc. 1995, n° 94-12.376.

³² D. MENARD, *L’encadrement juridique de l’élevage canin. La recherche du bien-être animal*, Thèse de Doctorat en droit privé, Université d’Aix-Marseille 2023, p. 211.

with the requirements relating to its welfare. However, the question of its effectiveness remains, especially since the risk of abandonment is still a persistent problem.³³ To address this issue, the legislator introduced the requirement to sign a “certificate of commitment and knowledge” when selling pets and equines.³⁴ The aim of this certificate is to increase the purchaser’s responsibility and thereby reduce the number of abandoned animals, while ensuring that their needs are better met. Specifically, it sets out the physiological, psychological and emotional needs of the species being transferred. However, the range of this certificate is limited to a restricted number of animals. It only applies to certain pets and equines and does not cover all domestic species. Nevertheless, it reflects a clear intention to raise awareness among buyers and thus reinforces their duties as future animal owners. However, the nature of this certificate raises questions about its actual enforceability: can such a certificate really be equated with the instructions for use or maintenance obligations that usually accompany the sale of ordinary goods?³⁵ While the buyer is clearly being made more responsible, there are still significant doubts about the existence of effective control mechanisms capable of ensuring compliance with this requirement.

This reinforcement appears necessary in order to guarantee the legal certainty of acts involving its transfer. The combination of the duty to respect the interests of the animal and to comply with contractual obligations clearly illustrates the compromise between the application of contract law and the consideration of the animal’s needs. However, it remains difficult to completely abandon the Kantian conception: the duty towards the animal appears here only as an indirect duty towards the contracting parties.

Thus, the animal constitutes the basis for an extension of the duties of the contracting parties, completing the traditional contractual obligations. However, recent developments in animal welfare and the challenges associated with the effective enforcement of restrictive legislation suggest that the contract should be considered a proper instrument for the protection of animals. This represents a paradigmatic change: contractual obligations are no longer designed purely in the interests of humans, but also in the interests of the animal, subject to the contract.

³³ *Les atteintes envers les animaux domestiques enregistrées par la police et la gendarmerie depuis 2016*, SSMI, Interstats analyse n° 51, 28 oct. 2022.

³⁴ Loi n° 2021-1539 du 30 novembre 2021 visant à lutter contre la maltraitance animale et conforter le lien entre les animaux et les hommes, *JORF*, n°0279, 1 déc. 2021.

³⁵ C. HUGON, K. GARCIA, *Du nouveau dans la cession des animaux de compagnie et la détention d'équidés*, in *Revue semestrielle de droit animalier*, 2022, 2, p. 41.

7. *Harmonizing contractual and animal welfare requirements*

As animal protection is a matter of public order, criminal law already punishes acts of cruelty, which currently constitutes the only legal basis for justifying the removal of an animal from its owners. In the absence of a clearly defined criminal offense, the scope of judicial intervention remains uncertain. It is therefore worth considering whether a broader approach to animal welfare could take into account certain practices, which do not constitute acts of cruelty in the strict sense, as undermining the fundamental needs of the animal, thus justifying a judicial review of the contract. This unresolved situation highlights the difficulties arising from legislative uncertainties and raises questions about the role of the judge in contractual matters.

Although there is no legal definition of animal needs, these legal standards will guide both judges in their decisions and contractors in the execution of contracts. In this sense, the contract offers all the advantages of anticipation, as it allows the concept of welfare to be specified in detail, thereby overcoming a concept that is sometimes too general. Developed on the initiative of the Brambell report,³⁶ the definition of animal welfare varies according to specialized terminology: the zoo technician's "animal welfare" is not necessarily the same as that of those who recognize the complexity and subjectivity of animals.³⁷ It is generally accepted that welfare refers to the absence of injury or disease; a non-aggressive climatic and physical environment; adequate nutrition and watering; an absence of fear or stress; and the ability to express "normal" behaviors for the species. Using this general concept presents the advantage of covering all domestic animals in principle, but suffers from a certain degree of uncertainty since, depending on the appreciation made, the degree of "welfare" may vary according to the decisions taken.

Contractual compliance with specific welfare standards therefore makes it possible to move beyond a purely negative conception of animal welfare, one limited to protection against harm. By adapting contracts to animal welfare, anticipatory mechanisms can be put in place that complement criminal law. Taking into account an animal's specific needs within contractual arrangements is justified both legally and morally, thereby

³⁶ R. BRAMBELL, *Report of the Technical Committee to Enquire into the Welfare of Animals kept under Intensive Livestock Husbandry Systems*, 1965, p. 84.

³⁷ S. DESMOULINS, *Des difficultés révélatrices d'une véritable aporie ?* in *Rev. UE*, 2021, p. 567.

enabling the development of ethical contractualization. One of the main advantages of contractualizing owners' duties lies in the possibility of transforming these duties into enforceable obligations, whose fulfillment can be effectively guaranteed through contract law.

"To contract is to anticipate. A contract is a means of taking hold of the future".³⁸ Admitting that a contract serves not only the interests of the contracting parties, but also those of its object, such as the animal, represents a departure from the strictly anthropocentric approach historically adopted by the law. This interpretation lends itself particularly well to the protection of animals, whose welfare has recently been recognized as one of the values of our modern democratic societies³⁹. Indeed, the contract, and more broadly contract law, would be the source of a debt of new duties towards animals. It would then make it possible to limit the "harmful effects of contractual selfishness in favor of greater collaboration between the parties "through" the technique of good faith, based on the principle of contractual balance, the promotion of contractual sustainability and, above all, greater judicial intervention in the sphere of contracts"⁴⁰. In addition the contractualisation of the animal's interest offers real practical advantages with lies in the possibility of specifying «the best solution" for the animal, adapted to its biological requirements and specific welfare needs.

However, a fundamental question arises : to what extent should these obligations be enforced, and what happens if they conflict with the interests of the owner ? The answer depends on the degree of recognition one wishes to accord to the animal. In addition, one problem remains : on the one hand, the existence of parallel methods of acquiring animals, particularly via online platforms⁴¹, and on the other hand, the lack of systematic contractual formalization in this type of transaction⁴². Ultimately, the answer depends on the extent to which the protection of the animal's interests is recognized, oscillating between a strict application of property law and a broader consideration of the animal's status as a sentient being.

³⁸ «Contracter c'est prévoir. Le contrat est une emprise sur l'avenir». G. RIPERT, *La règle morale dans les obligations civiles*, 4e éd., LGDJ, 1949.

³⁹ Judgment *Executief van de Moslims van België and Others v. Belgium*, ECHR, 13 February 2024.

⁴⁰ M. MEKKI, *Les doctrines sur l'efficacité du contrat en période de crise*, in *RDC*, 2010, p. 1.

⁴¹ D. MENARD, *L'encadrement juridique de l'élevage canin. La recherche du bien-être animal*, Thèse de Doctorat en droit privé, Université d'Aix-Marseille, 2023, p. 191.

⁴² M. LATINA, *Le droit spécial des contrats à l'épreuve de l'animal*, in *Droit rur.*, Janvier 2025, 1, dossier 3.

As Lacordaire famously observed: “Between the strong and the weak, between the rich and the poor, between the master and the servant, it is freedom that oppresses and the law that liberates”. To this balance, we might now add: between the animal and its owner, it is the contract that protects, and animal welfare that grounds this protection...

Maxime Dupan*

*Do sibling rights imply sibling duties?
Considerations concerning a (lack of) legal maintenance
obligation between siblings in Belgium*

ABSTRACT

Recently siblings are receiving increasing attention in the legal sphere. More than two decades after France introduced a right for siblings not to be separated from each other, Belgium reinforced the legal position of siblings with similar rights in the Act of 20 May 2021 (hereafter: the Sibling Act) and even went beyond: siblings now have the right not to be separated from each other, have a fundamental right to personal contact, and a broader definition of who qualifies as equivalent to a sibling was introduced. These rights are primarily intended to ensure that siblings can grow up together. The impact of these rights varies from child residence and contact arrangements upon separation of the parents, out-of-home placements in the context of youth care, and even (though to a lesser extent) guardianship. The legal position of siblings in Belgium primarily involves rights (and certain prohibitions, e.g. the legal impediment for siblings to marry each other). However, this close familial bond generates few, if any, obligations toward one another in the legal sense. Although there are undoubtedly several moral duties between siblings, these are not (or in some cases, with difficulty) legally recognized. A striking example is the absence of a maintenance obligation between siblings in Belgium. Maintenance obligations exist for nearly every family relationship in the direct line (parents, children, grandparents, great-grandparents, etc.). Even some in-laws have maintenance obligations toward each other (i.e. parents-in-law and children-in-law). Siblings, however, are not included. Based on existing case law, merely a “moral” maintenance obligation can apply between siblings, where the concept of a natural obligation is used to attempt to transform a moral duty (when voluntarily fulfilled) into a legally enforceable obligation. Nevertheless, some countries do impose a maintenance obligation between siblings. This is the case, for example, in both Spain and Italy. Do countries that recognize maintenance obligations between siblings also grant them specific rights in other legal spheres? This paper briefly examines developments in Belgium regarding sibling rights since the Sibling Act and connects these to the absence of a legal maintenance obligation between siblings. The lack of a maintenance obligation between siblings will be further analyzed from a comparative perspective.

* Maxime Dupan is a teaching and research assistant in family law, personal status law, and relationship property law at the Faculty of Law and Criminology at UGent, where she is preparing a doctoral dissertation on the legal status of siblings.

KEYWORDS

Family Law – Maintenance Law – Siblings – Brothers – Sisters.

SUMMARY: 1. The Sibling Act: the emergence of sibling rights – 2. Impact of the Sibling Act – 3. Sibling duties: the (lack of) legal maintenance obligation between siblings from a comparative perspective – 4. Towards (more) legal recognition of the sibling status

1. *The Sibling Act: the emergence of sibling rights*

Recently siblings are receiving increasing attention in the legal sphere. More than two decades after France introduced a right for siblings not to be separated from each other,¹ Belgium reinforced the legal position of siblings with similar rights in the Act of 20 May 2021² (hereafter: the Sibling Act) and even went beyond.

Siblings now have the explicit right not to be separated from each other, a fundamental contact right, and a broader definition of who qualifies as equivalent to a sibling was introduced. These rights are primarily intended to ensure that siblings can grow up together. The impact of these rights ranges from child residence and contact arrangements upon separation of the parents, out-of-home placements in the context of youth care, and even (though to a lesser extent) guardianship.³

The Sibling Act entered a chapter dedicated to brothers and sisters in the Belgian (Old) Civil Code⁴ (Book I ‘Persons’, Title IX ‘Parental authority and foster care’, Chapter 3 ‘Brothers and sisters’). This chapter

¹ See f.e.: E. BERRY, *Le principe de non-séparation de la fratrie en droit français*, in *Tijdschrift voor Familierecht* (hereafter: *T.Fam.*), 2021, 10, pp. 321-325.

² Act 20 May 2021 amending the old Civil Code, concerning personal ties between siblings, *Belgian State Gazette* 9 June 2021, 57.506.

³ For a more thorough (legal) analysis of the Sibling Act: E. ALOFS – S. DE BUS, *Broers en zussen in het jeugdrecht*, in *T.Fam.*, 2021, 10, pp. 312-320; I. BOONE, *De verblijfsregeling van broers en zussen na scheiding van de ouders*, in *T.Fam.*, 2021, 10, pp. 296-305; C. DECLERCK, *Het recht op persoonlijk contact tussen broers en zussen in de zin van artikel 375bis oud BW*, in *T.Fam.*, 2021, 10, pp. 306-311; M. DUPAN, *Juridische bescherming van de familiale band(en) tussen broer(s) en zus(sen)*. *Commentaar bij de wet van 20 mei 2021*, in *Revue générale de droit civil belge*, 2021, 9, pp. 458-466; F. SWENNEN, *Wie zijn broers en zusters?*, in *T.Fam.*, 2021, 10, pp. 292-295.

⁴ The Civil Code in Belgium has been partially recodified. The recodification process is happening gradually. Articles in parts that haven’t been recodified yet, are referred to as ‘old Civil Code’ (hereafter: OCC). Where recodification has happened, we speak of the ‘Civil Code’ (hereafter: CC).

contains three articles. Article 387*septiesdecies* OCC gives minor siblings the right not to be separated from each other. If the best interest of the child requires this right not to be applied, the parents, the foster carers, the court and the competent authority must strive to maintain personal contact between this child and each of its brothers and sisters, unless that is also contrary to the best interests of this child. Children who have at least one legal parent in common (whether through legally established kinship or adoption⁵) are legally considered to be siblings (although there is no explicit sibling definition to be found in the (O)CC). Depending on whether children have one or two parents in common, they will be qualified as either halfsiblings or full siblings.⁶

Article 387*sexiesdecies* OCC additionally states that children who are being raised within the same family and who have developed a special bond of affection between each other are assimilated to siblings.⁷ This is called the assimilation rule. One might think of stepsiblings or fostersiblings. The cumulative conditions of the assimilation rule do not apply to full and halfsiblings.

The right not to be separated from each other and the assimilation rule apply to the measures related to parental authority and foster care. Article 387*quinquiesdecies* OCC also extends the scope of these rights to minor non-emancipated children who have been placed (out of home) in the context of youth protection. There is however an exception if the child has been placed as a consequence of committing an act defined as an indictable offence (juvenile charge). This exception prevents them from ‘escaping’ an out of home placement in a closed (detention) facility by applying to the right not to be separated from their brothers and sisters, in the interests of protecting society.⁸

However, not every sibling right has made its way to the aforementioned chapter in the OCC. The Sibling Act also gives every brother and sister,

⁵ There are two types of adoption in Belgian family law, only one of which fully equates the adopted child to a child connected to his parents through legally established kinship, i.e. the ‘full’ (*volle*) adoption. A ‘simple’ (*gewone*) adoption has limited legal consequences, which only concern the relationship between the adopter and the adopted child and its descendants.

⁶ In this paper referred to as ‘legal’ siblings.

⁷ In this paper referred to as ‘social’ siblings.

⁸ Justification to the (adopted) amendment no. 19 by Ms. Rohonyi *c.s.*, Chamber of Representatives, 2020-2021, 27 April 2021, no. 55-780/9, 7 *j*° report of the second reading on behalf of the Committee on Justice to the bill to amend the Civil Code, concerning the personal ties between siblings (hereafter: report of the second reading), Chamber, 2020-2021, 6 May 2021, no. 55-780/10, 10.

at any age, a contact right with each other, unless this goes against the best interests of the child (art. 375*bis* OCC). Where before only grandparents were mentioned as having a principal⁹ contact right with their grandchildren, this right now extends to siblings as well. This right also applies to social siblings. Ironically, the burden of proof for social siblings to realise this 'principal' contact right is heavier than for other parties who apply for a right to personal contact. The latter must only prove a special bond of affection with the child, while social siblings also have to prove they are being raised in the same family.

The right not to be separated from each other does not state what the application of this right means in practice. This right, in theory, enables siblings to grow up together and implies being raised within the same family and maintain maximal contact with each other.¹⁰ In some areas, the Sibling Act has specified (to some extent) what this right entails for some more specific situations.

When parents separate, custody arrangements have to be made for their children. If the parents don't reach an agreement, and if they have multiple children, the (family) court must strive for an identical custody arrangement for all brothers and sisters. Where necessary, the court clarifies how the siblings will maintain contact with each other (art. 374, § 2, section 4 OCC). This right to an identical custody arrangement only applies to full legal siblings. However, since halfsiblings and social siblings still have the right not to be separated from each other, it is the (sometimes difficult) task of the family court judge to take into consideration the existing living and contact arrangements from half- and social siblings (e.g. stepsiblings) when deciding upon the custody arrangement of the full sibling(s).

In case the parents do reach an agreement about the custody arrangements for their children, this agreement will need to be homologated by the court. The homologation will only be denied if the agreement is manifestly contrary to the best interests of the child (art. 374, § 2, section 1 OCC). In this situation, (full) siblings have no explicit right to identical custody arrangements. However, the parents and the judge still need to keep in mind the general right not to be separated from each other. In practice, (at least some) judges do check if siblings are not separated from

⁹ This means they have to prove nothing more besides their legally established kinship with the child.

¹⁰ Justification to the (adopted) amendment no. 23 by Ms. Rohonyi *c.s.*, Chamber, 2020-2021, 27 April 2021, no. 55-780/9, 11 *j*° report of the second reading, Chamber, 2020-2021, 6 May 2021, no. 55-780/10, 11.

each other before they give their approval.¹¹

The fact that a judge has to strive for identical custody arrangements for siblings isn't the only factor they have to take into account. If at least one of the parents requests joint custody, the judge has to primarily examine this proposal (art. 374, § 2, section 2 OCC). Awarding identical custody arrangements to siblings can be either an argument *pro* or *contra* shared residence.¹² For example, in a group of three siblings, where the youngest is only 1.5 years old, the latter might not be ready to be separated from its mother for a prolonged time. This might be an argument to (sometimes temporarily) keep the main residence of all three siblings with the mother, and thus *contra* shared residence.

Since the legislation on guardianship is not part of the (material) scope of article 387*quinquiesdecies* OCC,¹³ a section was added to the already existing article 393 OCC to ensure siblings would maintain the right not to be separated in the case of guardianship. In case of siblings in the sense of article 387*sexiesdecies* OCC, the justice of the peace preferably appoints the same guardian for all siblings, taking into account the best interests of each child. Where necessary, the justice of the peace clarifies how the siblings maintain personal contact with each other (art. 393, section 2 OCC).

This rule applies when neither of the parents has appointed a guardian (in a testament or a declaration, see art. 392 OCC). If the parents did choose a different guardian for each of their children, the justice of the peace might (in my opinion) rely on the impossibility to follow their choice to nevertheless appoint the same guardian for all the siblings (art. 393, section 1 OCC).

It is indeed admirable to ensure that siblings won't be separated from each other when both parents are no longer able or allowed to exercise parental authority (art. 389, section 1 OCC). In practice, the need for a guardian usually occurs when both parents have passed away. For full siblings, this means two people that have simultaneously or successively died. If there were to be a halfsibling involved, this would mean three parents – the parent they have in common plus each non-common parent. In case of social siblings, there is usually no common parent, which means four parents would have to have passed away during their minority. The

¹¹ Fe.: Court of appeal Ghent (11th *quater* ch.) 26 September 2024, 2024/FA/290, unpublished.

¹² Fe.: Court of appeal Ghent (11th *quater* ch.) 23 October 2023, 2022/FA/411, unpublished.

¹³ The legislation governing guardianship is situated in chapter 2 of Title X 'Minority, guardianship and emancipation' of Book I OCC.

chances of this last situation happening are relatively small.¹⁴ In any case, should it happen, the possibility to have the same guardian does exist.

An important, albeit complex situation in which siblings threaten to be (and are frequently) separated, is when children are being placed out of home as a youth protection measure. Complex, because while the protection of the family relationship between siblings is a matter of federal competence in Belgium, the (organization of) youth protection and care is not. This competence belongs to the regions (the Flemish, French and German speaking regions, and to some extent the Common Community Commission (COCOM)). It is by consequence not completely clear how to interpret the federal right not to be separated from each other on a regional level, even though the federal legislator has explicitly stated that the right applies to out of home placements in youth care as well (art. 387*quinquiesdecies* OCC).

I believe that at this moment the federal legislation has to be viewed as being the minimal requirement of protection for sibling relationships in youth care. This means in case of an out of home placement, siblings should be placed together, whether it's in foster care or in a residential facility, unless the best interests of the child demands another solution.¹⁵ Some regions already had several measures to ensure siblings being placed together before the Sibling Act.¹⁶ Sometimes regions developed (additional) legislation later on.¹⁷ Not all regions offer the same level of protection to siblings in youth care and not every region complies with (all of) the requirements of the federal right not to be separated from each other. A thorough analysis of the existing legislation would however go too far for the scope of this paper.¹⁸ There are also practical impediments, which means that this sibling right is not always realized in practice. A shortage of available spaces in youth care facilities, whether or not a consequence of underfunding, leads to violations of sibling rights.¹⁹

¹⁴ M., MALLIEN, *Le principe légal de non-séparation des fratries : contours, réflexions et perspectives*, in D. PIRE (ed.), *Famille et jeunesse*, Anthemis, 2023, (96), pp. 122-123.

¹⁵ Explanatory memorandum to draft bill amending the Civil Code concerning the personal relations between siblings, Chamber, 2019-2020, 21 November 2019, no. 55-780/1, 11.

¹⁶ E.g. art. 48/1 Flemish Decree 12 July 2013 concerning the integral youth assistance, *BS* 13 September 2013, 65.154 (Flemish Community); art. 42 Decr.Fr. 18 January 2018 containing the code of prevention, youth assistance and youth protection, *BS* 3 April 2018, 31/814 (French Community).

¹⁷ E.g. art. 14 Flemish Decree 7 May 2004 concerning the legal position of the minor in the integral youth assistance, *BS* 4 October 2004, 70.066 (Flemish Community).

¹⁸ This analysis will be part of the PhD I'm preparing ('The status of brothers and sisters. Towards an optimisation of their rights and duties in Belgium').

¹⁹ B. JESPERS, *Placing siblings together in youth care*, July 2022, <https://cdn.nimbu.io/s/5s8z9pq/>

2. *Impact of the Sibling Act*

Some alleged that the Sibling Act would remain purely symbolical. Even though siblings, even minor siblings, were granted specific rights, the latter would not have the actual means to exercise those rights. In Belgium, minor siblings lack procedural capacity, following their general lack of legal capacity.²⁰ However, minor siblings do have some options to ensure their rights are being upheld. Due to the limited scope of this paper, only the right to be heard by the family court judge will be hereafter (briefly) discussed.

The Sibling Act has already shown its potential to make an impact, thereby dispelling the notion that it is merely symbolic. Briefly stated, the Belgian Constitutional Court (hereafter: CoC) decided that halfsiblings have the right to be heard in proceedings concerning the custody arrangements of their halfsibling(s).²¹ Its reasoning relied almost fully upon the rights of siblings not to be separated from each other and their principal contact right. These sibling rights confirmed that the custody arrangement of their younger halfsibling also affects them, thereby granting them the right to be heard in the matter.

The legislator has implemented this ruling in the recent revision²² of the article containing the right to be heard (art. 1004/1 Code of Civil Procedure, hereafter: CCP). Every minor has the right to be heard by a judge in matters that affect him (with some exceptions²³). Brothers and sisters (in the legal sense) are now explicitly considered to be affected by matters concerning the custody arrangements that concern one or more of them (art. 1004/1, § 1, section 2 CCP).

Even though the legislator used a restrictive approach in relation to the CoC-ruling and there still remain practical impediments to the

channelentries/zios0nw/files/2022_05%20Rapport_05_SWVG_EF13_Het%20samen%20plaatsen%20van%20broers%20en%20zussen%20in%20jeugdzorg.pdf?y50gvvl.

²⁰ I. BOONE – C. DECLERCK – E. VERTOMMEN, *National perspectives: Belgium*, in W. SCHRAMA (ed.), *International handbook on child participation in family law*, Intersentia, 2021, (103), pp. 119-120.

²¹ CoC 21 April 2022, no. 58/2022, ECLI:BE:GHCC:2022:ARR.058, www.const-court.be

²² Act 28 March 2024 containing provisions on digitalization of justice and various provisions *Ibis*, *Belgian State Gazette* 29 March 2024, 38.622, *err.* BSG 4 April 2024, 39.698.

²³ The exceptions being: proceedings concerning maintenance obligations and purely financial or patrimonial proceedings that don't directly affect the minor's property.

exercise of this right for siblings to be heard,²⁴ this can be seen as a positive development concerning the legal recognition of the sibling status.

3. Sibling duties: the (lack of) legal maintenance obligation between siblings from a comparative perspective

Belgium

In contrast to the aforementioned sibling rights, the close familial bond between siblings generates few, if any, obligations toward one another in the legal sense. Although there are undoubtedly several moral duties between siblings, these are not (or in some cases, with difficulty) legally recognized.

A striking example (within the scope of this paper) is the absence of a maintenance obligation between siblings in Belgium. Maintenance obligations exist for nearly every other family relationship. In the direct line, parents and (adult) children are obliged to maintain each other. The same goes for (great-)grandparents and (great-) grandchildren (art. 205 OCC). Even parents-in-law and children-in-law have a maintenance obligation toward each other (i.e. parents-in-law and children-in-law) (art. 206 OCC). This obligation is of a reciprocal nature (art. 207 OCC). Siblings however, are not included.

Between siblings, merely a ‘moral’ maintenance obligation can apply. This ‘moral’ obligation is generally accepted to exist between siblings, as long as their mutual bond of affection is strong enough for it to be qualified as a natural obligation.²⁵ The execution of a natural obligation cannot however be enforced (art. 5.2, section 1 and 2 CC). It is not without difficulty to transform a natural obligation into an enforceable civil obligation. Furthermore, the ‘maintenance obligation’ based on an original natural obligation does not qualify as a legal maintenance obligation. This means that the usual changeability, indexation, prescription etc. of maintenance obligations do not automatically apply between siblings.²⁶ Moreover, the lack of a legal obligation creates an inequality between siblings, especially if there are more than two siblings, of whom only one is in need. Where one of the siblings voluntarily helps his sibling, there is no way in which he

²⁴ Both of these aspects go beyond the scope of this paper and will be discussed in my PhD.

²⁵ K. WILLEMS., *De natuurlijke verbintenissen*, die Keure, 2011, p. 345, no. 392.

²⁶ Y.-H. LELEU, *Droit des personnes et des familles*, Larcier, 2020, p. 814, no. 808.

could reclaim (not even partially) the financial support he provided from his other sibling(s).

Leaving aside the collateral nature of their parentage, siblings are family members in the second degree (art. 4.11, § 5 CC), which is as close as the family relationship between grandparents and grandchildren (art. 4.11, § 4 CC), who do have a legal obligation to maintain each other. Even between great-grandparents and great-grandchildren such an obligation exists, and they are ‘only’ related in the third degree. The (mutual) maintenance obligation in the direct upwards and downwards line is not even limited to a certain degree.

Siblings are also more likely to inherit from their (childless) brother or sister, than from some other family members who do have an obligation to maintain each other. For example, a grandparent will only inherit in estate succession if the deceased leaves no parents and no siblings (art. 4.28, section 1 *j*° 4.29, § 1 CC). A sibling will however still inherit a part of the estate even if their (childless) first-deceased sibling was married (or legally cohabitating) (art. 4.17, § 2 CC and 4.23 CC) and/or their parent(s) are still alive (art. 4.26 CC). While in death there seems to be a presumption of (intragenerational) solidarity between siblings, this presumption appears absent *inter vivos*.

It seems contradictory, furthermore, that some legislation confirms the fact that siblings are presumed to have a close family relationship, like the prohibition to marry (art. 162 OCC)²⁷, while when it comes to family solidarity, this bond seems to be deemed not close enough.²⁸

Nevertheless, some countries do impose a maintenance obligation between siblings. This is the case, for example, in both Spain and Italy. For the scope of this paper, I will only discuss the existence and nature of the maintenance obligation between siblings in legislation and other sibling-related legislation in Spain.

Spain

According to article 143, section 2 Código Civil (hereafter: CoC), in Spain siblings are obligated to maintain each other, but this obligation is more restrictive compared to what other family members should provide (art. 142 CpC). Their duty to maintain is limited to ‘(strictly) necessary assistance’ (*los auxilios necesarios para la vida*) and, if necessary, (some) educational costs. Siblings are the last family members to appeal to for

²⁷ The prohibition to marry applies to both full and half-siblings in Belgium.

²⁸ R. OUADROGO, *La notion de devoir en droit de la famille*, Bruylant, 2014, p. 336, nr. 621.

maintenance. Full siblings must be approached first, halfsiblings should be addressed last (art. 144, section 1, 4° CpC).

Spain does not only look to the sibling bond as a means of consolidating family solidarity: even from a brief overview, one can conclude the personal relations between siblings are deemed important in other (legal) spheres as well.

When parents separate and custody arrangements have to be made for their children, the judge must take care not to separate siblings from each other (art. 92, 10. CoC). Siblings also have an explicit right to maintain personal contact with each other (art. 160 CoC). In youth care, siblings should be entrusted to the same institution or person so they remain united (art. 172^{ter}, 2. CoC). If a guardian has to be appointed, siblings are one of the preferable family members (art. 213, section 1, 2° CoC). If multiple siblings need a guardian, the law ensures the appointment of the same guardian (art. 215 CoC). These provisions are very similar to the Belgian legislation that covers the legal position of siblings in family law.

Siblings are however less likely to inherit part of their siblings' estate in Spain than in Belgium. Siblings inherit only if there are no descendants, ascendants or spouse (art. 944 CoC). If the deceased also has nieces or nephews, they inherit together (although not necessarily to the same extent, art. 948 CoC).

4. Towards (more) legal recognition of the sibling status

The legal position of siblings in Belgium primarily involves subjective rights in favour of siblings in the field of residence, access and custody. If the sibling bond is being protected (especially) through childhood, why not call upon this family relationship to establish a stronger network of family solidarity? The legal recognition of a maintenance obligation between brothers and sisters would also protect the equality between siblings who feel morally compelled to assist a sibling in need, particularly when other siblings might not (want to) assume the same responsibility.

More legal recognition could be understood as attributing (more) legal duties to the sibling status, for example by embedding the already existing moral obligation to maintain one's sibling into our legal framework. Countries like Spain, which already have this kind of maintenance obligation, can offer inspiration as to the possible extent of sibling solidarity.

In an additional way, more legal recognition is also possible by including

more siblings. In today's families, siblings are no longer limited to legal (full and half) siblings. There might also be something to be said for the inclusion of social siblings, in light of their (sibling) rights or their duties.

The Sibling Act has been a step forward in the recognition of sibling-related rights. Rights and duties are however but two sides of the same coin. If we are to move towards an optimal legal position for siblings, sibling duties should be an integral part of the discussion.

Kristof Heidemann*

Mandatory deliberation day – An Antidote to Societal Divide?

ABSTRACT

Democratic backsliding and polarization are increasing problems in democracies across the globe. This paper analyses the “Deliberation Day” proposal by Bruce Ackerman and James Fishkin after its 20th anniversary and discusses the question of whether it might be a supportive tool against these problems after the fundamental changes that have occurred in the overall political situation over the last 20 years. It concludes that due to the dangers of increasing group polarization in homogeneous groups, low participation prospects, and the lack of adequate minority protection, the idea holds value, but should be adjusted towards a framework more closely with the setups of Deliberative Polls and Citizens’ Assemblies, which include a representative cross-section of society at large in each discussion group.

KEYWORDS

Deliberation Day – Deliberative Democracy – Polarization – Democratic Backsliding – Democratic Duties

SUMMARY: I. Introduction – 2. Definition of Deliberation Day – 3. Uniqueness of the proposal – 4. The polarization problem – 5. Effectiveness of the Proposal as a Countermeasure against Polarization – 5.1. Cure via Exposure Therapy? – 5.2. Too Big and Too Small – 5.3. Misrepresentation of the political arena – 5.4. Technical Design Issues – 5.5. Contradictions in the Argumentation – 6. Conclusion

1. *Introduction*

September 2025 marks the 20th anniversary of the official publication of the revised version of Bruce Ackerman’s and James Fishkin’s book “*Deliberation Day*”, in which they sought to revitalize democracy, a pursuit whose necessity has since become a cross-disciplinary focus point of contemporary research in light of the democratic backsliding¹

* Kristof Heidemann is a PhD researcher under the supervision of Prof. Janne Salminen and Dr. Hanna Malik (LL.M.) at the Faculty of Law of the University of Turku.

¹ Used here as the most commonly referenced term for the phenomenon, however other, equally suitable terms have been proposed such as e.g. “*Democratic Rollback*” in Larry

occurring in recent years² across the western world, while their offered idea of a solution proposal has not gained similar momentum. This paper aims to fill that gap by revisiting the proposal and discussing the question of whether the fundamental changes that have occurred to public discourse in the last 20 years³ render the idea of a Deliberation Day as a democratic duty a naïve academic pipe dream or if the introduction of such a proceeding as a (soft) democratic duty might constitute a valuable countermeasure against societal divide and the decline of political cognitive empathy⁴ around the world.

2. Definition of Deliberation Day

The authors conceptualized “*Deliberation Day*” as a national holiday held two weeks before major elections, during which citizens can choose between two possible days to take time off work and deliberate about the central issues of the campaign with fellow citizens at neighbourhood meeting places.⁵ While attendance shall be legally voluntary, the motivation to participate is expected to stem from a sense of civic duty, a financial

Diamond, “Democratic Rollback: The Resurgence of the Predatory State,” *Foreign Affairs* 87, no. No. 2 (2008): 36–48, <https://www.foreignaffairs.com/world/democratic-rollback>.

² N. BERMEO, *On Democratic Backsliding*, in *Journal of Democracy*, 2016, 1, pp. 5-19; S. HAGGARD - R. KAUFMAN, *Backsliding: Democratic Regress in the Contemporary World*, in *Elements in Political Economy*, ahead of print, January 2021; D. WALDNER - E. LUST, *Unwelcome Change: Coming to Terms with Democratic Backsliding*, in *Annual Review of Political Science*, 2018, 1, pp. 93-113.

³ The authors already acknowledged in their work that with the progress of time over one or two decades, changes to the idea would be inevitable, see B. ACKERMAN - J. S. FISHKIN, *Deliberation Day*, Yale University Press 2004, p. 13.

⁴ It is beyond the scope of this work (and left as a topic of possible further research) to discuss the possible downsides of cognitive empathy and their consequences for the DDay format; for the matter of this paper it suffices to note, that even critiques of the excessive use of empathy in politics usually acknowledge that cognitive empathy (opposed to affective empathy) in the sense of the skill of perspective taking (sometimes also referred to as social cognition, theory of mind, etc.) is a skill necessary for effective moral behavior and therefore from a moral point of view at minimum neutral, see P. BLOOM, *Against Empathy: The Case for Rational Compassion*, First Edition, Ecco 2016. Therefore, even if one questions that empathy is a useful tool in its own right, an increase would at least raise our capabilities to conduct constructive political action more effectively, which is necessary in its own right, given the gravitas of humanity’s current problems.

⁵ B. ACKERMAN - J. S. FISHKIN, *Deliberation Day*, cit., p. 3.

incentive of \$150, and social pressure comparable to that associated with gatherings on festive days, such as New Year's, etc.,⁶ and can therefore be conceptualized as a soft democratic duty. According to their idea, the day is supposed to include structured events, such as the communal viewing of a live TV debate centred around 2-4 main campaign topics, followed by the collaborative formulation of questions that are later presented to local party representatives to clarify the candidates' positions.⁷ In order to uphold the civility of the discussion mechanisms, such as a randomly selected foreman enforcing a 90-second time limit for each contribution by a participant, are introduced.⁸ While the proposal has never actually been tested in practice, it is noteworthy, that it came close in connection to the planned British Referendum on the EU-constitution in 2005: then British Prime Minister Tony Blair was intent on countering the anti-EU-rhetoric of the "Murdoch press", which urgently advocated to its consumers to vote against the adaptation, with a British Deliberation Day. Early planning had begun⁹ before the arrangements were discontinued after the enterprise had been rendered pointless by the French and later Dutch rejection of the proposal,¹⁰ which caused the EU-member-states to pursue the advancement of European integration through the Lisbon treaty not open for referenda¹¹ in the member states instead.¹²

⁶ *Ivi*, pp. 17 and 20.

⁷ *Ivi*, pp. 25-26.

⁸ *Ivi*, p. 27.

⁹ T. GRILLOT - J.C. MONOD, *Reconstructing Citizenship for the Twenty-First Century - An Interview with Bruce Ackerman | Oiling the Wheels of Democracy*, Books & ideas, March 5, 2012, <https://booksandideas.net/Reconstructing-Citizenship-for-the->

¹⁰ N. STARTIN - A. KROUWEL, *Euroscepticism Re-Galvanized: The Consequences of the 2005 French and Dutch Rejections of the EU Constitution*, in *Journal of Common Market Studies*, 2013, 1, pp. 65-84; P. HAINSWORTH, *France Says No: The 29 May 2005 Referendum on the European Constitution*, in *Parliamentary Affairs*, 2006, 1, pp. 98-117.

¹¹ With the sole exception of Ireland due to the opinion of the legal advisors to the Irish Government that parts of the Lisbon Treaty constituted an amendment to the existing Irish Constitution (as a reduction of Irish sovereignty) and the fact that according to Art. 46 the Irish Constitution may only be amended by a referendum, see also Ambassador John Bruton, Head of the Delegation of the European Commission to the United States, "The Lisbon Treaty, the Irish Referendum and Implications for the European Union: What Next?," accessed August 26, 2025, <https://www.europeaninstitute.org/-european/index.php/8-reference-center/background-briefs/12-the-lisbon-treaty-the-irish-referendum-and-implications-for-the-european-union-what-next-speech-text-in-extenso>.

¹² European Parliament, Draft Treaty Establishing a Constitution for Europe, accessed August 25, 2025, <https://www.europarl.europa.eu/about-parliament/en/in-the-past/the-parliament-and-the-treaties/draft-treaty-establishing-a-constitution-for-europe>.

3. *Uniqueness of the proposal*

Ackerman and Fishkin principally compared their proposal to deliberative polling¹³, in which a randomly selected group of citizens is surveyed before and after reading intensively and later on deliberating on an issue.¹⁴ According to their thinking, studies of Deliberative Polls suggest that, driven by an improved understanding, participants, independent of their socio-economic background, change their political attitudes and voting intentions through a deliberative process in many ways comparable to Deliberation Day (henceforth referred to in abbreviation form as “DDay”).¹⁵

One could just as well construct a case regarding commonalities to other deliberative formats such as e.g. Citizens’ Assemblies (gatherings of a demographically representative cross-sections of the population, convened to engage in collective deliberation¹⁶ after receiving expert insights and to afterwards produce policy recommendations for government officials)¹⁷ or participatory budgeting (a combination of direct and representative democracy as a process whereby citizens can provide input, sometimes beyond deliberative, on at least parts of an official governmental budget),¹⁸ since all formats in the end can be qualified as structured deliberative techniques to produce considered judgments by (parts of) the general public on policy matters. Experiments with such small-scale techniques have spread across the globe in what the OECD has titled the “*deliberate wave*”.¹⁹ All these ideas can be seen as attempts to go beyond a formal

¹³ For a more up-to-date explanation than the one provided in the book see e.g. “What Is Deliberative Polling?” | Deliberative Democracy Lab,” accessed August 21, 2025, <https://deliberation.stanford.edu/what-deliberative-pollingr>.

¹⁴ B. ACKERMAN - J. S. FISHKIN, *Deliberation Day*, cit., p. 4.

¹⁵ *Ivi*, p. 59.

¹⁶ If the deliberation is focused on a specific topic related to science and technology they have sometimes, especially in the Danish context been called “Consensus Conferences”, see O. ESCOBAR - S. ELSTUB, *Forms of Mini-Publics: An Introduction to Deliberative Innovations in Democratic Practice*, in *newDemocracy*, Research and Development Note 2017, 4, p. 2, <https://www.newdemocracy.com.au/2017/05/08/forms-of-mini-publics/>.

¹⁷ K. HEIDEMANN, *Citizens’ Assemblies as a Tool to Promote Gender Equality*, in *Talking Rights*, December 12, 2024, <https://talkingrights.org/2024/12/12/citizens-assemblies-as-a-tool-to-promote-gender-equality/>.

¹⁸ L. BARTOCCI et al., *The Journey of Participatory Budgeting: A Systematic Literature Review and Future Research Directions*, in *International Review of Administrative Sciences*, 2023, 3, p. 757 f.

¹⁹ OECD, *Innovative Citizen Participation and New Democratic Institutions | Catching the Deliberative Wave*, 2020, https://www.oecd.org/en/publications/innovative-citizen-participation-and-new-democratic-institutions_339306da-en.html.

towards a more substantive version of democracy, in which popular sovereignty is strengthened by a deeper collective integration of the majority of citizens into the political process.²⁰

Nevertheless, the DDay-format idea has some unique features setting it apart from the rest of the deliberative democracy discourse.

First, the proposal is exceptional in the sheer scale of the plans, which are intended to involve as large a part of the population as possible in order to spread a sense of civic duty and engagement. Most deliberative formats, on the contrary, including Deliberative Polls and Citizens' Assemblies, are restricted to a very limited number of participants and therefore have a very limited effect on the feeling of democratic duty within the overall population. Meanwhile, even a single DDay would potentially involve all eligible voters if they are registered,²¹ meaning that, e.g., in the U.S., at least in theory, more than 200 million people could take part.²²

While the authors imagine engagement in the practice to be voluntary, the mixture of financial incentive and social pressure is supposed to create a cultural context²³ that establishes DDay as something akin to a soft democratic duty, comparable to how traditionally parts of the population in democratic nations perceive themselves to have a duty to vote,²⁴ even though legally speaking such a duty does not exist in most democracies.²⁵ Second, the proposal has some features connected to its construction as a civic holiday that are singular among deliberative discussion forums, especially the incorporation of a live televised debate of national candidates and the ritualization of conducting the event always exactly two weeks before the national election.²⁶

²⁰ N. BOBBIO, *Liberalism and Democracy*, Verso, 1990, pp. 32 and 37 f.

²¹ B. ACKERMAN - J. S. FISHKIN, *Deliberation Day*, cit., p. 3.

²² "Eligible Voters by State 2025", World Population Review, accessed August 22, 2025, <https://worldpopulationreview.com/state-rankings/eligible-voters-by-state>.

²³ B. ACKERMAN - J. S. FISHKIN, *Deliberation Day*, cit., p. 17 f. James S. Fishkin (ISBN 978-0-300-10964-1

²⁴ H. B. WALDFOGEL et al., *A Sociocultural Approach to Voting: Construing Voting as a Duty to Others Predicts Political Interest and Engagement*, in *Proceedings of the National Academy of Sciences*, 2024, 22, p. 2; *Die Deutschen und die Qual der Wahl: Der Souverän hat das Wort*, in *Deutschlandfunk*, February 23, 2025, <https://www.deutschlandfunk.de/bundestagswahl-wahlen-wahltag-100.html>.

²⁵ Regarding the exceptions (of which only some can be qualified as a democracy), see "Countries with Mandatory Voting 2025", World Population Review, accessed August 22, 2025, <https://worldpopulationreview.com/country-rankings/countries-with-mandatory-voting>.

²⁶ B. ACKERMAN - J. S. FISHKIN, *Deliberation Day*, cit., pp. 3 and 24 f.

These differences raise the question whether this sui generis nature of the DDay format makes it a singularly suitable tool to address the current problems of democracy. This paper will focus on one particular aspect of the crisis, the increasing polarization within democratic societies across the globe.

4. *The polarization problem*

While the authors were still cautiously optimistic two decades ago that, in the political environment of those days, the deliberations among citizens could usually, through institutional design, be prevented from turning into hours of shouting matches,²⁷ the situation has evolved. Both affective (= revolving around social identity and emotional attachment to one's own political camp generally or a specific party, along with the simultaneous dislike for out-parties and their sympathizers²⁸) as well as ideological polarization (= revolving around substantive issues of public policy²⁹) have increased³⁰ in Western democracies in the recent past. While a small amount of polarization in specific circumstances might be beneficial for a democracy in creating clear choices for the electorate in previously unclear party lines and improving citizens' engagement with the political processes,³¹ generally surges of polarization are connected to various other negative societal developments,³² such as e.g. the erosion of democratic norms³³, political

²⁷ *Ivi*, p. 30.

²⁸ T. GESSLER - N. WUNSCH, *A New Regime Divide? Democratic Backsliding, Attitudes towards Democracy and Affective Polarization*, in *European Journal of Political Research*, 2025, 4, p. 3.

²⁹ N. MCCARTY, *Polarization - What Everyone Needs to Know*, Oxford University Press 2019, p. 8 f.

³⁰ V. EMANUELE and B. MARINO, *Party System Ideological Polarization in Western Europe: Data, Trends, Drivers, and Links with Other Key Party System Properties (1945–2021)*, in *Political Research Exchange*, 2024, 1; L. BOXELL et al., *Cross-Country Trends in Affective Polarization*, National Bureau of Economic Research, Working Paper no. 26669, Working Paper Series, January 2020; H. HAHM ET AL., *Divided We Unite: The Nature of Partyism and the Role of Coalition Partnership in Europe*, in *American Political Science Review*, 2024, 1, pp. 69-87.

³¹ I. CHOLBI, *The Positives of Political Polarization*, in *Berkeley Political Review*, April 13, 2019, <https://bpr.studentorg.berkeley.edu/2019/04/13/the-positives-of-political-polarization/>.

³² D. CALUWAERTS ET AL., *Deliberation and Polarization: A Multi-Disciplinary Review*, in *Frontiers in Political Science*, 2023, 5.

³³ J. KINGZETTE ET AL., *How Affective Polarization Undermines Support for Democratic Norms*, in *Public Opinion Quarterly*, 2021, 2, pp. 663-77.

online animosity,³⁴ legislative gridlock,³⁵ loss of a shared reality as basis for discussion,³⁶ social detachment and factionalism,³⁷ and a deficiency in the quality of education in public schools³⁸ (once their curriculum becomes a partisan battleground). At least once it occurs, parallel with high levels of political competition, polarization will also contribute to an acceleration of political violence,³⁹ probably leading to further polarization, possibly culminating in a destructive downward spiral without apparent end.⁴⁰

On the one hand, these changes of the past two decades make the prospects of success when conducting Deliberation Day experiments more doubtful than before, since the partisan valleys that need to be crossed have grown deeper. That trend shows no sign of subsiding anytime soon.

On top of that, many incumbents from the former political extremes have profited from the polarization trend on their way into elected office, e.g., by receiving above-average amounts of small-donor campaign contributions, and are therefore likely disinclined to saw off the branch that they have learned to climb more skilfully than their opponents and are now sitting on.⁴¹

³⁴ M. FALKENBERG ET AL., *Patterns of Partisan Toxicity and Engagement Reveal the Common Structure of Online Political Communication across Countries*, in *Nature Communications*, 2024, 1, p. 9560.

³⁵ F. E. LEE, *How Party Polarization Affects Governance*, in *Annual Review of Political Science*, 2015, 18, pp. 261-82. but the case for ideological polarization in the spatial sense is not definitive. Effects on the institutional processes of US government have entailed a hardening of party divisions and a tendency toward centralization of power. Nevertheless, these more cohesive parties are not more effective than their predecessors at enacting policies or managing routine governing responsibilities. The consequences for public policy seem best characterized as “drift” (Hacker 2004, p. 246

³⁶ See e.g. R. Nadeem, *Declining Share of Republicans Say It Is Important To Prosecute Jan. 6 Rioters*, *Pew Research Center*, September 28, 2021, <https://www.pewresearch.org/politics/2021/09/28/declining-share-of-republicans-say-it-is-important-to-prosecute-jan-6-rioters/>.

³⁷ S. IYENGAR ET AL., *The Origins and Consequences of Affective Polarization in the United States*, in *Annual Review of Political Science*, 2019, 22, pp. 136-38.

³⁸ J. KAHNE ET AL., *The New Politics of Education and the Pursuit of a Diverse Democracy*, in *AERA Open*, 2025, 11.

³⁹ *Polarization and Violent Threats to Democratic Systems: Assessing the Risks and What Can Be Done About Them*, Peace & Justice, Salzburg Global Seminar | Harry Frank Guggenheim Foundation, 2025), 16, <https://www.salzburgglobal.org/news/publications/article/polarization-and-violent-threats-to-democratic-systems-assessing-the-risks-and-what-can-be-done-about-them>; JAMES A. PIAZZA, *Political Polarization and Political Violence*, in *Security Studies*, 2023, 3, pp. 476-504.2025

⁴⁰ S. A. LEVIN - E. U. WEBER, *Polarization and the Psychology of Collectives*, in *Perspectives on Psychological Science*, 2024, 2, p. 338.

⁴¹ R. H. PILDES, *Participation and Polarization*, in *University of Pennsylvania*

On the other hand, the need for mechanisms counterbalancing these developments is even greater now than it used to be 20 years ago, meaning those legislators who intend to defend democracy and rebuild civil society might be more tempted to try novel and drastic approaches, such as a Deliberation Day, if they can be convinced of its effectiveness. Parallel to the rising political polarization, the last 20 years have brought forward new technological (digital) possibilities for potentially more transparent, equal and broader deliberations,⁴² but the development of good practices in this regard is an ongoing process,⁴³ showing some promise, but, given multiple potential dangers in connection to the deliberative democratic usage of such technologies,⁴⁴ with open end regarding the amount of final success. Considering that many current discussion forums, especially of the online kind⁴⁵ as well as some inherent tribal human psychological tendencies⁴⁶ do not reward political actors for engaging with the political opponent in an effort to bridge the partisan gap, but instead structurally support those further fuelling partisan narratives, the time seems ripe to experiment with new forms of political discourse institutions;⁴⁷ the natural

Journal of Constitutional Law, 2020, 2; R. H. PILDES, *Small-Donor-Based Campaign-Finance Reform and Political Polarization*, the Yale Law Journal Forum, November 18, 2019, pp. 149-70, https://www.yalelawjournal.org/pdf/Pildes_SmallDonorBasedCampaignFinanceReformandPoliticalPolarization_1nbukg72.pdf.

⁴² For details see A. MIKHAYLOVSKAYA, *Enhancing Deliberation with Digital Democratic Innovations*, in *Philosophy & Technology*, 2024, 1, p. 3. fostering greater citizen participation and political influence. However, it remains unclear how digitalization affects the quality of deliberation—whether digital democratic innovations (DDIs

⁴³ M. RASK - B. SHIN, *Integrating Paths: Enhancing Deliberative Democracy Through Collective Intelligence Insights*, in *Societies* 2024, 12, p. 270.

⁴⁴ A. ROMANISHYN ET AL., *AI-Driven Disinformation: Policy Recommendations for Democratic Resilience*, in *Frontiers in Artificial Intelligence*, 2025, 8; C. BANDARA, *Hallucination as Disinformation: The Role of LLMs in Amplifying Conspiracy Theories and Fake News*, in *Journal of Applied Cybersecurity Analytics, Intelligence, and Decision-Making Systems*, 2024, 12, pp. 65–76; INSIKT GROUP, *Russia-Linked CopyCop Uses LLMs to Weaponize Influence Content at Scale*, CTA-2024-0509, Cyber Threat Analysis (Recorded Future, 2024), <https://go.recordedfuture.com/hubfs/reports/cta-2024-0509.pdf>; I. SHUMAILOV ET AL., *AI Models Collapse When Trained on Recursively Generated Data*, in *Nature*, 2025, 631, no. 8022, pp. 755-759.

⁴⁵ M. FALKENBERG ET AL., *Patterns of Partisan Toxicity*, cit.

⁴⁶ J. HAIDT, *The Righteous Mind | Why Good People Are Divided by Politics and Religion*, Pantheon Books, Random House Inc. 2012, p. 138 f.; BLOOM, *Against Empathy*, p. 202 et seq.

⁴⁷ “Institution” is used here in concordance with the definition of Douglass C. North, who defined them as the “rules of the game in a society or [...] the humanly devised constraints that shape human interaction” (contrasting them with “organizations”, which are the players);

follow up question is whether Deliberation Day is a promising candidate in this regard.

5. *Effectiveness of the Proposal as a Countermeasure against Polarization*

5.1. *Cure via Exposure Therapy?*

The core idea of the DDay proposal, introducing more deliberative institutions into our political culture, is laudable, and its importance for raising the level of public discourse can hardly be overestimated. Especially the idea to combine the deliberation with a morning communal-debate-watching followed by shared reflections seems highly promising to increase the understanding of the discussed topics.⁴⁸ Comparable to the improved comprehension achieved when reading a text while taking notes⁴⁹ and discussing it with others afterwards,⁵⁰ this practice would, in all likelihood, nudge participants towards a deep watching experience through active engagement that radically differs from the currently prevalent passive late-night viewing of political debates.

Concerning polarization, it has to be noted, that since the societal separation into camps is at least partially fuelled by basic misconceptions due to psychologically biased views of citizens about the opposing camp⁵¹ (such as e.g. confirmation bias which is causing strong negative emotional responses followed by motivated counter-reasoning to arguments dissonant with one's own opinion⁵² or negativity bias leading humans to overestimate levels of prejudice and dehumanization towards oneself by the political adversary⁵³),

see D. C. NORTH, *Institutions, Institutional Change and Economic Performance*, in *Political Economy of Institutions and Decisions*, 1990, p. 3.

⁴⁸ B. ACKERMAN - J. S. FISHKIN, *Deliberation Day*, cit., pp. 43, 52 and f.

⁴⁹ E.g. M. BOHAY ET AL., *Note Taking, Review, Memory, and Comprehension*, in *American Journal of Psychology*, 2011, 1, pp. 63-73.

⁵⁰ E.g. M. DE LUIS ANDRÉS, *Reading Together at Book Clubs in Journalism Culture*, in *Journal of Poetry Therapy*, n.d., 6.

⁵¹ P. H. DITTO ET AL., *Partisan Bias in Political Judgment*, in *Annual Review of Psychology*, 2025, 76, pp. 717-740.

⁵² D. L. DICKINSON, *Political Ideology, Emotion Response, and Confirmation Bias*, in *Economic Inquiry*, 2025, 1, pp. 181-205.

⁵³ S. L. MOORE-BERG ET AL., *Exaggerated Meta-Perceptions Predict Intergroup Hostility between American Political Partisans*, in *Proceedings of the National Academy of*

a Deliberation Day might by way of “exposure therapy” to the opposing views and experiences help counteract the polarization trend.

That such a change is, under the right conditions, possible has been demonstrated by past experiments with other forms of deliberative democracy, such as Deliberative Polls,⁵⁴ Juries⁵⁵ (as put forward in the book⁵⁶), and Citizen Assemblies.⁵⁷

But as the authors recognize to some degree themselves,⁵⁸ constructing the right conditions for depolarization through deliberation is a delicate task that should not be underestimated and unless performed conscientiously, the opposite effect, meaning more polarization by pushing participants towards more extreme versions of their previously already formed views will occur⁵⁹ (these dynamics are especially emphasized by proponents of “group polarization theory”).⁶⁰ Moreover, the participating individuals could face a heightened risk of exposure to hate speech in such surroundings.⁶¹

Ackerman and Fishkin convincingly show that they have achieved such productive conditions while conducting their deliberative polls and therefore rightly claim that a lack of comparable success for DDays could only manifest due to significant differences to deliberative polls.⁶² However, subsequently they rather flippantly pass over the consequentiality of one of the major differences between the two designs, namely that deliberative

*Sciences*2020, 26, pp. 14864-72. but also by how they think the outgroup perceives the ingroup (i.e., meta-perceptions)

⁵⁴ B. ACKERMAN - J. S. FISHKIN, *Deliberation Day*, cit., p. 4.

⁵⁵ J. GASTIL - D. Hale, *The Jury System as a Cornerstone of Deliberative Democracy*, in R. LEVY ET AL. (eds.), *The Cambridge Handbook of Deliberative Constitutionalism*, Cambridge University Press, 2018, p. 236.

⁵⁶ Regarding juries the supporting argument for DDays in the book (which also partially analyzes differences between juries and DDays in order to establish that DDays are less prone to group thinking) primarily focuses on the resulting evidence suggesting that constructive deliberation among normal citizens is possible in the absence of a trained moderator, see B. ACKERMAN - J. S. FISHKIN, *Deliberation Day*, cit., p. 66.

⁵⁷ L. MURADOVA, *Seeing the Other Side? Perspective-Taking and Reflective Political Judgements in Interpersonal Deliberation*, in *Political Studies*, 2021, 3, pp. 644-64.

⁵⁸ B. ACKERMAN - J. S. FISHKIN, *Deliberation Day*, cit., p. 61 f.

⁵⁹ C. SUNSTEIN, *The Law of Group Polarization*, in *Law & Economics Working Papers*, December 1, 1999, https://chicagounbound.uchicago.edu/law_and_economics/542.

⁶⁰ For an overview e.g. see J. BENSON, *Democracy and the Epistemic Problems of Political Polarization*, in *American Political Science Review*, 2024, 4, p. 1720.

⁶¹ M. FALKENBERG ET AL., *Patterns of Partisan Toxicity*, cit., p. 9.

⁶² B. ACKERMAN - J. S. FISHKIN, *Deliberation Day*, cit., p. 65; J. S. FISHKIN, *Deliberative Polling: Reflections on an Ideal Made Practical*, in K. NEWTON - B. GEISSEL, *Evaluating Democratic Innovations*, Routledge, 2012, p. 79.

polls are constructed as a statistical microcosm of the whole electorate, while each group on DDay will be recruiting their members from a narrow “three- to five- mile” geographical area; according to them, since DDays are not aiming to simulate the thought process of an entire nation and even talking to neighbours is for many citizens a considerable expansion of their political circle of discussion (which is usually restricted to family members and friends) the problems of this change are indecisive.⁶³

This view runs contrary to an increasing number of empirical studies (in most cases published after the initial release in 2004⁶⁴) which suggest that depolarizing effects of deliberation only occur under specific circumstances, namely the adherence to a deliberative democracy framework, adequate facilitation of the deliberation (ideally in a face-to-face manner), and with a sufficiently heterogeneous group.⁶⁵ Given that a vast amount of neighbourhoods with a three to five mile radius are inhabited by a comparatively homogenous group of people (especially with regard to (but differing between and within various nations in composition⁶⁶ and extent) their age,⁶⁷ political leanings,⁶⁸ economic situation⁶⁹ with the

⁶³ B. ACKERMAN - J. S. FISHKIN, *Deliberation Day*, cit., p. 70 f.

⁶⁴ The main counterexample is the work of Sunstein (which is addressed at length but given more recent studies in the end unconvincingly by Ackerman and Fishkin) who argued early that in order to avoid counterproductive (in terms of polarization) setups, it is important to form groups in which different political leanings are represented by a roughly equal number of members, see C. R. SUNSTEIN, *Deliberative Trouble? Why Groups Go to Extremes*, in *The Yale Law Journal*, 2000, 110, pp. 71-119.

⁶⁵ D. CALUWAERTS ET AL., *Deliberation and Polarization*, cit. p. 11.

⁶⁶ E.g. Age Segregation a problem in many countries in Europe (see following endnote), but not so in the (though in other aspects (e.g. ethnic background composition) more segregated) United States, see D. DAS GUPTA - D. W. S. WONG, *Changing Age Segregation in the US: 1990 to 2010*, in *Research on Aging*, 2022, 9-10, pp. 669–81.

⁶⁷ See e.g. A. SABATER - N. FINNEY, *Age Segregation and Housing Unaffordability: Generational Divides in Housing Opportunities and Spatial Polarisation in England and Wales*, in *Urban Studies*, 2023, 5, pp. 941-61.

⁶⁸ See e.g. J. R. BROWN ET AL., *The Increase in Partisan Segregation in the United States*, Working paper nos. 2023-09, Discussion Papers Nottingham Interdisciplinary Centre for Economic and Political Research, 2023, <https://EconPapers.repec.org/RePEc:not:notnic:2023-09>.

⁶⁹ See e.g. *Income Segregation in the United States' Largest Metropolitan Areas The Disappearance of Middle Class Neighborhoods*, Stanford Center on Poverty and Inequality, Stanford University Data, accessed August 25, 2025, <https://inequality.stanford.edu/income-segregation-maps>.

connected work affiliation,⁷⁰ and ethnic background⁷¹), the last factor cannot reasonably be expected to occur under the proposed model to a sufficient degree.

Understandably, the authors did not want to make their proposal unaffordable by requiring that for each of the probably millions of deliberative groups on their vision of DDay, an impartial trained facilitator⁷² has to be found, a careful arrangement of each group to achieve adequate diversity has to be planned, and afterwards carried out in a Herculean logistical task. Unfortunately, without them, it seems unlikely that the sweeping positive effects as they imagined them will manifest.

Therefore, at least in democracies with high amounts of geographical segregation⁷³ of political views, the direct implementation of the DDay format as it is proposed by Ackerman and Fishkin appears inadvisable. While a change to a format similar to Deliberative Polls or Citizen Assemblies in which all participants are put into groups of a randomly sorted cross-section of the nation would remove this concern, such a change seems indeed like an unrealistic pipe dream since the financial burden connected to the planning and practical management of such a setup would shoot up exponentially.

On this matter it is also noteworthy that these days at least James Fishkin⁷⁴ seems to concede the necessity for randomly selected diverse

⁷⁰ See e.g. M. VAN HAM ET AL., *Changing Occupational Structures and Residential Segregation in New York, London and Tokyo*, in *Nature Human Behaviour*, 2020, 4, pp. 1124-34.

⁷¹ E. K. ANDERSSON ET AL., *Comparing Patterns of Segregation in North-Western Europe: A Multiscalar Approach*, in *European Journal of Population*, 2018, 2, pp. 151-168.

⁷² Which seems the only likely effective countermeasure to possibly achieve depolarizing effects even in more homogenous groups, see K. STRANDBERG ET AL., *Do Discussions in Like-Minded Groups Necessarily Lead to More Extreme Opinions? Deliberative Democracy and Group Polarization*, in *International Political Science Review*, 2017, 1, pp. 41-57.

⁷³ Which is not an uncommon occurrence, see e.g. for the currently two most economically influential democracies (measured by GDP) in the world (U.S. and Germany): S. SAVAT, *The Divide between Us: Urban-Rural Political Differences Rooted in Geography*, in *The Source*, February 18, 2020, <https://source.washu.edu/2020/02/the-divide-between-us-urban-rural-political-differences-rooted-in-geography/>; S. PICKEL - G. PICKEL, *Ost- und Westdeutschland 30 Jahre nach dem Mauerfall – eine gemeinsame demokratische politische Kultur oder immer noch eine Mauer in den Köpfen?*, in *Zeitschrift für Politikwissenschaft*, 2020, 3, pp. 483-91.

⁷⁴ Bruce Ackerman, on the other hand, continues to explicitly and publicly advocate a DDay, see *Democracy in a Postmodern Era with Bruce Ackerman*, in *Democracy Paradox*, April 9, 2024, <https://democracyparadox.com/2024/04/09/democracy-in-a-postmodern-era-with-bruce-ackerman/>.

deliberation groups to achieve significant positive effects, not through words but through action, since the Deliberative Democracy Lab at Stanford University spent their resources in 2025⁷⁵ on representative sample experiments in the already opinion diverse swing state⁷⁶ of Pennsylvania⁷⁷ rather than on most probably far cheaper projects in randomly selected neighbourhoods with possibly little diversity among attendees. Similarly, Fishkin has in the past also publicly critiqued projects that did not sufficiently take precautionary steps to ensure that a truly representative microcosm of the community is represented in a deliberation experiment.⁷⁸ Furthermore, in a recent publication he (as the lead author) argued (with explicit reference to the DDay-format) for the scaling up of deliberative democracy, based on the conducted study which showed the potential of deliberative polls to quite dramatically alter the attitudes of citizens even a year after the experiment itself had taken place, but crucially pointed out specifically the need to use stratified random sampling⁷⁹ in the scaling up efforts to preserve the positive effects from deliberative polling.⁸⁰ Therefore, from the perspective of the group polarization problem, an adaptation of the DDay format seems advisable, which brings the format closer to broad-scale representative set-ups like Deliberative Polls and Citizens' Assemblies.

5.2. *Too big and too small*

A different point of concern regarding DDay is that it is inherently in one way too big, in the sense that it requires huge investments of

⁷⁵ The 2025 example is only the latest one in a series of similar experiments which have been running continuously for years.

⁷⁶ D. J. MALLINSON, *How Trump Won Pennsylvania – and What the Numbers from Key Counties Show about the Future of a Pivotal Swing State*, in *The Conversation*, November 7, 2024.

⁷⁷ *America in One Room: Pennsylvania*, Deliberative Democracy Lab, accessed August 23, 2025, <https://deliberation.stanford.edu/america-one-room-pennsylvania>.

⁷⁸ J. S. FISHKIN, *Deliberative Polling*, cit., pp. 74-75.

⁷⁹ A method in principle similar to the one described above used in deliberative polling: “Stratified random sampling is a method for sampling from a population whereby the population is divided into subgroups and units are randomly selected from the subgroups.” Quoted from M. DEYOREO, *Stratified Random Sampling*, in *The SAGE Encyclopedia of Educational Research, Measurement, and Evaluation* (SAGE Publications, Inc., 2018), <https://doi.org/10.4135/9781506326139>.

⁸⁰ J. FISHKIN ET AL., *Can Deliberation Have Lasting Effects?*, in *American Political Science Review*, 2024, 4, 2018-2019.

financial as well as time resources,⁸¹ while also being too small, considering that, since it is only happening once every 2 or 4 years⁸² for a couple of hours on one day regarding 2-4 specific topics, the average effects on citizens will likely be limited⁸³ or at the very least might seem to voters that way beforehand. Therefore, their proposal might fall short to the same fallacy that they see as one of the main problems of current voting systems, namely that the importance of a single vote, or in case of DDAy a single participating member in a single discussion setting, is just not too miniscule to constitute a sufficient amount of motivation for a sizeable amount of the citizenry to deeply engage with the enterprise.

Ackermann and Fishkin were not oblivious to this problem of low attendance rates at DDay and conceded that without the participation of a critical mass, the project would be predestined to fail, since it would fundamentally undermine the effectiveness by giving outsized power to the extreme positions of the political spectrum with a small, but highly motivated number of followers. As they rightly point out, such developments might culminate in a downward spiral in which the hostile environment of extreme positions lowers attendance of “normal participants”, further increasing the divisiveness, which in turn again lowers the attendance rate and so on.⁸⁴

The arguments they are putting forward to argue why this might not be a dramatic issue after all are far less convincing, at least after the political developments of the past two decades. Neither a sense of civic duty nor social pressure, as imagined by Ackerman and Fishkin, are likely candidates in the contemporary political and societal environment to outweigh these disincentives.

⁸¹ G. SMITH, *Beyond the Ballot: 57 Democratic Innovations from around the World*, in *The Power Inquiry*, 2005, pp. 57-61; L. Cervone, *Digital Technologies for Deliberative Democracies: Models and Applications for Continuous Civic Engagement*, Digital Technologies for Deliberative Democracies: Models and Applications for Continuous Civic Engagement, [Dissertation thesis], Alma Mater Studiorum Università di Bologna, 2017, p. 116 f., accessed August 15, 2025, <https://library.net/document/zl11rery-digital-technologies-deliberative-democracies-models-applications-continuous-engagement.html.n.d>.

⁸² By the Ackerman and Fishkin designed for the U.S. model depending on whether it is only happening for the presidential or also for midterm elections, however applied as close as possible in adherence to the original idea, a similar frequency would emerge in many different other democracies.

⁸³ E.g. for Citizens' Assemblies at least 30 hours of discussion time (stretched usually over a minimum of 4 days) are required in order for it to even be considered a Citizens' Assembly, see *How Do I Setup a Citizens' Assembly?*, in *Involve* accessed August 23, 2025, <https://www.involve.org.uk/resource/how-do-i-setup-citizens-assembly-old>.

⁸⁴ B. ACKERMAN - J. S. FISHKIN, *Deliberation Day*, cit., p. 84.

While the former will motivate those to participate who are, precisely because of their sense of duty, already comparatively informed about the political process and the arguments of the political opponent, it seems an unlikely motivator for those who, since they do not feel a civic duty to inform themselves, previously have had very limited exposure to opposing viewpoints and would therefore in theory be the prime targets of DDays.

However, the main hope of the authors rests on social peer pressure to prevent the above-described downward spiral: Just as it is socially expected and enforced through family pressure to attend events like Christmas, neighbour pressure is supposed to enforce DDay-attendance.⁸⁵ The problem is though, that in many western countries the importance of socialising with one's immediate neighbours, especially among younger people, who form the majority of their meaningful connections outside of their immediate neighbourhood, has decreased significantly⁸⁶ to a low point that makes it seem unlikely that a large number of those without intrinsic attendance motivation will participate simply to avoid a reputation as politically unmotivated among their neighbours.⁸⁷ On a related note, setting up the deliberation among neighbours also gravely increases the risks of petty personal fights (possibly in combination with confrontations between already existing groups) instead of in-depth discussion about policy topics.

Furthermore, there is the danger that in some instances people would indeed show up to earn the money incentive but would (perhaps collectively after consultation with their neighbours) use the time to continue working on a brought laptop, etc.⁸⁸

⁸⁵ *Ivi*, p. 20.

⁸⁶ L. SILVER - J. HATFIELD, *How Connected Do Americans Feel to Their Neighbors*, Pew Research Center, May 8, 2025, <https://www.pewresearch.org/short-reads/2025/05/08/how-connected-do-americans-feel-to-their-neighbors/>; J. HIRVONEN - J. LILIUS, *Do Neighbour Relationships Still Matter?*, in *Journal of Housing and the Built Environment*, 2019, 4, pp. 1023-1041; *Community Connections: For young adults, 'belonging' has little to do with neighbourhood*, Angus Reid Institute, March 30, 2022, <https://angusreid.org/community-connections-covid-19-belonging-canada/>; G. Richter, *Nachbarschaft - Der Fremde von nebenan*, in *Deutschlandfunk Kultur*, March 9, 2017, <https://www.deutschlandfunkkultur.de/nachbarschaft-der-fremde-von-nebenan-100.html>.

⁸⁷ On the contrary, intuitively it would make sense that those who are heavily invested in the local community and well known among their neighbors are generally also more prone to care about society at large deeply enough to nurture a sense of civic duty and political interest and therefore are the ones that require no further convincing to attend.

⁸⁸ L. CERVONE, *Digital Technologies*, cit., p. 116 f.; *Summary of Ackerman and Fishkin: Deliberation Day*, Adam Brown, BYU Political Science, accessed August 15, 2025,

Given these risks of investing vast resources for limited effect under the initially proposed DDay framework, it seems preferable (just as from the perspective of group polarization) to orient the event rules more towards a classical, broad-representative and smaller-scale deliberative models, such as Citizens' Assemblies or Deliberative Polls.

5.3. *Misrepresentation of the Political Arena*

Viewed from a broader perspective, it is also instructive to analyze that at the core of Ackerman and Fishkin's argument lies their view of the (U.S.) political arena as being a "*government by opinion poll*".⁸⁹ Regarding polling, they make a (theoretically) convincing case that they are neither reliably conducted⁹⁰ nor a well-suited tool to achieve democracy in its best sense, since it opens the floodgates to demagogy⁹¹ instead of incentivizing politicians to act in the actual interest of the people.

However, the accuracy of this view was already doubtful in the 2000s,⁹² and has grown increasingly dubious over the course of the past two decades: For starters, politicians are not just passive outside readers of public opinion, but often in the process of actively (with varying success) trying to shape it. In addition to this, the claim does not hold up empirically: e.g., in the U.S., a majority in opinion polls favours regulatory governmental action on topical issues like abortion⁹³ and gun ownership⁹⁴, but for decades, no serious federal legal advancements in those fields have been undertaken. Some research⁹⁵ even suggests that the outcome of governmental decisions

https://adambrown.info/p/notes/ackerman_and_fishkin_deliberation_day.

⁸⁹ B. ACKERMAN - J. S. FISHKIN, *Deliberation Day*, cit., pp. 7, 77 f., 94. James S. Fishkin (ISBN 978-0-300-10964-1)

⁹⁰ Such as the issue of "*phantom opinions*" in polls given by respondents who actually either do not care about the given issue or are aware that they are not informed enough to have a serious opinion, but will hand in one to the pollster anyways since pride forbids them from admitting that, see *Ivi*, p. 7.

⁹¹ *Ivi*, p. 79.

⁹² A. J. BERINSKY, *Review of Deliberation Day*, by Bruce Ackerman and James S. Fishkin, in *Political Science Quarterly*, 2005, 1, p. 139.

⁹³ *Public Opinion on Abortion*, Pew Research Center, June 12, 2025, <https://www.pewresearch.org/religion/fact-sheet/public-opinion-on-abortion/>.

⁹⁴ *Majority in U.S. Continues to Favor Stricter Gun Laws*, Gallup.Com, October 31, 2023, <https://news.gallup.com/poll/513623/majority-continues-favor-stricter-gun-laws.aspx>.

⁹⁵ M. GILENS - B. I. PAGE, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, in *Perspectives on Politics*, 2014, 3, pp. 564-81.

in the U.S. is determined almost exclusively⁹⁶ by the views of economic elites and organized groups representing business interests rather than average citizens and mass-based interest groups, which have almost no influence at all. Therefore, it seems questionable whether the problem of modern democracies is a lack of information (of citizens about the relevant facts regarding current policy issues and of politicians regarding the actual preferences and interests of voters) as claimed by Ackerman and Fishkin. Analyzing and weighing the other different diagnosis proposals is beyond the scope of this paper, but they include, e.g., foreign interference,⁹⁷ oligarchical influence,⁹⁸ the elimination of party gatekeeping,⁹⁹ etc. A DDay format, as proposed by Ackerman and Fishkin, might indirectly¹⁰⁰ support political action against these causes of democratic backsliding, but the case for that is not adequately argued in the book and seems far less straightforward than for the “*government by opinion poll*” scenario.

5.4. Technical Design Issues

Additional potential problems can be found in the specific design choices of the concrete proposal in the book, which do not generally undermine the idea but would need to be addressed as well. For example, the power imbalance through economic dependence¹⁰¹ of parts of the

⁹⁶ Though the results are partially disputed; regarding the critique see e.g. O. S. BASHIR, *Testing Inferences about American Politics: A Review of the ‘Oligarchy’ Result*, in *Research & Politics*, 2015, 4.

⁹⁷ N. EISEN - J. KATZ, *Democracy Playbook 2025*, The Brookings Institution, 2025, pp. 98-99, <https://www.brookings.edu/articles/democracy-playbook-2025/>.

⁹⁸ L. W. POWELL, *The Influence of Campaign Contributions on the Legislative Process*, in *Duke Journal of Constitutional Law & Public Policy*, 2014, 1, p. 161; J. M. BALKIN, *Constitutional Crisis and Constitutional Rot*, in M. A. GRABER - S. LEVINSON - M. TUSHNET (eds.), *Constitutional Democracy in Crisis?*, Oxford University Press 2018, p. 17.

⁹⁹ S. LEVITSKY - D. ZIBLATT (eds.), *How Democracies Die*, Crown Publishing Group, 2018, pp. 33-52.

¹⁰⁰ Through a citizenry more informed and therefore more vocal about the problems.

¹⁰¹ The topic of potential problems of economic dependence of certain citizen groups is discussed, with the authors arguing that for 21st century processes the privacy of voting itself is sufficient as a guardrail, see B. ACKERMAN - J. S. FISHKIN, *Deliberation Day*, cit., p. 39. However, this ignores the fundamental difference between regular spontaneous political discussions in private that are almost impossible for employers to surveil to a planned and public occasion like DDay that creates comparatively easy opportunities for employers to gather data which later can be used for purposes of political discrimination (which is not federally prohibited in some countries like e.g. the U.S. and in any case can

population towards their employer could lead to self-censorship if no legal confidentiality guardrails are put in place, which grant attendees the option (if previously announced and well justified) to prevent other participants from later sharing their expressed views with people outside the deliberation meeting.

While such obstacles might be comparatively simple to overcome, others are going to prove far more challenging, such as the decisions¹⁰² made to facilitate deliberation towards issues (in the form of questions formulated by the deliberators later presented to local candidates), which aim to find as broad an appeal as possible among all attendees, seem destined to drown out the issues of minorities.¹⁰³ These design choices build upon current societal discourse dynamics, in which, even if minorities are represented numerically adequately in deliberative formats¹⁰⁴, during the discussions, they continue to experience systematic disadvantage in voice and authority.¹⁰⁵ Overall, it is therefore to be expected that DDay, in its proposed form,¹⁰⁶ would nudge the societal discourse further towards the focus on problems of majority groups, therefore contributing to the prevalent negligence of politically addressing the problems of those who would often require support most urgently, given that minorities continue to face a broad range of discrimination across democracies. Similar to the above discussed danger of group polarization these problems could at least be minimized with a composition resemblant of the overall population like it is common practice in deliberative polls, Citizens' Assemblies, etc.,

be hard to prove in later legal action).

¹⁰² *Ivi*, p. 28.

¹⁰³ E. HAUPTMANN, *Review of Deliberation Day; Deliberative Democracy in America: A Proposal for a Popular Branch of Government; Democratic Autonomy: Public Reasoning about the Ends of Policy*, by Bruce Ackerman et al., in *Perspectives on Politics*, 2004, 4, p. 821.

¹⁰⁴ Which is usually not the problem, since politically marginalized groups (especially people with disabilities and young people) have tended to be at least sufficiently open towards participation in unconventional political activities, see M. DELL'AQUILA ET AL., *Realising the democratic ideal: empowering marginalised voices in deliberative democracy*, CEPS In-Depth Analysis, Horizon Europe Research Programme 'ORBIS: Augmenting Participation, Co-Creation, Trust and Transparency in Deliberative Democracy at All Scales', 2024, 7, https://cdn.ceps.eu/wp-content/uploads/2024/12/2024-15_GRID-ORBIS-formatted-1.pdf.

¹⁰⁵ E. M. ELDER ET AL., *Race, Voice, and Authority in Discussion Groups*, in *Perspectives on Politics*, January 14, 2025, p. 1-22.

¹⁰⁶ It should be noted though, that Fishkin has empirically contested similar earlier critiques and argued that neither women nor minorities are experiencing disadvantages in speech time during the deliberations, see J. S. FISHKIN, *Deliberative Polling*, cit., pp. 77–78.

especially if combined with facilitation practices specifically aimed at empowering marginalized voices, such as e.g. collaborative agenda setting and supporting measures designed to assure easier access to the deliberation (childcare, free-of-charge transportation, translators, etc.).¹⁰⁷

The inherent time (and therefore substance) limitation of the discussion also puts into question the oversold hopes¹⁰⁸ of both authors that DDay will terminate what they perceive to be politicians' overreliance on polls to determine the public will: while the argument might turn out true for the 2-4 topics of discussion of the day¹⁰⁹, all other problems will be neglected, leaving both decision makers as well as citizens again exactly as uninformed about each other as it is currently the case. Undoubtedly, a more nuanced public discourse on 2-4 of the decisive topics of the day is an improvement, but given the vast array of currently prevalent problems, it is not a silver bullet towards "*enlightenment*"¹¹⁰ but at most hopefully a step in the right direction.

5.5. *Contradictions in the argumentation*

Finally, the argumentation of Ackermann and Fishkin¹¹¹ includes minor internal contradictions that they seem to be oblivious of, such as their stance on the relationship between speech time limits and the substance of what is being said: on the one hand they frequently lament the development that candidates have increasingly shortened their campaign messaging to what they call "*sound bites*", which due to their format necessarily lack nuance and are conversely usually only created to elicit hot-headed responses,

¹⁰⁷ For a comprehensive overview of the Best Practices regarding the inclusion of Marginalized Groups in deliberative settings, see M. DELL'AQUILA ET AL., *Realising the democratic ideal*, cit., pp. 18–32.

¹⁰⁸ B. ACKERMAN - J. S. FISHKIN, *Deliberation Day*, cit., chap. 4.

¹⁰⁹ Which is in itself doubtful, considering that between the discussion of a topic on DDay (which happens shortly before the election, longer before the forming of a government and inauguration, even longer before the introduction of a draft into the legislative process and a (usually) changed version finally becoming law) and the actual decision being taken, months if not years will have passed, during which the opinions within the constituencies can and more often than not will have evolved and shifted, be it because of the unfolding of new events or due to the general mood fluctuations within the public at large (even briefly mentioned with regard to the works of William Riker in B. ACKERMAN - J. S. FISHKIN, *Deliberation Day*, cit., p. 57).

¹¹⁰ *Ivi*, p. 73.

¹¹¹ Possibly as a result of cowriting.

appealing to emotion rather than intellect of the voters.¹¹² They go as far as suggesting that it might be a good idea to prohibit candidates from buying advertisement time slots of less than 5 minutes as a countermeasure.¹¹³

On the other hand, however, their whole time scheduling of DDay builds upon the format that each participant has a 90-second time limit when speaking, which, if necessary, will be enforced through a randomly selected foreman of each deliberative group.¹¹⁴

The authors are leaving the question unanswered why common citizens, who, contrary to the political establishment, have usually not been trained in rhetoric, should be better suited to deal with the problem that “*Many ideas can’t be conveyed in ten seconds—or even in a minute! Once the time frame opens up to five or ten minutes, a lot more things become sayable.*”¹¹⁵

That being said, it seems probable that through a process of trial and error a functional time management schedule could be found (perhaps granting each participant multiple talking time rights of different lengths, e.g. a participant is allowed to speak within one session twice for 1 minute, once for 2 minutes and once for 5 minutes) that balances the need for adequate oral idea development and formulation with the competing contradictory needs for fairness between the participants and conducting the whole process in a limited timeframe.

6. Conclusion

Ackerman and Fishkin were not blind to the limitations of their idea during the formulation, acknowledging that it would not solve all of democracy’s current problems, but they hoped for it to be a helpful supporting tool.¹¹⁶ The proposal, as presented in the book, lacks in some decisive respects, rendering it in its proposed form too ineffective to justify the immense costs connected to it. Conceptually, it constitutes a fight against the windmills of a “*government by opinion poll*”, which is, at the very least, in most contemporary cases, not necessary.

However, overall, the authors rightly point to the continuing problem

¹¹² *Ivi*, pp. 7 f., 39, 54, 73, 86 f., 111, 114, 150, 162 f., 188, 192, 195 f. James S. Fishkin (ISBN 978-0-300-10964-1)

¹¹³ *Ivi*, p. 86.

¹¹⁴ *Ivi*, p. 27.

¹¹⁵ *Ivi*, p. 87.

¹¹⁶ *Ivi*, pp. 13, 15.

of an insufficiently informed public regarding policy issues, and the DDay-idea unquestionably has certain merits, especially in its efforts to use the lessons of deliberative experiments to create comparatively non-confrontational discussion spaces as a support of public conversations about the most pressing issues of our time by participants without directly corrupting personal stakes. Furthermore, the suggestion to construct a nationwide deliberative effort on one (or technically two) specific days in order to maximize public awareness, and the authors deserve credit for it.

Nonetheless, given the dangers of increasing group polarization in too homogeneous groups and the danger of low participation with universal invitation, it seems worthwhile considering whether, instead, as many Deliberative Polls or Citizens' Assemblies as reasonably possible should be held across a nation on a single day. In other words, instead of a Deliberation Day, it might be worthwhile to organize a nationwide Deliberative Poll/Citizens' Assemblies Day. The core idea would be preserved, and the amendments in the design choice would greatly increase the chances that the measure would counter the polarization instead of contributing to it.

Naturally, this would come with the downside that not everyone willing to deliberate in such a setting would get the chance, but the decrease in quantity of deliberation would likely be more than compensated by an increase in deliberation quality. This will hold especially true if the above-discussed issues of increased privacy protection and changes in the speaking time schedule are implemented. Furthermore, if a sufficient number of deliberative settings are concentrated on a very narrow time window across the nation, this will receive media attention and influence public opinion even if not every willing citizen joins the discussions themselves.

Most importantly, though, the representativeness of the deliberative setups in this scenario would significantly raise the prospects that female and minority issues would obtain appropriate attention and that polarization would actually decrease.

Sahar Karimi*

GDPR and Cross-border Data Transfer in Global Trade

ABSTRACT

This article examines the tension between the European Union's General Data Protection Regulation (GDPR) and its international trade commitments under the General Agreement on Trade in Services (GATS). While Chapter V of the GDPR was designed to safeguard personal data transferred outside the EU, its transfer mechanisms - adequacy decisions, standard contractual clauses, and derogations - increasingly function as a de facto regulator of global digital trade. The paper first analyses persistent ambiguities in the relationship between the GDPR's territorial scope (Article 3) and its transfer regime (Chapter V), using the Dutch Data Protection Authority's 2024 decision against Uber to show how the regulator adopted a broader reading of "transfer" than the European Data Protection Board's own 2021 Guidelines, generating legal uncertainty and compliance risk for multinational businesses.

The paper then maps the EU's adequacy-based approach against core GATS obligations - Most-Favoured Nation treatment, National Treatment, and Market Access - and against the potential defences available under Article V (regional integration) and Article XIV (general exceptions). Rather than giving a definitive compatibility answer, the analysis identifies where the EU's legal position is weakest: National Treatment depends on an unresolved question of whether foreign and EU data services count as "likeness", Article V's external condition depends on how a panel would interpret "raising barriers," and Article XIV's requirement remains contested given the EU's selective and sometimes sectoral recognition of third countries. The article argues that this doctrinal openness is itself a structural problem and leaves the EU's transfer regime exposed to challenge without a clear internal answer as to how it would be defended.

The analysis further situates the GDPR within the broader landscape of competing regulatory models pursued by the United States and China, and traces the EU's growing reliance on bilateral and regional Free Trade Agreements as an alternative avenue for spreading data protection standards abroad. Here the paper reaches a firmer conclusion: examining the EU-South Korea, CETA, and EU-Japan agreements, it finds that each suffers from limited enforceability, and that the EU's more recent horizontal clauses with Indonesia and Australia, while doctrinally more ambitious, cannot substitute for a binding multilateral framework given the inherently cross-border nature of data flows. The paper

* Sahar Karimi is a doctoral researcher at the Faculty of Law, University of Turku. She is funded by Finland's Ministry of Education and Culture's Doctoral Education Pilot under Decision No. VN/3137/2024-OKM-6 (The Finnish Doctoral Program Network in Artificial Intelligence, AI-DOC project). She works at the intersection of data protection law, AI governance, and EU consumer protection.

concludes by proposing a dual strategy: greater internal coherence, through clearer joint guidance from the European Commission and the European Data Protection Board on the scope of “transfer” in light of the Uber precedent, and greater external adaptability, including the incorporation of the CJEU’s 2025 ruling on pseudonymised data into future transfer guidance. Reconciling these two dimensions, the paper suggests, is central to preserving the GDPR’s legitimacy as both a rights-protective instrument and a de facto standard for global data governance, even in the absence of a settled answer to its formal compatibility with GATS.

KEYWORDS

GDPR – Cross-Border Data Transfers – GATS – Digital Trade – Extraterritoriality.

SUMMARY: 1. Introduction – 2. the GDPR and cross-border data flows – 2.1. Problems arising from the GDPR’s approach to governing cross-border data flows – 3. The EU’s Cross-border Data Flows and Global Trade – 3.1. Possible Conflict with GATS Obligations – 3.2 Defense under Article V GATS: Regional Integration – 3.3 Defense under Article XIV GATS: General Exceptions – 3.4. Beyond GATS: Obstacles for Multilateral Data Regulations – 3.5. The EU’s Shift Towards Free Trade Agreements – 4. Conclusion and suggestions.

1. *Introduction*

The global economy has changed as a result of the rapid growth of digital technology and e-commerce, making data essential to communication, innovation, and trade.¹ At the same time, this transformation has raised concerns about privacy, surveillance, and the protection of fundamental rights.² The European Union’s General Data Protection Regulation (GDPR), which entered into force in 2018, has become the world’s most influential legal framework in this field. Chapter V of the GDPR, which places conditions on the transfer of personal data to third countries, reflects the EU’s commitment to guaranteeing high levels of data protection even outside its borders.³ However, in the process, it has also changed how cross-border data flows are governed and, in turn, how international digital

¹ N. KOZŁOWSKA - A. KOZIEN, *Contemporary Public Legal Challenges in the Area of E-commerce, in Economic and Social Development: Book of Proceedings*, VADEA, 2021.

² *Ibid.*

³ GDPR, Art. 44-49; for more information see C. KUNER ET AL., *The EU General Data Protection Regulation: A Commentary/Update of Selected Articles*, in SSRN Scholarly Paper, May 4, 2021.

commerce is regulated.⁴

This dual function of the GDPR, as both a tool for protecting rights and a *de facto* trade regulator, seems to present important challenges. By incorporating privacy safeguards into international transactions, the EU's framework may help to increase trust in the digital economy. However, its conditional transfer mechanisms, such as adequacy decisions and standard contractual clauses, could also introduce additional layers of cost and complexity for multinational businesses, and they may at times come into tension with the EU's international trade commitments. In particular, adequacy decisions might be perceived as conflicting with the Most-Favored Nation principle under the General Agreement on Trade in Services (GATS), since they appear to give preferential treatment to some jurisdictions over others.

There is currently no comprehensive multilateral framework for digital trade, which further intensifies these tensions. As a result, businesses are left to deal with conflicting national regulations. This situation also reveals the limitations of the World Trade Organization (WTO) in effectively resolving such disputes.

This paper explores how the EU might reach a compromise between its two roles as a major trade power and a protector of basic rights. It investigates whether the GDPR's system for controlling cross-border data flows might be interpreted as limiting the EU's trade responsibilities under GATS, and examines how the EU has attempted to address these issues through bilateral and regional Free Trade Agreements (FTAs). These questions are not merely theoretical; they are also practical and carry direct implications for business compliance and for the EU's credibility as a global standard-setter in digital governance.

2. *The GDPR and Cross-Border Data Flows*

Chapter V of the GDPR sets out the main legal framework for the transfer of personal data outside the EU.⁵ It begins with a general

⁴ H. BERGGREN, *The GDPR and International Trade, Evidence and implications for EU policy*, 2025, pp. 10-12, <https://www.kommerskollegium.se/globalassets/publikationer/rapporter/2025/gdpr-and-international-trade.pdf>

⁵ GDPR, Art. 44-49.

prohibition on such transfers and then establishes three possible ways to make them lawful. The first mechanism is through adequacy decisions under Article 45, which allow data to flow freely to countries that the European Commission has determined to provide a level of protection essentially equivalent to that of the EU.⁶ This is the most straightforward option,⁷ as it provides legal certainty and avoids the need for additional contracts or authorization. However, it has proven politically sensitive and has faced repeated legal challenges, most notably in relation to EU–US frameworks.⁸ According to the GDPR, adequacy decisions should be based on specific standards, including the protection of data subject rights, the responsibilities of controllers and processors, the existence of independent supervisory authorities, and effective enforcement mechanisms.⁹ Additionally, they need to be examined at least every four years.¹⁰ The second mechanism is found in Article 46, which allows transfers if companies put in place appropriate safeguards such as binding corporate rules or standard contractual clauses approved by the Commission.¹¹ These safeguards enable international operations but still involve considerable uncertainty because of regulatory and judicial scrutiny.¹² Article 49 contains the third mechanism, which allows for derogations in certain circumstances.¹³ These include explicit consent from the data subject or necessity for the performance of a contract. Such derogations, however, are not designed to provide a normal legal basis for transfers; rather, they are supposed to be exceptions.¹⁴

⁶ GDPR, Art. 45.

⁷ GDPR, Recital 103.

⁸ X. TRACOL, *Schrems II: The Return of the Privacy Shield*, in *Computer Law & Security Review*, 2020, 39 (The Court of Justice of the European Union's *Schrems II* ruling (C-311/18, 2020) invalidated the EU–US Privacy Shield adequacy decision on the grounds that U.S. surveillance laws did not provide protections “essentially equivalent” to those guaranteed under EU law, particularly with respect to oversight and redress mechanisms for EU citizens.)

⁹ GDPR, Recital. 104.

¹⁰ GDPR, Art. 45 & Recital. 104.

¹¹ GDPR, Art 46.

¹² GDPR, Recital 108-110. See also *Schrems II* (C-311/18). Both highlight that SCCs and BCRs are subject to strict oversight and may not always be sufficient.

¹³ GDPR, Art. 49.

¹⁴ GDPR, Recital 112, <https://gdpr-info.eu/recitals/no-112/> & European Data Protection Board (EDBP), *Guidelines 2/2018 on Derogations of Article 49 under Regulation 2016/679*, Accessed June 21, 2025, (the derogations must be interpreted restrictively so that the exception does not become the rule) <https://www.edpb.europa.eu/our-work-tools/our->

2.1. *Problems Arising from the GDPR's Approach in the Governance of Cross-Border Data Flows*

One of the challenges in managing global data flows comes from how far the GDPR reaches beyond EU's borders. That is, its extraterritorial reach.¹⁵ While the regulation was adopted to protect the data of EU data subjects, its broad application in a digital world has created tensions for cross-border data trade.¹⁶ From the EU's perspective, extending GDPR rules outside its territory is justified: without applying data protection rules outside its borders, the EU would struggle to guarantee safeguards for individuals whose personal data is processed by companies all over the world. The logic is that privacy, as a fundamental right, cannot stop at the EU's borders.¹⁷

This extraterritorial application, however, creates significant compliance difficulties for international businesses. By making adequacy decisions, safeguards, and derogations a condition for lawful transfers, the GDPR embeds privacy regulation directly into the framework of global digital trade. While this reinforces trust and high standards in cross-border exchanges, it also introduces additional layers of complexity and cost for multinational companies.¹⁸

For instance, one of the complexities arises from the uncertainty surrounding the relationship between the GDPR's territorial scope¹⁹ and its transfer regime (Chapter V). The Regulation is silent on whether companies located outside the EU, but operating in or targeting the EU market and already subject to the GDPR, must still apply transfer mechanisms when data is processed to the third countries. The debate is whether Chapter V transfer mechanisms are required whenever personal data moves beyond the EU's physical territory, or only when it leaves the jurisdictional reach of the GDPR.²⁰

documents/guidelines/guidelines-22018-derogations-article-49-under-regulation_en.

¹⁵ M. CZERNIAWSKI – D. J. B. SVANTESSON, *Challenges to the Extraterritorial Enforcement of Data Privacy Law – EU Case Study*, Stiftelsen Juridisk Fakultetslitteratur, 2024, 2, pp. 127–54.

¹⁶ *Ibid.*

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ GDPR, Art. 3.

²⁰ International Association of Privacy Professionals, *New EDPB Guidelines Define International Transfers: Dancing in Place*, Accessed June 27, 2025, <https://iapp.org/news/a/new-edpb-guidelines-define-international-transfers-dancing-in-place/>.

The European Data Protection Board (EDPB) attempted to resolve this issue in its 2021 Guidelines.²¹ It defined a transfer as occurring whenever an EU-based controller or processor discloses data to another entity in a third country, even if that entity is itself subject to the GDPR.²² At the same time, it emphasized that not every cross-border flow amounts to a “transfer”. For example, if an EU individual discloses data directly to a foreign company, no transfer is deemed to take place because there is no “exporter” within the EU²³. The Board also warned that, even outside Chapter V, companies remain responsible for assessing risks such as disproportionate foreign government access under other GDPR provisions, including Articles 32–35.²⁴

Despite this guidance, there is still debate over the relationship between Article 3 and Chapter V.²⁵ According to Christopher Kuner, applying Chapter V conditions where the foreign recipient is already subjected to the GDPR is unnecessary and only makes things more complicated.²⁶ Regulators and courts, however, stress that real risks remain, especially when it comes to foreign surveillance and the challenges of enforcing these protections outside the EU.²⁷

²¹ EDPB, *Guidelines 05/2021 on the Interplay between the Application of Article 3 and the Provisions on International Transfers as per Chapter V of the GDPR*. Accessed June 27, 2025, https://www.edpb.europa.eu/our-work-tools/documents/public-consultations/2021/guidelines-052021-interplay-between-application_en.

²² *Ivi*, para. 20.

²³ *Ivi*, para. 18.

²⁴ *Ibid.*

²⁵ C. KUNER, *Comments on the ‘EDPB Guidelines 05/2021 on the Interplay between the Application of Article 3 and the Provisions on International Transfers as per Chapter V of the GDPR*, Public Consultation Response, January 28, 2022.

²⁶ *Ibid.*

²⁷ EDPB, *Guidelines 05/2021* (The EDPB explicitly states that the purpose of Chapter V is to ensure the continued protection of personal data after transfer. It clarifies that even when Article 3 applies to the importer, Chapter V is still needed because the legal framework of the third country may allow for disproportionate government access or conflicting national laws (i.e., foreign surveillance) that Article 3’s contractual obligations cannot override). See also CJEU, *Schrems II Case C-311/18* (The European Court invalidated the EU-US Privacy Shield adequacy decision precisely because US surveillance law grants US public authorities access to transferred data in a manner that does not meet the “essentially equivalent” level of protection required by the EU Charter of Fundamental Rights. The court mandated that data exporters and Supervisory Authorities must assess, on a case-by-case basis, whether the law of the third country (the recipient’s country) undermines the protection provided by the transfer tool (like SCCs), particularly regarding foreign government surveillance.)

The tension became visible in practice in August 2024, when the Dutch Data Protection Authority fined Uber €290 million for transferring EU drivers' data to the United States without implementing Chapter V safeguards.²⁸ Uber's central argument was that no transfer regime was required because its US parent company, Uber Technologies Inc. (UTI), was already subject to the GDPR under Article 3(2).²⁹ On this basis, the company maintained that additional safeguards under Chapter V of the GDPR were unnecessary.

The Dutch DPA rejected this reasoning and addressed several of Uber's specific defenses.³⁰ First, Uber argued that no "transfer" had occurred because UTI directly collected data from EU drivers. The regulator disagreed, pointing out that since the drivers were in an employment relationship with Uber B.V. in the Netherlands, they had no real control over how their personal data was being used. Consequently, the data flows still qualified as transfers, even though this conclusion diverged from the EDPB's own Guidelines 05/2021, which had stated that direct collection from individuals in the EU by a foreign company does not constitute a transfer (para. 18). Second, Uber claimed that its Dutch and U.S. entities were joint controllers, and therefore Chapter V obligations were redundant since the GDPR already applied to UTI. The DPA rejected this as well, holding that joint controllership does not prevent a data flow from being considered an international transfer when one entity is located in a third country, an interpretation that aligned more closely with paragraph 20 of the EDPB Guidelines. Third, Uber argued that it lacked an appropriate legal instrument because the European Commission had not yet issued SCCs designed for transfers to entities already subject to the GDPR. The DPA responded that the absence of such tools did not excuse companies from following Chapter V rules. Finally, Uber tried to rely on Article 49, arguing that its transfers were necessary for contractual performance. The DPA again disagreed, noting that these derogations are meant for exceptional cases, not for regular and large-scale transfers carried out by Uber.³¹

Taken together, the ruling reflects a broader interpretation of what counts as a "transfer" under the GDPR than the EDPB had previously said. By refusing to accept Uber's defenses, the Dutch DPA essentially expanded

²⁸ Autoriteit Persoonsgegevens, Decision to Fine Uber for Data Transfers to the United States, The Hague: Dutch Data Protection Authority, July 22, 2024, Accessed August 26, 2024. <https://autoriteitpersoonsgegevens.nl/system/files?file=2024-08/Besluit%20boete%20Uber%20doorgifte%20naar%20VS.pdf>

²⁹ *Ivi*, paras. 43–44.

³⁰ *Ivi*, paras. 46–56.

³¹ *Ibid.*

Chapter V's scope to include intra-group and employment-related data flows. This case highlights how unclear rules create practical difficulties for multinational companies.

There is another serious concern regarding the GDPR's compliance with international trade law, given its dual role as both a safeguard for individual rights and, in practice, a regulator of cross-border trade.³² Adequacy decisions, in particular, may sit uneasily with the principles of non-discrimination and market access under the GATS. This makes it important to assess whether the EU's approach to data transfers risks creating tensions with its commitments under the WTO framework.

3. *The EU's Cross-border Data Flows and Global Trade*

The regulation of cross-border data transfers has become a critical nexus of trade and privacy policy.³³ Although the WTO has not yet implemented a complete regulatory framework for cross-border data flows, the current WTO regulations, especially those under the GATS, continue to be pertinent.³⁴ WTO Dispute Settlement Bodies have confirmed that these regulations pertain to digital trade,³⁵ and the GATS Council on Services determined in 1999 that a significant portion of e-commerce is included within its jurisdiction, necessitating that electronic service delivery be regarded similarly with other supply methods.³⁶ Consequently, the GATS provides the primary multilateral standard for assessing whether the EU's data transfer regime is compatible with its trade commitments.³⁷

³² S. YAKOVLEVA – K. IRION, *Pitching Trade Against Privacy: Reconciling EU Governance of Personal Data Flows with External Trade*, in *International Data Privacy Law*, 2020, 3, pp. 201–219.

³³ *Ibid.*

³⁴ S. A. AARONSON – P. LEBLOND, *Another Digital Divide: The Rise of Data Realms and its Implications for the WTO*, in *Journal of International Economic Law*, 2018, 2, p. 246.

³⁵ *Ivi*, p. 251.

³⁶ *Ibid.*

³⁷ GATS, Art. II (Most-Favoured Nation treatment), Art. XVI Market Access, and Art. XVII National Treatment.

3.1 Possible Conflict with GATS Obligations

The EU's cross-border data regulations may be contested based on three fundamental GATS obligations: the Most-Favored Nation (MFN) principle, National Treatment (NT), and Market Access. The MFN concept mandates that WTO members confer any trade benefit afforded to one nation to all countries that offer "like" services and service providers.³⁸ Adequacy decisions, however, treat some jurisdictions as "safe" while withholding recognition from others, thereby introducing differential treatment.³⁹ Services from non-recognized nations may resemble those from recognized countries; nonetheless, they encounter supplementary duties, including the implementation of contractual protections or the reliance on derogations. This can increase costs and limit their competitiveness.⁴⁰ In effect, adequacy decisions give an advantage to certain countries, creating a preferential treatment that, although not explicitly discriminatory, could be seen as inconsistent with the MFN obligation under WTO rules.⁴¹

Similarly, the National Treatment (NT) obligation⁴² prohibits less favorable treatment of foreign services compared to "like" domestic ones. Under the GDPR, third countries are categorized into those possessing adequacy determinations and those without them. Providers from countries with adequate recognition can freely process, handle, and control EU data, but providers from non-recognized countries must implement extra measures under Articles 46–49 of the GDPR, frequently necessitating prior authorization. This difference creates an opportunity gap between EU and non-EU suppliers, which may affect their competitive position.⁴³ Ultimately, whether these measures violate NT depends on the classification of services and suppliers as "like" and whether the supplementary responsibilities significantly modify competitive circumstances, a judgment for WTO adjudicating authorities to assess on a case-by-case basis.⁴⁴

³⁸ GATS, Art. II.

³⁹ S. YAKOVLEVA – K. IRION, *The Best of Both Worlds? Free Trade in Services, and EU Law on Privacy and Data Protection*, in *European Data Protection Law Review*, 2016, pp. 32–33.

⁴⁰ *Ibid.*

⁴¹ F. VELLI, *The Issue of Data Protection in EU Trade Commitments: Cross-Border Data Transfers in GATS and Bilateral Free Trade Agreements*, in D. AUGENSTEIN – C. HERRMANN – A. R. ZIEGLER (eds.), *European Law in the Global Context: Essays in Honour of Gordon L. Weil*, xxx, 2021, p. 885.

⁴² GATS, Art. XVII.

⁴³ F. VELLI, *The Issue of Data Protection*, cit., p. 886.

⁴⁴ *Ibid.* p. 887.

Finally, the Market Access obligation⁴⁵ forbids quantitative restrictions or limitations on cross-border supply. By conditioning data flows on adequacy or alternative safeguards, the GDPR can be interpreted as introducing regulatory barriers that limit service trade in sectors dependent on data.⁴⁶

3.2 Defense under Article V GATS: Regional Integration

Article V GATS authorizes members to form preferential trade agreements that liberalize trade more deeply within a regional bloc, even if this results in outsiders being treated differently. For this to apply, two conditions must be satisfied.⁴⁷ First, the internal condition requires the agreement to cover a substantial sectoral scope and eliminate discrimination between members. The EU's data protection regime arguably fulfils this, since the GDPR harmonizes rules within the internal market and allows data to flow freely across the Union once compliance is ensured.

The external condition, however, is more problematic. It stipulates that such agreements must not raise trade barriers for non-members. While the GDPR does not explicitly prohibit external data flows, it imposes demanding obligations on non-EU providers, either requiring adequacy or contractual safeguards. Whether the GDPR's external effects are compatible with Article V therefore depends on how broadly a WTO panel interprets "raising barriers" and "overall disadvantage".⁴⁸

3.3 Defense under Article XIV GATS: General Exceptions

More promising for the EU is Article XIV, which allows deviations from GATS obligations where measures are necessary to achieve legitimate policy objectives, including the protection of privacy and personal data under Article XIV(c)(ii). Since Chapter V of the GDPR explicitly regulates data flows to safeguard privacy rights under EU law, the adequacy regime clearly falls within the scope of Article XIV.

The key problem is adhering to the stipulations of Article XIV, which forbids arbitrary or unjustified discrimination and concealed

⁴⁵ GATS, Art. XVI

⁴⁶ F. VELLI, *The Issue of Data Protection*, cit., p. 887.

⁴⁷ GATS, Arts V:1 and V:4.

⁴⁸ F. VELLI, *The Issue of Data Protection*, cit., p. 888.

trade barriers.⁴⁹ Concerns emerge since adequacy determinations may be perceived as excessively restrictive than necessary, especially in light of other international frameworks, such as Canada's accountability principle or the Asia-Pacific Economic Cooperation (APEC) Cross-Border Privacy Rules (CBPR), which utilize self-certification processes.⁵⁰ Moreover, the EU's selective recognition of third countries may appear arbitrary, as seen in the contrast between the (now invalidated) Privacy Shield agreement with the United States and the absence of similar arrangements with major economies such as India.⁵¹ In addition, adequacy is often granted sectoral rather than comprehensively, which could be seen as discriminatory. In practice, therefore, whether the GDPR meets the chapeau requirement remains open to interpretation, and critics doubt whether adequacy can be defended consistently under WTO scrutiny.⁵²

3.4. *Beyond GATS: Obstacles for Multilateral Data Regulations*

The lack of a global trade deal concerning digital trade illustrates the differing strategies of the EU, US, and China.⁵³ The EU's conditional framework necessitates prior adequacy or contractual protections; the US adopts an open model characterized by self-certification and subsequent responsibility; China employs a regulated approach with stringent restrictions, local processing mandates, and governmental approval.⁵⁴ This regulatory divergence complicates WTO negotiations, as integrating these fundamentally distinct systems into a global framework is difficult.

In response, several international efforts have aimed to promote cross-border data transfers without enforcing consistent legal requirements.⁵⁵ The Organization for Economic Co-operation and Development (OECD) has advocated for privacy-enhancing technology and standards to mitigate trade friction while ensuring data protection.⁵⁶ The APEC system is a voluntary,

⁴⁹ S. YAKOVLEVA – K. IRION, *The Best of Both Worlds?*, cit., p. 25.

⁵⁰ *Ibid.*

⁵¹ *Ibid.*

⁵² F. VELLI, *The Issue of Data Protection*, cit., p.889.

⁵³ A. BRADFORD, *Digital Empires: The Global Battle to Regulate Technology*, Oxford University Press, 2023.

⁵⁴ *Ibid.*

⁵⁵ T. CHRISTAKIS, *Data Free Flow with Trust: Current Landscape, Challenges and Opportunities*, in *Journal of Cyber Policy*, 9, 2024, 1, pp. 95-120.

⁵⁶ OECD, *Mapping Commonalities in Regulatory Approaches to Cross-Border Data Transfers*,

principles-based structure that guarantees openness, accountability, and security for businesses throughout Asia-Pacific economies. The Data Free Flow with confidence (DFFT) idea, supported by the G7 and G20, underscores legal clarity and confidence via effective governance and collaborative procedures to facilitate data exchanges. Although these initiatives enhance interoperability and foster mutual confidence, they are voluntary and cannot adequately replace a binding multilateral agreement.⁵⁷

3.5. *The EU's Shift Towards Free Trade Agreements*

The EU has progressively integrated data protection rules into Free Trade Agreements (FTAs) in response to uncertainty in global governance. In contrast to GATS, which considers privacy an exception to trade liberalization, subsequent FTAs regard privacy protection as a distinct affirmative responsibility.⁵⁸

The EU–South Korea FTA (2010) requires each party to adopt adequate safeguards in financial services, thereby elevating privacy beyond a mere exception.⁵⁹ The Comprehensive Economic and Trade Agreement (CETA) with Canada (2016) goes further by stipulating that data transfers must respect the law of the originating country, thereby securing EU standards for European data abroad.⁶⁰ The EU–Japan Economic Partnership Agreement (2019), in turn, preserves each party's right to regulate data protection, echoing the GATS model but reframed as a recognition of privacy as a regulatory right rather than a trade restriction.⁶¹

However, these FTAs still present several limitations regarding their enforcements and effectiveness.⁶² In the South Korea FTA, enforcement relies on each party individually, making the protection of personal data difficult to monitor and potentially less effective. CETA's law-of-origin provision seeks to uphold EU data standards but does not provide unilateral

May 17, 2021. https://www.oecd.org/en/publications/mapping-commonalities-in-regulatory-approaches-to-cross-border-data-transfers_ca9f974e-en.html.

⁵⁷ T. CHRISTAKIS, *Data Free Flow with Trust*, cit.

⁵⁸ *Ivi.* p. 890.

⁵⁹ Decision 2011/265.

⁶⁰ *CETA Chapter by Chapter*. Accessed July 21, 2025. https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/canada/eu-canada-agreement/ceta-chapter-chapter_en.

⁶¹ Decision 2018/1907.

⁶² F. VELLI, *The Issue of Data Protection*, pp. 890-891.

enforcement capabilities, necessitating further GDPR duties under Articles 46–49 for processors in foreign countries. The unilateral power to impose data protection measures under the EU–Japan FTA is conditional and may not comprehensively encompass all facets of GDPR enforcement, resulting in ambiguity over the extent and enforceability of these protections.

Most recently, the EU has introduced horizontal clauses in negotiations with Indonesia⁶³ and Australia⁶⁴ that define data protection as a fundamental right and grant parties the unilateral authority to adopt safeguards, including adequacy decisions. This indicates a transformation in EU trade policy: instead of treating adequacy as an exception to free trade, it aims to incorporate data protection as an essential element of trade regulations.

However, these bilateral approaches risk creating inconsistent standards and fail to adequately address the fundamentally global character of cross-border data flows, underscoring the ongoing necessity for international solutions.⁶⁵

4. Conclusion and suggestions

The GDPR's framework for cross-border data flows reflects the European Union's ambition to export its high standards of data protection into the global digital economy⁶⁶. Chapter V⁶⁷ integrates privacy directly into the governance of international data flows by requiring adequacy, safeguards, or narrowly limited derogations. This approach has reinforced individual rights and trust in the digital marketplace; yet, it has also imposed considerable compliance obligations on multinational corporations and raised concerns over its alignment with international trade law⁶⁸. The Uber case of 2024 exemplifies how ambiguities in the relationship between the GDPR's territorial scope (Article 3) and its transfer regime (Chapter

⁶³ *EU-Indonesia Agreement: Documents*, Accessed July 24, 2025.

https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/indonesia/eu-indonesia-agreement/documents_en.

⁶⁴ *EU-Australia Agreement: Documents*, Accessed August 23, 2025.

https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/australia/eu-australia-agreement/documents_en.

⁶⁵ F. VELLI, *The Issue of Data Protection*, cit., pp. 893-894.

⁶⁶ M. CZERNIAWSKI – D. SVANTESSON. *Challenges to the Extraterritorial Enforcement*, cit.

⁶⁷ GDPR, Chapter V.

⁶⁸ M. CZERNIAWSKI – D. SVANTESSON. *Challenges to the Extraterritorial Enforcement*, cit.

V) may generate inconsistent enforcement and costly disputes.⁶⁹ More broadly, adequacy decisions and contractual safeguards can be perceived as difficult to reconcile with the principles of non-discrimination and market access under GATS, creating uncertainty about the EU's capacity to balance its regulatory objectives with its trade commitments.⁷⁰

To address these challenges, this paper suggests a dual strategy: enhancing internal coherence while promoting external adaptability. Internally, clearer and more harmonized guidance from the European Commission and the European Data Protection Board on the definition of "transfers" and the interaction between Article 3 and Chapter V would help reduce divergence among supervisory authorities. Consistency in interpretation would decrease uncertainty for multinational firms and mitigate inefficiencies resulting from fragmented compliance practices. The aim is not to weaken the GDPR's protections but to ensure that they are applied in a predictable and operationally sustainable manner, particularly for businesses with complex corporate structures or reliance on global cloud infrastructures.

Externally, the EU may benefit from pursuing a more adaptable relationship with evolving international standards while maintaining a high level of protection. Recent jurisprudence offers a significant pathway⁷¹. On 4 September 2025, the Court of Justice of the EU confirmed, in *EDPS v. Single Resolution Board* (C-413/23 P), that pseudonymized data does not automatically constitute personal data for every recipient: where a party lacks the means to re-identify the data subject, and re-identification would require disproportionate effort, the data falls outside the GDPR's scope for that party (reference 72 then is: case C-413/23 P, 4 September 2025). The Court was careful to frame this as context-specific rather than categorical; however the disclosing controller remains subject to the GDPR's obligations at the point of collection and transmission, and the classification can shift if a recipient later acquires re-identification means.⁷² Within these limits, the ruling narrows the scope of the GDPR and offers a pathway for reducing compliance burdens in contexts where the privacy

⁶⁹ Autoriteit Persoonsgegevens, *Decision to Fine Uber for Data Transfers to the United States*, cit.

⁷⁰ H. Berggren, *The GDPR and International Trade*, cit. 14-15.

⁷¹ M. KNOWLES – A. EVANS – R. NANCE, *CJEU Advocate General Clarifies When Pseudonymised Data Falls Outside the Definition of Personal Data*, Data Protection Report, February 10, 2025. <https://www.dataprotectionreport.com/2025/02/cjeu-advocate-general-clarifies-when-pseudonymised-data-falls-outside-the-definition-of-personal-data/>.

⁷² *Ibid.*

risks are minimal. Incorporating this clarification into future EDPB guidelines could promote the use of privacy-preserving techniques such as pseudonymization and anonymization as lawful bases for cross-border transfers. Doing so would not only facilitate compliance but also bring the GDPR into closer alignment with the flexible approaches endorsed in other jurisdictions and international fora.

In conclusion, the GDPR remains a global benchmark in data protection, but its credibility as both a rights-protection and trade-governance instrument depends on reconciling internal coherence with external adaptability. By clarifying the interpretation of its transfer regime and by integrating jurisprudential refinements such as the treatment of pseudonymized data, the European Union can strengthen the legitimacy of its data protection model while ensuring its smoother integration into the realities of an interconnected data economy.

Krisztián Renner-Kis*

Duty and Discretion: Principle of Opportunity

ABSTRACT

The paper examines the discretionary nature of opportunity. Opportunity means the freedom of administrative bodies to decide whether to initiate ex officio procedures. Discretionary power is a defining feature of administrative law, enabling administrative authorities to choose among equally lawful alternatives while balancing competing public and private interests. The study analyses the nature of administrative discretion and explores the challenges related to the judicial review of discretionary decisions, especially in the context of procedural opportunity.

The paper presents the Hungarian regulatory framework in an international comparative context using analytical, dogmatic, and comparative methods. Particular attention is devoted to environmental law, where effective administrative enforcement and increasing societal expectations intensify the need for governmental intervention and judicial protection. Environmental cases also provide important examples of attempts by affected individuals and NGOs to compel administrative action through litigation.

The paper argues that the principle of opportunity constitutes a specific form of material discretion that has so far remained underdeveloped both in legal scholarship and judicial practice. The absence of a coherent doctrinal framework makes judicial review difficult, particularly because the current procedural rules provide limited possibility to challenge administrative inactivity in ex officio proceedings. Although Hungarian law contains exceptional provisions that may allow judicial intervention in cases of compelling public interest, these mechanisms remain uncertain and restricted due to narrow standing requirements in addition to the broad discretion left to courts.

The analysis demonstrates that statutory criteria are essential for effective judicial review of discretionary administrative decisions. However, the lack of clear legal standards governing procedural opportunity significantly weakens legal certainty and predictability. The paper concludes that further doctrinal and jurisprudential development is necessary to clarify the nature, limits, and enforceability of the principle of opportunity within administrative law.

KEYWORDS

Discretion – Opportunity – Discretionary Power – Deference – *Ex Officio*.

* PhD student, Eötvös Loránd University (Budapest), Department of Administrative Law, kiskrisztian@staff.elte.hu

SUMMARY: 1. Introduction. – 2. Definition of discretionary power. – 3. The obligation to proceed. – 4. Enforceability of obligation to proceed in *ex officio* procedures. – 5. Conclusions.

1. *Introduction*

The complexity of social interactions combined with the growing tasks of the welfare state highlight the importance of the public administration's discretionary power, a distinguishing characteristic of administrative law. An administrative decision made within discretionary power means, essentially, the freedom of an administrative body to choose between equally lawful alternatives when dealing with an individual case. Through this power, public administration can create its own public policies and simultaneously ensure an effective balance between competing and even conflictual interests of different stakeholders. It guarantees the resilience of administrative law, which contributes to efficient administrative action and legal certainty. In fact, discretionary power is one of the traditional focal points of administrative law studies, although the issue can be approached from multiple perspectives. In this paper, after a short introduction on the nature of discretionary power, I will focus on two aspects: whether public administration has a discretionary power to freely decide in which cases to start procedures of its own (principle of opportunity) and which standard of judicial review can be applied in those cases..

To illustrate the conceptual challenges of this matter, the Hungarian normative framework is presented within an international context. The paper uses analytical and dogmatic, as well as comparative method. The issue is particularly relevant in environmental matters, where there is a need for strong governmental intervention to enforce substantive legal requirements, which is even fortified by the public's expectations so that more and more affected individuals or NGOs are seeking the possibility to enforce the public administration's activity. Using examples from the field of environmental law, the paper therefore examines the issue of procedural opportunity and addresses its potential enforceability through administrative litigation as well.

2. Definition of discretionary power

2.1. General notion

To set the scene, first there is a need to find a common understanding of what discretionary power is. While it is clear that public administrations worldwide have a certain freedom when dealing with individual cases, the degree of this freedom differs based on the conceptual frameworks of a given legal order. Among the internationally used definitions for discretionary power, the one provided by the European Council best suits the purposes of this paper.

Recommendation no. R (80)2 of the Committee of Ministers to member states concerning the exercise of discretionary powers by administrative authorities states that “*discretionary power means a power which leaves an administrative authority some degree of latitude as regards the decision to be taken, enabling it to choose from among several legally admissible decisions the one which it finds to be the most appropriate*”.¹ The Explanatory Memorandum further explains “*in some matters, the outcome of administrative decisions is precisely determined in advance by laws and regulations. In others, the law allows administrative authorities some degree of latitude and sets only the limits to that latitude, that is, the administration is given a discretionary power. An administrative authority which exercises a discretionary power must not only comply with the applicable laws and regulations but also act in a manner that is fair and just*”.² In this paper, this definition given by the European Council is considered as a common starting point.

However, in this paper the expression of margin of appreciation is not used since it collocates a very different legal institution. Margin of appreciation usually appears in the context of international and national courts’ dialogue, and in its complexity it has been developed in the case-law of the European Court of Human Rights.³ The margin of appreciation

¹ Recommendation No. R (80)2 of the Committee of Ministers, I. Scope and definitions

² Explanatory memorandum (pp. 11 ff. of the Final Activity Report of the CDCJ on Exercise of discretionary powers by administrative authorities (CM(77)173-add2) 2. paragraph

³ H. C. YOUROW, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence*, Kluwer 1996, p. 13. See more precisely in the context of Hungarian legal language D. V. DUDÁS, *A mérlegelési mozgástér doktrína természete, különös tekintettel a Magyar vonatkozású strasbourgi ügyek tapasztalataira*, PhD dissertation, Eötvös Loránd University, 2014, pp. 12-27.

doctrine is the manifestation of the subsidiarity principle in the European human rights protection system.⁴ According to the ECHR, national judges, in principle, are better positioned to conciliate concurring rights and interests protected by the Convention. Therefore, member states when assessing the proportionality of interferences and defining the exact content of the Convention's rights in individual cases have a certain degree of appreciation, a space where they can interpret the Convention in the light of their own cultural and legal context. The margin of appreciation doctrine can be considered as an expression of a particular characteristic of the international legal order, as a tool for respecting states' sovereignty and different cultural-legal traditions of states. When Member States use their margin of appreciation they remain however in the legal sphere of interpretation of the Convention, as member states have to assess the legal aspects of the case and apply only human rights-based tests. The discretionary power by contrast has a broader meaning, in the sense that public administration can exercise its freedom of choice not only by adopting its own legal interpretation but can also consider elements beyond the law such as the public interest and the effectiveness of a certain decision. As it is shown in the paper later, this metajuristic criterion is not only a feature of discretionary power, but its distinguishing component.

2.2. *The Hungarian doctrine of discretion*

The concept of discretionary power developed in the legal literature is a primarily dogmatic concept. In Hungarian legal literature discretionary power can be used as an umbrella term. Administrative law scholarship uses three different *terminus technici* to describe public administration's freedom of choice, each having a meaning of its own: discretionary power *stricto sensu* (*diszkrecionális jogkör*), material discretion (*mérlegelési jogkör*) and power of equity (*méltányossági jogkör*).

Public bodies have discretionary power *stricto sensu* when the law does not regulate an intersubjective relationship at all, or regulates it in a completely unbound way, therefore it leaves administrative body with so much latitude that it can make its decision on the basis of its own free will with no juridical guideline.⁵ Discretionary power *stricto sensu* therefore is

⁴ T. A. O'DONNELL, *The Margin of Appreciation Doctrine: Standards in the Jurisprudence of the European Court of Human Rights*, in *Human Rights Quarterly*, 1982, 4, pp. 474-479.

⁵ S. BERÉNYI, *Mérlegelés, méltányosság alkalmazása*, in L. FICZERE (ed.), *Magyar közigazgatási jog, Általános rész*, Osiris 1998, pp. 326 and 330.

not welcomed in a rule-of-law-based society, except in exceptional cases. The power of equity meanwhile refers to a specific form of discretionary power, when the public authority has the power to deviate from the general rule in exceptional cases, mostly based on the individual-personal circumstances of the affected party (such as financial, personal or family situation etc.), to his or her good. It is the modern manifestation of the *'iustum et aequum'* principle of Roman law. Rules of its application are always to be set down in sectoral laws in detail.

Material discretion – which is the focus of this paper – is a legally more clearly definable concept. It means that laws in force define the limits of public administration's freedom of choice by setting out conditions for the exercise of the discretion, i.e. when, how and with what content the public body can issue a certain decision or by assigning criteria to be taken into account by the competent body when deciding between (seemingly equally) lawful alternatives. In the interpretation of the Hungarian supreme court, the Kúria, material discretion occurs when *"the action of the administrative body is based on a legal provision of jurisdiction (i.e. substantive law) which only defines the boundaries of the decision and, in the exercise of its competence, the administrative body may choose between several lawful decisions"*.⁶

The demarcation criterion between discretionary power in *sensu strictu* and material discretion is the existence of a standard—evaluation criteria or some boundaries of the decision's content – laid down in statutory law, allowing the judicial review of the decision. In this understanding, the material discretion is not a homogeneous notion but a concept where great differences in the grade of freedom conferred to public administration can be found. The extent of decisional freedom was exactly the guiding principle when the main classification within the category of material discretion has been established.

2.3. Different forms of material discretion through codification techniques

The public administration's choice is legally more bound if the discretion is conferred by a legal norm with disjunctive disposition or when legislator uses indeterminate legal concept in the hypothesis of the norm. A disjunctive disposition means either permissive or alternative instructions for the administration. The disposition is also disjunctive when it determines only the minimum and maximum limit of the decision but not the exact quantity (mainly administrative fines or other quantifiable acts). On the other hand,

⁶ Kúria decision no. Kfv.IV.37.864/2019/5.

the norm is considered legally less bound if it has a vague hypothesis or it is absent, or the disposition is loosely defined. In Madarász based legal school's understanding both legally more and less bound material discretion is reviewable by the court although the intensity of such a review differs.

Besides, other classifications of material discretion exist, such as the one elaborated by András Patyi, former Supreme Court judge, now member of the Constitutional Court. His concept is based on the difference between legally bound decisions and decisions where public administration enjoys a margin of appreciation. The latter category is near to the concept of material discretion. However, Patyi makes a clear distinction between the discretion regarding the merits of the case and the so-called procedural discretion. Procedural discretion has three categories (1) weighing of evidence, (2) discretion relating to the enforcement of decisions and (3) procedural opportunity.⁷ The discretionary power related to the enforcement of decisions takes place when the public authority decides whether to initiate an enforcement procedure of a previously issued final decision and if it decides to do so, including the means it will use to enforce the obligation of the party. Procedural opportunity basically means the freedom to decide whether to start an administrative procedure or not.

Péter Kántás distinguishes between (1) discretion when weighing evidence, (2) "forced" discretion and (3) "conferred" discretion.⁸ The weighing of evidence needs no further explanation as it covers the common mechanism related to every case where the application of law is needed, because the decision-maker has to verify the facts of the individual case by assessing different pieces of evidence and data in order to decide which law and how to be applied. If there is one thing on which the overwhelming majority of Hungarian legal scholars (including the three main opponents mentioned before), judicial practice and lawyers in general agree, it is that weighing of evidence does not fall within the discretionary power or material discretion of the public administration, but it is a separate power that every decision-maker is entitled when taking decisions. Kántás however uses weighing of evidence in a broader sense, as according to him even the simplest facts are results of a certain legal interpretation. The "forced" discretion in his doctrine is a symptom of dysfunction in the law-making processes. It occurs when the law wanted to be clear, but it does not provide clear instructions for its application, e.g. the legal concept in question or the content of the provision is opaque, due to a legal loophole or another inconsistency. In these cases, decision-makers have to correct

⁷ A. PATYI, *A közigazgatási működés jogi alapjai*, Dialóg Campus, 2017, pp. 175-177.

⁸ P. KÁNTÁS, *A mérlegelés dilemmái*, in *Belügyi Szemle*, 2001, 2.

the codification error with the help of legal interpretation and with the methods elaborated by hermeneutics. “Conferred” discretion is the “real” discretionary power, as this is the case when the legislator expressly confers the power of discretion to the public administration either by disjunctive norms, procedural opportunity, power of equity or by indeterminate (legal) concepts. Kántás highlights the importance of procedural opportunity as a special type of material discretion and emphasises that excluding the concept from administrative law field has an adverse impact on law application, since in the lack of well-founded principles and clearly elaborated requirements laid down in law, there is a danger of abuse or misuse of this power.

2.4. The standards of review

The exercise of discretionary power also affects administrative court proceedings; accordingly, the legislator approached the issue from the perspective of procedural law. Section 339/B of Act III. of 1952 on Civil Procedure (hereinafter: old CCP), in force from September 2005, was the first to address the scope of administrative court review in this sense, stating that a decision made within the scope of discretionary power is lawful if the administrative body has sufficiently clarified the facts, has complied with the rules of procedure, the criteria for exercising its discretion can be established, and the reasoning shows that the evidence has been weighed in a proper manner. This provision was replaced by Section 85(5) of the new code of procedure, Act I. of 2017 on Administrative Court Procedure (hereinafter: CACP) according to which reviewing an administrative act taken within the discretionary power of the defendant, the court shall examine whether the administrative organ exercised its power within the limits of its authorisation to proceed under its discretionary power and whether the aspects and the propriety of the assessment may be established from the document containing the administrative act.

The Hungarian legislature opted for the standard of propriety (*okszerűségi teszt*), which can be captured by the wording of Kúria’s decision no. Kfv.III.37.147/2021/13-II. It says:

“pursuant to the provisions of the CACP, a decision made within the scope of discretionary power is lawful if the administrative body exercises its power appropriately, in accordance with the specific characteristics of the individual case, logically, in accordance with their weight, and gives an account of the deliberation process in its reasoning, explaining which

circumstances it assessed and with what weight, and which it disregarded and for what reasons. Within the framework of the plaintiff's petition, the court must assess whether the defendant authority has clearly set out in its decision the considerations and its evaluation, and whether the line of argument is coherent and convincing".⁹

The fact that the court can examine the propriety of the discretion also means that its power of examination is limited and does not extend to the possibility of re-evaluating the merits of the case entirely:

"the court cannot base its decision on the fact that, although the decision of the administrative body is not unlawful, a different decision, which is also lawful, could be made in the case within the framework provided by law".¹⁰

The starting point for examining the propriety of a decision is the evaluation criteria specified in the applicable law. Then the court will assess whether the evaluation by the public authority was reasonable under the general legal principles and the rules of logic in relation to the evaluation criteria and the specific characteristics of the case. Based on available case law, the courts' examination steps can be placed in a logical order to form the following propriety test.

- 1) The court first examines whether the legal norm granting discretionary power or other related substantive law contains any discretionary criteria.
- 2) If it does so, the main question of the review is whether the administration took the specified discretionary criteria into account when evaluating the case, and
- 3) if the evaluation criteria are not exhaustively listed in the norm, whether it took other criteria into account, and
- 4) whether these other criteria are relevant in view of the specific circumstances of the case and the logic of the law.
- 5) If the answer to the first question is no, i.e. the law does not contain any evaluation criteria at all, then, as a second step, the court examines whether the public administration has developed the criteria in its previous practice, and whether the criteria applied in the specific case is in line with this (i.e. the standard of propriety will be the practice of the administrative body and not the legal norm), and
- 6) whether the criterion taken into account, regardless of whether

⁹ Kúria decision no. Kfv.III.37.147/2021/13-II., para. 41.

¹⁰ Kfv.III.37.188/2021/6-I, para. 31.

it is based on the public administration's existing practice or on other criteria outside that practice, is relevant from the perspective of the specific case, based on the logic of the law. In this understanding, the administration's established practice attests only the consistency of the evaluation criteria and the absence of arbitrariness in the defendant's decision. Among the criteria taken into account (outside the law), judicial practice is permissive if it can demonstrate a logical connection with the case.¹¹

3. *The obligation to proceed*

After the brief summary of conceptual approaches to discretionary power, let us examine the role of opportunity, its connection to discretion and to obligation to proceed.

3.1. *Administrative procedures commenced upon application*

Administrative procedures can be initiated upon application by the parties or by the determination of the public authority itself (*ex officio*). Procedures commenced upon application have an important role in ensuring the rights and legitimate interests of private persons, therefore the "owner" of the case in these procedures is the party. Parties may dispose freely of their application: they can decide whether to submit such a request, its precise content and they can also withdraw the application until the decision made on it becomes final. Typically, parties submit an application in order to obtain entitlement to exercise certain substantive legal rights, for example seeking a building or environmental permit, an official certificate, or a recognition of legal status etc. In fact, section 35(1) of Act no. CL of 2016 on the Code of General Administrative Procedure (hereinafter: CGAP) defines application as a "*statement made by the party in which he/she requests that an administrative procedure be carried out or a decision be made by the public authority*".¹²

Procedures commenced upon application primarily implement private interests, consequently discretion related to initiation is undesirable.

¹¹ K. KÍS, *A mérlegelési jogkörben hozott hatósági döntések felülvizsgálatának kúriai gyakorlata*, in *Magyar Jog*, 2025, 7, pp. 424-426.

¹² <https://njt.hu/translations/-:0000:2016:CL/1/10>

In other words, administrative organ has no procedural opportunity; rather parties' application imposes a duty to act on behalf of the public administration. The duty to act means that administration must decide on the merits of the case, if the procedural and formal requirements are met. The obligation to proceed is implied in the right to good administration laid down in Article XXIV (1) of the Hungarian Constitution and expressly worded in section 15(1) of CGAP.¹³ The obligation to proceed in procedures commenced upon application is legally enforceable, as there are tools both in the hands of the parties and of the supervisory organs against unlawful administrative silence that can be summarised as follows.

CGAP prescribes that a public authority's superior organ shall instruct the subordinate body to conduct an appropriate procedure, in case the authority fails to proceed within the relevant time limit.¹⁴ Accordingly, Section 104(1) subpar. c) declares that the authority shall, in the area of its territorial jurisdiction, initiate the procedure *ex officio* if it has been ordered by its supervisory organ to do so. Furthermore, CGAP contains a very similar rule in Section 121(1) which states the supervisory organ may, *ex officio*, examine the procedure and decision of the subordinate authority, and it shall accordingly a) take the measures necessary to eliminate the unlawful omission. The latter provision gives a broader power in the hands of the superior body, since it is not limited only to order a start of procedures, but includes other related omissions. Hence, (1) superior organs have the power to instruct the subordinated body to proceed in procedures commenced upon application, however (2) this action depends on the determination of the superior body (*ex officio*), therefore parties have no subjective rights to enforce it.¹⁵

The only remedy available upon the request of the parties is the judicial protection against administration's failure to act. Judicial protection has a vital role in ensuring the parties' rights for an effective legal remedy and for a fair trial as guaranteed in the Constitution and several human-rights based treaties, such as in Article 6 of the European Convention of Human Rights. On the other hand, the courts' constitutional task of overseeing the legality of the public administration covers not only annulment of illegal administrative acts, yet it requires its active action to restore the unlawful silence of public administration.

¹³ K. ROZSNYAI, *Administrative Silence in Hungary*, in P. ABERASTURY – O. A. VALDEZ, (eds.), *Administrative Silence: Le silence de l'administration*, Cambridge, 2023, pp. 205-238, 207.

¹⁴ Sec. 15(2) CGAP.

¹⁵ K. ROZSNYAI, *Administrative Silence*, cit., p. 224.

Accordingly, section 4(1) of CACP expressly includes within the scope of judicial review the legal protection against public administration's failure to act. Detailed provisions for the action for failure to act can be found in Chapter XXII of CACP. As Krisztina Rozsnyai highlights, the CACP opened the way for the concerned parties to file legal action if their rights are directly affected by the administrative body's failure to act, although with stricter rules of standing as in a "normal" annulment court action.¹⁶ Pursuant to Section 129 (1) the court shall establish the failure to act if the administrative organ did not meet its obligation provided by the law to carry out the administrative act within the relevant time limit. (2) The court shall also establish the failure to act if the administrative organ is required to carry out an act upon a compelling reason of public interest or the action was filed by the organ exercising the review of legality.

There is no disagreement on the fact that action for failure to act is available in case when the final decision has not been issued in time in an administrative procedure commenced upon application. Normally the action for failure to act is used by the parties for that purpose. There are, however, other scenarios where a failure to act may be contested in court proceedings. First of all, provisions laid down in the CACP do not cover only authoritative administrative decisions, but all sorts of administrative acts that go far beyond the authoritative role of public administration.¹⁷ Therefore, it is appropriate to ask whether an action for failure to act is applicable also when a public organ fails to initiate an *ex officio* procedure. If so, it is then necessary to examine who may file such an action and what the standard of the review is. This paper provides some input for answering these questions in the following chapters.

3.2. *Ex officio procedures and the obligation to proceed*

While the regime of obligation to proceed and the related legal remedies to enforce it are quite clear and unambiguously accepted from a doctrinal and statutory law perspective in procedures commenced upon application, the situation with *ex officio* procedures is more complicated.

¹⁶ *Ivi*, 227.

¹⁷ Namely administrative acts that are not the result of an administrative "authoritative" procedure, e.g. administrative contracts, regulations, physical intervention etc. For critical analyses of the judicial practice see. F. Bögös, *Kezdeti (elméleti) lépések a magyar éghajlatvédelmi perek terén, avagy mulasztási perek szolgáskorban*, in *Közjogi Szemle*, 2023, 3, pp. 1-10.

The statutory law provision that establishes the obligation to proceed is section 15(1) of CGAP, according to which “*within the area of its territorial jurisdiction or on the basis of designation, the authority shall be obliged to proceed in cases falling within its subject-matter jurisdiction.*” It is apparent that the legislator did not differentiate based on how the administrative procedure was initiated, instead created a general obligation to proceed. Furthermore, this section is placed in the second chapter of CGAP, named fundamental provisions, right before chapter three that regulates procedures upon application. This fact leads to the consideration of the obligation to proceed as a general duty to act, regardless of the ex officio nature of certain administrative acts. Accordingly, mainstream legal scholars agree that competence does not only mean a right but also an obligation to proceed if the legal conditions for the intervention are satisfied.¹⁸

Ex officio procedures usually aim to respond to a violation of law or to prevent a situation that threatens to cause such a violation, as the very function of public administration is to protect and preserve the public interest. However, it is illusory and unrealistic that public administration may discover every single breach of substantive law and launch the adequate process to deal with it. Therefore, it is argued that the first precondition for the existence of obligation to proceed in ex officio procedures is that the competent public authority must be aware of the factual circumstances giving cause to initiate proceedings (since this usually involves a violation of law, for the sake of simplicity, the paper considers violations of law as a general condition to initiate ex officio proceedings).

There are two ways in which a public authority may become aware of a violation of law. First, if it carries out an official inspection and detects a violation of law in the course of it, and second, if a third party brings a violation of law to the attention of the authority either by reporting it directly or by referring to it in other proceedings. In the former case, the choice to open an official inspection may be included in the administrative body’s inspection plan or made on an ad hoc basis. However, in each case, this depends on the policy of the administrative body and on the administrative body’s considerations of efficiency and public policy, which are not legal issues and consequently are not subject to judicial review. In

¹⁸ A. PAULOVICS, *A hatáskör fogalma és szabályai*, in F. LAJOS – F. MARIANNA (eds.), *Magyar közigazgatási jog – Általános rész*, Osiris, 2006, pp. 394-395; I. KOVÁCS, *A hatáskörök elhatárolásának és a tömegkapcsolatok differenciálásának jelentősége a tanácsai szervezetben*, in *Állam és Igazgatás*, 1955, 6, p. 212; J. FAZEKAS, *Az Ákr. szervei hatálya. A hatóság és a hatóság oldalán közreműködő szervek*, in M. FAZEKAS (ed.): *Közigazgatási jog – Általános rész III.*, Eötvös Kiadó, 2021, p. 200.

the second case, if an administrative body is informed of such a violation by a third party, the provisions of Act no. XXV of 2023 (hereinafter: Complaints Act) and Section 15 of CGAP must be interpreted together.

Complaints Act provides that based on the complaint or the so-called “motion in the name of public interest”, if it proves to be well-founded, steps must be taken to a) restore the lawful or publicly desirable situation that is in the public interest and take any other necessary measures, b) eliminate the causes of the irregularities identified, c) remedy the damage caused, and d) initiate proceedings to establish liability where justified.¹⁹ The Complaints Act does not only apply to administrative procedures, rather it realises the fundamental right to petition any public organ, with public administration being only one part of this.

It seems that in the case of a complaint of a third party, if the reported violation of law is well-founded, in the light of Section 15 of CGAP the public authority has no choice but to restore the lawful situation by initiating an *ex officio* procedure. Of course, the public administration has a quite wide margin of appreciation when deciding whether the reported facts constitute a breach of law or not both in its power of weighing of evidence and when interpreting the statutory law. This power, however, does not fall within the material discretion as we saw in chapter 2, rather they are part of the normal law application task of the public administration. The obligation deriving from the Complaints Act usually is not considered as an obligation to proceed, because the Act does not declare it *expressis verbis* and Complaints Act is not considered as part of the administrative procedural law.

3.3. *The principle of opportunity: a special form of material discretion?*

The general obligation to proceed laid down in GCAP may lead to an interpretation according to which the public body has no freedom of choice on the launch of an *ex officio* procedure, instead Section 15(1) and 104(1) a) are legally bound and pre-programmed legal norms with no discretion. Yet it would be contrary to the spirit of *ex officio* procedures and would entail a complete denial of the principle of opportunity if the competent authority had no discretion, but it would be vested only with margin of evaluation associated with the general process of application of a legal norm (the freedom of assessment of facts, evaluating evidence and interpretation of statutory law). Indeed, these aspects are considered as entirely reviewable

¹⁹ Sec.5(1) of Complaints Act.

legal issues in an eventual judicial review. As the enforcer of the public interest, the administration must have the power, within the scope of its material discretion, to take into account certain considerations beyond the law when making decisions to initiate *ex officio* procedures, even if it has a general obligation to proceed.

Let us illustrate the decisional freedom of the administration with an example. If a resident of a suburban area reports to the territorial environmental authority that the water in a nearby canal has changed colour and a sample taken from the water clearly shows that this is caused by various man-made phenols, the environmental authority must assess several aspects before determining what steps are appropriate to take.

First, it must decide whether the evidence submitted by the resident is sufficiently convincing to establish that there has been a violation of law and therefore the preconditions for initiating proceedings are met. At this stage, the authority must weigh the evidence and interpret the relevant statutory law as well as other normative or individual administrative acts, such as those setting target concentrations in chemical substances for the affected water body or environmental permits issued to particular polluters in the area. Then, it must decide whether to open an official inspection or whether the available evidence and other data in its possession are sufficient to directly initiate an *ex officio* procedure. Considering the result of a possible inspection, it is still to be answered whether in a potential sanctioning procedure, liability can be clearly established among the several factories operating in the area, and at what cost. The authority must also decide whether to initiate proceedings for sanctioning the responsible polluter, or to revise previously issued environmental permits and the pollution limits determined therein for the factories directly connected to the canal. Alternatively, the public body must decide whether it is in the public interest to immediately instruct the water management agency to restore the good condition of the water as part of damage remediation—thereby potentially hindering or even preventing subsequent evidence gathering and the attribution of responsibility.

Another possible case: if somebody reports an improper handling of a small amount of waste by a certain company after the improper activity has already ended and the company has been complying with the rules ever since, is it worth initiating procedures to punish it?

As we see, beyond the general weighing of evidence and interpretation of law, administration has a lot more aspects to consider before taking measures and initiating procedures. Unfortunately, as the principle of

opportunity is under-discussed in legal literature and neither statutory law recognises it expressly, we do not find any criteria or legal boundaries laid down in the normative framework to be taken into account by authorities when exercising their procedural opportunity. However, as we have seen, the lack of evaluation criteria does not prevent the existence of material discretion, and does not mean a full discretion (discretionary power *stricto sensu*). The full discretion is excluded due to the legal boundaries that exist both with the adoption of sec. 15(1) and 104(1) a) and the specific conditions in sectoral laws.

In fact, Hungarian jurisprudence has elaborated how the propriety test has to be applied in cases where legal norms do not contain expressly evaluation criteria. If the law does not contain any evaluation criteria at all, the court examines whether the public administration has developed criteria in its previous practice, and whether the criteria applied in the specific case are in line with this practice, so in this case the standard of propriety will be the practice of the administrative body. Then, the court will also examine whether the criterion taken into account is relevant for the particular case, based on the logic of the relevant legislative framework and rationality. Among the criteria taken into account, judicial practice is permissive, in the sense that the authority can demonstrate a logical connection with the case it usually accepts it as a lawful criterion.²⁰

Appropriate criteria to be considered when exercising the opportunity power may be e.g. the seriousness of the violation of law, the public organ's policy choices regarding certain type or extent of violation of law, or how effectively the liability for the violation in question may be established etc. The policy choices and criteria underlying an opportunity-based decision would no longer be subject to full judicial control, rather only to a review of appropriateness which is the general standard of review applicable to material discretion.

²⁰ K. KIS, *A mérlegelési jogkörben hozott hatósági döntések felülvizsgálatának kúriai gyakorlata*, in *Magyar Jog*, 2025, 7, pp. 424-426.

4. *Enforceability of obligation to proceed*

It is submitted that the principle of opportunity is a special type of material discretion, consequently judicial review has to be guaranteed – at least a restricted one. Having legal boundaries which is the distinctive feature of material discretion, the court must oversee the legality of opportunity decisions, otherwise differentiating between discretionary power in *sensu strictu* and material discretion would not have any relevance. A prerequisite for judicial review of opportunity is the eventual enforceability of obligation to proceed if the discretionary power was not exercised properly. There are some problematic points regarding the enforceability of obligation to proceed in *ex officio* procedures, however.

4.1. *General enforceability*

As we have seen in the discussion about administrative remedies against unlawful silence, the superior organ has the power to instruct the subordinated organ to launch a procedure. This could be used not only in procedures commenced upon request but also in *ex officio* processes, and it is actually used in practice. The superior organ normally uses this power when it receives a complaint under Complaints Act in which the claimant reports the failure of subordinate organ to proceed in a case where a clear violation of law may be found. In essence, the supervisory organ may re-evaluate entirely the subordinate organ's assessment and, depending on the outcome of its own assessment, decides on the instruction to act.

Turning to judicial remedies, parties face two obstacles. First, the rule of standing requires that the party be directly affected in its rights or legal interests. In most cases standing requirements are not fulfilled, and therefore filing an action against public administration's failure to act is not provided. This comes from the nature of *ex officio* procedures since they are designated to protect the public interest and not someone's private one. The Hungarian jurisprudence is consistent in establishing that as a general rule, one may not claim its rights were directly affected when the procedures is about to establishing someone else's violation of law and sanctioning him/her for that reason, nor when imposing a duty to a third.²¹

²¹ A. G. KOVÁCS, *Comment to Section 88 of CACP - A keresetösségi jog hiánya* [Lack of standing], in G. BARABÁS – K. F. ROZSNYAI – A. G. KOVÁCS (eds.), *Nagykommentár a közigazgatási perrendtartásról szóló 2017. évi I. törvényhez, 2024.* Of course some exceptions exist.

A simple complaint filed to the competent authority does not change this situation and does not make the claimant directly affected in the case.

Second, the preconditions when court shall establish the failure to act laid down in Section 129(1) are not met in *ex officio* procedures as either the obligation to carry out the administrative act is not provided by law and (therefore) there is no relevant time limit for it. One may argue that the first condition, i.e. obligation provided by law to carry out the administrative act is fulfilled because of the existence of Section 15(1) of CGAP. This is not the majority opinion of the judges and legal scholars since the lack of a clear obligation to proceed set out explicitly in exact statutory law and establishing time limit for it. I see no reason why not to consider Section 15(1) interpreted together with Sec. 104(1) subparagraph a) as a clear and precise obligation to proceed if the jurisdictional requirements provided in sectoral law are fulfilled.

Court litigation is not closed entirely, nonetheless. As István Hoffman and András György Kovács claim: *“section 129(2) of CACP sets out a specific, supplementary provision. As a general rule, the court shall find that there has been a failure to act if the administrative body has not fulfilled its obligation within the deadline for doing so. However, as an exception, the CACP also provides for the possibility of establishing failure to act even in the absence of a specific deadline for handling the matter or in the absence of an exceeding of that deadline. There are two such cases, both of which can be traced back to the public interest: the first refers explicitly to the existence of compelling reasons based on the public interest, while in the second case, it is the specific plaintiff who gives way to establishing a failure to act within the deadline for handling the matter or, in the absence of an explicit deadline for handling the matter”*.²² Section 129(2) provides an opportunity to bring an action also for failure to act related to *ex officio* procedures. Two observations have to be made at this point. First, it is on the court to decide on a case-by-case basis what is to be considered as a compelling reason of public interest. For sure, it has to be a serious violation of law or a situation that could cause significant danger to others, and it has to be in the public interest to prevent this danger or restore the lawful order. Trivial or only private interest motivated matters fall outside the scope. Secondly, the issue with the rule of standing has not been resolved yet.

Both pursuant to section 129 para (1) and (2), special types of plaintiffs (the so-called privileged plaintiffs) can bring an action to the

²² I. HOFFMAN – A. G. KOVÁCS, *Comment to Section 129 of CACP - 1. A jogellenes mulasztás megállapítása és az ítélet hatálya* in: BARABÁS Gergely, F. ROZSNYAI Krisztina, KOVÁCS András György (eds.): *Nagykommentár a közigazgatási, cit.*

court without the need of direct involvement to the case. These are the public prosecutor and the organ exercising the supervision of legality over other administrative body (generally territorial government offices or ministers). It gives some potential for enforcing ex officio proceedings, but it is rarely used in practice. However, direct action by the parties continues to face challenges due to standing issues. Yet, sector-specific rules — mostly encouraged by international obligations — offer hope for broader enforceability. Environmental matters are an excellent example of this phenomenon.

4.2. *Environmental cases*

Environmental administrative law is highly influenced by international treaties and European Union law. Not only substantive rules are harmonised in this sector but through the common EU directives a strong convergence in procedural law can be discovered too. One of the achievements of the harmonisation project is the increase in the level of collective legal protection such as public participation during administrative procedures, access to environmental information and broader access to justice.²³ In fact, collective judicial protection, where direct substantive relation to the case is not necessary to file an action but certain privileged plaintiffs (mostly non-governmental organizations) may seek judicial review in the name of public interest, has gained significant role in the Member States' legal systems.²⁴ That was the case for example with Germany where the legislature upon the judgement of the European Court of Justice (hereinafter: ECJ) in case no. C-115/09. (Trianel) and other relevant ECJ and international case-law has departed from the strict application of the so-called '*Schutznormlehre*' doctrine and broadened standing in environmental cases.²⁵

In addition to the extension of standing forced by harmonised law, environmental law has a specific characteristic that derives from its nature. Given the complexity of environmental sciences and the large gaps in information about the environment, the role of objectives and indicators measuring the realization of such objectives is significant.²⁶ The

²³ L. SZEGEDI, *Közigazgatási bírói jogvédelem uniós átalakulás alatt?*, HVG-ORAC 2019, p. 115.

²⁴ *Ibid*

²⁵ *Ivi*, pp. 99-103.

²⁶ C. McGRATH, *The role played by policy objectives in environmental law*, in D. FISHER (ed.), *Research Handbook on Fundamental Concepts of Environmental Law*, Edward Elgar

complexity of scientific considerations and the very heterogeneous nature of environmental impacts and causes furthermore emphasises the use of discretionary power of the public administration. As Elizabeth Fisher establishes in relation to the environmental impact assessment (EIA) procedure which is a core element of administrative environmental law, environmental law should be considered as hot law as activities that are likely to have a significant impact on environment are full of scientific uncertainties over future effects, and they deal with polycentric situations involving complex interrelationships between a wide range of parties.²⁷ Therefore, according to Fisher when a public authority makes a decision about EIA it is a mix of analysis and deliberation which cannot be easily inserted in the fact-law-discretion taxonomy. However, generalist courts tend to follow a deferential approach when reviewing EIA decisions.²⁸

Hungarian legislature with the adoption of Sections 98-100 of Act no. LIII of 1995 on General Rules of Environmental Protection (hereinafter: GREP) created the basis for collective participation in environmental-related administrative proceedings. Civil associations (NGOs) with the purpose of environmental protection may seek party status in administrative procedures in environmental matters, although the definition of environmental matters is restrictive in the Kúria's case-law.²⁹ NGO-s have also consultation rights in state and local governments' normative decision-making process where environmental related legislations or other strategic plans, environmental assessments are involved. What is more relevant for our topic is that according to Section 99 (1) in the event the environment is being endangered, damaged or polluted, organizations are entitled to intervene in the interest of protecting the environment and a) request a government agency or local government to take appropriate measures within its jurisdiction or b) file a lawsuit against the user of the environment. (2) In the lawsuit specified in Paragraph b) of Subsection (1), the party in the case may request the court to a) enjoin the party posing the hazard to refrain from the unlawful conduct (operation); b) compel the same to take the necessary measures for preventing the damage.

publishing, 2022, p. 313 f.

²⁷ E. FISHER, *Environmental impact assessment: 'setting the law ablaze'*, in D. FISHER (ed.), *Research Handbook on Fundamental Concepts*, cit., pp. 343-345.

²⁸ *Ivi*, p. 348.

²⁹ Sec.98(1), Uniformity Decision by the Administrative Chamber of the Supreme Court of Hungary no. 4/2010. (X. 20.) on the legal status of civil organisations in environmental administrative authority matters, as well as their right to initiate proceedings and their right to be sued in administrative litigation.

As can be seen, Section 99(1) paragraph a) gives NGOs an opportunity to request public administration's activity to prevent or restore environmental dangers. This rule does not apply only to formal administrative procedures, but NGOs can use it to ask for every kind of administrative act. Furthermore, they can ask not only for acts but also for activities that have no direct legal effects on third parties. Administrative procedures aiming to avoid environmental danger or restore damaged or polluted environment are normally *ex officio* procedures. With establishing the NGOs' right to seek it, the legislature created a very tough situation. As Complaints Act is also applicable in case of NGOs and environmental matters it should have an additional meaning rather than establishing the very same right to file a petition to public organs. Regulating the same intersubjective relationship twice, in two different legal sources may not be the intent of the legislator. Unfortunately, extent case-law is not yet available on this issue. I claim that in the light of the nature of environmental protection system which, as we saw, operates with numerous general objectives and with the involvement of public participation, Section 99(1) paragraph a) should be interpreted as a legal norm creating duty to act on the side of public administration. The relevant public organ in that case has a material discretionary power to decide (1) whether the circumstances of the case require an act or not, and if so (2) choosing the best-fitting procedures or activity to carry out. The real material discretion lies in the second question, since GREP defines accurately what is to be considered as environmental damage, pollution or threat to environment, therefore, these are legal questions that a court of law may entirely review.

Moreover, this extensive interpretation better fits the spirit of the Aarhus Convention, especially its Article 9(3). As Fruzsina Bögös and Krisztina F. Rozsnyai highlight, NGOs are to be considered as part of "the public" in the context of the Aarhus Convention, therefore pursuant to Article 9(3) of the Convention they are entitled to file a petition for failure to act before administrative court.³⁰ If we accept this interpretation of Section 99(1) of GREP, NGOs can also bring an action for failure to act under sec. 129(2) of CACP with no standing problem which would be a significant development in collective legal and environmental protection system. However, this theory has not appeared in judicial practice yet. It would require the parties to dare to use the new type of action appearing

³⁰ F. Bögös – K. F. Rozsnyai, *Egy per fajta magyarországi megszületésének esélyeiről – Gondolatok a klímaperék közigazgatási bíróságok előtti megjelenésének lehetőségeiről*, in *Közös jövőnk, közös felelősségünk: a jövő nemzedékek védelmének kihívásai*, ORAC 2025, pp. 54-55.

in the CACP, namely the action for failure to act, and to raise these legal questions before a court.³¹

5. Conclusions

After introducing the Hungarian discretionary power concept, the paper showed that the principle of opportunity, namely, the power to decide whether an *ex officio* administrative procedure should be launched or not is a special type of material discretion and it should be treated as such. However, so far, both the legal literature and the case-law have under-discussed this aspect of administrative discretion and tend to bury their heads in the sand. Therefore, I agree with the statement of Péter Kántás on the urgent need to develop a coherent concept in the administrative law field regarding the principle of opportunity as legal scholars have already done in criminal procedural law.

Due to the lack of a well-developed dogmatic concept, the current legislative framework makes it difficult to ensure judicial review over the exercise of opportunity by the public administration. Since the time limit set out in statutory law for *ex officio* procedure depends on the starting date of the procedure itself, the general legal basis in CACP cannot be used, only in procedures commenced upon application. There is however an exceptional rule in Sec. 129(2) of CACP that could enable judicial protection also in *ex officio* cases, although it does not grant an absolute right to enforce the obligation to proceed, but leaves it to the discretion of the court to decide whether there is a compelling reason of public interest in the specific case that justifies the intervention. Due to the lack of standing in most cases this section also does not give a satisfactory response. Thus, environmental cases where collective judicial protection plays an important role can be the catalyst for the evolution of jurisprudence towards a broader legal protection in this matter. Until then, there is still a lot of work to be done.

The paper demonstrates the importance of statutory criteria set out in statutory law in the phase of judicial review as they serve as a standard against which the administrative judge can measure the propriety of the discretionary decision. Still, in procedural opportunity the lack of these

³¹ For the problem related to the actions for failure to act and their relation to environmental matters see F. BÖGÖS, *Damoklész kardja, avagy az éghajlatvédelmi perek közigazgatási jogi vonatkozásai*, ORAC 2025.

criteria can be regarded as one of the greatest challenges. This not only makes it harder the control of legality, but indeed it makes judicial review unpredictable considering also the lack of established case-law. Principle of opportunity, as the combination of discretionary power and duties of the public administration, still requires further research to reveal its exact nature and characteristics.

Liu Jianlin*

The Duty of Security of Processing Under the GDPR and PIPL

ABSTRACT

Security of processing is a central compliance duty under both the EU General Data Protection Regulation (GDPR) and China's Personal Information Protection Law (PIPL). Although both regimes are often characterized as risk-based, they operationalize the connection between risk and required safeguards through distinct regulatory techniques. This article argues that the GDPR designs the duty of security of processing through standards-based discretion: Article 32 requires controllers and processors to adopt measures "appropriate" to risk, while deliberately avoiding a closed list of safeguards and leaving the content of "appropriateness" to be justified under an evolving standard. By contrast, the PIPL adopts a baseline-plus-discretion technique: Article 51 sets enumerated organizational baselines and preserves discretion over technical safeguards, while the broader data security governance framework guides the risk identification and calibration. The article shows how these design choices allocate compliance burdens differently and draws implications for cross-border compliance design.

KEYWORDS

Security of Processing – Article 32 GDPR – Article 51 PIPL – Risk-Based – Cross-border Compliance.

SUMMARY: 1. Introduction – 2. Source and Structure of the Duty of Security of Processing – 3. What "Risk" Means in a Risk-Based Security Duty – 4. From "Appropriate Measures" to Implementable Compliance – 5. Conclusion.

1. *Introduction*

Digital technology has permeated modern society, and individuals are increasingly bound to technologies that rely directly or indirectly on their personal data.¹ As these technologies advance, the collection and processing of personal data not only fuel innovation but also expand the pathways

* Jialin Liu is a PhD candidate at the departments of Transboundary Legal Studies at the Faculty of Law of the University of Groningen (RUG), the Netherlands and member of the Security, Technology & e-Privacy (STeP) research group. Email-address: jialin.liu@rug.nl

¹ N. PURTOVA, *The Law of Everything. Broad Concept of Personal Data and Future of EU Data Protection Law*, in *Law, Innovation and Technology*, 2018, 10, p. 40.

through which data can be accessed, leaked, altered, or lost, making data security risks more visible. Against this background, the GDPR and the PIPL both require organizations to safeguard personal data (GDPR) or personal information (PIPL) against unauthorized access, leakage, alteration, and loss.² They adopt a similar risk-based approach, which means the level of risk posed by data processing is directly linked to the extent of measures that controllers and processors must take to protect personal data.³ Although the PIPL is often discussed as GDPR-inspired, doctrinal similarity does not imply regulatory equivalence.⁴ The central divergence lies in how each system operationalizes a risk-based security duty. Namely how the abstract requirement of “security appropriate to risk” is translated into implementable and assessable compliance expectations. This article therefore focuses less on conceptual overlap than on regulatory technique: how each regime allocates discretion and translates a risk-based security duty into compliance expectations that can be implemented and assessed.

This article advances three claims. First, the GDPR’s security of processing duty in Article 32 is structured as a standards-based obligation: controllers and processors must select “appropriate” measures in light of risk and specified assessment factors against an evolving benchmark. Second, the PIPL adopts a baseline-plus-discretion design: Article 51 couples risk-based approach with enumerated organizational baselines, and the meaning of risks is best understood within China’s broader data security governance framework, especially the Data Security Law’s (DSL) classified-and-graded protection system. Third, these design choices generate different compliance dynamics: the GDPR tends to create greater compliance uncertainty but preserves technical flexibility, whereas the PIPL tends to enhance baseline certainty that makes compliance easier to verify in practice but can expand the compliance agenda by linking personal information security to broader governance objectives. By comparing how each regime defines risk and transforms that definition into “appropriate measures,” the article aims to clarify the regulatory logic of risk-based

² Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L 119/1.

³ A. SELZER, *The Appropriateness of Technical and Organisational Measures under Article 32 GDPR*, in *European Data Protection Law Review*, 2021, 7, p. 120.

⁴ W. LI – J. CHEN, *From Brussels Effect to Gravity Assists: Understanding the Evolution of the GDPR-Inspired Personal Information Protection Law in China*, in *Computer Law & Security Review*, 2024, 54, p. 105994.

security duties and to draw implications for cross-border compliance.

2. *Source and Structure of the Duty of Security of Processing*

2.1. *The GDPR: principles-based discretion in Article 32*

The obligation to ensure the security of processing is prescribed in the Article 32 GDPR. It requires both data controller and data processor to “implement appropriate technical and organizational measures to ensure a level of security appropriate to the risk”.⁵ Structurally, Article 32 operationalizes this duty through a two-step, risk-based approach that leaves substantial discretion to the regulated actor.⁶

First, the controller and processor must identify and assess the risks presented by data processing, especially risks of “accidental or unlawful destruction, loss, alteration, unauthorised disclosure of, or access to personal data transmitted, stored or otherwise processed”.⁷ Second, they must select and maintain measures that are “appropriate” in light of the relevant assessment factors, including “the state of the art, the costs of implementation, and the nature, scope, context and purposes of processing, as well as the risk of varying likelihood and severity for the rights and freedoms of natural persons.”⁸

This design makes risk identification and the justification of chosen safeguards the core compliance task. However, the GDPR neither provides a definitive list of risks to be addressed nor specifies which measures can necessarily satisfy the “appropriate” standard. Instead, Article 32(1) and (2) offer only a set of criteria for risk-identifying and appropriate measure-choosing. Although these provisions are supplemented by a non-exhaustive list of examples, the data controller and processor retain broad discretion in selecting appropriate measures, as the list serves only as examples for reference rather than binding requirements.⁹ The result is a principles-

⁵ P. WOLTERS, *The Security of Personal Data under the GDPR: A Harmonized Duty or a Shared Responsibility?*, in *International Data Privacy Law*, 2017, 7, p. 172.

⁶ C. KUNER – L. A. BYGRAVE – C. DOCKSEY, *Commentary on the EU General Data Protection Regulation (GDPR). A Commentary*, Oxford University Press 2020, p. 635.

⁷ Article 32 (2) GDPR.

⁸ Article 32 (1) GDPR.

⁹ C. KUNER – L. A. BYGRAVE – C. DOCKSEY, *Commentary on the EU General Data*, cit.,

based model: the legal obligation is stable in its form (“take safeguards appropriate to risk”), while the concrete content is determined case-by-case and justified *ex post*. This technological neutrality position of the GDPR supports its adaptability across different systems and sectors,¹⁰ but it also means that compliance depends heavily on how convincingly data controllers and processors can evidence the appropriateness of the safeguard measures they chose and the risks encountered in data processing.¹¹

2.2. The PIPL: baseline-plus-discretion in Article 51

Article 51 PIPL requires personal information handlers (similar to data controllers in the GDPR) to take measures to ensure legal compliance and to “prevent unauthorized access as well as personal information leaks, distortion, or loss”. Like the GDPR, Article 51 takes the risk-based approach: it leaves the discretion for information handlers to determine measures with reference to “the purposes and manners of processing, the categories of personal information to be processed, the impact on personal rights and interests, and the potential security risks”.¹²

Where the PIPL differs is in how it translates the abstract security duty into compliance expectations. Article 51 contains an enumerated set of governance-oriented requirements such as establishing internal management systems and operating procedures, implementing access controls, conducting security education and training, and developing incident response plans,¹³ while also recognizing the handlers’ discretion for choosing appropriate technical measures (with examples such as encryption and de-identification).¹⁴ The list is not closed, but it functions as a set of compliance baselines: it tells handlers what kinds of organizational arrangements regulators expect to see as a minimum, even while the specific technical measures remains in the discretion of information handlers.

This is best characterized as a baseline-plus-discretion model. The “baseline” element lies in the statute’s relatively explicit expectation of organizational measures. The “plus-discretion” element remains significant:

p. 636.

¹⁰ A. OJANEN, *Technology Neutrality as a Way to Future-Proof Regulation: The Case of the Artificial Intelligence Act*, in *European Journal of Risk Regulation*, 2025, p. 1.

¹¹ A. SELZER, *The Appropriateness of Technical and Organisational Measures*, *cit.*, p. 121.

¹² Article 51 PIPL.

¹³ Article 51 (1), (2), (4) and (5) PIPL.

¹⁴ Article 51 (3) PIPL.

Article 51 is still framed around tailoring measures to risk, and its technical examples are illustrative rather than exhaustive, leaving room for different technical solutions provided the handler can justify them as appropriate.

In addition, entrusted processing under the PIPL is structured in a layered way that reinforces this baseline-plus-discretion approach. When a handler entrusts processing to another party, Article 21 requires the entrusting handler to define the entrusted processing's "purpose, duration, method, categories of personal information, protective measures, and the parties' rights and obligations, and to supervise the entrusted party's processing activities". At the same time, the entrusted party is not governed only "indirectly" through its contract with entrusting handler: Article 59 imposes direct statutory obligations on entrusted parties to take necessary measures to ensure the security of processing and to assist the entrusting handler in fulfilling PIPL duties. Together, the PIPL operationalizes the duty of security of processing through statutory governance baselines, while preserving discretion over technical choices. The entrusted-processing provisions complement this design by layering responsibility between the entrusting handler and the entrusted party, which ensures the baseline obligation remains anchored even when processing is outsourced.

3. What "Risk" Means in a Risk-Based Security Duty

Both the GDPR and PIPL take a risk-based approach to formulate the duty of security of processing. They directly link the level of risk presented by data processing to the extent of measures that data controllers and processors must take to protect personal data.¹⁵ Accordingly, "appropriateness" cannot be assessed without first clarifying what risks are legally relevant. Yet the two regimes do not define "risk" in the same way. Their divergence is not merely semantic; it reflects different normative anchors and different regulatory logics, which in turn shape how organizations should structure security assessments and how regulators evaluate compliance.

¹⁵ A. SELZER, *The Appropriateness of Technical and Organisational Measures*, cit., p. 120.

3.1. *The GDPR: risks to the rights and freedoms of natural persons*

Under Article 32 GDPR, the relevant risks are those concerning the “likelihood and severity for the rights and freedoms of natural persons”. Recital 75 elaborates that such risks may result in “physical, material, or non-material damage, including discrimination, identity theft or fraud, financial loss, damage to reputation, loss of confidentiality protected by professional secrecy, or other significant economic or social disadvantage.”

This broad formulation has two consequences. First, the GDPR’s risk concept is fundamentally individual-harm centric: the doctrinal anchor is how processing may harm natural persons’ rights and freedoms. The risks are not limited to privacy or data protection rights but may extend to other fundamental rights;¹⁶ they may affect not only data subjects but also other natural persons whose data is not being processed, provided their rights could be negatively impacted;¹⁷ and they encompass diverse forms of data processing which can cause either material or non-material damage. Second, the GDPR deliberately refrains from prescribing a fixed risk taxonomy or method for severity evaluating. It provides the framing and expects controllers and processors to carry out context-specific risk assessment capable of ex-post justification. In other words, the GDPR sets the evaluative lens, but leaves substantial discretion in how organizations translate that lens into concrete risk analysis.¹⁸

3.2. *The PIPL within China’s data governance: individual interests plus broader “security risks”*

Article 51 PIPL requires personal information handlers to adopt measures “according to” factors including “the processing purpose and method, the types of personal information processed, the impact on individuals’ rights and interests, and possible security risk.” The “rights and interests” dimension can be read as broadly compatible with the GDPR’s individual-protection focus. The distinctive element is the explicit reference to “possible security risk,” which is not exhaustively defined

¹⁶ C. KUNER – L. A. BYGRAVE – C. DOCKSEY, *Commentary on the EU General Data*, cit., p. 671.

¹⁷ K. DEMETZOU, *GDPR and the Concept of Risk*, in E. KOSTA ET AL. (eds.), *Privacy and Identity Management. Fairness, Accountability, and Transparency in the Age of Big Data*, Springer International Publishing, 2019, p. 147.

¹⁸ K. DEMETZOU, *GDPR and the Concept of Risk*, p. 139.

within the PIPL itself.

To interpret that phrase in a legally grounded way, the PIPL must be situated within China's wider data governance framework – most importantly, the Data Security Law (DSL) and National Standard on Data Classification and Grading (DCG Standard), which is formulated based on the PIPL and DSL.¹⁹ These instruments mandate a “categorized and classified system” calibrated to (a) the importance of data to economic and social development and (b) the degree of harm to national security, public interests, or the legitimate rights and interests of individuals or organizations if data are compromised.²⁰ This architecture matters for personal information protection because it positions “security risk” within a governance frame that extends beyond individual harm and prioritizes national security and public interest alongside individual rights.

4. From “Appropriate Measures” to Implementable Compliance

Since “risk” is anchored differently in each regime (individual rights risk in the GDPR, and individual interests plus a broader security-governance frame in China) the regimes also diverge in how they translate “appropriate measures” into implementable and enforceable compliance duties.

4.1. The GDPR: evolving benchmarks under a standards-based duty

Article 32 GDPR is standards-based: controllers and processors must implement “appropriate technical and organisational measures” taking into account “the state of the art, the costs of implementation and the nature, scope, context and purposes of processing as well as the risk of varying likelihood and severity for the rights and freedoms of natural persons”. The provision provides a non-exhaustive list of examples (such as encryption and pseudonymization, resilience and restoration capability, and regular testing and evaluation), but it does not convert those examples into a checklist that determines compliance.

¹⁹ Data Security Law of the People's Republic of China (中华人民共和国数据安全法) Article 21; Data security technology — Rules for data classification and grading (数据安全 安全技术数据分类分级规则) GB/T 43697-2024.

²⁰ Article 21 DSL and Appendix H(1) DCG Standard.

This design yields a bottom-up compliance structure.²¹ Organizations retain wide discretion in selecting measures, but that discretion is conditional: they must be able to justify their choices by showing a defensible link between (a) assessed risks and (b) adopted safeguard measures. Recital 83 reinforces this logic by emphasizing that controllers and processors should evaluate inherent risks and implement measures to mitigate those risks. They are required to “take into account the state of the art and the costs of implementation in relation to the risks and the nature of the personal data to be protected.”

Against this background, the benchmark of “appropriateness” is inherently evolving. The statutory assessment factors are dynamic in content, as they change with developments in threats, defensive techniques, and professional practice. In particular, the “state of the art” element operates as a reasonableness constraint: it does not require the adoption of the newest technology, but it limits reliance on clearly outdated or inadequate safeguards where proportionate and more effective options are reasonably available.²²

In practice, this evolution is mediated through a set of interpretive signals rather than detailed statutory specification. Regulatory guidance, enforcement practice, and widely recognized security practices play a central role in giving operational content to the Article 32 standard. Data protection authorities and EU-level bodies, for example, publish guidance and case materials illustrating how “appropriate measures” are assessed in recurring threat scenarios.²³

In sum, the GDPR operationalizes the duty of security of processing through standards-based discretion: it does not prescribe a closed set of measures, but requires controllers and processors to make and evidence context-specific choices according to risk assessment. Compliance therefore turns on the ability to justify the adopted safeguard measures against an evolving benchmark, rather than on formal adherence to predefined statutory baselines. It sets up a natural point of comparison with regimes that operationalize the duty of security of processing through more explicit statutory requirements.

²¹ G. DE GREGORIO – P. DUNN, *The European Risk-Based Approaches: Connecting Constitutional Dots in the Digital Age*, in *Common Market Law Review*, 2022, 59, p. 476.

²² A. SELZER, *The Appropriateness of Technical and Organisational Measures*, cit., p. 122.

²³ See E. KOSTA, *Security of Processing and Data Breach Notification* (27 November 2023); European Data Protection Board, ‘Guidelines 4/2019 on Article 25 Data Protection by Design and by Default’ (Version 2.0, 20 October 2020) <https://www.edpb.europa.eu/sites/default/files/files/file1/edpb_guidelines_201904_dataprotection_by_design_and_by_default_v2.0_en.pdf> last accessed 21 August 2025.

4.2. *The PIPL: enumerated baselines plus discretion*

Article 51 PIPL takes a different technique. While it remains risk-based, it specifies organizational measures that handlers should adopt to “ensure compliance and prevent unauthorized access, leakage, falsification/tampering, or loss”. This enumerative drafting functions as a set of baseline governance expectations: it signals what regulators are likely to look for in organizational design (rules and procedures, internal management structures, access control, training, incident response planning, etc.).²⁴ At the same time, the provision preserves discretion with respect to technical measures: the choice of appropriate technical measures must still be determined by information handlers and tailored to processing context and risk.²⁵

The broader DSL ecosystem strengthens this design. DSL Article 21 establishes a classified and graded data protection system, under which the intensity of safeguards is calibrated to factors including the importance of data to economic and social development and the degree of harms to national security, the public interest, and the lawful rights and interests of individuals and organizations.²⁶ Read together with the PIPL’s reference to “possible security risks”, the DSL’s classified-and-graded system provides a reference framework for identifying and ranking those risks: it directs handlers to consider the category and significance of the data, and the severity of harms that compromise could cause, when determining the level of protection required. In this way, the DSL framework complements the duty of security of processing in the PIPL by offering a structured basis for risk identification and for calibrating measures, without prescribing a rigid list of safeguards.

Against this background the GDPR/PIPL contrast is not simply “flexibility versus strictness.” Rather, it is different in kind: the two regimes allocate compliance burdens differently. The GDPR places a premium on continuous, case-specific justification under an evolving standard of “appropriateness”; the PIPL places a premium on building and maintaining baseline requirements that make compliance design demonstrable and reviewable, while still leaving discretion for controllers in choosing context-based technical choices within a broader data governance framework.

²⁴ Article 51 (1), (2), (4) and (5) PIPL.

²⁵ Article 51 (3) PIPL.

²⁶ Appendix H(1) and H(4) DCG Standard.

4.3. Implications for cross-border compliance

The comparison above suggests that cross-border compliance is not primarily a matter of translating safeguards into different languages, but of integrating two distinct regulatory techniques for making a risk-based duty enforceable. The GDPR's standards-based approach centers on risk identification and ex-post justifiable discretion in choosing safeguards; the PIPL approach centers on prescribed baseline measures and the calibration of protection intensity through a structured risk framework. A viable compliance synthesis must therefore combine these logics rather than treating them as interchangeable.

First, a GDPR-style risk identification can function as the technical core of a unified compliance design, but it must be extended for compliance on the China side. In addition to assessing threats in terms of likelihood and severity of harm to individuals, organizations must adopt methods for mapping data and processing activities in a way that supports the classification and graded system, which reflects the PIPL's reference to "possible security risks" as understood within the DSL ecosystem. This does not require redefining the concept of risk, but it does require extra work for differentiating data significance and scaling protection accordingly.

Second, compliance design must make baseline organizational measures explicit. While the GDPR treats organizational arrangements largely as part of an open-ended "appropriateness" assessment, Article 51 PIPL identifies certain measures as minimum requirements. For organizations operating across both regimes, this implies that they must be able to demonstrate the existence of baseline organizational measures while preserving discretion over the selection and adaptation of technical safeguards.

Taken together, these implications clarify the article's central claim. The GDPR and the PIPL are both risk-based, but they distribute compliance burdens differently: the GDPR emphasizes continuous, case-specific justification under an evolving standard, while the PIPL emphasizes baseline governance requirements coupled with structured risk calibration within a broader data-security framework. A coherent compliance synthesis internalizes both approaches rather than assuming that alignment with one regime will automatically satisfy the other.

5. *Conclusion*

This article sets out to deepen the understanding of risk-based duty of security of processing by comparing the GDPR and the PIPL at two levels: (a) what each regime treats as “risk” in the duty of security of processing, and (b) how that risk framing is translated into “appropriate measures” and enforceable compliance expectations. The comparison shows that, although both regimes present security of processing as risk-based, they adopt two distinct regulatory techniques for making the duty enforceable.

Under the GDPR, risk is anchored in the likelihood and severity of harm to the rights and freedoms of natural persons, and Article 32 implements this through standards-based discretion. Controllers and processors are granted flexibility in selecting safeguards, but they must be able to justify those choices by linking identified risk to adopted measures against an evolving benchmark. The strength of this design lies in technological neutrality and adaptability; its trade-off is that compliance depends heavily on justificatory work and can generate *ex ante* uncertainty as expectations evolve over time.

Under the PIPL, Article 51 similarly takes a risk-based approach, but operationalizes the duty through a baseline-plus-discretion structure. It enumerates organizational measures that function as baseline governance expectations and preserves discretion over the selection of technical safeguards. The PIPL’s reference to “possible security risks” is further situated within China’s broader data governance framework, which extends “risk” beyond individual harm to include public and national interests. This framework can reduce uncertainty about minimum governance expectations and provide a structured basis for calibrating protection intensity, while burdening information handlers with potentially broader compliance tasks including those concerning social and national interests.

These findings support the article’s central claim: the GDPR and the PIPL do not simply impose different levels of “strictness.” They allocate compliance burdens differently. The GDPR concentrates the compliance burden on continuous, case-specific justification under a standards-based discretion; the PIPL concentrates it on maintaining identifiable baseline requirements and structured risk calibration within a broader data governance system, while preserving discretion over the selection of technical safeguards. For organizations operating across both regimes, the implication is a compliance synthesis rather than a choice: an effective compliance design must integrate standards-based discretion with baseline

requirements and structured risk-ranking methods capable of supporting a classification and graded framework. More broadly, the comparison illustrates that “risk-based duty” can be enforceable through different legal techniques, and that the design choice between them shapes not only compliance costs, but also what regulators can demand in practice.

Maryna Manteghi*

*TDM Regulation in the EU:
Compliance Challenges, Balancing Rights, and Shaping the AI Future*

ABSTRACT

Text and data mining (TDM) technology is crucial for the development and functioning of generative AI systems, such as ChatGPT and Midjourney, which have rapidly entered the mainstream due to their potential to enhance various aspects of life. However, concerns have arisen regarding the use of large amounts of data during TDM to train these systems. If input data is protected by copyright or database rights, unauthorised mining may infringe the right to reproduction or the sui generis database right. To avoid copyright infringement, TDM users may seek to rely on the TDM exceptions provided in Articles 3 and 4 of the EU Directive on Copyright in the Digital Single Market. These provisions constitute novel statutory exceptions intended to strike a balance between the rights and interests of rightholders and those of TDM users. However, they remain subject to several conditions and limitations that may dilute their effectiveness. The legal shortcomings and omissions examined in this paper demonstrate that the exceptions may not fully resolve the conflicts of interest arising from the use of TDM. Nevertheless, they could alleviate copyright-related concerns if properly amended. The findings suggest that readjusting the TDM exceptions could help balance power in the digital environment, ensuring both effective copyright protection and the advancement of cutting-edge scientific research and AI development in the European Union.

KEYWORDS

Text and Data Mining – CDSM Directive – Copyright Exceptions – Generative AI.

SUMMARY: 1. Introduction – 2. Opportunities and Limitations of the CDSM's TDM Exceptions – 2.1 Article 3 of the CDSM: A Critical Overview – 2.2 Article 4 of the CDSM: A Critical Overview – 3. Conclusion.

* Maryna Manteghi is a Postdoctoral Researcher at the Faculty of Law, University of Turku, Finland. The paper has been written in the framework of the research project Dynamics of Digital Rights in Europe, funded by the Research Council of Finland grant (no 362853).

1. *Introduction*

The EU Directive on Copyright in the Digital Single Market¹ (the CDSM) was adopted to respond to rapid technological developments and to provide greater legal certainty in the digital environment.² Among its most significant changes, the CDSM introduced two specific exceptions for text and data mining (TDM), permitting the use of copyright-protected works under certain conditions. TDM is an automated analytical technique that enables users to extract new knowledge, such as patterns, trends, and correlations, from large volumes of digital data.³ Both private and public organisations increasingly leverage TDM to optimise performance, conduct research, and uncover information essential to addressing pressing societal challenges.

For instance, TDM is widely used in medicine to identify drug interactions, vaccine candidates, risk factors, and other relevant information. Moreover, TDM is crucial for the development and functioning of various artificial intelligence (AI) systems.⁴ This includes widely used generative AI (GenAI) models such as ChatGPT, GitHub Copilot, DALL-E, Midjourney, and Stable Diffusion. As these technologies rapidly become mainstream, they hold significant potential to advance various aspects of our lives.

However, concerns arise in relation to the use of large amounts of data, such as photographs, music, articles, and books, a significant portion of which is protected by copyright, in the course of TDM. This is because, in order to extract the information, a computer must necessarily create copies of the source materials.⁵ Accordingly, if input data is protected by copyright, mining such data without prior authorisation may infringe copyright holders' exclusive right to reproduction⁶ or the *sui generis* database

¹ Directive (EU) 2019/790 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC [2019] OJ L 130/92, 17.5. 2019, pp. 92-125.

² Recital 3 of the CDSM.

³ For a general overview of TDM techniques and methods see, for instance, J. HAN ET AL., *Data Mining: Concepts and Techniques*, Elsevier 2012, pp. 1-703.

⁴ H. SURDEN, *Machine Learning and Law: An Overview*, in R. VOGL (ed.), *Research Handbook on Big Data Law*, Edward Elgar Publishing 2021, p. 171.

⁵ N. LUCCHI, *ChatGPT: A Case Study on Copyright Challenges for Generative Artificial Intelligence Systems*, in *European Journal of Risk Regulation*, 2023, p.11.

⁶ Directive (EU) 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in

right granted to those actors who have made a substantial investment in the creation of a database.⁷ When it comes to TDM, obtaining licences for large volumes of data, or relying exclusively on freely available online content or public-domain works,⁸ may not be the most practical or efficient solution.⁹

Against this background, TDM users may seek to rely on the CDSM's TDM exceptions provided under Articles 3 and 4 to avoid copyright infringement. The provisions represent novel statutory exceptions intended to strike a balance between the rights and interests of rightholders and those of TDM users. The following sections introduce the provisions and critically assess their merits and shortcomings, thereby developing a perspective on how EU TDM regulation should be readjusted in the age of AI. This analysis will be conducted not only in terms of what users, copyright holders, and other stakeholders are legally entitled to under those provisions, but also in terms of their correlative obligations toward one another and toward society as a whole.

2. Opportunities and Limitations of the CDSM's TDM Exceptions

The CDSM's TDM exceptions demonstrate that exceptions to copyright and related rights go beyond a mere derogation of such rights and may constitute self-sufficient rules that could promote public access to and use of creative works.¹⁰ The provisions are intended to create space for new developments and processes in the digital age, which could also strengthen the European Union's AI sector.¹¹

the information society OJ L 167, 22.6.2001, p. 10–19 (the InfoSoc Directive), Art. 2.

⁷ Directive 96/9 on the legal protection of databases [1996] OJ L77/20 (Database Directive) art.7(1).

⁸ The term “public domain” encompasses those works that are not protected by Intellectual Property Laws (e.g., copyright, trademark, or patent) or for which such protection has expired.

⁹ M. MANTEGHI, *Can text and data mining exceptions and synthetic data training mitigate copyright-related concerns in generative AI?*, in *Law, Innovation and Technology*, 2024, p. 663 and p. 665.

¹⁰ S. DUSOLIER, *The 2019 Directive on Copyright in the Digital Single Market: Some Progress, a Few Bad Choices, and an Overall Failed Ambition*, in *Common Market Law Review*, 2020, p. 979, pp. 982-983.

¹¹ C. GEIGER AND B. J. JÜTTE, *Designing Digital Constitutionalism: Copyright Exceptions and Limitations as a Regulatory Framework for Media Freedom and the Right to Information Online* in M. SENFTLEBEN ET AL. (ed.), *Cambridge Handbook of Media Law and Policy in*

The exceptions are mandatory and, therefore, have been transposed into the laws of EU Member States. The harmonised TDM framework can provide more legal certainty and clarify the legality of TDM-based data analysis, at least in principle.¹² Despite many positive aspects, the provisions have been widely criticised for their inability to adequately regulate TDM in the age of AI and rapid technological development. Accordingly, the readjustment of the CDSM's TDM exceptions is a matter of current interest. The following subsections examine these issues in detail.

2.1 Article 3 of the CDSM: A Critical Overview

The exception provided under Article 3 of the CDSM permits research organisations and cultural heritage institutions to carry out text and data mining of protected works to which they have “lawful access”, for the purpose of scientific research.¹³ The beneficiaries include universities, research institutions, libraries, museums, or any other entity conducting scientific research on a non-profit basis or that reinvests all profits in its scientific research, or pursuant to a public interest mission.¹⁴ The intention was to strengthen the EU's competitive position as a research area;¹⁵ however, in practical terms, the limited scope of the provision could impede the effective exercise of the right to TDM.

In particular, the exclusion of private actors (e.g., journalists, individual researchers, start-ups, and other commercial entities) from the scope of beneficiaries may hinder research and innovation in different fields.¹⁶ Currently, a considerable body of public-interest research is carried out by commercial actors, notably in the medical field and in AI. It may not be reasonable to prevent commercial users from performing TDM research on data to which they have obtained lawful access through contractual arrangements or other appropriate means. Imposing additional fees

Europe, Cambridge University Press 2025, p. 4.

¹² C. GEIGER ET AL., *The Exception for Text and Data Mining (TDM) in the Proposed Directive on Copyright in the Digital Single Market - Legal Aspects*, in Centre for International Intellectual Property Studies Research Paper No.2018-02, 2018, p. 20.

¹³ Article 3(1) of the CDSM.

¹⁴ Art. 2(1) and (3) of the CDSM.

¹⁵ Recital 10 of the CDSM.

¹⁶ M. MANTEGHI, *In Search of Balance: Text, Data Mining and Copyright in the Digital Single Market Directive from a Fundamental Rights Perspective*, in *European Law Review*, 2023, p. 449.

merely for analysing lawfully obtained content could deter commercial organisations from producing valuable findings that could advance economic, technological, and other developments.¹⁷

Therefore, broadening the scope of Art. 3 of the CDSM to allow any person or entity with lawful access to protected works to conduct TDM-based research might facilitate research activities and collaboration across the EU. It could also prove valuable to extend access to content for third parties associated with the primary TDM actors to ensure the smooth flow of the verification process of research outcomes (e.g., peer review, data validation).

While the provision grants users the right to carry out TDM, it also imposes certain compliance obligations on the beneficiaries. The provision permits the use of TDM tools only for the purpose of scientific research. Generally, to qualify as scientific, research should be based on established scientific methods and techniques, which must exhibit various characteristics (e.g., replicability, precision, falsifiability, objectivity, etc.), and the findings of such research should contribute to the current state of science.¹⁸ Regarding the latter condition, this requirement could be problematic because some fields of study, such as arts, music, and literature, do not fall within the traditional notion of “science,” as they do not rely on scientific methods.¹⁹

The CDSM does not clarify the concept, merely indicating that it should cover “both the natural sciences and the human sciences”.²⁰ Therefore, proving that the research meets the criteria of scientific research is a challenging task, given the variety of approaches, categories, classification methods, and techniques involved. Against this background, it might be reasonable to adopt a broader formulation by employing the term “research” to encompass a wider range of studies across multiple fields.

Further, Article 3 of the CDSM requires that beneficiaries of the exception have lawful access to the works they intend to mine.²¹ Recital 14 of the CDSM clarifies the concept as “covering access to content based on an open access policy or through contractual arrangements between

¹⁷ M. MANTEGHI, *Overcoming Barriers to Text and Data Mining in the Era of ChatGPT: The Proposed Data Act as a Game-Changer*, in *GRUR International*, 2024, p. 39.

¹⁸ B. KENNETT, *Planning and Managing Scientific Research: A guide for the beginning researcher*, ANU Press 2014, p. 2.

¹⁹ A. BHATTACHERJEE, *Social Science Research: Principles, Methods, and Practices*, University of South Florida 2012.

²⁰ Recital 12 of the CDSM.

²¹ Article 3(1) of the CDSM.

rightholders and research organisations or cultural heritage institutions, such as subscriptions, or through other lawful means”.²² Additionally, lawful access should be understood as covering access to materials that are freely available online.²³ The requirement of lawful access can limit the right to TDM, as the application of Article 3 would depend on the discretion of rightholders to permit, restrict, or entirely prohibit access to their works.²⁴

Simply put, rightholders may, for instance, hinder TDM-based research by refusing to grant licences or by raising the costs of licences or subscriptions. In this sense, well-funded research organisations would gain more research “power” than poorly funded institutions. As *Geiger* fairly argues, this would “discriminate research according to research organisations’ market power”.²⁵ Rightholders may also restrict access to online content through the terms and conditions of their websites or by employing technological protection measures (TPMs) (e.g., encryption, scrambling, paywalls, user authentication, IP address validation, etc.).

The limited number of sources may affect the quality of TDM research, which requires the analysis of large amounts of data to produce accurate and efficient information. Moreover, the use of TPMs to control access to data can result in overblocking, as automated technological tools (such as filtering technologies) are not capable of properly differentiating between lawful access (e.g., covered by a copyright exception) and unlawful access.²⁶ Although the requirement of lawful access is an essential element in balancing competing rights and interests, many aspects of it require further clarification.

In addition, Article 3 of the CDSM allows rightholders to apply measures to ensure the security and integrity of their systems and databases due to a potentially high number of access requests to their materials.²⁷ However, rightholders must ensure that such measures are proportional

²² Recital 14 of CDSM.

²³ Recital 14 of CDSM.

²⁴ M. MANTEGHI, *In Search of Balance*, cit. p. 451.

²⁵ C. GEIGER ET AL., *The Exception for Text and Data Mining*, cit., p. 22.

²⁶ T. E. SYNODINOU, *Intermediaries’ Liability for Copyright Infringement in the EU: Evolutions and Confusions*, in *Computer Law & Security Review*, 2015, p. 62. *SABAM* (C-360/10) EU:C:2012:85 at [50] and [52]; *Scarlet Extended SA* (C-70/10) EU:C:2011:771 at [50]; *Ahmet Yildirim v Turkey* (3111/10) 18 March 2013 at [66]–[68]; *Kharitonov v Russia* (10795/14) 16 November 2020 at [38]–[40]; *Poland v European Parliament* (C-401/19) EU:C:2022:297 at [86].

²⁷ Article 3(3) of the CDSM.

to the risks involved and do not prevent or hinder TDM-based research.²⁸ Beneficiaries, in turn, should respect any TPMs put in place by rightholders by, for instance, refraining from overloading the server. To prevent overblocking, it may be reasonable to clarify the application of TPMs under Art. 3 and establish appropriate safeguards or a legal mechanism that would operate in cases where lawful access to data is disabled.

Finally, Art. 3(2) of the CDSM allows the storage of copies created in the course of mining for the “purposes of scientific research, including for the verification of research results”.²⁹ The CDSM requires that the copies be stored with an appropriate level of security.³⁰ However, it does not specify the conditions needed to fulfil that requirement (e.g., time limitations, the issue of responsibility, or specific storage conditions).³¹ Against this background, many aspects of Art. 3 of the CDSM should be clarified by the Court of Justice of the European Union (CJEU) to ensure a fair balance between competing interests, thereby enhancing the effectiveness of the TDM exception for scientific research in the era of AI.

To sum up, the provision is formulated as an exception to copyright and *sui generis* database holders’ exclusive rights, introducing a new statutory exception for researchers. Art. 3 of the CDSM does not directly impose duties on research organisations or on rightholders, for instance, to enable or facilitate TDM. However, its application depends on a number of conditions and obligations that, in practical terms, operate as correlative duties. The relationship between rights and duties, embedded within the appropriate framework, could be crucial for balancing, *inter alia*, research activities and the innovations resulting from them with the protection of IP in times of rapid technological development.

2.2 Article 4 of the CDSM: A Critical Overview

The exception of Article 4 of the CDSM applies to all types of users and covers any purpose of TDM activities, provided that rightholders have not expressly reserved the use of their works for text and data mining in an appropriate manner.³² Rightholders can reserve their rights by using machine-readable means, including metadata and the terms and conditions

²⁸ Article 3(3) and recital 16 of the CDSM.

²⁹ Article 3(2) of the CDSM.

³⁰ Article 3(2) of the CDSM.

³¹ M. MANTEGHI, *In Search of Balance*, cit., pp. 454–455.

³² Article 4 and recital 18 of the CDSM.

of a website or service, in cases where their works are publicly available online. In other circumstances, they may reserve their rights through other means, such as contractual agreements or unilateral declarations.³³ The provision was adopted to compensate for the narrow scope of Article

3 and to emphasise the relevance and importance of TDM tools for a wide range of uses in both the public and private sectors.³⁴

The so-called “commercial” TDM exception could mitigate the impact of the control exercised by copyright holders over digital data, thereby creating “breathing room” for many private actors, such as AI developers.³⁵ However, similarly to Article 3 of the CDSM, the effectiveness of this exception may be diluted by certain limitations. Despite the legal uncertainty and lack of clarity surrounding the lawful access requirement, the right to store copies,³⁶ and the restrictive effects of TPMs, all of which were discussed above and are also relevant to Article 4, the main concern is an “opt-out” mechanism.

The mechanism was introduced to preclude the over-exploitation of copyright-protected works by private actors and thereby ensure a balance between competing interests.³⁷ However, in practice, it could give copyright holders even more control over their works in the context of TDM, as the exception, unlike Article 3, can be overridden by contractual terms under Art. 7(1) of the CDSM.³⁸ For instance, AI developers may need to pay twice to train their models using TDM techniques, first for lawful access to content, and then for the right to analyse the obtained data with automated analytical tools.³⁹

This could diminish the innovative capacity of small IT companies with constrained budgets and further consolidate power over the EU

³³ Article. 4(3) and recital 18 of the CDSM.

³⁴ Recital 18 of the CDSM.

³⁵ M. Kop, *The Right to Process Data for Machine Learning Purposes in the EU*, in *Harvard Journal of Law and Technology*, 2021, p. 15; C. GEIGER AND B. J. JÜTTE, *Designing Digital Constitutionalism*, cit., p. 4; M. Manteghi, *Can text and data mining exceptions and synthetic data training mitigate copyright-related concerns in generative AI?*, in *Law, Innovation and Technology*, 2024, p. 663 and p. 673.

³⁶ The right to store copies of data made in the course of TDM of Article 4 is more restrictive than in Art. 3 as it allows the retaining of copies only “for as long as is necessary for the purposes of text and data mining” and thus once the mining is done the copies should be deleted (Article 4(2) and recital 18 of the CDSM).

³⁷ Recital 6 of the CDSM.

³⁸ Article 7 (1) of the CDSM.

³⁹ M. MANTEGHI, *Can text and data mining exceptions*, cit., p. 663 and p. 675.

AI sector in the hands of large AI players.⁴⁰ Although Article 4 does not impose direct duties on users, in practical terms the provision requires them to check whether rightholders have reserved their rights before performing TDM on protected works, and to comply with any “opt-out” mechanisms or licensing terms by obtaining authorisation from rightholders.

Another issue concerns the practical application of the reservation right, the details of which remain unclear. The CDSM does not specify how the mechanism will work in practice. Rightholders may, for instance, use the Robots Exclusion Protocol (a so-called robots.txt file)⁴¹ to control the use of their works for TDM. However, the mechanism may not constitute an effective technological measure,⁴² as the protocol is a voluntary measure that could be ignored by AI crawlers. Moreover, the protected content may still be accessed through other websites embedding links to disallowed content.⁴³

Therefore, an increasing number of alternative solutions are emerging that allow rightholders to either permit the use of their works for AI training or opt out (e.g., the Spawningai.txt protocol,⁴⁴ HaveIBeenTrained website,⁴⁵ Google-Extended⁴⁶, etc.). However, most of these are model-specific mechanisms, and it is not clear whether they would fall within the statutory notion of the reservation of rights under Article 4.

Against this background, many argue that there is a need to implement generally accepted protocols or standards to clarify the operation of an “opt-out” mechanism and thereby address the current lack of harmonisation in this regard.⁴⁷ This would provide greater legal certainty for both rightholders

⁴⁰ G. M. ZIAJA, *The Text and Data Mining Opt-out in Article 4(3) CDSMD: Adequate Veto Right for Rightholders or a Suffocating Blanket for European Artificial Intelligence Innovations?*, in *Journal of Intellectual Law and Practice*, 2024, p. 453 and pp. 454-453.

⁴¹ Robots Exclusion Protocol is an exclusion mechanism which informs web robots or crawlers about which pages or files of the website should not be processed.

⁴² *VG Bild-Kunst v Stiftung Preussischer Kulturbesitz* (C-392/19) EU:C:2021:181; [2021] Bus. L.R. 800 at [46]; in this sense see also *GS Media BV v Sanoma Media Netherlands BV* (C-160/15) EU:C:2016:644; [2017] 1 C.M.L.R.

³⁰ at [46].

⁴³ D. ANG, *The Web Scraper's World of Copyright Exceptions and Contractual Overrides*, in *Singapore Law Review*, 2021, p. 5.

⁴⁴ See < <https://site.spawning.ai/spawning-ai-txt> > accessed 10 July 2025.

⁴⁵ See < <https://haveibeentrained.com> > accessed 10 July 2025.

⁴⁶ See < <https://developers.google.com/search/docs/crawling-indexing/overview-google-crawlers> > accessed 01 March 2025.

⁴⁷ M. Senfleben, *Generative AI and Author Remuneration*, in *International Review of Intellectual Property and Competition Law*, 2023, p. 1535 and pp. 1544-1545.

and users, and ensure a more effective application of the exception. However, allowing rightholders to control TDM through the reservation of rights may prevent private actors, such as AI developers, from accessing lawfully obtained information and analysing inherent ideas and facts that are not protected by copyright. Therefore, it may be reasonable to broaden the “commercial” TDM exception by excluding the “opt-out” mechanism, thereby increasing access to information and facilitating innovation and technological development within the EU.⁴⁸

3. Conclusion

The exceptions under Articles 3 and 4 of the CDSM have been adopted to balance the rights and interests of copyright holders and those of TDM users. Even though they do not expressly impose duties on users or rightholders, they include a number of conditions and limitations that could dilute their effectiveness. The legal shortcomings and omissions examined in this paper demonstrate that the exceptions may not be able to fully address the conflicts of interest arising from the use of TDM.

However, they could alleviate the copyright-related concerns if properly amended. Readjusting the TDM-related exceptions could help balance power in the digital environment, ensuring both effective copyright protection and the advancement of cutting-edge scientific research and AI development in the EU.

⁴⁸ M. MANTEGHI, *Can text and data mining exceptions*, cit., pp. 679-680.

Hugo Neuhauser*

*Workers' Insurance, between Moral and Legal Duty:
Debates about Compulsory Insurance in the International
Office for Workplace Accidents (1889-1894)*

ABSTRACT

The last decade of the nineteenth century witnessed the gradual development across Europe of national systems for the compensation of workplace accidents and the legal protection of workers. Alongside traditional legal actors, employers, as interested parties, became increasingly involved in debates surrounding the making of such legislation. They organised themselves through associations and international congresses, such as the International Workplace Accidents Congress. From 1889 onwards, members of this association met regularly to identify the most appropriate legal framework for compensating workplace accidents, while taking into account social considerations, insurance costs and workers' welfare.

This paper seeks, first, to identify the positions advocated or opposed by the actors involved in the association and, second, to analyse the arguments mobilised in support of these positions. Since national legal frameworks alone are insufficient to account for these debates, the analysis is complemented by a political and socio-economic perspective.

The discussions reveal a clear divide between proponents of liberalism and advocates of state intervention. A second line of division appears between supporters of private-sector insurance and promoters of public insurance systems. To justify these positions, the notion of duty is central. On the one hand, duty can be understood as a moral obligation incumbent upon employers, leading them to remedy the negative consequences of industry by themselves, thereby excluding state intervention. On the other hand, duty is conceived as an obligation for the state to intervene in labour relations in order to address the shortcomings of industrial employers and impose compulsory insurance guaranteeing workers' compensation.

The International Workplace Accidents Congress thus constitutes an epistemic community united by a shared concern for "humanity", within which informed opinions are shaped and evidence-based arguments are developed.

* Hugo Neuhauser is a PhD student in legal history in the Centre d'histoire judiciaire (CHJ, UMR 8025) at the University of Lille. He studies the role of international congresses in the emergence of international labour law, in a historical and comparative perspective.

KEYWORDS

Labour Law History – Transnational Legal History – Industrial Accidents – Social Insurance – International Congresses.

SUMMARY: 1. Introduction – 2. Workers' insurance obligation: an urge or a threat? – 3. The IOWA, "catalyst" of the employers' interests? – 4. The diversity of opinions in the IOWA: debating to draw a just solution, or multiple solutions? – 5. The notion of humanity: a motivation for debating

1. *Introduction*

On 9 May 1890, French president Sadi Carnot welcomes a delegation of members from the organising committee of the International Workplace Accidents Congress, held between 9 and 14 September 1889 as part of the 1889 Exposition Universelle in Paris.¹ This delegation includes Oscar Linder, Henry Darcy, Louis Ricard, Émile Cheysson, François Dujardin-Beaumetz and Édouard Gruner² – mostly engineers connected to the industrial world. The organisers pride themselves on having brought together about 800 participants from twelve different countries to discuss the growing issue of workplace accidents. This success makes the congress "one of the most brilliant of the Exposition".³ Oscar Linder, president of the organising committee, then president of the 1889 Paris congress, presents their accomplishments to the Head of state, praising the importance of the exchange of opinions that took place during the meeting, in the presence of "distinguished foreigners". He also mentions the recent creation of the International Office for Workplace Accidents (IOWA)⁴ – whose first

¹ É. GRUNER, *Congrès International des Accidents du Travail. Bulletin du Comité permanent*, Paris, 1890, p. 115.

² Édouard Gruner's name is spelled Grüner, but as he usually signs Gruner, this spelling was preferred here.

³ É. GRUNER, *Congrès International des Accidents du Travail*, cit., p. 115.

⁴ As the association's name changes over time (initially in French, Comité Permanent International des Accidents du Travail), we chose to translate Bruno Debaenst's proposition, in B. DEBAENST, « *L'Office international des accidents du travail* » (1889-1914), *catalyseur du droit social naissant*, in *Revue du Nord. Hors-série. Collection Histoire*, 2020, p. 19 and ff., p. 19. Sandrine Kott refers to it as Permanent Committee for Social Insurance, and International Association for Social Security (IASS), in S. KOTT, *From Transnational Reformist Network to International Organization: The International Association for Labour Legislation and the International Labour Organization, 1900–1930s*, in D. RODOGNO – B. STRUCK – J. VOGEL (eds.), *Shaping the Transnational*

session took place on 18 January 1890⁵ –, an association established to carry forward the work of the 1889 congress, which he was elected to preside over. He emphasises the importance of the workplace accidents issue, which triggers public concern as well as the ruling class's "solicitude". This question is indeed in "all Parliaments' agendas", after Germany paved the way with its first workplace accidents law of 1884, followed by Austria in 1887.

In his address, Linder's inclination towards the private sector to answer the pressing issue of workplace accidents, and more broadly welfare funds, is already noticeable: "Industrial France has, up to now, more willingly sought the solution to these questions through the free action of those concerned, workers and employers, who have multiplied ad infinitum associations and benefits institutions. This is a trait that honours our country".⁶ Sadi Carnot concludes this reception by thanking his visitors for their work and assuring them of both the government's and his personal commitment to these questions.

Between the first session of the IOWA committee and his encounter with Sadi Carnot, Oscar Linder attended the 1890 International Labour Conference in Berlin, convened by Wilhelm II in the midst of a showdown with Chancellor Bismarck.⁷ This conference is often considered a first step forward in the construction of international social laws, despite its lack of concrete legal outcome.⁸ In fact, participating states were wary of entering into any form of commitment in this domain, and restricted themselves to enacting wishes without legal implications in domestic laws. The final protocol consists of recommendations phrased as "It would be advisable to...", and includes no binding disposition, nor any supervisory body organised to follow the implementation of these targets. Regarding workplace accidents, the text only states that providence funds for "sickness, accidents, disability, old age and death" should be further developed "in

Sphere, Berghahn Books, 2015, p. 239 and ff., p. 241 and ff.; whereas Christian Müller and Jasmien Van Daele use International Association for Social Insurances (IASI), in CH. MÜLLER – J. VAN DAELE, *Peaks of Internationalism in Social Engineering: A Transnational History of International Social Reform Associations and Belgian Agency, 1860-1925*, in *Revue belge de Philologie et d'Histoire*, 2012, p. 1297 and ff., p. 1297.

⁵ É. GRUNER, *Congrès International des Accidents du Travail*, cit., p. 39.

⁶ *Ivi*, p. 116.

⁷ M. DELEVINGNE, *The Pre-War History of International Labor Legislation*, in J.T. SHOTWELL (ed.), *The Origins of the International Labor Organization*, Columbia University Press 1934, p. 19 and ff., p. 21 and ff.

⁸ *Ibid.*, p. 24 and ff.; G. SCELLE, *L'Organisation internationale du travail et le BIT*, A. Seifert (pref.), Dalloz 2020, p. 22.

accordance with each country's customs".⁹ Surprisingly, coming back from Berlin, Oscar Linder does not recount the diplomatic meeting to the IOWA committee, even though it would appear to be a well-suited place to discuss the negotiations' difficulties and achievements. This major event is scarcely acknowledged in the bulletin the IOWA publishes and, apart from a record of Oscar Linder's return, is absent from the table of contents of the 1890 and later bulletins.

The IOWA is part of a transnational "reformist nebula"¹⁰ focused on social matters at the European level.¹¹ Alongside other associations such as the International Association for Labour Legislation (IALL) and the International Association against Unemployment (IAU),¹² the IOWA contributes to the setting up of a circle of experts which, after the First World War, participates in the creation of the International Labour Office (ILO), the labour-specialised body of the League of Nations.¹³ This paper examines the mobilisation of legal discourses and moral justifications articulated during the regularly convened International Workplace Accidents Congresses, as well as in the bulletins published by the IOWA every two to three months. IOWA actors mobilise the notion

⁹ *Proceedings of the Berlin International Conference*, 15-29 mars 1890, Final protocol, art. I, 3, d. (available on [https://gallica.bnf.fr/ark:/12148/bpt6k5613751c/f136.item], p. 126 and ff.).

¹⁰ CH. TOPALOV, *Les « réformateurs » et leurs réseaux : enjeux d'un objet de recherche*, in Ch. TOPALOV (ed.), *Laboratoires du nouveau siècle : la nébuleuse réformatrice et ses réseaux en France, 1880-1914*, Editions de l'Ecole des Hautes Etudes en Sciences Sociales, 1999, p. 11 and ff.; CH. MÜLLER – J. VAN DAELE, *Peaks of Internationalism in Social Engineering*, cit., p. 1307 and f.; C. MUSTERLE – M. LENGWILER, *Un médiateur entre deux univers concurrents de l'« État social »*, in *Les Études Sociales*, 2018, p. 245 and ff.

¹¹ J. VAN DAELE, *Engineering Social Peace: Networks, Ideas, and the Founding of the International Labour Organization*, in *International Review of Social History*, 2005, p. 435 and ff.; S. KOTT, *From Transnational Reformist Network to International Organization*, cit., p. 239 and ff.

¹² R. GREGAREK, *Une législation protectrice : les Congrès des assurances sociales, l'Association pour la protection légale des travailleurs et l'Association pour la lutte contre le chômage, 1889-1914*, in Ch. TOPALOV (ed.), *Laboratoires du nouveau siècle*, cit., p. 317 and ff.; R. GREGAREK, *Le mirage de l'Europe sociale. Associations internationales de politique sociale au tournant du 20^e siècle*, in *Vingtième Siècle. Revue d'histoire*, 1995, p. 103 and ff.; CH. TOPALOV, *Les réformateurs du chômage et le Musée social*, in C. CHAMBELLAND (ed.), *Le musée social en son temps*, Presses de l'Ecole normale supérieure, 1998, p. 281 and ff.

¹³ S. KOTT, *Une « communauté épistémique » du social? Experts de l'OIT et internationalisation des politiques sociales dans l'entre-deux-guerres*, in *Genèses*, 2008, p. 26 and ff., p. 28 and f.; M. HERREN-OESCH, *Internationale Sozialpolitik vor dem Ersten Weltkrieg: die Anfänge europäischer Kooperation aus der Sicht Frankreichs*, Duncker & Humblot, 1993.

of duty, either to avoid the creation of legal obligations placed upon the employer or, conversely, to urge the states to intervene in labour relations. Despite the IOWA's evident proximity to employers' associations, a plurality of viewpoints is expressed; the association thus serves as a forum for debate on social insurance.

2. *Workers' insurance obligation: an urge or a threat?*

The 'Germanic model', based on the 1884 workplace accidents legislation creating a public, corporation-managed insurance system, is a precursor during the 1880s decade. As soon as the 1890s decade begins, it becomes the sole comparison point for all industrialised states looking for an answer to the 'social matter'.¹⁴ The debates are strong, about whether France, Italy, Belgium, or Switzerland, should adopt a similar compulsory insurance system, or a system based on 'freedom', consisting of a free choice for the employer to insure with private insurance companies or not.¹⁵ In this context, the quite similar German and Austrian insurance systems become a model to follow or to avoid for industrialists, engineers, and juriconsults.

Sometimes liberal or sometimes more attached to the "social peace",¹⁶ the main actors of the association provide multiple reasonings and arguments in support of their rejection of the 'Germanic system'. For instance, Arthur Raffalovitch, an eminent Russian journalist and economist living in Paris, argues that the "free initiative" is sufficient to tackle social issues, and adequate to counter the "state-socialism" characterising the 'Germanic system'.¹⁷ Furthermore, he explains that the 'English system' based on trade-unionism is beneficial, because it limits the propagation of socialism, seen as a danger for "sowing discord between capital and labour",¹⁸ The

¹⁴ R. GREGAREK, *Joutes franco-allemandes autour du thème de la paix sociale. Français et Allemands aux "Congrès internationaux des accidents du travail et des assurances sociales" (1889-1914)*, in *Cahiers d'Études Germaniques*, 1991, p. 205 and ff., p. 207 and ff.

¹⁵ S. KOTT, *Une « communauté épistémique » du social ?*, cit., p. 32; C. MUSTERLE, M. LENGWILER, *Un médiateur entre deux univers concurrents de l'« État social »*, cit., p. 251 and ff.

¹⁶ See L. GUERLAIN, *L'école de Le Play et le droit*, LGDJ, 2017.

¹⁷ É. GRUNER, *Congrès International des Accidents du Travail*, cit., p. 111 and ff.

¹⁸ *Ivi*, p. 113. See also R. GREGAREK, *Joutes franco-allemandes autour du thème de la paix sociale*, cit., p. 206.

Dutch Westerouen van Meeteren argues that he is a laissez-faire supporter, while assigning a special role to the state: “the legislator must prepare ways and exercise control”, but should not substitute for the employer.¹⁹ Some other IOWA members introduce a distinction between compulsory insurance and state insurance: an obligation to insure doesn’t necessarily lead to a public-organised insurance fund. This point is raised during a session of the IOWA committee by Samuel Périssé,²⁰ vice-president, then president of the Association of French Industrialists against Workplace Accidents (Association des Industriels de France pour la prévention des accidents du travail, AIF),²¹ which, as soon as 1888, expressed a preference for the compulsory system associated with private insurances.²²

In order to counter a statutory-based obligation, participants invoke the existence of a moral obligation for the employer to take good care of his employees. Presented as the only legitimate source of obligation placed upon the employer, the moral duty is described as sufficient to make him adopt adequate measures to protect the workforce. In this regard, Alexandre Gibon, engineer and former director of the Commeny’s foundries, clearly states that: “No doubt there are among industrialists some who are unconcerned; but to bring them onto the path of employers’ institutions – which alone will resolve social questions – what is needed is [...] to remind them of their duty, and to honour the employers, whose number grows by the day, who set the best examples”.²³ Employers feel “obliged”, they bear a duty to address the difficulties arising from industrialisation they are confronted with.

Émile Cheysson, a prominent engineer and economist, convinced of the importance of the “social role” of the employer, is more nuanced. To him, a duty rests upon the employer to “concern himself with the wages and living conditions of his employees [...], especially in exceptional circumstances (unemployment, illness, death...)”.²⁴ While a

¹⁹ CONGRÈS INTERNATIONAL DES ACCIDENTS DU TRAVAIL, 2^e session tenue à Berne du 21 au 26 septembre 1891. Rapports et procès-verbaux, Berne, 1891, p. 673.

²⁰ É. GRUNER, *Congrès International des Accidents du Travail*, cit., p. 191 and f.

²¹ V. VIET, *La course aux techniques d’hygiène et de sécurité : les premiers pas de l’inspection du travail*, in Y. COHEN – R. BAUDOUÏ (eds.), *Les chantiers de la paix sociale : 1900-1940*, ENS-LSH Editions, 2022, (online: [<https://doi.org/10.4000/books.enseditions.26230>]).

²² CH. TALANSIER, *Loi sur les accidents du travail. Résumé des vœux émis au Congrès des Industriels de France dans leurs réunions de Juin à Décembre 1888*, Hachette, 1888, p. 4.

²³ É. GRUNER, *Congrès International des Accidents du Travail*, cit., p. 353.

²⁴ Y. BRETON, *Émile Cheysson et l’économie sociale*, in J. LUCIANI (ed.), *Histoire de l’Office du travail : 1890-1914*, Syros, 1992, p. 173 and ff., p. 177. This distinctive social

strong advocate of the private initiative in social matters, he also admits the legitimacy of a (limited) state's intervention in work relations. However, in his mind private insurances and a public welfare fund cannot coexist: as the state fund losses can be shared out between taxpayers, whereas a private fund is not able to do so, the competition will necessarily lead to a state monopoly. For all these reasons, Émile Cheysson defends the development of private provident societies, with the Government's support and a legal framework. Even though he recognises his "profound impression [...] in favour of the Germanic system" and its "majestic institution",²⁵ he immediately qualifies his statement by noting that a foreign system should not be implemented across the border as it is. A 'legal transplant' – Émile Cheysson uses the example of vine stock – has to "acclimate to a country, adapt to its mores, to its historical development".²⁶

The IOWA also includes adherents of the 'Germanic system', who prove to be particularly active during the IOWA congresses.²⁷ They vigorously defend this system's efficiency, using financial but also moral arguments. According to the ex-politician, Swiss journalist Constant Bodenheimer, this system will "go round the world", as it is a way "1° for the state to diminish public assistance expanses, 2° for the employers to avoid civil liability, which can be too costly (especially for small industry), and 3° to improve workers' condition".²⁸ Members like Tonio Bödiker, president of the Reich's insurance,²⁹ or Karl Kögler, director of the Workplace Accident Insurance Office of Vienna, argue that being less expensive for the employer, the 'Germanic system' also presents the advantage of better compensating workers. The latter, according to whom the "compulsory insurance is a necessity", even invoke the notion of natural law, stating that "all workers insured in case of illness, accidents and disability, that is the

conception of business leadership was shaped by his companionship with Frédéric Le Play, and his experience managing the Schneider factories in Le Creusot: *Ivi.*, p. 175 and ff.; L. GUERLAIN, *L'école de Le Play et le droit*, cit., p. 506.

²⁵ CONGRÈS INTERNATIONAL DES ACCIDENTS DU TRAVAIL, 2^e session tenue à Berne du 21 au 26 septembre 1891, cit., p. 656.

²⁶ *Ibid.*

²⁷ C. MUSTERLE – M. LENGWILER, *Un médiateur entre deux univers concurrents de l'« État social »*, cit., p. 264 and ff.

²⁸ CONGRÈS INTERNATIONAL DES ACCIDENTS DU TRAVAIL, 2^e session tenue à Berne du 21 au 26 septembre 1891, cit., p. 595 and f.

²⁹ C. MUSTERLE – M. LENGWILER, *Un médiateur entre deux univers concurrents de l'« État social »*, cit., p. 265.

ideal and there lies a natural right for workers”.³⁰ The mobilisation of this legal notion is particularly interesting and precursory, as the recognition of a natural right of the workers to be compensated entails a duty of the state to guarantee the compensation, by creating a legal obligation to insure. In a similar way, Georg von Mayr puts forward that, since the private initiative turns out to be insufficient, the state is forced to intervene. Without saying it explicitly, the German professor comes close to considering that the state has a duty, or even an obligation, to substitute for the employers and compensate injured workers.³¹

Two competing conceptions of duty can be identified within the IOWA. On the one hand, duty is conceived as a moral obligation, private by nature, and thus excluding state intervention. On the other hand, it is mobilised as a justification for state intervention in work relations.

3. *The IOWA, “catalyst” of the employers’ interests?*

In the context of uncertainty preceding the implementation of social laws throughout industrialised Europe, the IOWA acts as a platform enabling to explore the ‘social matter’ and the workplace accidents issue, construct opinions, and express oppositions.³² Reuniting French and international representatives of the employers, economists, engineers and jurists, the IOWA allows the expression of a lively debate, but it may also be seen as a way for these actors to organise in order to prevent the creation of compulsory and public insurances. As a matter of fact, the IOWA has close ties with several employers’ associations, towards which some notable figures gravitate.³³

Looking at members forming the IOWA’s board, it is noticeable that the officers are characterised by their affiliations to multiple associations. For instance, Henry Darcy, vice-president of the IOWA, is founder and president of the Central Committee of French Coal Mines (Comité Central des Houillères de France, CCHF), which hosts in its premises

³⁰ CONGRÈS INTERNATIONAL DES ACCIDENTS DU TRAVAIL, 2^e session tenue à Berne du 21 au 26 septembre 1891, cit., p. 609 and ff.

³¹ *Ivi*, p. 603.

³² S. KOTT, *From Transnational Reformist Network to International Organization*, cit., p. 241 and f.

³³ R. GREGAREK, *Joutes franco-allemandes autour du thème de la paix sociale*, cit., p. 210 and f.

the IOWA's library and committee sessions.³⁴ Édouard Gruner is both general secretary of the IOWA and secretary of the CCHF, just like François Dujardin-Beaumetz.³⁵ The CCHF makes a 1,000 frs donation to the 1889 Paris congress organisation,³⁶ when Samuel Périssé's AIF gives 200 frs and Frédéric Engel-Gros, industrialist, honorary president of the IOWA and president of the Mulhouse Association to Prevent Machine Accidents,³⁷ personally gives 2,000 frs,³⁸ More than a simple coincidence, this closeness between the IOWA and employers' organisations is claimed and fostered by the IOWA: in order to strengthen the ties between the two organisations, a participant asks to appoint two members of the Foundry Committee (Comité des Forges de France, CFF) as IOWA members.³⁹ One of the mentioned CFF members is Eugène Schneider, owner of the factory Émile Cheysson managed. It is also interesting to note that a significant number of IOWA members are part of board of directors of (mostly) mining companies.

The IOWA, as well as associations linked to the IOWA's network, organise in order to wield effective influence on social policies⁴⁰. During the 1894 Milan congress, Oscar Linder proclaims that the IOWA "can exert its influence on the public opinion, as well as the Parliaments".⁴¹ His position of president obviously brings him to emphatically exaggerate the association's role, but for the least, it is possible to underline that the IOWA's work attains a significant portion of the economic and political elite.⁴² Their course of action consists firstly of a close study of draft bills

³⁴ C. MUSTERLE – LENGWILER, *Un médiateur entre deux univers concurrents de l'« État social »*, cit., p. 258 and f.; A. PHILIPPE, *Genèse et structuration du Comité des Houillères (1840-1907) : enjeux d'échelles, de réseaux et de pouvoirs*, in *Cahiers Jaurès*, 2018, p. 17 and ff., p. 20 and ff.

³⁵ É. GRUNER, *Congrès International des Accidents du Travail*, cit., p. 179.

³⁶ *Ivi*, p. 185. This sum amounts to approximately 4,566 euros in 2024: INSEE, *Convertisseur franc-euro*, [<https://www.insee.fr/fr/information/2417794>].

³⁷ See fn. 44 below.

³⁸ É. GRUNER, *Congrès International des Accidents du Travail*, cit., p. 40.

³⁹ *Ivi*, p. 189. See also É. GRUNER, *Congrès International des Accidents du Travail. Bulletin du Comité permanent*, vol. II, Paris, 1891, p. 2.

⁴⁰ A. HIRSCH, *Statistiques professionnelles et lois sociales : l'invention de la mesure du travail en France (1880-1914)*, PhD thesis, Université Paris sciences et lettres, 2024, p. 211 and ff.; CH. MÜLLER – J. VAN DAELE, *Peaks of Internationalism in Social Engineering*, cit., p. 1308.

⁴¹ CONGRÈS INTERNATIONAL DES ACCIDENTS DU TRAVAIL ET DES ASSURANCES SOCIALES, *Troisième session tenue à Milan du 1^{er} au 6 octobre 1894. Procès-verbaux des séances et communications présentées au congrès*, vol. II, Milan, 1894, p. 69.

⁴² R. GREGAREK, *Le mirage de l'Europe sociale*, cit., p. 106 and f.

and bills from across Europe related to their domain of intervention, after which members can work on alternative solutions and counterproposals. They can state their opposition to a specific measure, or to the overall scheme of a project. Besides, the publication of a bulletin enables these reflections and counterproposals to circulate widely. These statements can also advantageously be presented to a few members of the IOWA who are parliamentarians, specifically interested and involved in industrial or social questions. In return, these politicians can communicate to the IOWA work documents of specialised and ad-hoc parliamentary commissions, draft bills and bills regarding social laws. These documents are a significant asset for the association, for it allows a thorough day-to-day follow up of the legislative process all across Europe, including wills and hesitations of the Chambers. Conversely, their belonging to specialised associations such as the IOWA, confers alleged knowledge to parliamentarians. These employers' organisations constitute real pressure groups concerning social laws and more broadly industry matters.⁴³

In addition, the employers' moral duty compels action. As early as 1867, some industrialists already organised in the Mulhouse Industrial Society, an employers' association linked to paternalism, dedicated to the promotion of workplace accidents prevention by creating the Mulhouse Association to Prevent Machine Accidents. Vincent Viet points out that one purpose of this association was to avert "the growing ambition of the state to regulate industry [...] on the one hand, and absolve the employer from the crushing responsibility [...] the legislator tends toward imposing upon the employers, on the other hand".⁴⁴ Shortly after, in 1879, the Normandy Association to Prevent Workplace Accidents is created.⁴⁵ and in 1883, the above-mentioned Association of French Industrialists against Workplace Accidents followed. The founders of these associations are active members of the IOWA, like Frédéric Engel-Gros. Samuel Périssé of the AIF and Jules de Coëne of the Norman Association are present when, during an IOWA committee session, the president congratulates them for obtaining a reward for their work.⁴⁶ In 1890, a Dutch and then a Belgian

⁴³ A. PHILIPPE, *Genèse et structuration du Comité des Houillères (1840-1907)*, cit., p. 28 and ff.; A. PHILIPPE, *Le Comité des Houillères face aux syndicats ouvriers, entre stratégie d'évitement et influence parlementaire (année 1880-1914)*, in *Revue du Nord*, 2020, p. 327 and ff., p. 332 and ff.

⁴⁴ V. VIET, *La course aux techniques d'hygiène et de sécurité*, cit., (online).

⁴⁵ C. MYKITA, *La prévention des accidents du travail en Haute-Normandie au XIX^e siècle (1830-1914)*, in *Annales de Normandie*, 1997, p. 147 and ff., p. 163 and ff.

⁴⁶ É. GRUNER, *Congrès International des Accidents du Travail*, cit., p. 190 and f.

association for the prevention of workplace accidents are created.⁴⁷

Besides some industrialists organising into associations to support the development of workplace accident prevention mechanisms, others directly establish mutual aid societies. In this case, they take this initiative by asserting their intention to respond to a moral duty, in order to avoid being subjected to obligations imposed by law. Such is the case for the CCHF and the CFF, which jointly created a mutual aid fund in 1891: on the justification that they were “seriously preoccupied with the grave dangers of a system that would make the state the sole insurer [...], they did not hesitate to establish the institution which received their preference after a well-reasoned and in-depth examination”.⁴⁸ Édouard Gruner, member of the IOWA, the CCHF but also of the AIF, had repeatedly exhorted his colleagues to undertake such actions.⁴⁹

4. The diversity of opinions in the IOWA: debating to draw a just solution, or multiple solutions?

The IOWA presents a distinctive feature in that it allows for a wide range of opinions to be expressed, whether in the pages of its bulletin or during the congresses, which renders the precise character of the association somewhat ambiguous. The tension inherent in the IOWA's non-univocal character explains its decision not to adopt any motion. Indeed, some of its members noticed during a committee session that when an association settles on a definite position on a given issue, the members of that association hasten to declare themselves in opposition to it. The same position is adopted during the congresses, even though other congresses often conclude with the adoption of motions which can be relayed in the press.⁵⁰ On the occasion of the second International Workplace Accident Congress in 1891, Édouard Gruner justifies this decision: “the participants are so different, a Congress to one another, a session to one another, that their votes, depending on circumstances, could result in particularly diverging votes. In these conditions, votes or even mere wishes

⁴⁷ *Ivi*, p. 34 and p. 110.

⁴⁸ É. GRUNER, *Congrès International des Accidents du Travail*, cit., p. 519.

⁴⁹ É. GRUNER, *Congrès International des Accidents du Travail*, cit., p. 365. See also V. VIET, *La course aux techniques d'hygiène et de sécurité*, cit., (online).

⁵⁰ É. GRUNER, *Congrès International des Accidents du Travail*, cit., p. 523.

would not have any value”.⁵¹ Secondly, Édouard Gruner asserts that a unique solution to these questions cannot be brought up in a definitive manner: “Social matters [...] vary with the countries, the temper and habits of their populations, their economic and industrial situation, etc. A resolution, voted by the majority of a Congress, may prove unenforceable in some countries. The multiplicity of the facts and their diversity make generalisations impossible in the field of social economics”.⁵² Thus, every situation is different and calls for different solutions: this conclusion is a guiding principle, and a recurring discourse of the IOWA.

In this context, the IOWA's purpose is not to reach a definitive resolution of the question of workplace accidents compensation and more broadly social insurances, but rather to allow every proposition to be set out, defended and disputed. Despite the predominance and leading position of liberal actors within the association,⁵³ disagreement can deploy: there is no silencing, nor erasing divergent perspectives. On the contrary, congresses are organised precisely to provide a forum for expressing contrasting viewpoints.⁵⁴ In the same way, the Bulletin du Comité permanent gives a comprehensive account, in its bibliography, of as many publications as possible related to these topics, while letting the editor of the review express their opinion without endorsing it.

Some members even acknowledge having changed their position over time. For instance, in the 1894 Milan congress, Ugo Pisa, co-founder of the Milanese Employers' Association for Workplace Accidents and member of the Milanese Chamber of Commerce, admits that his hopes that the private sector would be sufficiently organised to address the question of workplace accidents were disappointed – using the same argument as Georg von Mayr, mentioned above. He states: “Until the first congress held in 1889 in Paris, I was a champion for freedom of insurance. [...] I regret having to admit it, circumstances proved me wrong”.⁵⁵ Therefore, he concedes that the ‘obligation system’ may be the most effective in this matter: “the two countries that had already adopted compulsory insurance are able to show

⁵¹ CONGRÈS INTERNATIONAL DES ACCIDENTS DU TRAVAIL, 2^e session tenue à Berne du 21 au 26 septembre 1891, cit., p. 577.

⁵² *Ibid.*

⁵³ C. MUSTERLE – M. LENGWILER, *Un médiateur entre deux univers concurrents de l'« État social »*, cit., p. 258 and f.

⁵⁴ S. KOTT, *From Transnational Reformist Network to International Organization*, cit., p. 243; CH. MÜLLER – J. VAN DAELE, *Peaks of Internationalism in Social Engineering*, cit., p. 1309.

⁵⁵ CONGRÈS INTERNATIONAL DES ACCIDENTS DU TRAVAIL ET DES ASSURANCES SOCIALES, *Troisième session tenue à Milan du 1^{er} au 6 octobre 1894*, cit., p. 194.

the significant results of these laws [...]. Thanks to the state, the major apparatus they brought to life compensated millions of workers".⁵⁶

Such variations in some members' positioning illustrate that the IOWA does not constitute solely a relay, a proxy for employers' organisations. It also fulfils a more substantive mission, which is to facilitate the formation of opinions on the basis of rational considerations.⁵⁷ This is precisely what the IOWA claimed in its invitation circular for the 1891 Bern congress: "[This congress] does not place itself under the banner of any preconceived system, but aspires solely to be a work of free examination, intended to promote the most effective methods for addressing a major humanitarian question".⁵⁸ Luigi Luzzatti, several times Italian Minister of Commerce and Industry and particularly involved in the reformative associations network concludes on this idea in his distinctive lyrical style: "To us, insurance is not a goal, but a means. The goal is social well-being, but several ways are possible in order to achieve it".⁵⁹

The confrontations staged at the occasion of IOWA congresses prove sometimes to be highly technical and rely on official workplace accident statistics, collected either by states or private organisations.⁶⁰ To engage in a constructive debate, IOWA members regard it as essential to ground their reasoning upon quantitative evidence.⁶¹ The association provides a favourable setting for such discussions, striving to ensure that the most reliable and up-to-date information is made available on an international scale.⁶² In that sense, Numa Droz, Swiss Federal Councillor, president of the 1891 Bern congress organising committee, declares: "We intend to make full use of our right to examine and discuss, while criticising and recommending systems with equal honesty, without losing our spirit of courtesy and tolerance, which is both a necessity in an international meeting such as ours and its particular charm".⁶³ It is worth noting that while the

⁵⁶ *Ibid.*

⁵⁷ CH. MÜLLER – J. VAN DAELE, *Peaks of Internationalism in Social Engineering*, cit., p. 1308.

⁵⁸ CONGRÈS INTERNATIONAL DES ACCIDENTS DU TRAVAIL, 2^e session tenue à Berne du 21 au 26 septembre 1891, cit., p. 577.

⁵⁹ CONGRÈS INTERNATIONAL DES ACCIDENTS DU TRAVAIL ET DES ASSURANCES SOCIALES, *Troisième session tenue à Milan du 1^{er} au 6 octobre 1894*, cit., p. 133.

⁶⁰ See A. HIRSCH, *Statistiques professionnelles et lois sociales*, cit., p. 33 and ff.

⁶¹ Y. BRETON, *Émile Cheysson et l'économie sociale*, cit., p. 184.

⁶² R. GREGAREK, *Le mirage de l'Europe sociale*, cit., p. 113.

⁶³ CONGRÈS INTERNATIONAL DES ACCIDENTS DU TRAVAIL, 2^e session tenue à Berne du 21 au 26 septembre 1891, cit., p. 578.

adoption of specific motions is rejected, one of the few motions consistently submitted at each congress concerns the creation of uniform international statistics on workplace accidents. Indeed, the already existing national statistics do not necessarily adopt the same categories between one another, thereby preventing meaningful international comparison. Additionally, national statistics established more recently do not provide a sufficiently broad temporal perspective and are subject to contingent fluctuations.⁶⁴

Thus, the IOWA constructs a “myth of neutrality”:⁶⁵ many assessments corroborate this statement, with which we concur. The clearest example of this idea is expressed by Édouard Gruner during the 1891 Bern congress, concerning the IOWA’s bulletin: “To furnish the most numerous and well-established data possible, to provide absolutely impartial translations or studies of bills from all countries – such was, from day one, the intended goal. The Committee refrained as much as possible from publishing pleas; it sought instead to gather facts, describe experiments, and collect scattered figures from various publications. It was left to the reader to draw conclusions”.⁶⁶ However, it is obviously impossible to be completely neutral when tackling political and social questions – especially when linked to employers’ organisations. In this instance, Édouard Gruner undoubtedly engages in a certain depoliticisation of the issue.

5. *The notion of humanity: a motivation for debating*

The opening and closing addresses of the International Workplace Accidents Congresses give prominent officials the opportunity to step away from technicality and to tend towards abstraction and elevated generalities. These experienced orators address theoretical concepts in a more lyrical register. They include intentional statements, emphasising the necessity of finding solutions to the problem of compensating injured workers. They invoke the opposition between the ‘Germanic’ and ‘Latin systems’, taking care not to endorse either. For instance, in his opening speech during the 1891 Bern congress, Numa Droz underlines the progress of the idea of

⁶⁴ CONGRÈS INTERNATIONAL DES ACCIDENTS DU TRAVAIL ET DES ASSURANCES SOCIALES, *Troisième session tenue à Milan du 1^{er} au 6 octobre 1894*, cit., p. 219 and ff.; Y. BRETON, *Émile Cheysson et l’économie sociale*, cit., p. 185 and f.

⁶⁵ R. GREGAREK, *Le mirage de l’Europe sociale*, cit., p. 116.

⁶⁶ CONGRÈS INTERNATIONAL DES ACCIDENTS DU TRAVAIL, 2^e session tenue à Berne du 21 au 26 septembre 1891, cit., p. 592.

compulsory insurance since the first congress in 1889 but immediately adds that the role of those meetings is not to choose a system as the preferred one.⁶⁷

Thus, these enlightened elites appeal to the notion of humanity as a guiding principle and a mobilising idea for the participants to address the practical and material issues faced by the working class. This humanitarian concern entails a duty to seek the appropriate solution: the most adequate, the most effective, the simplest one. To come to such a solution, it is necessary to discuss, debate, and deliberate. The most well-put and telling example is without a doubt Luigi Luzzatti's address in his opening speech at the 1894 Milan congress: "Blessed be the light of science; it sheds light upon minds, and, at the same time, it pacifies hearts and makes them beat as one for the healing of social ills".⁶⁸ He describes the moral vocation of the International Workplace Accidents Congresses as "working towards the good of humanity", before mentioning the congress' motto: "Everything for the well-being of the workers, nothing for the vanity of the learned, nothing for the amour-propre of nations".⁶⁹

To Maurice Bellom, IOWA's vice-secretary, the 'Germanic system' is the "consecration of assistance as a duty no longer individual and optional, but social and mandatory".⁷⁰ Compulsory insurance, understood as a legal obligation for the employer to compensate the employee, can be seen as a subsequent form of charitable groups, manifestation of a moral duty of the employer to come to his employee's rescue: to paraphrase Luigi Luzzatti, "insurance is ready to replace charity".⁷¹ This assertion barely comes as an obvious truth to a large part of IOWA members, but rather as a consequence of deficiencies on the part of the private sector and industrialists. Even if according to Numa Droz, the "necessity of insurance is almost not contested anymore" in 1891,⁷² for a significant portion of IOWA members it becomes a threat, leading them to act upstream to

⁶⁷ *Ivi*, p. 577 and f.

⁶⁸ CONGRÈS INTERNATIONAL DES ACCIDENTS DU TRAVAIL ET DES ASSURANCES SOCIALES, *Troisième session tenue à Milan du 1^{er} au 6 octobre 1894*, cit., p. 65.

⁶⁹ *Ivi*, p. 67.

⁷⁰ Maurice Bellom, cited by C. MUSTERLE – M. LENGWILER, *Un médiateur entre deux univers concurrents de l'« État social »*, cit., p. 252.

⁷¹ CONGRÈS INTERNATIONAL DES ACCIDENTS DU TRAVAIL ET DES ASSURANCES SOCIALES, *Troisième session tenue à Milan du 1^{er} au 6 octobre 1894*, cit., p. 66.

⁷² CONGRÈS INTERNATIONAL DES ACCIDENTS DU TRAVAIL, 2^e session tenue à Berne du 21 au 26 septembre 1891, cit., p. 577.

prevent the establishment of compulsory insurance. Despite its flaws,⁷³ the IOWA, one of the first associations to tackle the emerging issue of workplace accidents, paved the way for the construction of social expertise and is instrumental in the founding of the “social Europe” and the ILO.⁷⁴

⁷³ R. GREGAREK, *Le mirage de l'Europe sociale*, cit., p. 106, and p. 114 and ff.; S. KOTT, *From Transnational Reformist Network to International Organization*, cit., p. 249.

⁷⁴ J. MOSES, *The First Modern Risk: Workplace Accidents and the Origins of European Social States*, Cambridge University Press, 2018; N. SOUAMAA, *La France et l'OIT (1890-1953) : vers une Europe sociale ?*, PhD Thesis, Université de Paris 4, 2014; H. KAEUBLE, *The History of Social Europe: International Social Policy and National Welfare States in Europe, from the 1880s to 2020*, in *Themenportal Europäische Geschichte*, 2025 (online: [<https://www.europa.clío-online.de/essay/id/fdae-152515>]).

Davide Sili*

*Patent Pledges and Green Innovation:
Evidence from the United States and Germany*

ABSTRACT

Patent pledges are voluntary commitments by patent holders to waive some or all exclusive rights linked to one or more patents. In this way, patent pledges become privileged tools for the diffusion of knowledge, performing a particularly useful function in the field of green innovation, by virtue of the complementary nature and fragmentation of the related patents.

Starting from some contributions in legal literature on the configurability of obligations connected to patent pledges, this work intends to propose a comparison between the United States and Germany. In particular, the research considers the private law instruments that the two systems propose to bind patent holders who make patent pledges. This reflection can encourage collaboration and the transfer of green technologies.

KEYWORDS

Patent Pledges – Eco-Sustainable Innovation – Contract Law – US – Germany.

SUMMARY: 1. The Role of Patent Pledges in Eco-Sustainable Innovation – 2. Patent Pledges and Contractual Enforcement in the United States – 3. Patent Pledges and Contractual Enforcement in Germany – 4. Conclusion.

1. The Role of Patent Pledges in Eco-Sustainable Innovation

Patent matters have traditionally been oriented by legislators towards protective strategies, considered more effective in promoting innovation. In contrast, other areas of intellectual property have explored more flexible approaches, such as open source within copyright law. However, some private companies, driven by a desire to promote innovation, whether for philanthropic or opportunistic purposes – such as bringing their own

* Davide Sili earned his PhD in Law & Social Change from the University of Roma Tre, after graduating with honors in Law from the same institution. His research focuses on comparative private law, the relationship between law and literature and the history of law.

innovative technologies to market¹ – attempt to weaken patent monopolies through patent pledges.²

Patent pledges are voluntary commitments made by patent owners to grant licenses of one or more patents, for limited or no compensation.³ More specifically, the owners of such patents promise not to sue for infringement third parties who exploit them for innovation. Therefore, patent pledges are not targeted at specific contractual partners but are open to the public. Patent pledges differ from the voluntary transfer of patents to the public, because they do not affect the ownership of the pledged patent (ownership still belongs to the original holder), and they also differ from patent pools, because they may benefit all third parties, not just members of the patent pool.

Although some scholars find anticipatory forms of them,⁴ patent pledges have become frequent since the early years of the 21st century. Initially, patent pledges found diffusion in the software⁵ and biotechnology⁶ sectors, later also in the green one.

Patent pledges facilitate the adoption of patented technology and reduce the obstacles that stop new companies from entering the market.⁷ Because of this, patent pledges are very important in eco-innovation, where many different entities interact with each other to develop new green technologies. One of the first examples of this was when Tesla Motors in June 2014 promised not to «initiate lawsuits against anyone who, in

¹ See J. L. CONTRERAS, *Patent Pledges*, in *Arizona State Law Journal*, 2013, 47, p. 573. J. L. CONTRERAS, *The Evolving Patent Pledges Landscape*, Centre for International Governance Innovation, Paper No. 166, Waterloo (ON – Canada) 2018, pp. 4-8.

² See B. AWAD, *Patent pledges in green technology*, in J. L. CONTRERAS – M. JACOB (ed.), *Patent Pledges. Global Perspectives of Patent Law's Private Ordering Frontier*, Edward Elgar 2017, p. 86.

³ In legal literature, some scholars believe that the exclusion of compensation is an essential element of patent pledges. See J. F. EHNSPERGER; F. TIETZE, *Patent pledges, open IP, or patent pools? Developing taxonomies in the thicket of terminologies*, in *PloS One*, 2019, 8.

⁴ See J. M. BURNETT, *The Host's Dilemma: Strategic Forfeiture in Platform Markets for Informational Goods*, in *Harvard Law Review*, 2011, 124 (8), pp. 1861-1938.

⁵ Between 2004 and 2005, some companies like Nokia, Novell, and Sun made a public statement saying they would not use their patents to stop people from using the Linux operating system.

⁶ In 2010, for example, Monsanto, a corporation that operated in the agrochemical and agricultural biotechnology sector, pledged not to exercise its patent rights where traces of patented genetic material were unintentionally present in a farmer's field.

⁷ G. DE RASSENFOSSE – A. PALANGKARAYA, *Do patent pledges accelerate innovation?*, in *Research Policy*, 2023, 52, p. 2.

good faith, wants to use [their] technology» to produce electric cars.⁸ In January 2015, Toyota followed this example by offering free licenses to use thousands of its patents related to hydrogen fuel cell vehicles.⁹ As a matter of fact, Tesla and Toyota were the first to change how patents are used in the field of green technology, showing «that business models based on tight control over intellectual property are not the only viable pathways to innovation and product development».¹⁰

When looking at patent pledges, legal writings point out important problems about whether these pledges are legally binding.¹¹ Unlike licensing agreements, patent pledges usually are not considered as contracts revealing the pledgor's mere intention to encourage the exploitation of the pledged patent to promote innovation. In these cases, the sole basis of the pledge lies in the pledgor's goodwill. Therefore, there is a risk that the pledgor retracts the pledge and undermines innovation.¹²

More specifically, because many patent pledges are generally worded, the contract law may not apply to them. For this reason, the following sections will examine whether the contract laws of the United States and Germany can make patent promises legally binding. This decision comes from the fact that in both legal systems – common law and civil law – legal writings have started a strong discussion about the role of patent pledges on green innovation. In this way, the intention of the paper is to expand research already started by some scholars.¹³

⁸ E. MUSK, *All Our Patents Are Belong to You*, in *Tesla Blog* (2014). <<http://www.teslamotors.com/blog/all-our-patent-are-belong-you>>.

⁹ See Toyota Usa Newsroom, *Toyota Opens the Door and Invites the Industry to the Hydrogen Future* (2015). <<https://www.toyota-europe.com/news/2015/hydrogen-future>>.

¹⁰ J. L. CONTRERAS, *Patent Pledges*, cit., p. 545.

¹¹ See J. L. CONTRERAS, *Patent pledge enforcement theories*, in J. L. CONTRERAS – M. JACOB (ed.), *Patent Pledges. Global Perspectives of Patent Law's Private Ordering Frontier*, Edward Elgar 2017, pp. 101-116.

¹² In this regard, Contreras speaks of the impermanence of patent pledges, highlighting the absence of legal consequences if patent holders retract their promise. See J. L. CONTRERAS, *Patent Pledges*, cit., p. 597-598.

¹³ See C. MARACKE – A. METZGER, *Playing Nice With Patents: Do Voluntary Non-Aggression Pledges Provide a Sound Basis for Innovation?*, in *North Carolina Journal of Law & Technology*, 2016, 17 (3), pp. 485-524. C. MARACKE – A. METZGER, *Voluntary Patent Pledges: Enforcement in Germany*, in J. L. CONTRERAS – M. JACOB (ed.), *Patent Pledges*, cit., pp. 137-148.

2. Patent Pledges and Contractual Enforcement in the United States

In the United States it is unlikely that patent pledges can be considered contracts. Indeed, in the United States, a contract is a type of agreement between two parties that involves mutual assent and bargain.¹⁴ In this way, there is a significant difference between «the contractual transaction (a direct bargain between two parties) and the more fluid and multilateral set of relationships that characterize patent pledges».¹⁵

Even though under U.S. contract law patent pledges are not binding, legal writing suggests three ways to enforce them by using certain tools from contract law. These methods are helpful when the pledgor changes or takes back their promise in a not-clear way, maybe by hiding the website where the promise was made.¹⁶

First, scholars say that promissory estoppel can be used to enforce patent pledges under U.S. contract law.¹⁷ Effectively, U.S. contract law balances a strict view of contracts with the more flexible idea of promissory estoppel. The definition of promissory estoppel is found in the Restatement Second of Contracts, section 90(1).¹⁸ The doctrine of promissory estoppel has its origins in equity, and it deals with promises which give rise to the prejudicial reliance of a third party, even without mutual agreement and bargain. Specifically, there are three key parts to this doctrine: 1) the promise should make someone reasonably believe they should act or not act; 2) the person acts or chooses not to act; 3) such action or forbearance leads to an unfair result for that person. Promissory estoppel is meant

¹⁴ This assumption can be deduced from the following definition: «Except as stated in Subsection (2), the formation of a contract requires a bargain in which there is a manifestation of mutual assent to the exchange and a consideration. (2) Whether or not there is a bargain a contract may be formed under special rules applicable to formal contracts or under the rules stated in §§ 82-94». Restatement (Second) of Contracts §17(1) (1981).

¹⁵ J. L. CONTRERAS, *Patent pledge enforcement theories*, cit., p. 102. The same idea was already expressed in J. L. CONTRERAS, *A Market Reliance Theory for FRAND Commitments and Other Patent Pledges*, in *Utah Law Review*, 2015, 2, Art. 5, p. 503.

¹⁶ See J. L. CONTRERAS, *A registry for patent pledges*, in J. L. CONTRERAS – M. JACOB (ed.), *Patent Pledges*, cit., pp. 291-292.

¹⁷ For example, see C. MARACKE – A. METZGER, *Playing Nice With Patents*, cit., p. 505.

¹⁸ «A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires». Restatement (Second) of Contracts §90(1) (1981).

to stop the pledgor from denying the existence of a contract for lack of consideration.

Scholars, in extending this doctrine to patent pledges, highlight some practical difficulties. In particular, Maracke and Metzger write:

What if the user was not aware of the patent or did not relate his product or service to the relevant patent claims? What if the user has purchased products that contain protected technology without his knowledge? Proving actual reliance may be challenging in such cases.¹⁹

In this regard, Contreras suggests a solution that can adjust the doctrine of promissory estoppel to deal with the challenges of complementary technological innovations. He develops the “market reliance theory”.²⁰ The key part of this theory is to offer a presumption of reliance that helps the implementer of the pledged patent against the patent holder. This approach would give a strong foundation for defending patent pledges from unfair actions by the patent owner.

Secondly, Contreras suggests another solution based on contract law: creating a system to register patent pledges. It is important to note that registers are around the world «the most common means of conveying information about property rights». ²¹ When it comes to patents, the U.S. Patent and Trademark Office provides a voluntary system for registering patent transfers and licenses. In the first case, registering a patent transfer is not required for the transfer to be legal, but it helps protect the purchaser of a patent from a subsequent purchaser of the same patent²². In the second case «patent licenses need not be recorded in order to survive against subsequent competing licenses». ²³ Registering patent pledges, which might be done voluntarily like the previous examples, could have positive effects. Even though a registration system would not turn a patent pledge into a legally binding agreement, it would create a public record that people can refer to. This would also make it less likely for patent owners to act unfairly, such as taking down a patent pledge from their website to pursue patent infringement actions.

¹⁹ C. MARACKE – A. METZGER, *Playing Nice With Patents*, cit., p. 506.

²⁰ See J. L. CONTRERAS, *A Market Reliance Theory*, cit., pp. 542-543.

²¹ A. BELL – G. PARCHOMOVSKY, *Of Property and Information*, in *Columbia Law Review*, 2016, 116, p. 245.

²² See 35 U.S. Code § 261.

²³ J. L. CONTRERAS, *Patent Pledges*, cit., p. 602.

Thirdly, Vu looks closely at using Creative Commons as an alternative to patent pledges.²⁴ Following open source, Creative Commons uses copyright law to protect different types of work in a flexible way. Open source concerns in general software or other digital products freely available to anyone for use, modification and distribution. Creative Commons are specific set rules that let creators give permission for people to use their work, but only under certain conditions. There are plenty of reasons why applying these rules to patents might not work well. In this regard, Vu writes:

“The high fees and length of time to get a patent reduces the number of patent applicants. On the other hand, copyright automatically attaches, has no direct fees or lengthy waiting times, and thus the pool of copyright holders is much larger. Essentially, everyone has copyrighted material, whether it is an email or a poem haphazardly written on a napkin”.²⁵

However, a Creative Commons system for patents could make patent pledges more certain and reduce the need for trusting the patent holders. In this way, patent holders, losing complete control over their patents, show concretely their intention to promote innovation.

3. Patent Pledges and Contractual Enforcement in Germany

Compared to the United States and other common law systems, German contract law has fewer strict requirements for a contract to be legally binding (Sections 145-157 BGB). German law does not require consideration,²⁶ nor that acceptance be known by the offeror. These two features make it easier for patent pledges to be treated as contracts under German law.

More specifically, patent pledges are covered by German contract law if the wording clearly shows the promisee intends to be legally bound (*Geschäftswille*). In their study, Maracke and Metzger look at different

²⁴ See S. VU, *Pledging Patents Effectively: Copyright and Open Source as a Framework for Patent Pledges*, in *Colorado Technology Law Journal*, 2016, 2, pp. 449-452.

²⁵ S. VU, *Pledging Patents Effectively*, p. 449.

²⁶ «German law does not require consideration for an offer to become binding. There is no real equivalent to the Anglo-American doctrine of consideration». J. ZEKOLL – G. WAGNER (ed.), *Introduction to German Law*, Wolters Kluwer 2019, p. 226.

contractual hypotheses for patent pledges. They suggest two options: a covenant not to sue, which in German law works like a *pactum de non petendo*,²⁷ and an implied patent license. A *pactum de non petendo* is a procedural agreement and it is when the patent holder just says to refrain from taking legal action against someone using their technology to help with innovation. Otherwise, if the wording clearly shows the licensee has real rights to use the patented invention, it creates an implied patent license. Each option produces different legal effects: a *pactum de non petendo* is only a personal commitment, while an implied license is potentially binding on subsequent owners of the patent.

If it is not possible to carry out the above two contractual hypotheses, Maracke and Metzger suggest three ways to enforce patent pledges.

The most feasible solution is based on the idea of using simple consent for patent pledges, extending the solution that the German Federal Court gave in a copyright case called *Vorschaubilder I* in 2010.²⁸ This case was about thumbnail previews in Google's image search in Germany. The Court said that if the owner of the image does not want the image to be shown as a thumbnail, he or she has the duty to provide opt-out solutions to prevent indexing. The Court found that if the image owners do not offer such an option, there is an implied agreement to let Google show the thumbnails. The Court allowed this implied agreement only because the thumbnail feature did not give the user any rights to the image. Furthermore, simple consent is revocable at any time, but, even if revoked, any action for patent infringements committed in the past is precluded. In other words, it is an "accepted use" of intellectual property theoretically applicable also to non-binding patent pledges, «because it belongs to the very nature of simple consent to be without any binding effect for the future and to be revocable at any time».²⁹

The other two solutions are more difficult to implement. They are the unilateral waiver and the theory of *venire contra factum proprium*.

The interpretation of patent pledges as unilateral waivers of patents has been proposed in consequence of the *Mauer-Bilder* case (1995) in copyright law.³⁰ In this case, the German Federal Court refused to let the artists of the Berlin Wall artworks get a portion of the money made from

²⁷ For a comparison of the different legal nature of covenant not to sue under German law and U.S. law, see R. HAUCK, *Rechtsnatur und-wirkungen eines covenant-not-to-sue nach deutschem und US-Patentrecht*, in *Zeitschrift für Geistiges Eigentum*, 2013, 5, pp. 203-229.

²⁸ See BGH I ZR 69/08 – *Vorschaubilder I*.

²⁹ C. MARACKE – A. METZGER, *Playing Nice With Patents*, cit., p. 510.

³⁰ See BGH I ZR 68/93 – *Mauer-Bilder*.

selling parts of the Wall. The Court explained that a unilateral waiver of certain economic rights, such as the right of distribution, is permissible under German Copyright law. In patent law, a unilateral waiver is only possible if it is in written form and submitted to the Patent Office (Section 20 of the German Patent Act). Considering this, since patent pledges are often found on websites, this solution is rarely implementable.³¹

The doctrine of *venire contra factum proprium* is a part of the general rule of good faith (Section 242 of the German Civil Code). Basically, if someone who used a pledged patent is sued by the patent owner who publicly declared the non-assertion of patents, that person can use this doctrine as a defense. But proving this is not a simple matter, thus discouraging the application of this theory.³²

4. Conclusion

Looking at this analysis, a significant fact emerges: how a legal system's contract laws are set can have a big impact on how patent pledges are enforced and whether they actually help drive innovation. It is important to understand what tools a legal system offers to enforce a patent, especially when contract law does not apply. This is especially key in areas where technology is complementary and ownership is spread out, like in the green technology sector. Making patent promises reliable for innovators reduces the risk of infringement actions by opportunistic patent holders and accelerates the pace of technological progress.

³¹ See C. MARACKE – A. METZGER, *Voluntary patent pledges*, cit., pp. 143-144.

³² *Ivi*, pp. 146-147.

Eszter Anna Üveges*

The Hungarian Preparatory Proceeding and the Rule of Law

ABSTRACT

The Hungarian Code of Criminal Procedure – which entered into force on 1 July 2018 – introduced the preparatory proceeding as a new procedural stage preceding the investigation. Its purpose is to determine whether the available information is sufficient to establish a simple suspicion of a criminal offence. This means that, unlike an investigation, the preparatory proceeding may be initiated on the basis of information that does not even reach the level of simple suspicion, while the authorities may employ a broad range of covert investigative measures, including judicially authorized surveillance. This raises fundamental questions concerning the compatibility of the institution with the principles of the rule of law and the protection of the right to privacy.

This paper examines the preparatory proceeding from a rule of law perspective by analysing the relevant provision of the Hungarian Code of Criminal Procedure in light of the Fundamental Law of Hungary, the European Convention on Human Rights and the case law of the European Court of Human Rights. The legal analysis is complemented by publicly available statistical data on the practical operation of preparatory proceedings.

The study argues that the current regulation suffers from serious deficiencies in legal certainty. Key concepts, including the threshold for initiating the proceeding and the notion of a “potential perpetrator” are formulated in vague and indeterminate terms, granting excessive discretion to investigative authorities. As a result, covert measures involving significant interferences with privacy may be applied even where no objectively verifiable criminal suspicion exists. The statutory safeguards are therefore insufficient to ensure meaningful judicial review of the necessity and proportionality of such restrictions on fundamental rights.

The available statistical data reinforce these concerns, as only a relatively small proportion of preparatory proceedings result in the initiation of formal criminal investigations despite the extensive use of covert investigative measures.

The paper concludes that, although covert methods are indispensable for effective law enforcement, their application must be governed by clear legal standards and effective procedural safeguards. In its current form, the Hungarian preparatory

* Dr. Eszter Anna Üveges was admitted to the Faculty of Law of Eötvös Loránd University (ELTE) in 2015. She graduated in 2020 with *summa cum laude* honours and obtained her PhD from the same university on 27 April 2026, also graduating *summa cum laude*. She was an Assistant Lecturer at ELTE from 2024 to 31 August 2026 and has been an Assistant Professor there since 1 September 2026. Alongside her academic career, following graduation she pursued legal practice in a law firm specializing exclusively in criminal law, in line with her research interests. She passed the Hungarian Bar Examination with distinction in 2024 and established her own legal practice.

proceeding fails to satisfy these requirements and therefore raises significant rule of law concerns, making legislative reform necessary.

KEYWORDS

Rule of Law – Rule of Law Concerns – Right to Privacy – Covert Investigative Measures – Preparatory Procedure.

SUMMARY: 1. Opening thoughts – 2. Regulations of the preparatory proceeding – from a critical perspective – 3. The problems – from a rule of law perspective – 4. Concluding remarks

“Knowledge acquired about individuals constitutes power, which may be exercised legitimately or misused.”¹

1. *Opening thoughts*

If we were to ask the person on the street what is required to initiate a criminal proceeding, the answer would probably – and quite rightly – be: suspicion. This, however, has not been true of Hungarian criminal procedure since July 1, 2018.

The Hungarian Act XC of 2017 on the Code of Criminal Procedure (hereinafter: CCP) which entered into force on July 1, 2018, introduced substantial changes to the criminal procedure rules for covert investigation. The legislature created a new legal institution called the preparatory proceeding, which is a non-mandatory procedural stage before the investigation. Through this preparatory proceeding, it became possible to examine information that does not reach the level of suspicion, within the framework of the guarantees provided by the criminal procedure, using covert investigation methods. An investigation, in contrast to the preparatory proceeding, may be conducted on the basis of a simple suspicion of a criminal offense.

The legislator justified the establishment of this legal institution by the need for a unified regulation of covert investigative activities for law enforcement purposes within the framework of criminal procedure. With the creation of the preparatory proceeding, the legislator also introduced a new category, the so-called “covert means”, for covert investigative methods,

¹ L. KORINEK *The Power of Data, the Data of Power*, in *Hungarian Law*, 2025, p. 205 and ff., p. 207.

that can be used only during criminal procedure – during the preparatory proceeding and the investigation. By contrast, covert intelligence gathering for national security or policing purposes continues, under the current rules, to be carried out on the basis of sectoral legislation.

The creation of the preparatory proceeding provoked a strong response and has been criticized and questioned from the perspective of the principles of the rule of law. The criticism can be explained by the fact that the legal framework allows criminal proceeding to be initiated against virtually anyone on the basis of information that does not even reach the level of simple suspicion, while the authorities conducting the process may employ covert methods. A wide range of covert investigative tools is available to the authority conducting the preparatory proceeding, even though the use of such tools entails a serious restriction of the right to privacy. At the very beginning, it is necessary to stress that: in accordance with the principles of the rule of law, restrictions on fundamental rights may only be imposed on the basis of reasons defined by law, in pursuit of a legitimate aim, and in compliance with the principles of necessity and proportionality.

The central problem is how the necessity and proportionality of an activity entailing a serious restriction of fundamental rights can be justified in cases where the conduct of the person concerned essentially lacks any features of criminality.

Before turning to the presentation of the rules of the preparatory proceeding and to the expression of my critical opinion, I find it necessary to set out the following. It is not my intention to question the existence, use, or necessity of covert investigative tools. Given the inherently clandestine nature of crime, the use of similarly covert methods in the fights against it appears natural.² Keeping pace with the rapidly developing world and digitalization is difficult, which poses new challenges for law enforcement authorities as well. Covert investigative tools are indispensable instruments for effective and successful law enforcement. The question to be examined, therefore, is never the legitimacy of these tools, but rather the adequacy of the regulation in terms of detail, transparency, and compliance with the principles of the rule of law.

From this perspective, my study undertakes a comprehensive examination of the rules of the preparatory proceeding.

First, it analyses the regulatory framework in detail, with particular attention to the uncertainties and problems embedded in its specific

² P. NYESTE – F. SZENDREI (eds.), *Handbook of Criminal Intelligence*, Dialóg Campus Kiadó 2019, p. 59.

provisions. For the examination of the detailed provisions, I relied on the simplest of tools: language itself. By means of this straightforward instrument, the shortcomings embedded in the detailed rules, as well as their gravity, can be identified.

Second, the analysis considers to what extent this legal institution can be aligned with the principles of the rule of law, with particular regard to the constitutional requirements for restricting fundamental rights and the guarantees necessary to protect them effectively. In this respect, the Fundamental Law of Hungary, the European Convention on Human Rights, and the jurisprudence of the European Court of Human Rights have served as key points of reference.

Finally, after the theoretical analysis, I find it important to also look at the statistical data that are available – even if they are rather limited. Examining these figures allows the study to bring in practical experience as well, so that the analysis is not confined solely to abstract legal reasoning but also reflects how the preparatory proceeding operates in practice.

2. Regulations of the preparatory proceeding – from a critical perspective

According to Section 340 (1) of the CCP, the purpose of the preparatory proceeding is to determine whether there is any suspicion of a crime. This procedure may be conducted by the prosecution service and by investigative authorities vested with investigative powers under the CPP. In addition, other bodies authorized by sectoral legislation – such as the National Protective Service and the Counter Terrorism Centre – may also initiate and conduct preparatory proceedings within their respective competences.³

The preparatory proceeding is grounded in what is often described, in colloquial terms, as a mere “suspicion of suspicion”. The so-called “suspicion of suspicion”, which forms the basis of the preparatory proceeding, may be divided into three categories based on the CCP. First, information that comes to the attention of the authorities *ex officio*; second, information contained in a complaint following the dismissal of that complaint; and third, information included in the initiative of the authority conducting covert information gathering, where such gathering has been carried out under sectoral legislation, that is not under the CCP.⁴

³ CCP, Section 339 (2)-(3).

⁴ CCP, Section 340 (3).

The key problem with the possible grounds of the preparatory proceeding is the undefined boundary between a “suspicion of suspicion” and an actual suspicion. More broadly, the challenge lies in establishing well-founded criteria to determine which behaviors are neutral from a criminal perspective, which may give rise to a “suspicion of suspicion”, and which reach the level of “ordinary” suspicion. This ambiguity presents a serious challenge to law enforcement authorities and encourages subjective discretion. But the subjective assessment carries the risk that authorities intervene in processes devoid of any criminal nature via the preparatory proceeding. If we cannot even establish whether an offence might have occurred – or whether a particular person may have committed it – then law enforcement agencies may end up interfering in normal, lawful processes without any indication of criminal activity.⁵

The problem becomes even more pressing in light of the examination of the covert means that may be applied during the preparatory proceeding.

The use of covert investigative tools necessarily entails limitations on fundamental rights. According to the definition by the legislator in Section 214 (1) of the CCP, covert instruments involve special activities carried out by authorized bodies within criminal proceedings without the knowledge of the person concerned. These activities inherently restrict the inviolability of the home, the right to privacy, the secrecy of correspondence, and the protection of personal data. A distinction is made between covert means not requiring authorization, those requiring prosecutorial authorization, and those subject to judicial authorization; the classification is based on the gravity of the restriction imposed on the fundamental right concerned.

During the preparatory proceeding it is allowed to use covert means not requiring authorization, to use prosecutorial and judicially authorized covert instruments, and it is also allowed to conduct data acquisition activities; all aimed at reaching a decision on whether a simple suspicion of a criminal offence exists. These covert means include, among other, the secret interception and recording of communications, the surveillance of payment transactions, the surveillance and secret recording of persons and premises, the monitoring of electronic data and online activities, as well as the deployment of the undercover investigators and covert cooperation with informants.⁶

It can be stated with confidence: the legislature allows the use of tools

⁵ L. KORINEK, *Paradoxes in Criminology and Criminal Justice*, ORAC Kiadó, 2023. ff., p. 27

⁶ CCP, Section 341.

that reveal the entire private life. But for the preparatory proceeding to be acceptable in line with the principles of the rule of law, there must be a solid system of safeguards in place. This means setting out clear limits on when it can be used, alongside strict and verifiable conditions for applying covert investigative tools. Without such guarantees, the restriction of fundamental rights risks becoming arbitrary and open to abuse, something that a democratic state governed by the rule of law cannot tolerate.

The applicability of covert means not requiring authorization, as well as those subject to prosecutorial authorization, is not linked to any personal condition. This means that during the preparatory proceeding these covert means can be used to investigate any crime, against anyone – without any personal or objective limitation.

In the case of covert means subject to judicial authorization, certain “limitations” can be identified.

As an “objective limitation”, Section 234 (2)-(3) of the CCP states as a general rule that the use of covert means requiring judicial authorization is permitted in cases of intentional offences punishable by imprisonment for five years or more; however, the law also allows their application, for certain specified offences, in the case of intentional crimes punishable by up to three years of imprisonment.

About this regulation, the interpretative problem stems from the very nature of the preparatory proceeding. As noted, the basis of the procedure is – we can state that – any information that does not reach the level of simple suspicion. Where so limited information is available that even simple suspicion cannot be established, no factual or sufficiently grounded legal classification of the offence and penalty is possible. Any such decision rests instead on the subjective judgment of the authorities, accompanied by the temptation to employ covert investigative tools requiring judicial authorization. For this reason, in my view, the “objective limitation” cannot operate as genuine restriction.

As a “personal limitation” according to Section 343 (1) of the CCP, covert tools requiring judicial authorization may be used during the preparatory proceeding against a person “who may be considered as a potential perpetrator of a criminal offence” or those “reasonably believed to maintain direct or indirect contact with such individuals”. The expression “potential perpetrator” is alien to the doctrinal framework of criminal procedure: it corresponds neither to the established notion of a suspect nor to the CCP’s concept of a “person reasonably suspected of committing a crime”.⁷

⁷ CCP, Section 38.

Given that judicially authorized covert means impose the most severe restriction on rights, stricter conditions should apply than to measures requiring only prosecutorial or no authorization. Yet the regulation lacks any clear criteria for identifying a “potential perpetrator”, leaving the matter – as with numerous other issues requiring determination – entirely to the discretion of the authorities. This vagueness is compounded by the provision extending covert tools to anyone in direct or indirect contact with such a person, leaving the “personal limit” essentially meaningless. In practice, the CCP legitimizes surveillance on the basis of a logical tautology, since anyone can be said to have some indirect connection with an unknown “potential perpetrator”.⁸ And it must be emphasized – because it shouldn’t be forgotten – that all this occurs in a procedure that does not even require the existence of simple suspicion.

A preparatory proceeding can last for a period of up to six months or, in cases where the subject of the proceeding is an offence that may also be examined through covert means requiring judicial authorization even for a period of up to nine months.⁹

If the data acquired during a preparatory proceeding indicate that the suspicion of a criminal offence can be established, an investigation must be ordered.¹⁰

Otherwise, the preparatory proceeding must be terminated if the data obtained do not substantiate the suspicion of a criminal offence, if its continuation is unlikely to yield any result, or if the statutory time limit has expired, and any information gathered therein may not be used as evidence in criminal proceedings.¹¹

During the preparatory proceeding, therefore, the authorities have access to a wide range of covert investigative means, while the statutory time limit available for conducting the proceeding can hardly be regarded as short. This combination raises concerns, as the extended timeframe together with the broad arsenal of covert tools may result in significant interference with fundamental rights without the procedural safeguards that are otherwise attached to the status of a suspect in formal criminal proceedings.

However, if it comes to the problem of preparatory proceeding the

⁸ K. PARTI *Statutory Safeguards Relating to the Covert Interception of Electronic Communications in Hungary*, in *Miskolc Legal Review*, 2019, p. 302 and ff., p. 308-309.

⁹ CCP, Section 344 (1).

¹⁰ CCP, Section 344 (5).

¹¹ CCP, Section 346 (1)-(2).

situation is paradoxical: the authorities possess only weak information that does not even reach the level of suspicion, and in order to substantiate it, increasingly powerful instruments are required.

Yet, the application of the most effective covert means must be subjected to the strictest conditions. From the standpoint of procedural safeguards it becomes evident that the vague and ambiguous wording of the current regulation cannot qualify as a rigorous system of requirements; rather, it undermines legal certainty and opens the door to arbitrary interpretation.

3. The problems – from a rule of law perspective

The right to privacy is a fundamentally protected right that stems from human dignity and encompasses multiple entitlements such as the inviolability of the home, the secrecy of private communications, and the protection of personal data. The right to privacy is enshrined not only in the Hungarian Fundamental Law¹² but also in numerous international legal instruments, most notably the European Convention on Human Rights¹³. With regard to the content of the right to privacy, numerous court decisions have been delivered, and both the Constitutional Court of Hungary and the European Court of Human Rights have consistently interpreted these rights broadly, affording them a high degree of protection.

The right to privacy does not fall into the category of non-restrictable rights. In constitutional states, public authorities and the legislature have the possibility, in the interest of the public good, social order, and societal peace, to enter the realms of individual freedom and under certain conditions, to impose restrictions on particular rights. But the restriction of fundamental rights in a constitutional democracy is subject to strict conditions, and this applies with heightened intensity in the context of the right to privacy.

The Fundamental Law of Hungary, the European Convention on Human Rights, and the CCP together set a framework of requirements that any limitation on such rights – and the application of covert intelligence methods in particular – must satisfy. These requirements include legality (a statutory basis and clarity), a legitimate aim, and compliance with the principles of necessity and proportionality. In addition, the European

¹² Fundamental Law of Hungary, Article VI.

¹³ European Convention on Human Rights, Article 8.

Court of Human Rights requires that the institutions entrusted with the protection of fundamental rights under the European Convention on Human Rights be genuinely capable of enforcing the guarantees.¹⁴

On the basis of the rules set out above it can be established that, although the formal requirement of legality appears to be satisfied – given that the use of covert measures in preparatory proceedings is regulated at the statutory level by the CCP – the substantive elements of the legality are manifestly deficient. The norms governing the preparatory proceeding are drafted in such vague and indeterminate terms that they remain unpredictable and open to arbitrary interpretation, thereby failing to satisfy the requirements of legal certainty.

The concept of a mere “suspicion of suspicion” cannot be defined with any precision, leaving the threshold to the state intervention dangerously unclear. Likewise, the expression “a person who may be considered a potential perpetrator of a criminal offence” is practically meaningless, as it does not correspond to any recognized category of criminal procedure. By relying on such ambiguous notions, the law grants excessive discretion for the authorities and weakens essential safeguards.

This is particularly problematic in light of the fact that especially in relation to covert means and proceeding, the European Court of Human Rights has emphasized that the person concerned must have a concrete connection to the purpose of their application (in criminal proceedings, to the offence itself), and that this connection must be capable of verification by the authorizing authority.¹⁵ In other judgements, the European Court of Human Rights has pointed out that the secrecy surrounding interferences with fundamental rights, together with the tools and procedures employed, grants the executive branch “unforeseeable” possibilities with respect to the private sphere and this is exactly why it must be ensured that the procedures themselves provide sufficient safeguards to secure the effective protection of individual rights.¹⁶

Given these deficiencies, it is evident that the regulatory framework governing the preparatory proceeding fails to meet the constitutional standards of legality, necessity and proportionality.

As a result of these regulations, the judicial authority responsible for authorizing covert intelligence methods is not in a position to conduct a

¹⁴ *Ekimdzhiiev and others v. Bulgaria, Application no. 70078/12.*

¹⁵ *Szabó and Vissy v. Hungary, Application no. 37138/14.*

¹⁶ *Klass and others v. Germany, Application no. 5029/71., Malone v. United Kingdom, Application no. 8691/79.*

meaningful assessment of whether such measures are indeed necessary and proportionate, due to the absence of clearly defined legal criteria.

However, compliance with the standards of necessity and proportionality, as well as the provision of adequate reasoning for the decision, is indispensable for the ex-post review of the legality of restrictions on fundamental rights. Without this, the authorization and application of covert investigative tools risk being based on formulaic decisions lacking substantive consideration, which is highly problematic from the perspective of fundamental human rights.

And it should be noted that, in my view, these serious concerns are not mitigated by the fact that the CCP provides for prosecutorial supervision during the preparatory proceedings as a form of procedural guarantee. The constitutional concerns, in and of themselves, call into question the very legitimacy of the legal institution.

4. Concluding remarks

In light of the uncertainties and indeterminate concepts revealed in the detailed rules of the preparatory proceeding, and considering the constitutional requirements for restricting the right to privacy, it must be firmly concluded that the preparatory proceeding, in its current form, is irreconcilable with the fundamental principles demanded by a democratic state governed by the rule of law.

After conducting a grammatical analysis and critique of the procedural rules, and evaluating them in light of the principles of the rule of law, it becomes necessary to turn to practical experiences. Examining how the preparatory proceeding operates in practice provides essential insight into whether the theoretical guarantees are effectively realized, and whether the application of covert means within this framework respects the fundamental rights it inevitably restricts.

The public statistics – published by the Office of the Prosecutor General – are available concerning preparatory proceedings and the covert means applied therein, and the investigations ordered on their basis. The statistical data are strikingly severe.

Between 2018 and 2022, the proportion of the preparatory proceedings leading to the initiation of formal criminal investigations remained consistently low – ranging from 4.4% to 26.3% annually – with a slight increase to 31.3% in 2023; it was only 28.7% in 2024. At the same

time, the number of decisions authorizing covert surveillance measures rose significantly, peaking at 2,491 in 2022. These figures underscore a disproportionate use of covert techniques in a legal framework that lacks adequate normative and procedural safeguards.

The data – or more precisely, their weight – is illustrated in the following figure, which has been compiled by the author.¹⁷

The main perspective from which these numbers should be viewed is that the number of covert means applied ought to be proportionate to the actual outcomes of the preparatory proceedings. Between the second half of 2018 and 2024, a total of 10,607 preparatory proceedings were launched, and in these, 13,436 decisions were made on the use of covert means. This number, taken on its own, is not especially striking. But when evaluating it, we have to keep in mind that since the second half of 2018 approximately 20% of preparatory proceedings have actually led to the establishment of simple suspicion and the opening of a formal investigation.

On the basis of the statistical data, the question to be examined is whether the use of covert means has in fact complied with the legislative expectations set out in Section 214 (5) of the CCP. In other words, whether it could genuinely be assumed that the information or evidence sought was indispensable for achieving the purposes of the criminal proceedings and could not be obtained by other means; whether due consideration was given to the requirement that the use of covert means must not result in a disproportionate restriction of the fundamental rights of the person concerned or of others compared to the legitimate aim pursued; and whether it was realistically probable that the use of covert means would yield information or evidence related to the offense.

In my view, in light of the number of investigations ordered as a result of preparatory proceedings, the answer to these questions must be negative.

Quoting Géza Finszter, *“a process can be considered constitutional if it is characterized by impersonality, normativity, a limited and controlled exercise of punitive power, and where human dignity is not compromised”*.¹⁸

The absence of clear legal standards, the insufficiency of safeguards, and the high degree of discretionary power granted to investigative authorities all contribute to a regulatory environment in which the right to privacy is insufficiently protected.

¹⁷ Diagram created by the author. Based on the data published in the Statistical Bulletin of the Office of the Prosecutor General: <https://ugyeszseg.hu/wp-content/uploads/2025/10/buntetojogi-szakag-2024.pdf>.

¹⁸ G. FINSZTER *Constitutional Criminal Procedure and Criminal Investigation*, in *Fundamentum*, 1997, p. 109 and ff., p. 111.

If we accept that serious covert means could be applied on the basis of subjective assessment, this would pave the way for total prevention, along which even conduct devoid of any criminality could at any time be examined within the framework of criminal proceeding. Such a course is not acceptable in a democratic state governed by the rule of law and it clearly calls for reform to restore predictability, transparency, and genuine protection of fundamental rights. Because fundamental rights and the rule of law must be protected, even if the protection leads to – in theory – “less” effective law enforcement.

Lou Vanbeselaere*

*Autonomous interpretation:
The CJEU's duty to preserve effectiveness,
consistency and coherence in EU law*

ABSTRACT

This article argues that autonomous interpretation is not merely a technique available to the Court of Justice of the European Union, but, in certain circumstances, a duty. That duty arises where an EU instrument neither defines a concept nor refers its meaning to national law, and where divergent national interpretations would threaten the uniform, coherent and effective application of EU law. Building on the Court's case law, with *Ekro* as a foundational case, the article develops a two-step model for identifying when autonomous interpretation is required: first, the concept must be undefined and not expressly delegated to national law; second, divergent interpretations must risk undermining the objectives or consistent application of the EU measure. The article situates this duty within the autonomy of the EU legal order, the principle of effectiveness, Article 197 TFEU and the preliminary ruling procedure. It further examines the political logic of legislative silence, showing how ambiguity may facilitate agreement between Member States while shifting responsibility for clarification to the Court. The article then considers how autonomous meaning is constructed, demonstrating that the Court relies on a cumulative combination of textual, contextual and teleological reasoning rather than on literal interpretation alone. Against that background, particular attention is paid to the policy domain of EU criminal law, where the demand for uniformity must be reconciled with the diversity and constitutional sensitivity of national criminal justice systems. These tensions are illustrated through Directive 2016/800, whose undefined concept of 'criminal proceedings' determines the scope of the procedural safeguards afforded to children. The article concludes that, where such ambiguity leads to fragmentation and unequal protection, the Court is obliged to establish an autonomous EU meaning.

KEYWORDS

Autonomous Interpretation – Article 197 TFEU – Criminal Proceedings – Case 327/82 *Ekro v Produktschap*.

* Lou Vanbeselaere is a PhD researcher in EU criminal law at Ghent University and a member of the Institute for International Research on Criminal Policy. His research is funded by the Research Foundation Flanders, project G042223N, and focuses on the interpretative role of the Court of Justice of the European Union in criminal matters, with particular attention to autonomous interpretation.

SUMMARY: 1. Introduction: a need for uniformity in a fragmented legal landscape – 2. The principle of autonomy and the origin of the doctrine – 3. When does the duty arise? A two-step model – 4. Beyond doctrine: the political logic of interpretation – 5. How the court interprets ‘autonomously’ – 6. Autonomous interpretation in EU criminal law: tensions, trends, and the case of ‘Criminal Proceedings’.

1. Introduction: a need for uniformity in a fragmented legal landscape

For EU law to function properly, it needs not only clear legal rules, but also a consistent way of interpreting them across all Member States. Because the EU brings together many languages and legal systems, there is always a risk that the same legal terms will be understood or applied differently in different countries, especially when those terms are not clearly defined in EU legislation. When these differences persist, they can undermine the clarity, consistency, and legal certainty of EU law as a whole.¹

The Court of Justice of the European Union (CJEU) has responded to this challenge through the development of so-called autonomous concepts, legal terms that are given an independent and uniform meaning at the EU level, regardless of how they may be understood in national law. This technique of interpretation is traditionally seen as a means of preserving the effectiveness and supremacy of Union law.

However, this paper argues that autonomous interpretation is not merely a doctrinal tool at the CJEU’s disposal. It is, under specific conditions, both a legal and a normative obligation. The legal obligation flows from the structure of EU law itself: where the text of an EU legal instrument neither defines a concept nor refers to national law for its interpretation, and where divergent national understandings would jeopardise the uniform and effective application of that law, the Court must assume its role as constitutional arbiter and provide an autonomous interpretation. The normative obligation, by contrast, is grounded in broader constitutional principles such as legal certainty, equality before the law, and the protection of individual rights, which would be undermined if key EU legal concepts were left to diverging national understandings. In such cases, the principle of effectiveness (*effet utile*), read in light of Article

¹ E. PAUNIO – J. RAITIO, *Taking Language Seriously: An Analysis of Linguistic Reasoning and Its Implications in EU Law*, in *European Law Journal*, 2010, p. 395 and ff.; V. MITSILEGAS, *Autonomous Concepts, Diversity Management and Mutual Trust in Europe’s Area of Criminal Justice*, in *Common Market Law Review*, 2020, p. 45.

197 TFEU and the structural logic of the preliminary ruling procedure, generates a duty of autonomous interpretation.

To substantiate this claim, the paper proceeds in six parts. It begins by situating the principle of autonomy within the broader framework of EU law. It then examines the rationale and doctrinal basis for autonomous interpretation, developing a two-step model for identifying when the duty arises. This is followed by a discussion of the political logic underlying legislative silence and judicial discretion, as well as the methodological tools used by the Court. A striking example of the Court's duty to engage in autonomous interpretation arises in the context of Directive 2016/800 on procedural safeguards for children, which relies on the undefined procedural concept of "criminal proceedings." The case study illustrates both the necessity and the constitutional significance of autonomous interpretation in ensuring the effective protection of procedural rights within an integrated legal space.

2. *The principle of autonomy and the origin of the doctrine*

The European Union is widely recognised as a *sui generis* legal order, one that transcends the conventional framework of international treaties. While the EU was initially rooted in international agreements, it has evolved into an autonomous legal system with both supranational authority and constitutional characteristics, forming a distinct legal order that goes beyond traditional international law. This unique legal structure shapes and governs not only the EU's institutional dynamics but also the internal and external obligations of its Member States.²

The autonomy of EU law has been central to several landmark rulings by the Court of Justice of the European Union (CJEU). In Opinion 2/13, the Court invoked this principle to justify the EU's non-accession to the

² J. VAN DE BEETEN, *On Metaphor and Meaning: The Autonomy of EU Legal Order through the Lens of Project and System*, in *European Papers*, 2023, p. 1141; C. CONTARTESE, *The Autonomy of the EU Legal Order in the ECJ's External Relations Case Law: From the "Essential" to the "Specific" Characteristics of the Union and Back Again*, in *Common Market Law Review*, 2017, p. 1627; P. KOUTRAKOS, *The Anatomy of Autonomy: Themes and Perspectives on an Elusive Principle*, in *ECB Legal Conference 2019*, (European Central Bank 2019), p. 92; M. KLAMERT, *The Autonomy of the EU (and of EU Law): Through the Kaleidoscope*, in *European Law Review*, 2017, p. 815; D. KUKOVEC, *The Autonomy of EU Law, Legal Theory and European Integration*, in *European Papers*, 2024.

European Convention on Human Rights, while in *Achmea*, it invalidated investor-state dispute settlement mechanisms under intra-EU bilateral investment treaties for being incompatible with the EU legal order.³ These cases underscore the fundamental status of autonomy as a guiding constitutional principle within the Union.

From this broader principle emerges the doctrine of autonomous interpretation. Because EU law operates as a self-contained and self-referential legal system, the interpretation of its legal concepts cannot be left to the divergent meanings found in national systems. Instead, such concepts must be interpreted uniformly across the Union. The CJEU has consistently advanced this interpretative approach, assigning Union-specific meanings to legal terms to ensure coherence, legal certainty, and the effective functioning of EU law. In doing so, the Court reinforces the internal logic of the EU legal order and maintains its distinctiveness in relation to Member State legal systems.⁴ While this autonomy means that the CJEU develops its own interpretative framework, it does not imply total isolation, as the Court has occasionally acknowledged broader principles of international law where these align with its constitutional logic.⁵

Through the technique of autonomous interpretation, the CJEU establishes that certain legal terms must be given a uniform and independent meaning throughout the EU. This approach is typically justified by the Court by reference to the need to ensure the consistent and uniform application of Union law and uphold the principle of equality among Member States.⁶ It is important to note at the outset that this practice, rooted in the principle of autonomy, is by no means exclusive to the CJEU. The ECtHR (European Court of Human Rights) has likewise developed a doctrine of autonomous interpretation to ensure effective human rights protection and to prevent Member States from arbitrarily relying on national classifications. A prime example is the application of

³ Opinion 2/13, *Accession of the European Union to the ECHR*, ECLI:EU:C:2014:2454, paras 179–200; Case C-284/16, *Slowakische Republik v Achmea BV*, ECLI:EU:C:2018:158, paras 33 and 35.

⁴ V. MITSILEGAS, *Autonomous Concepts*, cit., p. 47.

⁵ S. DOROGA – A. MERCESCU, *A Call to Impossibility: The Methodology of Interpretation at the European Court of Justice and the PSPP Ruling*, in *European Journal of Legal Studies*, 2021, p. 93; Case C-162/96 *Racke v Hauptzollamt Mainz*, ECLI:EU:C:1998:293.

⁶ See, among others: Case C-287/98 *Grand Duchy of Luxembourg v Linster*, ECLI:EU:C:2000:468, para. 43; Case C-279/20 *Bundesrepublik Deutschland v XC*, ECLI:EU:C:2022:618, para. 37; Case C-5/08 *Infopaq International*, ECLI:EU:C:2009:465, para. 27; Case C-467/08 *Padawan*, ECLI:EU:C:2010:620, para. 32; Case C-34/10 *Brüstle v Greenpeace eV*, ECLI:EU:C:2011:669, para. 25.

the *Engel* criteria, through which the ECtHR determines the autonomous meaning of a ‘criminal charge’ in order to assess whether Article 6 ECHR fair trial guarantees apply.⁷ This method reflects the Court’s position that key concepts of the Convention must be interpreted independently of national understandings, thereby limiting the discretion of the defendant state and safeguarding uniform and effective rights protection across the Convention system.⁸ A similar rationale underpins the approach of the Court of Justice, namely the need to ensure a partially uniform level of fundamental rights protection.⁹ In the context of EU criminal law, autonomous interpretation extends to mutual recognition of judicial decisions and substantive criminal law approximation, where the Court stresses the need for uniform and effective application of EU law as well.¹⁰

The notion of autonomous interpretation was first formally articulated by the CJEU in the *Ekro* case. In this case, a Dutch meat exporter, Ekro BV, applied for export refunds under an EU regulation after exporting veal to Vatican City. The dispute centred on whether certain cuts, which included a piece known as the “thin flank,” were eligible for a refund. The Dutch authorities denied the claim, arguing that the inclusion of the thin flank disqualified the entire cut. Ekro contended that this component was minor and should not affect the overall eligibility for refund.¹¹

The Court held that the meaning of the term “thin flank” could not be determined by reference to national definitions or butchering practices. Instead, it required a uniform, EU-level interpretation, grounded in the context and objectives of the regulation. Crucially, the Court stated:

“The need for a uniform application of Community law and the principle of equality require that the terms of a provision of Community law which makes no express reference to the law of the Member States

⁷ *Engel and Others v. Netherlands*, App. no. 5100/71, ECtHR, 8 June 1976, 1 EHRR 647; G. LETSAS, *The Truth in Autonomous Concepts: How to Interpret the ECHR*, in *European Journal of International Law*, 2004, p. 279.

⁸ K. TRYKHLIB, *Analysis of Autonomous Concepts in the Practice of the European Court of Human Rights*, in *Comparative Law Review*, 2022, p. 459; S. GREER, *The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights*, Council of Europe Publishing 2000, pp. 18–19.

⁹ See L. VANBESELAERE, *Youth justice or criminal law? The scope of ‘judicial cooperation in criminal matters’*, in *New Journal of European Criminal Law*, 2025.

¹⁰ See, for example: Case C-66/08 *Kozłowski*, ECLI:EU:C:2008:437; Case C-158/21 *Puig Gordi and Others*, ECLI:EU:C:2022:252; Case C-566/19 *Parquet général du Grand-Duché de Luxembourg (Procureurs de Lyon et Tours)*, ECLI:EU:C:2021:765.

¹¹ Case 327/82 *Ekro v Produktschap voor Vee en Vlees*, ECLI:EU:C:1984:11.

for the purpose of determining its meaning and scope must normally be given an independent and uniform interpretation throughout the Community; that interpretation must take into account the context of the provision and the purpose of the relevant regulations.”¹²

Ekro thus established the core conditions for triggering autonomous interpretation: the absence of reference to national law, and the need for a uniform and effective application of EU provisions.

However, the origins of this approach can be traced further back to the *Unger* case. There, the Court ruled that the term “worker” under EU law must be given an autonomous meaning. It explicitly rejected the idea that such concepts could be left to national definitions, stressing that doing so would undermine the effectiveness and objectives of the Treaty. The Court famously declared that “the concept of ‘worker’ in the said articles does not therefore relate to national law, but to Community law”. This early recognition laid the groundwork for what would become one of the cornerstones of EU legal interpretation.¹³

3. When does the duty arise? A two-step model

The rationale behind autonomous interpretation is rooted in the need to guarantee the effectiveness of EU law.¹⁴ For EU legislation to operate effectively, Member States must apply EU legal concepts in a consistent and coordinated manner. In this paper, consistency refers to uniform application across Member States, coherence to the structural integrity of the EU legal order, and effectiveness (*effet utile*) to the capacity of EU law to achieve its intended objectives, as reflected in Article 197 TFEU. These dimensions are closely related and often invoked together in the Court’s reasoning, but they should be analytically distinguished. National authorities must therefore interpret key terms in a way that safeguards all three, avoiding arbitrariness and divergent applications that could jeopardise consistency and thus effectiveness of Union law.

When an EU legal instrument uses a term without providing a precise definition, it falls to the CJEU to ensure that the term

¹² *Ivi*, para 11.

¹³ Case 75/63 *Unger v Bedrijfsvereniging voor Detailhandel en Ambachten*, [1964] ECR 177, 184.

¹⁴ Case C-129/14 PPU *Spasic*, ECLI:EU:C:2014:586, para. 81.

is interpreted uniformly across all Member States. The doctrine of autonomous interpretation ensures that essential legal concepts are not left to the discretion of national authorities, an approach that could invite inconsistency across Member States and undermine the effectiveness of EU law. Instead, they are given an independent, EU-wide meaning that safeguards the consistency of national application and thus the effectiveness of Union legislation.¹⁵ Some authors have even argued that ensuring the uniform application and interpretation of EU law constitutes the very *raison d'être* of the CJEU.¹⁶ Given that this rationale is the guiding basis for autonomous interpretation, it is key to understand that autonomous interpretation is needed when the effectiveness of the provision or instrument is hindered by a common misunderstanding of a term. The rule for autonomous interpretation is that “*since neither that provision nor that directive contains a definition of that concept and that provision makes no reference to national law as regards the meaning to be given to it, that concept, (...) must be regarded as an autonomous concept of EU law*”.¹⁷

Blindly following this logic, any term in EU law, including even basic connectors such as “and” or “or”, that are not explicitly assigned a national definition could, in theory, be regarded as an autonomous concept requiring uniform interpretation across Member States. While such an approach would be excessive and impractical, it highlights the theoretical breadth of autonomous interpretation. In practice, the determining factor for whether a term requires an autonomous EU meaning is its potential impact on the effectiveness of Union law. Divergent national interpretations risk undermining consistency of application across Member States, and thereby frustrating the effectiveness of the provision. In such cases, it becomes necessary for the CJEU to interpret the term autonomously, ensuring legal certainty across the Union. This is where the concept of “duty” becomes relevant. The need for an effective and uniform interpretation of EU law imposes an obligation on the CJEU to engage in autonomous interpretation when necessary. This interplay between necessity and duty can also be understood as a pre-legislative and post-legislative dynamic. During the legislative process, Member States have the discretion to define legal terms explicitly within EU instruments, ensuring a commonly

¹⁵ Other authors have labelled this a “principle”. See M. GOCIU, *The Principle of Autonomous Interpretation and Limits of Member States’ Courts in Interpreting EU Law*, in *Challenges of the Knowledge Society*, 2023, p. 285.

¹⁶ M. ȘANDRU – M. BANU – D. CĂLIN, *Procedura trimiterii preliminare*, C. H. Beck Publishing House 2013, p. 610; M. GOCIU, *The Principle of Autonomous Interpretation*, cit.

¹⁷ Case C-126/23 *Burdene*, ECLI:EU:C:2024:488, para. 36.

understood meaning. However, once a legal instrument is adopted, the relevant dynamic shifts entirely to the interpretation level, unless the text explicitly refers to national law for defining specific terms, or the definition is given in the text itself. In the absence of such references, the CJEU has a duty to apply autonomous interpretation, ensuring that the meaning of key legal concepts is determined at the EU level rather than being subject to divergent national interpretations.

Article 197 TFEU provides that “effective implementation of Union law by the Member States, which is essential for the proper functioning of the Union, shall be regarded as a matter of common interest.”¹⁸ This formulation affirms that the effective application of EU law is not only a systemic necessity, but also a shared objective of all Member States. It follows that where legal ambiguity threatens the uniform operation of EU law, both the Member States and the Court of Justice bear responsibility for preserving its integrity and effectiveness. This shared responsibility is operationalised through the preliminary reference procedure.¹⁹ National courts are expected to refer questions concerning the interpretation of ambiguous EU provisions to the Court of Justice. In turn, where such questions are brought before it, the Court has not merely the discretion but the duty to provide an autonomous interpretation, particularly where this is required to ensure the clarity, coherence, and effective functioning of Union law across jurisdictions.

This notion of duty can be traced to the logic articulated in *Ekro*, and has since evolved into a two-step model. First, the Court considers whether the concept in question is undefined in the legal instrument and whether the text includes no explicit reference to national law for its meaning. Second, the Court assesses whether divergent national interpretations risk undermining the consistency and effectiveness of EU law. Where both conditions are met, autonomous interpretation is not optional: it becomes necessary. It should be noted that the first condition, relating to interpretative divergence, is not a prerequisite for the Court’s competence to engage in autonomous interpretation. However, in the absence of such divergence or ambiguity, there is little practical impetus for the Court to exercise this interpretative power. Thus, it is precisely where fragmentation and uncertainty arise that the Court’s duty to interpret autonomously becomes operational, serving as a structural safeguard for the consistency of the EU legal order. This interpretative shift carries constitutional weight.

¹⁸ TFEU, article 197.

¹⁹ TFEU, article 267.

It reflects the Court's role in safeguarding the coherence and primacy of the Union's legal order. Autonomous interpretation thus becomes more than a doctrinal device; it is a structural tool that ensures key legal concepts are interpreted and applied consistently throughout the EU and its different legal systems.²⁰

4. *Beyond doctrine: the political logic of interpretation*

The Court's duty to interpret autonomously does not operate in a vacuum. It must be understood within the broader institutional dynamics of EU lawmaking. Member States may be aware that, in the absence of explicit definitions, legal terms in EU instruments are likely to be interpreted autonomously by the CJEU. This awareness raises a critical question: why would legislators deliberately leave such terms undefined?

Maduro, drawing on Cass Sunstein's theory of "incompletely theorized agreements," offers a compelling explanation. He suggests that Member States may intentionally leave certain terms vague to reach consensus on politically sensitive legislation, deferring difficult interpretive questions to the judiciary.²¹ Autonomous interpretation thus becomes not only a legal necessity but also a potential integrative strategy. It allows legislative progress to occur without resolving deeper conceptual disagreements at the negotiation stage.

However, this practice also generates legal uncertainty. For Member States, the Court's eventual interpretation may diverge from political expectations formed during the legislative process. Yet the deeper concern lies with individuals: legal certainty in the EU legal order primarily protects citizens, who must be able to foresee the legal consequences of their actions. Fragmentation or delayed clarification therefore undermines not only state-level assumptions but also the rule of law principle that individuals should know what to expect.²² This tension is possibly recognised by the

²⁰ V. MITSILEGAS, *Autonomous Concepts*, cit., p. 47.

²¹ C. R. SUNSTEIN, *Incompletely Theorized Agreements*, in R. BELLAMY (ed.), *The Rule of Law and the Separation of Powers*, Routledge 2017; M. POIARES MADURO, *Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism*, in *European Journal of Legal Studies*, 2007, 2, p. 9.

²² V. SHCHERBANYUK – V. GORDIEV – L. BZOVA, *Legal nature of the principle of legal certainty as a component element of the rule of law*, in *Juridical Tribune – Review of Comparative and International Law*, 2023, 1, p. 21.

judiciary itself and subtly incorporated into its reasoning. Maduro cautions that judicial responses in such contexts must be carefully calibrated. Courts should clarify legal meaning without pre-empting future political debate or closing off space for democratic deliberation.²³

This dynamic illustrates a broader paradox in the EU legal order. On one hand, the complexity and inertia of the EU's legislative process often necessitate judicial intervention in politically relevant areas. On the other hand, precisely because legislative amendment is so difficult, the Court bears a heightened responsibility to act with restraint. It must provide the legal clarity needed for the system to function, while also respecting the boundaries of its role within a still-evolving constitutional framework.

Following the adoption of legislation, once the Court of Justice has interpreted a provision of the Treaties or of secondary legislation, that interpretation becomes definitive and binding and functions as a de facto precedent for the interpretation of that concept in that context or instrument.²⁴ It supplants the ordinary or apparent meaning of the written text and remains authoritative until the Court revises its position in a subsequent judgment. The only way in which the Member States may overturn such an interpretation is through the amendment of the Treaties or the amendment of the instrument in which the interpreted concept exists.²⁵

5. *How the court interprets 'autonomously'*

The CJEU has consistently affirmed that autonomous interpretation must be guided by both the context of the provision and the purpose of the relevant legislative instrument.²⁶ However, this interpretative process typically begins with a preliminary analysis of the wording of the provision. Only after this initial step does the Court proceed to examine the broader legal and legislative context in which the term is situated, along with the underlying objectives of the Union instrument at issue.²⁷ This approach is

²³ M. POIARES MADURO, *Interpreting European Law*, cit. p. 9.

²⁴ G. Beck, *Judicial Activism in the Court of Justice of the EU*, in *University of Queensland Law Journal*, 2017, 36, pp. 334–335.

²⁵ *Ivi*, 334.

²⁶ Case 327/82 *Ekro v Produktschap voor Vee en Vlees*, ECLI:EU:C:1984:11, para. 11.

²⁷ L. MANCANO, *Judicial Harmonisation through Autonomous Concepts of European Union Law: The Example of the European Arrest Warrant Framework Decision*, in *European*

logical, given that the limitations of textual interpretation quickly surface in the multilingual and pluralistic context of EU law. The existence of twenty-four equally authentic language versions makes it inherently difficult, if not impossible, to derive stable and universally accepted meanings from the text alone. Differences in legal terminology, grammar, and idiomatic usage often give rise to interpretative ambiguity. As a result, a rigid or literal reading of legal provisions proves inadequate to achieve legal certainty or uniformity.²⁸ For this reason, scholars such as Paunio and Lindroos-Hovinheimo have argued that legal reasoning in the EU context should prioritise open and transparent argumentation rooted in purposive and contextual analysis, rather than relying on formal linguistic logic. Literal meaning, they contend, is a legal fiction, especially in a multilingual legal order where language cannot be detached from its interpretive context.²⁹

An empirical analysis of the CJEU's case law confirms a clear methodological pattern: the Court consistently applies a cumulative interpretative approach. Rather than relying on a single method, it systematically combines textual, contextual (systemic), and teleological reasoning. Exclusive reliance on one interpretative method was virtually absent in the judgments analysed. Instead, systemic and textual interpretation appeared in almost every case, with teleological arguments frequently employed to reinforce coherence with the objectives and values of the EU legal order.³⁰ This pattern demonstrates that autonomous interpretation, as practised by the Court, is not rooted in linguistic formalism but rather in a deliberate effort to ensure internal consistency, purposive coherence, and practical effectiveness (*effet utile*) within the multilingual and pluralistic framework of EU law. The teleological finality inherent in the doctrine of autonomous interpretation makes it logically incompatible with a purely textual reading of the autonomous concept.

Journal of Crime, Criminal Law and Criminal Justice, 2018, 3-4, p. 242; Case C-354/22 *Weingut A*, ECLI:EU:C:2024:325, para. 40.

²⁸ PAUNIO and LINDROOS-HOVINHEIMO (n 1), p. 395; V. MITSILEGAS, *Autonomous Concepts*, cit., p. 47.

²⁹ *Ibid.*

³⁰ See G. BECK, *The Legal Reasoning of the Court of Justice of the EU*, Bloomsbury Publishing 2013; L. VANBESELAERE, *The Cumulative Interpretative Approach of the Court of Justice: Friend or Foe in Criminal Matters?*, in *European Criminal Law Review*, 2025, 15, p. 221; L. VANBESELAERE, *Youth justice or criminal law?*, cit.

6. *Autonomous interpretation in EU criminal law: tensions, trends, and the case of ‘Criminal Proceedings’*

In the field of EU criminal law, the challenges associated with autonomous interpretation are particularly pronounced. As Mitsilegas notes, this area remains highly sensitive, as it directly touches on the sovereign authority of Member States. Criminal law has traditionally been deeply embedded in national identity, shaped by distinct constitutional traditions, political values, and legal cultures. Many of its core concepts have been developed almost exclusively within domestic frameworks, grounded in principles of legality and the rule of law. Against this backdrop, the imposition of a uniform, EU-level interpretation of legal terms through the doctrine of autonomous interpretation requires delicate judicial navigation. While uniformity is essential for the coherence and effectiveness of Union law, the diversity and constitutional significance of national criminal justice systems demand restraint and sensitivity.³¹ Striking this balance is no easy task. Indeed, some commentators argue that the Court of Justice, in its efforts to promote coherence, occasionally ventures into the territory of judicial harmonisation, even in areas where the EU legislature has intentionally sought to preserve Member State autonomy.³² An overly expansive use of autonomous interpretation in this field may therefore risk undermining the national limits set on criminal justice harmonisation.³³

Despite these tensions, the CJEU has developed several autonomous concepts within EU criminal law. Notable examples arise from the Framework Decision on the European Arrest Warrant, where the Court has provided autonomous definitions of key terms such as “same acts,” “judicial authority,” and “indirect summons.”³⁴ Similarly, in the context

³¹ V. MITSILEGAS, *Managing Legal Diversity in Europe’s Area of Criminal Justice: The Role of Autonomous Concepts*, in R. COLSON – S. FIELD (eds), *EU Criminal Justice and the Challenges of Legal Diversity: Towards a Socio-Legal Approach to EU Criminal Policy*, Cambridge University Press 2016, pp. 125-160; V. MITSILEGAS, *Autonomous Concepts*, cit., p. 45; L. VANBESELAERE, *The Cumulative Interpretative Approach*, cit.

³² L. MANCANO, *Judicial Harmonisation through Autonomous Concepts*, cit.; F. LEDIĆ, *Uniformity vs Cultural Diversity: Should the Copyright Concept of “Pastiche” Be Regarded as an Autonomous Concept of EU Law?*, in *European Public Law*, 2024, 3–4.

³³ F. LEDIĆ, *Uniformity vs Cultural Diversity*, cit. pp. 3-4.

³⁴ Case C-108/16 *Dworzecki*, ECLI:EU:C:2016:346, para. 32; Case C-261/09 *Mantello*, ECLI:EU:C:2010:683; Case C-452/16 PPU *Poltorak*, ECLI:EU:C:2016:858, paras. 46–52; MANCANO (n 27).

of Council Framework Decision 2008/909 on the mutual recognition of criminal judgments, the notion of a “judgment,” or the phrase “the issue of the final judgment,” has been recognised as requiring an EU-level definition.³⁵ Article 54 of the Convention Implementing the Schengen Agreement (CISA) has also prompted the Court to interpret the phrase “the penalty (...) has been enforced” as an autonomous concept of EU law.³⁶

These examples reflect the Court’s continued reliance on its established approach: when the EU legislature provides no definition and makes no reference to national law, the CJEU must interpret the term autonomously in light of the objectives and internal logic of the instrument.³⁷ Given the persistent divergence in national criminal justice systems and the resulting uncertainty in the application of EU criminal law, precisely the conditions that trigger autonomous interpretation, this interpretative pattern reveals new gaps and grey areas in the law. These are spaces where the Court may once again be called upon to intervene, potentially redefining legal terms with significant implications for Member State legal systems.

A striking example of the Court’s duty to engage in autonomous interpretation arises in the context of Directive 2016/800 on procedural safeguards for children. The Directive refers to the concept of “criminal proceedings,” a core procedural notion that determines the scope of the safeguards it guarantees. However, the Directive neither defines the term nor refers its interpretation to national law. This omission creates significant legal uncertainty, particularly regarding whether, and under what conditions, proceedings in national youth justice systems fall within the Directive’s scope.³⁸

The implications are serious. In the absence of a uniform EU definition, Member States may apply divergent understandings of “criminal proceedings,” risking uneven application of the Directive and undermining its core purpose: to guarantee consistent procedural safeguards for all children across the Union. This fragmentation not only compromises the effectiveness of EU law but may result in gaps in protection for minors subjected to de facto criminal processes that escape formal classification under domestic law.

³⁵ Case C-573/17 *Popławski*, ECLI:EU:C:2019:530; Case C-571/17 PPU *Ardic*, ECLI:EU:C:2017:1026.

³⁶ Case C-129/14 PPU *Spasic*, ECLI:EU:C:2014:586.

³⁷ *Ivi*, para 79.

³⁸ L. VANBESELAERE, *Youth justice or criminal law?*, cit.

To prevent such disparities, the Court must fulfil its role as constitutional arbiter by providing a substantive autonomous interpretation, not just of this term, but of any legal concept whose ambiguity threatens legal certainty and the coherent application of Union law. In this context, autonomous interpretation becomes a normative necessity rather than a discretionary tool.

That necessity follows a structured logic. As previously outlined, the Court typically applies a two-step approach to determine whether autonomous interpretation is required: (1) the legal instrument lacks a definition and makes no reference to national law, and (2) the objective and context of the provision demand uniform application. Both conditions are clearly met in the case of Directive 2016/800, making judicial intervention not only appropriate, but essential.

7. Conclusion: From interpretation to obligation

The interpretation of autonomous EU legal concepts is often described as just one among many techniques in the Court of Justice's interpretative repertoire, but this characterisation understates its constitutional importance. As this paper has demonstrated, when a legal concept is left undefined in an EU instrument and no reference is made to national law, and when divergent understandings among Member States threaten the uniform and effective application of Union law, the Court is not simply empowered to act; it is *obliged* to do so. This duty is rooted in the very logic of EU integration: safeguarding effectiveness, consistency and coherence across a plural legal space.

In a multilingual Union with diverse legal traditions, lack of interpretative coherence is not a rare complication but a structural reality. As *Babel-17* vividly embodies, language does not simply describe reality; it shapes how we perceive and interact with it.³⁹ In the EU legal order, where each term exists across multiple languages and legal traditions, the risk is not just misunderstanding, but fragmentation of meaning itself, potentially leading to uneven application. Autonomous interpretation is thus not judicial overreach, but a stabilising duty, essential to preserving the Union's legal effectiveness. This duty has both a legal dimension, flowing from the structural logic of EU law and the preliminary ruling procedure, and a

³⁹ S. R. DELANY, *Babel-17*, Ace Books, 1966.

normative dimension, grounded in the need for legal certainty, equality, and the protection of fundamental rights. This duty becomes particularly delicate in the field of EU criminal law, where national sensitivities run deepest and where core legal concepts are often constitutionally embedded or protected on the basis of national identity arguments. In such contexts, clarity is imperative. It also serves as a caution to Member States that, if they wish to avoid the autonomous interpretation of certain terms by the Court, they must define those terms with precision in the relevant instruments or expressly delegate their interpretation to national law.

Ultimately, when EU law leaves key concepts prone to fragmentation, the Court is obliged to step in guided by the need for effectiveness, coherence and consistency of EU law.

Anke Vander Elst*

*The balance between family and state solidarity:
need for reconsideration? Reflections on legal maintenance
obligations and the recovery of social assistance
from family members in Belgium*

ABSTRACT

In many Western European legal systems, maintenance obligations require family members to provide for each other, primarily by means of a financial provision. In Belgium, the legal framework on maintenance obligations has remained largely unchanged since its introduction by Napoleon in 1804. Although the development of the welfare state seems to have reduced the relevance of intergenerational family solidarity, the obligation for the Public Centres of Social Welfare (PCSW's) to recover the costs of social assistance from certain family members of the beneficiary illustrates the continuing role of these maintenance obligations. At the same time, the concept of family has undergone significant changes in the past few decades, raising the question of whether this framework still reflects reality.

This paper provides a doctrinal legal analysis of the Belgian legal framework governing intergenerational solidarity through maintenance obligations and the recovery of social assistance from maintenance debtors by the PCSW's. It specifically examines the extent to which this legal framework is adapted to the reality of contemporary families. The analysis shows that the maintenance obligations in Belgium are rigid, as they arise solely by virtue of legal kinship or marriage and do not take the actual relationship between family members into account. By contrast, the legal provisions on the recovery of social assistance are more flexible, as there is an exception to the obligation to recover based on 'equity reasons', allowing the PCSW's to take these relationships into account. However, the absence of a legal definition of these equity reasons grants considerable discretionary power to PCSWs, which may lead to differences in policies and unequal treatment.

Moreover, the obligation to recover is subject to numerous restrictions and exceptions set out in complex legislation. There are also clear signs that the legal framework does not entirely reflect the reality of contemporary families. In

* Anke Vander Elst is a PhD researcher affiliated with Ghent University and Hasselt University. Her research focuses on the evaluation and optimization of the Belgian legal framework governing the recovery of social assistance costs from family members through maintenance obligations. This research is situated within the broader context of intergenerational family solidarity and the allocation of responsibilities between the family and the state in providing financial support to persons in need.

particular, maintenance obligations between partners and in-laws arise only by virtue of marriage and disregard other family constellations, potentially resulting in a greater financial burden for married persons when PCSWs recover costs. Finally, due to the complexity of the legislation, the distinction between the financial obligations of the state and the family is not entirely clear, contributing to the continuing controversy surrounding compulsory family solidarity and the allocation of responsibilities between the family and the state.

KEYWORDS

Intergenerational Family Solidarity – Maintenance Obligations – Social Welfare – Allocation of Financial Responsibilities.

SUMMARY: 1. Introduction – 2. Family solidarity: history and legal framework – 3. The balance between state and family solidarity: a reflection of reality? – 4. Conclusion.

1. Introduction

Like in many other Western European legal systems, the Belgian old Civil Code contains provisions on maintenance obligations that require certain family members to provide for each other, primarily by means of a financial provision. The legal provisions on maintenance obligations were introduced by Napoleon in 1804 and have remained almost unchanged since.

Today, the significance of these obligations is mainly demonstrated when examined in the context of the social services provided by the Public Centres of Social Welfare (hereafter referred to as ‘PCSW’). Whilst these centres safeguard the right to a dignified life for all through social services, it is important to emphasize the subsidiary nature of this social assistance. Indeed, these PCSW’s are, to a certain extent, obliged to recover these costs from certain family members of the beneficiary of this social assistance.

The legal provisions imposing obligations for certain family members assume that there is a certain degree of intergenerational and reciprocal solidarity. However, the concept of family has undergone changes in the past few decades. One might question whether the current legal framework still reflects reality, given the growing diversity and complexity of family constellations.

This paper gives a brief history and general outline of the Belgian legislation on maintenance obligations, in particular concerning the recovery of social assistance from maintenance debtors. It gives insight in the allocation of responsibilities between the family and the state with regard to financial assistance for people in need. It further explores the

question to what extent this legal framework is adapted to the reality of contemporary families.

2. *Family solidarity: history and legal framework*

a. *Maintenance obligations in the Belgian old Civil Code*

Under Belgian law, a person who is ‘in need’, meaning someone who lacks the financial means to support themselves, may seek financial support from certain family members by enforcing their right to maintenance. Since 1804, the Belgian old Civil Code (hereafter referred to as ‘BCC’) has contained a general maintenance obligation between all relatives in vertical line, both in the ascending and descending lines, irrespective of their age or degree of kinship. This means that parents, children, grandparents and grandchildren are required to provide for each other (art. 205 BCC). Furthermore, a maintenance obligation between parents-in-law and children-in-law was introduced (art. 206 BCC). Initially, the principle of reciprocity of these maintenance obligations gave rise to controversy, but the legislation has been retained to this day.¹

In order to enforce the right to maintenance from its family, a person must be ‘in need’. This state of need is considered a relative state of emergency, taking into account various factual data, including age, state of health, number of children, intellectual abilities and – with the necessary reservations – the social background of the person concerned.² This means that the maintenance obligation is not strictly limited to the amount required to meet basic needs; the maintenance creditor is entitled to more than a subsistence income to guarantee a dignified life. At the same time, the family member must be able to provide the necessary maintenance. Therefore, the amount due is determined by both the specific needs of the maintenance creditor and the financial capacity of the family member obliged to provide it. Furthermore, the principle of variability applies, meaning the amount of maintenance can be increased, reduced, even possibly to a minimum as soon as the maintenance debtor is no longer

¹ J. VAN HOUTTE – J. BREDA, *Maintenance of the Aged by their Adult Children: an Adequate Legal Institution?*, in M. MACLEAN (ed.), *Family and Family Values*, Hart Publishing 2005, p. 248.

² Belgian Court of Cassation 25 March 2019, C.17.0469.F, *RABG* 2020/16, p. 1318, note M. GOVAERTS. See also G. VERSCHULDEN, *Handboek Belgisch Personen-, familie- en relatievermogensrecht, I, Verticale familiale relaties*, die Keure 2025, p. 261, nr. 514.

able to provide it or the maintenance creditor no longer needs it (art. 209 BCC).

In addition to the general obligation to provide maintenance, parents in particular have a more elaborate obligation towards their children. Parents are required to take responsibility for the housing, living arrangements, health, supervision, education, training and development of their children until they reach the age of majority or complete their education, according to their respective means (art. 203 BCC). Contrary to the general maintenance obligation, it is not necessary for the child to be in a state of need.

There are also horizontal maintenance obligations, for example between spouses and, under certain conditions, between former spouses. Because this paper focuses on maintenance obligations that reflect (reciprocal) intergenerational solidarity, the maintenance obligations between (ex-) partners will not be addressed.

The obligation to provide maintenance between ascendants and descendants arises solely by virtue of legal kinship. Regarding the in-laws, it is important to note that a maintenance obligation only arises in the case of marriage. Other forms of cohabitation, whether legal or factual, do not generate a maintenance obligation between a person and their partner's parents, or vice versa. Therefore, there are only two legal grounds for maintenance obligations: legal kinship and marriage. The current law on maintenance also hardly reflects blended families. For instance, stepparents are not legally obliged to provide maintenance for their stepchildren.³

Furthermore, legal kinship is both necessary and sufficient to generate a maintenance obligation. The actual relationship between family members is irrelevant as there are no grounds for losing this right or reducing the amount due.⁴ Even in the case of dishonourable conduct towards their family, the maintenance creditor is still entitled to their support.⁵

³ However, there is a very specific maintenance obligation for the stepparent in the event their partner passes away: he will then have a limited maintenance obligation towards the children of their partner (art. 203, § 3 BCC). This obligation too only applies in case of marriage.

⁴ In general, too, legal provisions on the responsibility towards relatives and the enforcement of legal maintenance claims tend to overlook the actual relationship between the parties, see J. RIBOT, *Maintenance Law and Elderly Care in Western Societies*, in E. ALOFS – W. SCHRAMA (eds.), *Elderly care and upwards solidarity: Historical, sociological and legal perspectives*, Intersentia 2020, pp. 73-74.

⁵ However, a parent divested of parental authority can no longer claim maintenance (art. 33 Act 8 April 1965 on juvenile protection, the charging of minors who have committed an offence described as a crime and the reparation of damage caused by this offence, BS 15 April 1965).

b. *The remaining subsidiary nature of social assistance*

The concept of intergenerational family solidarity enshrined in the old Civil Code seems to have become less relevant due to the development of a welfare state in the 19th century. The social security system, which was initially solely based on the payment of social contributions on income from work, was further supplemented by support systems that guaranteed a minimal income for those not entitled to social security, such as elderly people and disabled people. In the 1970s, the right to a minimum income for all and a more general right to social assistance were introduced in Belgian legislation, both of which operate as a safety net to guarantee a minimum subsistence level. Ensuring this right was entrusted to the Public Centres of Social Welfare, which operate at a municipal level, providing various social services to enable everyone to live a life consistent with human dignity.

There is very little case law regarding the maintenance obligations, in particular those involving elderly persons and their children.⁶ One reason for this may be that the state provides sufficient resources. Social and economic changes as well as the process of 'defamilisation of care' brought private support obligations between adult relatives into demise.⁷ Sociological studies also show that elderly people are reluctant to ask for (financial) help because they don't want to burden their children or because they are afraid it would jeopardise their relationship.⁸

However, at the same time, the legislator decided to maintain the PCSW's right to recover from maintenance debtors, resulting in a partial shift from state support back to family solidarity. In 1983, the legislator even transformed this right into a duty to reinforce the subsidiary nature of social assistance. The aim of the legislator was also to achieve a more equal distribution of public funds and more uniformity in the policies of the PCSW's.⁹ Over the course of the years, the legislation on the recovery of

⁶ It must be mentioned that case law in Belgium is not (yet) systematically published in a publicly available database.

⁷ J. RIBOT, *Maintenance Law*, cit., p. 68.

⁸ See J. VAN HOUTTE – J. BREDÁ, *Maintenance of the Aged*, cit. p. 249. A more recent study done in the Netherlands suggests that elderly people are reluctant to ask for help in a broader sense, because they don't want to burden their children and out of fear the relationship would change (F. BREDEWOLD et al., *The care receivers perspective: How care-dependent people struggle with accepting help from family members, friends and neighbours*, in *Health & Social Care in the Community*, 2019, 28, pp. 762-770).

⁹ This was declared by the legislator when Royal Decree nr. 244 31 December 1983 (BS 25 January 1984) was introduced.

social assistance has changed many times to keep up with societal changes. Today, the recovery is subject to numerous restrictions and exceptions set out in complex and at times incomprehensive legislation. As a result, the distinction between the financial obligations of the state and the family is not entirely clear.

c. The legal framework on the recovery of social assistance

Every Belgian municipality has a PCSW, whose primary task is to provide social assistance to both individuals and families. Whereas this entails a broad range of services such as medical assistance, psychological support, housing assistance and legal advice, the recovery primarily concerns financial aid. The financial aid provided by the PCSW's can be further divided into two categories: the living wage and social assistance in the strict sense. While the former is an allowance for those with insufficient means of subsistence that can be obtained if certain conditions are met, the latter is a more flexible form of social assistance which guarantees a life with dignity for all.

The legal basis for the recovery can be found in article 26 of the Act of 26 May 2002¹⁰ for living wages and article 98, § 2 of the Act of 8 July 1976¹¹ for social assistance in general. As mentioned above, this recovery is subject to many restrictions and exceptions.¹² Firstly, not all maintenance debtors are subject to recovery. Depending on the type of financial aid, there either is a limited list of maintenance debtors that must be addressed, or a distinction is made between the maintenance debtors from whom the PCSW's must recover and those from whom they can recover but are not obliged to. The two most common situations in which the PCSW must recover are: 1) the minimum income (*leefloon* in Dutch) granted to children must be recovered from their parents, and 2) financial support for people staying in nursing homes must be recovered from their children.

In both cases, the income of the maintenance debtor must exceed a certain threshold to avoid becoming needy himself.¹³ This threshold also determines the amount due: those who have a higher income will

¹⁰ Act 26 May 2002 on the right to social integration, *BS* 31 July 2002.

¹¹ Act 8 July 1976 on the Public Centres of Social Welfare, *BS* 5 August 1976.

¹² The conditions, limitations and exceptions are set out in two royal decrees: the Royal Decree of 11 July 2002 for livings wages (*BS* 31 July 2002) and the Royal Decree of 9 May 1984 for social assistance (*BS* 24 May 1984). Further details regarding the recovery can be found in the ministerial decrees from 12 December 2002 (*BS* 31 December 2002) (livings wages) and 2 March 2005 (*BS* 23 March 2005) (social assistance).

¹³ Article 50 Royal Decree 11 July 2002 and article 14 Royal Decree 9 May 1984.

progressively have to pay more.¹⁴ Recovery is naturally also limited to the amount of financial aid the beneficiary has received.¹⁵ Other conditions and restrictions are beyond the scope of this paper.

3. *The balance between state and family solidarity: a reflection of reality?*

a. *Marriage versus other forms of cohabitation*

Regarding the question of the extent to which the legal framework on recovery of social assistance is adapted to the reality of contemporary families, two main issues will be highlighted. The first one relates to the civil status of the maintenance debtors. Intergenerational family structures became significantly more complex due to socio-demographic and cultural changes, such as an increase in divorce and remarriage.¹⁶ This also includes couples who choose not to marry, instead opting for different types of cohabitation.¹⁷ However, there is only a maintenance obligation between in-laws, while legal and factual cohabitation do not generate any obligation towards the partner of your child or your partner's parents. This has implications for the recovery of both social assistance and living wages.

Social assistance, and more specifically the financial support for people staying in nursing homes, must be recovered from their children. When the child is married, it is common for the PCSW's to take into account the income of both the child and their partner when determining the amount to be recovered.¹⁸ While some justify this approach on the basis that the partner is equally bound by a maintenance obligation, others believe that it is a violation of the hierarchy established between the maintenance obligations of family members.¹⁹ According to the Belgian Court of

¹⁴ Article 51 Royal Decree 11 July 2002 and article 16 Royal Decree 9 May 1984. The amounts applicable since 1 February 2025 can be found via https://primabook.mi-is.be/nl/recht-op-maatschappelijke-integratie/bedragen-leefloon#0_h2_6.

¹⁵ Article 26 Act 26 May 2002 and article 3 Ministerial Decree 12 May 2002 (living wages); article 98, § 2 Act of 8 July 1976 and article 3 Ministerial Decree 2 March 2005 (social assistance in general).

¹⁶ L. HEYLEN – D. MORTELMANS – J. KNAEPS, *Sociological perspectives on changing family constellations and intergenerational support in ageing societies*, in E. ALOFS – W. SCHRAMA (eds.), *Elderly care and upwards solidarity*, cit., pp. 23-26.

¹⁷ F. SWENNEN – D. MORTELMANS, *Commission on European Family Law: Informal Relationships – National Report: Belgium*, 2015.

¹⁸ The legal provision allowing this is article 11 *bis* Royal Decree 9 May 1984.

¹⁹ For a more detailed analysis of this issue, see R. BARBAIX, *Enkele aspecten van het*

Cassation, a person must first claim maintenance from their relatives in vertical line before their in-laws.²⁰ As there is no maintenance obligation in case of legal or factual cohabitation, the partner's income cannot be considered. As a result, married children are at a disadvantage.

Even more striking is the potential impact of the civil status when the PCSW's recover living wages from the beneficiaries' parents. For married parents, the amount will be based on their joint income. In cases of legal or factual cohabitation, it is unclear whether both incomes will be considered together or if the PCSW will determine each parent's contribution based on their personal income. If the parents have separated, the amount that can be recovered from each parent is strictly limited to half of the living wage awarded to their child.²¹ Additionally, their income must still surpass the threshold amount. Interestingly, in this situation, some PCSW's also take the partner's income into account if the parent has remarried.²² Consequently, the PCSW will likely be able to recover more, especially when both parents have remarried. This is problematic, since the partner – who is the stepparent of the person receiving a living wage – has no legal obligation towards their stepchild. Again, married couples are put at a disadvantage. A parent who chooses not to remarry but instead chooses another form of cohabitation with his new partner, will only have to contribute according to their personal income.

b. Exceptions based on the actual relationship between family members

As mentioned above, maintenance obligations are based solely on legal kinship and marriage. There are no grounds for reducing or losing the right to maintenance, which means that judges cannot take the actual relationship between family members into account. For the recovery of

verhaal van het OCMW op de gehuwde onderhoudsplichtigen (note under Court of Appeal Brussels 1 December 2009), in T.Fam., 2010, 5, p. 105; D. ADRIAENS – R. DE COENSEL – M. VAN DER BIEST, Gehuwde onderhoudsplichtigen en het O.C.M.W.: Een verhaal apart of een apart verhaal?, in OCMW Visies, 1999, 3, pp. 14-17.

²⁰ Belgian Court of Cassation 16 March 1995, C.94.0333.F, *Arr. Cass.* 1995, p. 309, note J. ROODHOOFT.

²¹ Article 46 Royal Decree 11 July 2002.

²² PCSW's invoke article 46 Royal Decree 11 July 2002 to justify taking the joint income into account. This article stipulates that in the event of recovery from more than one maintenance debtor of equal degree, the amount the PCSW can recover from each maintenance debtor *and their spouse* is strictly limited to a fraction equal to the number of maintenance debtors. The Minister approved this *modus operandi*, as stated in his answer to a question asked in the Parliament: Question nr. 787 by Mr. S. Verherstraeten, Belgian Chamber of Representatives, 2016-2017, 14 July 2017, nr. 54/125, p. 320.

social assistance, however, the exception of the so-called ‘equity reasons’ (*billijkheidsredenen*) applies. PCSW’s are not obliged to recover if they believe it would not be beneficial given the specific circumstances of a case.

The legislator provided some examples of situations where an exception could be justified.²³ For instance, a PCSW may decide not to recover when a parent has not fulfilled his obligations towards his child or has made life difficult for them, if the recovery would harm the relationship beyond repair, when the children have already helped their parent, if there is a risk that the parent would refuse help from the PCSW because he fears it would put a burden on the children, or if the parent is in a state of need as a result of his own actions and behaviour whereas the children have always been careful with their finances. Financial reasons, such as high health care costs, study costs or rental costs can also justify an exception.

The main issue is the lack of a legal definition, which leaves the interpretation of the ‘equity reasons’ at the discretion of the PCSW. On the one hand, this guarantees the autonomy of PCSW’s who operate on a municipal level, on the other hand it can lead to different policies and unequal treatment of citizens.

c. The future of the right to recovery and family solidarity

For years, there has been controversy surrounding the recovery of social assistance through maintenance obligations in Belgium.²⁴ Given the pressing issue of the ageing of the population and the expected strain on public finances, the debate mainly concerns the recovery of financial support for elderly people residing in nursing homes. Several arguments have been put forward in favour of the abolition of the right to recovery. While some argue that the state and therefore society should provide the financial support for elderly people, others point out that the revenue of the recovery does not outweigh the costs and efforts needed by the PCSW’s and the difference in local policies regarding the recovery. The recovery by the PCSW can also be humiliating for people in need and could put a strain on the relationship between parents and children. In this regard, it is

²³ The list of examples was given following the introduction of Royal Decree 9 May 1984.

²⁴ Report on behalf of the Public Health, Environment and Social Renewal Committee, Belgian Chamber of Representatives, 2003-2004, 7 June 2004, nr. 51-1138/21, pp. 11-12 and J. VAN HOUTTE – J. BREDÁ, *Maintenance of the Aged by their Adult Children*, cit., pp. 243-255. Recent legislative proposals also show that the debate is still ongoing. However, a fundamental discussion on maintenance obligations and the recovery of social assistance has not yet taken place in the Belgian Parliament.

important to note that those in favour of abolishing the right to recovery are not necessarily opposed to the idea of family solidarity. Some rather argue that, while family solidarity is still important, the focus should not only be on financial support.

In turn, those opposed to abolishing the right to recovery argue that doing so would undermine the moral obligations of family members. They claim that abolishing it would place an additional burden on the state and would ultimately require a larger contribution from society. For them, it would be particularly objectionable if the state were expected to cover the cost of care for people with wealthy family members. Furthermore, it is argued that the legislation on the recovery of social assistance provides sufficient measures to take into account the actual relationship between family members so that recovery would not take place in situations where it would not be desirable.

It must be emphasised that the legal framework for the recovery of social assistance is only one of the many factors determining the relation between public and family solidarity. In recent years, there has also been a broader debate about intergenerational family solidarity and the allocation of care between the state and the family. Demographic trends such as an ageing population and a drop in fertility rates are putting a strain on public finances, creating pressure for increasing responsibility for family members.²⁵ On the other hand, compulsory family solidarity through maintenance obligations and rules allowing the recovery of social assistance in particular are subject to criticism, as they can have negative effects on family relations.²⁶ For instance, enforceable legal claims, such as maintenance obligations have shortcomings, which render them unreliable.²⁷ Research also shows that regulations on intergenerational support appear unable to keep pace with new social realities and therefore put some specific groups such as divorced, remarried and childless older adults, at risk.²⁸ Therefore, there is a need to place more emphasis on stimulating and supporting informal care through appropriate measures and policies.²⁹

²⁵ L. WARDLE, *Turning Hearts of Children and Fathers: Legal Recognition of Extended Families*, in H. FULCHIRON (ed.), *Solidarities between generations*, Bruylant 2013, p. 206.

²⁶ J. RIBOT, *Maintenance Law*, cit., pp. 67-82.

²⁷ J. RIBOT, *Refamilialisation of care and support: scope and limits of family solidarity in ageing societies*, in H. Fulchiron (ed.), *Solidarities between generations*, Bruylant, 2013, pp. 709-724.

²⁸ L. HEYLEN – D. MORTELMANS – J. KNAEPS, *Sociological perspectives*, cit., p. 43.

²⁹ See F. SWENNEN – L. VERHAERT, *Intergenerational solidarity and elder care in the Low Countries*, in *Child and Family Law Quarterly*, 2015, pp. 285-302; J. RIBOT, *Refamilialisation of care and support*, cit., pp. 709-724.

4. Conclusion

Intergenerational family solidarity is legally embedded in the Belgian old Civil Code through several maintenance obligations. Although these obligations seem to have become less relevant due to the development of a social safety net, the obligation for PCSW's to recover the costs of social assistance from certain family members demonstrates that there is still a great responsibility for family members, especially when it comes to financial aid. The responsibility has thus not entirely been shifted from the family to the state.

However, the legal framework for this recovery is complex and there are also clear signs that it is not entirely adapted to the reality of contemporary families. For one thing, legal maintenance obligations mainly focus on marriage and disregard other family constellations. Another issue concerns the discretionary power of PCSW's. While it is a good thing that social workers can take the actual relationship between family members into account when deciding on the recovery, there is also a risk for differences in policies and unequal treatment due to the lack of well-defined exceptions.

Finally, it is evident that the debate on the allocation of responsibilities between the family and the state extends beyond the question of whether or not to abolish the right to recovery. While demographic challenges create pressure for more responsibility for the family, it is important not only to focus on the legal obligations but also to consider appropriate measures to encourage informal care. A difficult yet very important task awaits policymakers.

Els Vyncke*

*The Everlasting Balancing Act Between
the Decedent's Children and the Surviving Spouse/Partner:
The Case of 'Avantages Matrimoniaux'*

ABSTRACT

When fundamentally reforming inheritance law and matrimonial property law in 2018, the Belgian legislator sought to enhance the freedom of disposition while upholding family solidarity. The extent to which this reform has succeeded remains subject to ongoing academic debate. In particular, the (im)balance between the interests of the decedent's children and those of the surviving spouse or partner has been widely criticized. The legal concept of '*avantages matrimoniaux*' ('matrimonial advantages') lies at the heart of this controversy. These are matrimonial property agreements that benefit the surviving spouse and may result in the disinheritance of descendants, by 'eroding' their compulsory portion.

These *avantages* illustrate a challenge faced by legislators across jurisdictions: the need to balance several competing interests, namely the decedent's freedom of disposition, the horizontal duty of solidarity between partners and the intergenerational duty of solidarity toward children. This paper offers a comparative and interdisciplinary analysis, examining this issue through a comparison of Belgian, French, and Dutch civil law and by situating these regulations within social scientific findings on comparable contemporary societies. It concludes with normative recommendations for Belgian family property law.

KEYWORDS

Forced Heirship – Relationship Property Agreements – Freedom of Disposition – Family Solidarity – Surviving Spouse.

SUMMARY: 1. Introduction – 2. Methodology – 3. The 'special treatment' of spouses under Belgian law, with a differential treatment based on family type – 4. Legal comparison with France and the Netherlands – 5. The question of alignment with social reality – 6. *Avantages matrimoniaux*: recommendations for Belgian law – 7. Conclusion.

* Els Vyncke is a postdoctoral researcher at Ghent University (Belgium), specialising in private law, with a focus on inheritance and relationship property law. Her research adopts a socio-legal and comparative perspective and combines fundamental inquiry with the development of practice-oriented solutions. She has published in several journals and edited volumes on innovative approaches to estate division and is actively engaged in legal education at Ghent University and the University of Antwerp.

1. *Introduction*¹

1. *Clash of opinions* – When fundamentally reforming family property law in 2018, the Belgian legislator aimed to enhance the freedom of disposition while upholding family solidarity.² The success of this reform remains controversial in academic circles. In particular, the (im)balance between the interests of the children of the decedent and those of the surviving spouse/partner is criticised. The ‘*avantages matrimoniaux*’ (‘matrimonial advantages’) touch upon the crux of this controversy. These are matrimonial property agreements that benefit the surviving spouse and may result in the disinheritance of the decedent’s descendants, by ‘eroding’ their compulsory portion.

Such differences in opinion about the balance of interests between the decedent’s children and the surviving spouse/unmarried partner are not unique to Belgium. On the contrary, it is internationally deemed to be a complex and challenging issue.³ This controversy is due, at least in part, to the emotional weight that this subject carries. The (lack of an) allocation of assets in the event of death can be perceived as an affirmation or a denial of the closeness to the deceased parent/partner.⁴

2. *Forced solidarity* – Regarding the inheritance of some family members, the law mandates a minimal confirmation of the close relationship with the decedent. These are the forced heirs, who are legally entitled to a compulsory portion of the estate. If the decedent has not voluntarily allocated (sufficient) assets to them, the compulsory portion allows these forced heirs to override the decedent’s dispositions in order to obtain (more) money or assets from the estate. The legislator thus imposes a duty of solidarity on the decedent.⁵ Children of the decedent are a prime

¹ This paper was finalised on 6 January 2026 and is based on the author’s doctoral dissertation which researches the overall balance in the event of death between the children of the decedent and the surviving spouses/partners in Belgian family property law: E. VYNCKE, *De eeuwige evenwichtsoefening tussen de kinderen en de langstlevende*, KnopsPublishing, 2025.

² E.g. Travaux préparatoires: *Chambre* 2016-2017, nr. 54-2282/001, 5.

³ A. BRAUN, *Symposium: Reforming Intestate Succession Law: Introduction*, in *Edinburgh Law Review*, 2020, p. 110 f.; R. ZIMMERMANN, *Das Ehegattenerbrecht in Historisch-Vergleichender Perspektive*, in *Rabels Zeitschrift für ausländisches und internationales Privatrecht*, 2016, pp. 41 f. and 87.

⁴ J. FINCH – J. MASON, *Passing on: Kinship and Inheritance in England*, Routledge, 2000, pp. 166 and 177-179.

⁵ For this research paper, the following definition of solidarity is used: “Solidarity is

example of forced heirs.⁶

3. *Competing duties of solidarity* – An individual may wish to allocate a certain amount of assets upon their death to their spouse/partner, out of solidarity towards them. To be able to do so, this individual may choose to reduce their children's share in the estate. Because the Belgian legislator allows that such dispositions in favour of the spouse can interfere with the children's compulsory portion, critics deem that the normative priorities of the duties of solidarity are not in line with the societal duties parents have towards their children.⁷

4. *Scope and objective* – This research paper analyses a concept in Belgian civil law, namely the '*avantages matrimoniaux*' within the context of the settlement of an estate, by comparing it with its French and Dutch counterparts and by drawing on social scientific evidence on contemporary dynamics in couples and in (blended) families. The objective is to make a contextualised assessment of this legal concept, and to formulate normative recommendations based on these insights.

2. Methodology

1. *Comparative law* – A comparative analysis was carried out, for which two neighbouring legal systems were selected: France and the Netherlands. This selection was based on the consideration that these are comparable societies to Belgian society⁸ and that fundamental reforms have been

the willingness to share and redistribute material and immaterial resources drawing on feelings of shared fate and group loyalty": S. STJERNØ, *Solidarity in Europe: The History of an Idea*, Cambridge University Press, 2004, p. 25.

⁶ Children – more broadly, descendants – are entitled to a compulsory portion in the three legal systems examined: Belgium, France and the Netherlands (*infra*). For the sake of readability, this paper refers to the decedent's children as the forced heirs. However, through the mechanism of substitution, other descendants may qualify as a forced heir, e.g. if the decedent's daughter is predeceased and is substituted by her children in the inheritance (in Belgium: art. 4.13 Belgian Civil Code, hereinafter: 'Belgian CC').

⁷ E.g. J.L. RENCHON – F. TAINMONT, *La réforme des régimes matrimoniaux et des droits successoraux du conjoint et du cohabitant légal: Ce que la loi du 22 juillet 2018 règle et ce qu'elle ne règle pas*, Intersentia, 2019, pp. 14-19.

⁸ They have a similar HDI-index as Belgium: 'very high' (UNDP), as well as a similar Freedom Rating: 'free' (FREEDOM HOUSE). Culturally, they can be considered to be part of the pan-European culture: *cf.* M. ANTOKOLSKAIA, *Harmonisation of Family Law in Europe: A Historical Perspective*, Intersentia, 2006, p. 510.

carried out since the beginning of the 21st century that have taken into account the balancing act in question.⁹

The objects of comparison¹⁰ are the functional equivalents to the Belgian *avantages matrimoniaux* in the context of the settlement of an estate. It concerns relationship property agreements through which patrimonial rights are transferred to the surviving spouse/partner,¹¹ which can impact the compulsory portion of the descendants due to their qualification as non-donative transactions.

2. *Systematic literature review* – A systematic literature review of 240 social scientific research papers was conducted to analyse whether Belgian legislation is in line with social reality.¹² Only findings on societies that are comparable to the Belgian society were considered.¹³

The validity of two assumptions underlying the Belgian family property legislation was analysed in both a quantitative manner (mapping review¹⁴) and a qualitative manner (thematic analyses). The first assumption being that couples in different relationship types (marriage, registered and informal partnerships) are different in terms of their commitment to each other.¹⁵ The second assumption that was examined is that blended families

⁹ Belgium: Loi du 31 juillet 2017, *MB* 1 September 2017; Loi du 22 juillet 2018, *MB* 27 July 2018; e.g. Travaux préparatoires: *CHAMBRE* 2016-2017, nr. 54-2282/001. France: Loi n° 2001-1135; e.g. Travaux préparatoires: *AN* 2001, n° 2910. The Netherlands: Wet van 18 april 2002; Wet 24 april 2017; e.g. *Kamerstukken II* 2013/2014, 33 987, nr. 3, *Kamerstukken II*, 2015/2016, 33987, nr. 21.

¹⁰ M. ODERKERK, *The Need for a Methodological Framework for Comparative Legal Research – Sense and Nonsense of “Methodological Pluralism” in Comparative Law*, in *Rabels Zeitschrift für ausländisches und internationales Privatrecht*, 2015, p. 610.

¹¹ The research paper focuses on the allocation of assets upon death in all relationship types (marriage, formal/registered and informal partnerships). The allocation of assets in the event of relationship breakdown lies beyond its scope.

¹² The findings presented below are not specific to the legal concept of *avantages matrimoniaux*, but stem from a broader analysis of the balance between the surviving spouse/partner and the decedent's children in Belgian family property law. The reviewed research papers were published on Web of Science, Scopus or ProQuest between 2000 and 2019. For inclusion and exclusion criteria, see: E. VYNCKE, *De eeuwige evenwichtsoefening*, cit., p. 48–54.

¹³ In total 19: Australia, Austria, Canada, Denmark, Finland, France, Germany, Iceland, Ireland, Liechtenstein, Luxembourg, the Netherlands, New Zealand, Norway, Slovenia, Sweden, Switzerland, the United Kingdom and the United States of America. See footnote n. 8 and E. VYNCKE, *ibid.*, for inclusion and exclusion criteria.

¹⁴ The resulting evidence (gap) maps enumerates the number of relevant primary sources that contained supporting and/or disproving evidence for the assumptions analysed.

¹⁵ E.g. Travaux préparatoires: *Chambre* 2005-2006, nr. 51-2514/1, 4-11.

and nuclear families are different in terms of intergenerational solidarity and conflict.¹⁶

3. *The 'special treatment' of spouses under Belgian law, with a differential treatment based on family type*

1. *Principle* – In Belgian law, it is unanimously recognised that *avantages matrimoniaux* exist as a legal concept.¹⁷ However, as this concept is not defined in the Belgian Civil Code, there is no agreement on its scope, i.e. which agreements result in an *avantage matrimonial*.¹⁸

The concept refers to certain matrimonial property agreements in a (pre)nuptial agreement that stipulate the transfer of assets to a (surviving) spouse. The law prescribes that, in principle, such transfers qualify as non-donative transactions.¹⁹ Therefore *avantages matrimoniaux* cannot be taken into account when calculating the extent of the estate's compulsory portion ('*réserve*') and its counterpart, the disposable portion.²⁰ Furthermore, the reduction of a non-donative *avantage matrimonial* is not possible, as the compulsory portion only protects the forced heirs against excessive donative transactions that the decedent made.²¹

2. *Exception* – As an exception to this principle, the law prescribes that in the context of the protection of the forced heirs, *avantages matrimoniaux* are sometimes to be regarded as *inter vivos* gifts.²² This is important, because

¹⁶ E.g. Travaux préparatoires: *Chambre* 2016-2017, nr. 54-2282/001, 5.

¹⁷ See e.g. Belgian Constitutional Court 23 November 2005, 170/2005, *A.A.* 2005/5, (2179) consideration B.2.3; Cass. (BE) 24 March 2017, F.15.0189.N, ECLI:BE:CASS:2017:ARR.20170324.4; Cass. (BE) 7 December 2020, C.19.0488.N, ECLI:BE:CASS:2020:ARR.20201207.3N.11, 2020.

¹⁸ In 2022, the legislation on matrimonial property law and inheritance law was codified into the 'new' Belgian Civil Code (Loi du 19 janvier 2022, *MB* 14 March 2022). During the parliamentary proceedings, it was proposed to include a definition of *avantages matrimoniaux* (*Chambre* 2019-2020, nr. 55-1272/001, 50-55). This definition was however removed by amendment, stating that the proposed definition could not be regarded as the codification of existing law (*Chambre* 2021-2022, nr. 55-1272/006, 81).

¹⁹ Art. 2.3.55, al. 2, art. 2.3.57 and art. 2.3.58 Belgian CC. Also art. 2.3.64, §1, al. 4 Belgian CC. This is an objective qualification, which cannot be rebutted: *cfr.* Belgian Constitutional Court 23 November 2005, nr. 170/2005, consideration B.5.2.

²⁰ Art. 4.145 and 4.153 Belgian CC.

²¹ Art. 4.150, al. 1 Belgian CC.

²² Art. 2.3.55, al. 2, art. 2.3.57 and art. 2.3.58 Belgian CC. Also art. 2.3.64, §1, al. 4

gifts are taken into account when calculating the extent of the compulsory portion.²³ Moreover, gifts can encroach upon the entitlements of the forced heirs. If a gift turns out to be excessive, the decedent's children are granted a monetary claim for reduction (*'action de réduction'*) against the surviving (step)parent, for the amount by which their compulsory portion was breached by the *avantage matrimonial*.²⁴ The amount due is payable solely to the claimant, not benefitting other children who did not make a claim.

3. *Consequence* – This means that the question whether an *avantage matrimonial* is to be treated as a donative or non-donative transaction is of paramount importance to the children of the predeceased spouse. For example, if a deceased parent has transferred the entirety of their assets to the surviving spouse via a non-donative *avantage matrimonial*, their estate will be left empty. As a result, there is nothing left to inherit for these children. As forced heirs, they could in theory claim their compulsory portion. However, this legal protection has in reality become an empty shell: if the estate holds no assets and there are no *inter vivos* gifts to add, the *masse de calcul* is void and consequently, the compulsory portion is *de facto* non-existent.²⁵ In other words, when *avantages matrimoniaux* are not equated to *inter vivos* gifts, they can erode the children's compulsory portion.

4. *Application* – Under what circumstances do *avantages matrimoniaux* irrebuttably qualify as non-donative transactions under Belgian law?²⁶ And when are they treated as *inter vivos* gifts; what thresholds must be exceeded? The answer differs depending on whether the forced heir is a 'common' child to both spouses (the decedent and the surviving spouse)²⁷ or an

Belgian CC: for this exception to apply, certain thresholds must be surpassed (*infra*). Note that these *avantages* do not qualify as gifts in other contexts: Cass. (BE) 10 December 2010, F.08.0102.N, ECLI:BE:CASS:2010:ARR.20101210.1; Cass. (BE) 5 January 2017, F.15.0164.F, ECLI:BE:CASS:2017:ARR.20170105.3.

²³ For this, the '*masse de calcul*' must be calculated: art. 4.153 Belgian CC. This 'calculation mass' comprises of all assets owned by the decedent at the time of death, from which debts are deducted and then *inter vivos* gifts are added, regardless of when or to whom the gifts were made. One half of this 'calculation mass' is the disposable portion, the other half is the descendants' compulsory portion: art. 4.145 Belgian CC.

²⁴ Article 4.150-4.157 Belgian CC. Each forced heir can decide individually whether they want to claim their individual compulsory portion or not: art. 4.151 Belgian CC.

²⁵ See footnote n. 23.

²⁶ This means that children cannot give evidence to the *animus donandi* of their parent in agreeing to the *avantage matrimonial*: *cfr.* Belgian Constitutional Court 23 november 2005, nr. 170/2005, consideration B.5.2.

²⁷ Article 2.3.57 Belgian CC.

'uncommon' child (when the surviving spouse is a stepparent to the forced heir).²⁸ The *ratio* for this different treatment is the idea that 'common' children will eventually inherit from their surviving parent, including the assets obtained via the *avantage matrimonial*, whereas 'uncommon' children cannot expect that assets originally belonging to their parent will ever belong to them, as they do not have inheritance rights in the estate of the surviving stepparent.²⁹

'Uncommon' children therefore enjoy a higher level of protection. The legal threshold is lower, which means that, in comparison to 'common' children, a larger portion of an *avantage matrimonial* can be treated like a gift in the calculations regarding the compulsory portion. This in turn can potentially lead to a (more substantial) monetary claim for reduction in comparison to the claims a 'common' child would have. However, neither of these thresholds are conceptually defined. Only the application within community property regimes is described by the Belgian Civil Code, and not in detail.³⁰ Scholarly interpretations on the matter vary,³¹ especially regarding the application of these thresholds within regimes of separation of property.³²

5. *Intermediate conclusion* – Three aspects of the Belgian concept of *avantages matrimoniaux* are particularly noteworthy. One is that, because this legal concept is not defined in the legislation, its boundaries are unclear. The Belgian Civil Code provides only illustrative applications of the rule and its exceptions within the framework of community property regimes.³³ Moreover, it offers only a vague indication for the *mutatis*

²⁸ Article 2.3.58 Belgian CC.

²⁹ Travaux préparatoires: *Chambre* 2017-2018, nr. 54-2848/007, 35-36.

³⁰ Article 2.3.55, al. 2, art. 2.3.57 and article 2.3.58 Belgian CC.

³¹ E.g. H. CASMAN – A.L. VERBEKE, *Huwelijksvoordelen in een stelsel van scheiding van goederen*, in *Tijdschrift Estate Planning*, 2020, p. 39, n. 82; P. DE PAGE, *Les avantages matrimoniaux dans le Livre 2.3 du Code civil – explications, applications et conséquences pratiques*, in *Revue du notariat belge*, 2023, pp. 93 and 101–105; F. TAINMONT, *Les avantages matrimoniaux. Éléments d'attention à l'égard des praticiens*, in *Revue de planification patrimoniale belge et internationale*, 2023, pp. 339–340; M. VAN DE VAERD, *Hoe wordt het huwelijksvoordeel in het stelsel van scheiding van goederen berekend?*, in *Nieuwsbrief notariaat*, 2024, p. 18 f.; E. VYNCKE, *De eeuwige evenwichtsoefening*, cit., pp. 450-459.

³² Article 2.3.64, §1, al. 4 Belgian CC (on regimes of separation of property) refers to the rules of article 2.3.57-2.3.60 Belgian CC (on regimes of community of property), and mandates that they are applied analogously, without giving further details.

³³ A *préciput* from the community property (article 2.3.55 Belgian CC) and the unequal division of the community property (article 2.3.56 Belgian CC) are unanimously accepted

mutandis application in other matrimonial property regimes.³⁴ This leaves legal practitioners with limited legislative guidance. As such, it is presently unclear what does and does not qualify as an *avantage matrimonial* under Belgian law. The second noteworthy aspect is that different rules apply for ‘common’ and ‘uncommon’ children, with a more robust protection for the ‘uncommon’ children’s compulsory portion against these *avantages*. Thirdly, the law only stipulates such provisions for spouses. Unmarried couples, including registered partners, cannot benefit from a prescribed non-donative qualification when concluding relationship property agreements.

4. Legal comparison with France and the Netherlands

1. *France: principle and consequence* – *Avantages matrimoniaux* are also known as a legal concept in the French legal system. It is linked to article 1527 of the French Civil Code. Simply put, this provision states that advantages drawn from a conventional community regime are not considered as *inter vivos* gifts. As such, *avantages matrimoniaux* cannot be considered when calculating the extent of the estate’s *masse de calcul*³⁵ and subsequently, the extent of the disposable portion and its counterpart, the compulsory portion (*réserve*).³⁶

As in Belgium, this means that because of their non-donative qualification, *avantages matrimoniaux* can erode the children’s compulsory portion, and because of the lack of definition, there is no legal certainty about what agreements result in an *avantage matrimonial*.

to be *avantages matrimoniaux*, because these are the examples given by the Civil Code.

³⁴ Article 2.3.64, §1, al. 4 Belgian CC.

³⁵ Article 922 French Civil Code (hereinafter: ‘French CC’). This ‘calculation mass’ comprises of (i) all assets owned by the decedent at the time of death, under deduction of debts, and also (ii) all assets which were the subject of *inter vivos* gifts by the decedent regardless of when the gifts were made: C. PÉRÈS, *Compulsory Portion in France*, in K. G. C. REID – M. J. DE WAAL – R. ZIMMERMANN (eds.), *Comparative Succession Law: Volume III: Mandatory Family Protection*, Oxford University Press 2020, p. 102.

³⁶ For descendants, the extent of the compulsory portion and the ‘ordinary disposable portion’ depends on the number of eligible descendants: art. 913 French CC; C. PÉRÈS, *Compulsory Portion in France*, K. G. C. REID – M. J. DE WAAL – R. ZIMMERMANN (eds.), *Comparative Succession Law*, cit., p. 89. For spouses, the ordinary disposable portion of the estate is supplemented by a special disposable portion (art. 1094-1 French CC) which can be used to benefit the surviving spouse: C. PÉRÈS, *Compulsory Portion in France*, cit., p. 97.

2. *Exception* – Exceptionally, ‘uncommon’ children can consider an *avantage matrimonial* as an *inter vivos* gift benefitting their surviving stepparent, but only to a certain extent.³⁷ If this *avantage matrimonial* then breaches the compulsory portion,³⁸ ‘uncommon’ children are granted a monetary claim against the surviving spouse (*action de retranchement*).³⁹ Note that this exception only applies to ‘uncommon’ children.⁴⁰ Therefore, it is only in the context of a blended family where the couple has both ‘common’ and ‘uncommon’ children, that a ‘common’ child can benefit from this reduction, i.e. when an ‘uncommon’ child takes the initiative to reduce the *avantage*. This is because this monetary claim is divided along with the estate, benefitting both the ‘uncommon’ and ‘common’ children in a blended family.⁴¹

3. *Application* – It is presently unclear how this monetary claim for a breach of the compulsory portion ought to be calculated.⁴² The French Civil Code is silent on this matter. Legal practice has developed the so-called ‘double liquidation’ method, where the settlement of the actual matrimonial regime is compared with that of a ‘reference regime’, to determine the extent of the advantage that was obtained.⁴³ Numerous questions remain unresolved, including which is the ‘reference regime’, and if it is the same regime in all cases. Moreover, the scope of *avantages matrimoniaux* as a legal concept is disputed. It is reported that a decreasing number of French legal scholars are of the opinion that it is limited to conventional community regimes,⁴⁴ even though the French Civil Code

³⁷ Article 1527, al. 2 French CC. There is no agreement on how this ought to be calculated (*infra*).

³⁸ The calculations to determine whether a gift exceeds the special disposable portion are highly technical and will not be discussed here. Refer on this subject to: Cass. (FR) 26 April 1984, n° 83-11.839, *Bull. civ.* 1984, I, n° 140 ; C. PÉRÈS, *Compulsory Portion in France*, cit., p. 97; M. GRIMALDI, *Droit Des Successions*, Lexis Nexis, 2020, pp. 268-278.

³⁹ Art. 1527, al. 2 French CC; Cass. (FR) 19 December 2018, n° 18-10.244, ECLI:FR:CCASS:2018:C101237.

⁴⁰ Cass. (FR) 9 July 2014, n° 13-19.013, ECLI:FR:CCASS:2014:C100858; Cass. (FR) 11 February 2009, n° 07-21.421, *Bull. civ.* 2009, I, n° 30.

⁴¹ B. VAREILLE, *Avantage Matrimonial*, in Dalloz (ed.), *Répertoire civil Dalloz*, Dalloz, 2020, nr. 67.

⁴² B. BEIGNIER, *Avantages matrimoniaux et participation aux acquêts: critiquons le Code civil, pas la Cour de cassation*, in *Droit de la famille*, 2021, p. 4.

⁴³ N. ALLIX, *L'identification de l'avantage matrimonial, analyse à partir de la jurisprudence récente*, in *Petit Affiches*, 2021, nr. 9-11; Q. GUIGUET-SCHIELÉ, *Fiche Pratique n° 4414: Les avantages matrimoniaux* in *Fiches pratiques LexisNexis*, 2022, nr. 2.2.1.

⁴⁴ As reported by: B. BEIGNIER, *Avantages matrimoniaux*, cit., p. 3.

provides no basis for analogous applications, and case law on the matter is scarce.⁴⁵

4. *For registered partners as well?* – There is a debate among French legal scholars about whether there exists an analogous concept for registered partners ('PACS'),⁴⁶ the so-called '*avantages pacsimoniaux*'.⁴⁷ Even though there is no legal equivalent to article 1527 of the French Civil Code for partners in a PACS, there is an optional relationship property regime (article 515-5-1 French Civil Code) that gives rise to this debate. This optional regime entails an indivision of joint acquests (joint ownership regime).⁴⁸ The discussion around *avantages pacsimoniaux* stems from the provision that in this regime, unequal financing of a joint acquisition can never give rise to a claim between the PACS-partners.⁴⁹ Importantly, this lack of recourse does not qualify as a gift.⁵⁰

Consequently, when calculations are made for the *masse de calcul*, the disposable portion⁵¹ and the compulsory portion, the children cannot take into account that their deceased parent made a disproportionately greater financial contribution to the joint acquisition than the surviving PACS-partner. In the absence of an equivalent to article 1527 of the French Civil Code, 'uncommon' children also cannot claim a reduction against this transaction.

Despite divided opinions on whether this legislation constitutes an equivalent to the *avantages matrimoniaux*, there is broad scholarly

⁴⁵ Nevertheless, refer on this subject to: Cass. (FR) 18 December 2019, n° 18-26.337, ECLI:FR:CCASS:2019:C101109 ; Cass. (FR) 29 November 2017, n° 16-29.056, ECLI:FR:CCASS:2017:C101241 ; Cass. (FR) 25 September 2013, n° 12-26.091, ECLI:FR:CCASS:2013:C101009 ; Cass. (FR) 17 February 2010, n° 08-14.441, *Bull. civ.* 2010, I, n° 42.

⁴⁶ Couples can register their partnerships in France to formalise them. This is called the *pacte civil de solidarité* ('PACS'): art. 515-1 French CC.

⁴⁷ See e.g. C. BRENNER, *Solidarités familiales et mise en commun des biens du couple*, in *Droit de la famille*, 2016, p. 4, nr. 28; A.S. BRUN-WAUTHIER, *Régimes matrimoniaux et régimes patrimoniaux des couples non mariés*, Bruylant, 2021, p. 440–441; L.F. PIGNARRE, *Liberté contractuelle et statut impératif*, in *Droit de la famille*, 2024, p. 30, nr. 19; B. VAREILLE, *Avantage Matrimonial*, in Dalloz (ed.), *Répertoire civil* Dalloz, Paris, 2020, nr. 8.

⁴⁸ Art. 515-5-2 French CC describes which assets are not part of the indivision between the partners. See on this topic e.g. M. GRIMALDI, *Droit patrimonial de la famille 2021/2022*, Paris, 2021, p. 1488.

⁴⁹ Art. 515-5-1 French CC.

⁵⁰ M. GRIMALDI, *Droit patrimonial de la famille 2021/2022*, Paris, 2021, p. 1487.

⁵¹ Contrary to the surviving spouse, there is no special disposable portion for a surviving partner in a PACS: art. 913 j° 1094-1 *a contrario* French CC.

consensus that the scope of article 515-5-1 of the Civil Code is limited.⁵² This means that contrary to spouses, who can for example choose a universal community of property regime to maximise the *avantage matrimonial*,⁵³ PACS-partners cannot maximise the *avantage patrimonial*, if it is accepted to exist. When PACS-partners conventionally expand the scope of their indivision, article 515-5-1 French Civil Code does not imply that the enlarged lack of recourse in the case of an unequal financial contribution is not a gift. Such an expansion in the relationship property agreement may qualify as a gift, hereby exposing the agreement to potential reduction claims by the decedent's children.⁵⁴

5. *The Netherlands: no specific statutory provision for spouses or registered partners* – In the Netherlands a registered partnership is equated with marriage. As such, the same relationship property regulation applies to both relationship types.⁵⁵ The Dutch Civil Code does not contain any explicit provision qualifying asset transfers on the basis of relationship property agreements as non-donative transactions.

6. *Case law and doctrine* – Nevertheless, there is relevant case law from the Dutch Supreme Court. It has ruled that if spouses opt for a community regime, the resulting joining of estates ('*boedelmenging*') does not constitute a gift,⁵⁶ even in the case of a conventional community regime with unequal shares in the community property.⁵⁷ Note that this case law does not consider the transfer of assets at the time of dissolution of the property regime, only at the time of joining of the estates (e.g. at the time a community regime is established between two individuals).

In theory, other relationship property agreements, such as the

⁵² Pro e.g. C. BRENNER, *Solidarités familiales et mise en commun des biens du couple*, in *Droit de la famille*, 2016, p. 2; A.S. BRUN-WAUTHIER, *Régimes matrimoniaux et régimes patrimoniaux des couples non mariés*, Bruxelles, 2021, p. 441–443; M. GRIMALDI, *Droit patrimonial de la famille 2021/2022*, Dalloz, 2021, p. 1498.

Contra: H. FULCHIRON, *le nouveau PACS est arrivé!*, in *Defrénois*, 2006, nr. II.B.a; P. SIMLER – P. HILT, *Le nouveau visage du pacte civil de solidarité: un quasi-mariage*, in *La Semaine Juridique Notariale et Immobilière*, 2006, nr. 32.

⁵³ Art. 1526 j° 1524 French CC (the so-called 'double clause').

⁵⁴ Art. 913-928 French CC.

⁵⁵ Art. 1:80b and 4:8 Dutch Civil Code (hereinafter: 'Dutch CC').

⁵⁶ Hoge Raad (NL) 28 January 1959, ECLI:NL:HR:1959:AY1786; Hoge Raad (NL) 17 March 1971, ECLI:NL:HR:1971:AC5095.

⁵⁷ Art. 1:121, al. 1 Dutch CC; Hoge Raad (NL) 16 February 2024, ECLI:NL:HR:2024:239. This was a fiscal case.

participation in acquisitions (*verrekenbedingen*), can qualify as a gift.⁵⁸ In practice however, it remains unclear when this is the case.⁵⁹ Another – much debated – question is whether such relationship property agreements benefitting the surviving spouse can qualify as a pseudo-legacy (*quasi-legaat*), which would lead to a legal qualification as a donative transaction in the context the settlement of the estate.⁶⁰

In short, there exists no statutory principle under Dutch law about the non-donative qualification of asset transfers based on relationship property agreements. If the agreement in a specific case qualifies as a non-donative transaction, this can ‘erode’ the children’s compulsory portion (*legitieme portie*), as is the case in Belgium and France.⁶¹

7. *Application* – If a transfer of assets via relationship property law has been qualified as a donative transaction, this is relevant for determining whether the decedent’s (‘common’ and/or ‘uncommon’) children have a monetary claim against the surviving spouse or registered partner for obtaining these assets.⁶² The composition of the calculation mass (*legitimaire massa*) is rather complicated.⁶³ For example, not all *inter vivos* gifts are to be taken into account, such as *inter vivos* gifts that fulfilled a moral obligation the decedent had.⁶⁴ It is also unclear how certain elements of this mass are to be appraised. For example, when a participation in

⁵⁸ Art. 7:186, al. 2 Dutch CC.

⁵⁹ J. DE BOER – W. D. KOLKMAN – F. R. SALOMONS, *Mr. C. Assers Handleiding tot de beoefening van het Nederlands Burgerlijk Recht. 1. Personen- en familierecht. Deel II. Huwelijk, geregistreerd partnerschap en ongehuwd samenleven*, Wolters Kluwer, 2016, nr. 480.

⁶⁰ Article 4:126 Dutch CC. See e.g. S. PERRICK, *Mr. C. Assers Handleiding tot de beoefening van het Nederlands Burgerlijk Recht. 4. Erfrecht en schenking*, Wolters Kluwer, 2021, nr. 591b; F. W. J. M. SCHOLS, *Quasi-erfrecht met bindende elementen*, Wolters Kluwer, 2005, p. 150-152; M. J. A. VAN MOURIK E.A., *Handboek erfrecht*, Wolters Kluwer, 2020, p. 202, nr. VII.2.20.

⁶¹ D. J. SAIJA – H. J. WEIJERS, “Jij Een Beetje Meer Dan Ik!” *Het breukdelengemeenschap-arrest van 16 februari 2024 vanuit civiel en fiscaal perspectief gezien*, in *Kwartaalbericht Estate Planning*, 2024, p. 13-14.

⁶² Article 4:70, al. 1 j° 4:71-76 j° 4:79 Dutch CC and article 4:63 j° 4:79 Dutch CC. A breach of the compulsory portion gives rise to a monetary claim by the children, corresponding to the amount of this breach (*legitimair tekort*).

⁶³ Article 4:64 j° 4:65 j° 4:67 j° 4:126 j° article 7:186 Dutch CC; W. D. KOLKMAN, *Compulsory Portion in the Netherlands*, in K. G. C. REID – M. J. DE WAAL – R. ZIMMERMANN (eds.), *Comparative Succession Law*, cit., pp. 330-332 and 338 f.

⁶⁴ Art. 4:69, al. 1a Dutch CC. Another example: in principle, only *inter vivos* gifts that took effect within five years of the decedent’s death are considered, but exceptions apply: art. 4:67 Dutch CC.

acquisition qualifies as a pseudo-legacy, it is unclear for which amount this donative transaction should then be accounted for in the calculations regarding the compulsory portion.⁶⁵

8. *Overall comparison* – These three legal systems identify a need to balance the chosen solidarity towards the surviving spouse/partner (via relationship property law) and the legally protected solidarity towards one's children (in inheritance law). The transfer of assets via relationship property law and its qualification as a non-donative or a donative transaction lies at the heart of this balancing act.

In none of the three legal systems, is there a clear statutory definition of the asset transfers grounded in relationship property agreements which – to a certain extent – qualify as non-donative transactions. Nor are the thresholds which trigger a donative qualification clearly defined, which is a hindrance in calculating whether the children's compulsory portion was breached. However, the Belgian and French legal systems provide some statutory guidance on the practical application of this legal concept, whereas the Dutch legislation does not.

An important point of divergence is the distinction between 'common' and 'uncommon' children, *i.e.* between children for whom the surviving spouse or partner is a legal parent, and those for whom the survivor is a stepparent. In the Netherlands, there is no such distinction and in Belgium there is a strict distinction, while in France, despite the fact that only 'uncommon' children can take the initiative to claim a reduction of an *avantage matrimonial*, this results in a 'shared' outcome in blended families with both 'common' and 'uncommon' children.

Finally, these legal systems differ in their distinction between relationship types. The Belgian legal concept of *avantages matrimoniaux* knows no equivalent for unmarried partners. French scholars propose that not only *avantages matrimoniaux*, but also *avantages pacsimoniaux* exist. The Dutch legal system, in turn, fully equates spouses and registered partners. However, none of these legal systems recognises a functional equivalent to the *avantages matrimoniaux* for informal partners, who therefore cannot benefit from a prescribed non-donative qualification when arranging an asset transfer via a relationship property agreement.

⁶⁵ See e.g. N. M. L. LOGGER, *Vermogensoverheveling binnen het huwelijk: eerlijk zullen we alles delen?*, in *Vakblad Estate Planning*, 2023, pp. 10-13.

5. *The question of alignment with social reality*

1. *Evidence-based legislation?* – For the fundamental reform of Belgian family property law, an important objective was its alignment with contemporary society.⁶⁶ It is therefore striking that the parliamentary proceedings rarely refer to scientific sources when statements about Belgian society are invoked as grounds for the legislative choices. For instance, it was asserted that parent-child relationships are characterised by solidarity, while those between a stepparent and stepchild are marked by conflict.⁶⁷ Another such statement concerns an assumed hierarchy in commitment, with married couples viewed as the most committed and informal couples as the least.⁶⁸

The purpose of conducting a systematic review was to ascertain whether these statements/assumptions are corroborated by scientific evidence.⁶⁹ The findings presented below are not specific to the legal concept of *avantages matrimoniaux*, but stem from a broader analysis of the balance between the surviving spouse/partner and the decedent's children in Belgian family property law.

5.a *The Belgian legislator's assumption about commitment in formalised and non-formalised couple relationships*

1. *Lacking nuance* – The systematic literature review showed that the Belgian legislator's assumption about a hierarchy in commitment is valid when considered as a rule of thumb.⁷⁰ For example, it is broadly valid to claim that married couples tend to exhibit more commitment than unmarried couples. Yet, the social scientific studies also showed that social reality is diverse, and that the relationship type alone does not fully capture the degree of commitment within a couple. Indeed, the studies revealed that the relationship between commitment and relationship type can diverge from policymakers' expectations, and in some cases, even have little to do with each other.

For example, studies showed that the act of getting married was not

⁶⁶ Accord de gouvernement fédéral, *Chambre* 2014-2015, nr. 54-0020/001, 139; Exposé d'Orientation Politique Justice, *Chambre* 2014-2015, nr. 54-0020/018, 27-28.

⁶⁷ E.g. Travaux préparatoires: *Chambre* 2017-2018, nr. 54-2848/001, 38.

⁶⁸ Travaux préparatoires: *Chambre* 2005-2006, nr. 51-2514/1, 4-11.

⁶⁹ For a detailed account of the methodological framework employed in this study, refer to E. VYNCKE, *De eeuwige evenwichtsoefening*, cit., pp. 30-61.

⁷⁰ On this subject, E. VYNCKE, *De eeuwige evenwichtsoefening*, cit., pp. 297-310.

universally experienced as deepening the already existing commitment.⁷¹ A study on money management strategies (pooling income vs. keeping it separate) in six European countries found that while cohabiters were more inclined towards separate money management than spouses, this effect of relationship type strongly decreased when relationship duration was considered.⁷² Put differently, the longer a relationship lasts, the more likely it is that the couple – regardless of marital status – will choose to pool economic resources.⁷³

5.b *The Belgian legislator's assumption about intergenerational solidarity and conflict in nuclear families and in blended families*

1. *Not always so close* – The systematic literature review indicates that the bond between a stepparent and a stepchild is indeed less close than the bond between a parent and a child.⁷⁴ Once again, the Belgian legislator's assumption is not unfounded. However, the empirical data challenge the assumption of a uniformly close relationship between parents and their children.

For example, a German study found that overall, the bond between a parent and a child was closer than between a stepparent and stepchild. Yet, when only comparing parent-child ties, the closeness that a parent felt with children shared with the current partner exceeded the closeness that a parent felt with children from a previous partnership.⁷⁵

⁷¹ M. BAKER – V. ELIZABETH, *Tying the knot: The impact of formalization after long-term cohabitation*, in *Journal of Family Studies*, 2013, p. 263; M. BAKER – V. ELIZABETH, *Transiting through cohabitation to marriage: emerging commitment and diminishing ambiguity*, in *Families Relationships and Societies*, 2015, p. 59 f.; E. R. BOSLEY-SMITH – C. RECZEK, *Before and After "I Do": Marriage Processes for Mid-Life Gay and Lesbian Married Couples*, in *Journal of Homosexuality*, 2018, pp. 1992-1995.

⁷² In four of the six countries, particularly in Germany and France.

⁷³ N. HIEKEL – A. C. LIEFBROER – A.R. POORTMAN, *Income pooling strategies among cohabiting and married couples: A comparative perspective*, in *Demographic Research*, 2014, pp. 1547-1549.

⁷⁴ On this subject, E. VYNCKE, *De eeuwige evenwichtsoefening*, cit, pp. 310–319.

⁷⁵ O. ARRÁNZ BECKER et al., *What Narrows the Stepgap? Closeness Between Parents and Adult (Step)Children in Germany*, in *Journal of Marriage and Family*, 2013, pp. 1140-1143.

6. *Avantages matrimoniaux: recommendations for Belgian law*

1. *Maintaining and defining the concept* – In my doctoral dissertation, I provided an extensive analysis of this legal concept – its definition, practical application, solutions to current problems and the reasons it should retain its place in Belgian family property law.⁷⁶

In short, I define an *avantage matrimonial* as the enrichment of a spouse's separate property, resulting from a joint decision for structural solidarity.⁷⁷ I challenge the doctrinal proposal to abolish this concept, arguing that such a decision would exacerbate legal uncertainty. This concern is illustrated by the uncertainty observed in both France and the Netherlands regarding the functional equivalents of the Belgian concept. Moreover, the function of the *avantages matrimoniaux* aligns with a core characteristic of marriage under Belgian law: the prioritisation of solidarity over individual autonomy.⁷⁸

2. *Equal protection for all children* – The *avantages matrimoniaux* are an expression of solidarity between spouses, yet their non-donative qualification can significantly undermine the compulsory rights of children in their deceased parent's estate. This outcome conflicts with the existence of the descendants' compulsory portion, which serves to uphold intergenerational solidarity.⁷⁹ This is why I propose a revision of the existing legal thresholds.⁸⁰ In my conclusion, a relationship property agreement about the allocation of acquests, i.e. the fruits of the couple's mutual endeavours, should always be objectively qualified as a non-donative transaction. Conversely, the allocation of non-acquests via relationship property agreements should always be objectively equated to a donative transaction in the context of the compulsory portion.⁸¹

I propose to prescribe the same threshold for both 'common' and 'uncommon' children, based on comparative, empirical and practical

⁷⁶ E. VYNCKE, *De eeuwige evenwichtsoefening*, cit., pp. 423–499.

⁷⁷ E. VYNCKE, *De eeuwige evenwichtsoefening*, cit., p. 427. The implications of this definition are discussed in depth in my dissertation. For example, a 'structural' decision implies a formalised relationship property agreement (notarial deed).

⁷⁸ E. VYNCKE, *De eeuwige evenwichtsoefening*, cit., p. 489 f.

⁷⁹ The extent to which the descendants' compulsory portion ought to be maintained is of course also a hot topic, but lies beyond the scope of this paper.

⁸⁰ See paragraph n. 3.4 on the existing thresholds.

⁸¹ For a discussion of the arguments on this recommendation, refer to E. VYNCKE, *De eeuwige evenwichtsoefening*, cit., p. 495–499.

insights. Comparatively, the current strict differentiation in Belgian law between these children diverges from the French and Dutch legal systems. Empirically, the systematic review has shown that the relationship between parents and children differs depending on whether they are embedded in a nuclear family or a blended family. From this, I have drawn the normative conclusion that 'common' children are also in need of protection against disinheritance by *avantages matrimoniaux*. After all, it is not certain that they will eventually inherit the assets that their surviving parent obtained from their predeceased parent via the *avantage matrimonial*. Should this widowed parent remarry, this could have a negative impact on the parent-child relationship, which could in turn lead to the surviving parent's wish to minimise these children's entitlements to these assets, to benefit their new spouse. Lastly, from a practical point of view, a single threshold will simplify the settlement of estates where there are both 'common' and 'uncommon' children who inherit.⁸²

3. *Expanding the scope* *ratione personae* – As mentioned above, Belgian law currently limits the applicability of *avantages matrimoniaux* to marital relationships. This diverges from France and the Netherlands, where registered partners can also embed solidarity via relationship property law – to a lesser or greater extent. Furthermore, the empirical data showed that commitment is not exclusive to married couples.

I therefore propose to include registered partners in its scope, but only those who have voluntarily submitted themselves to the duty of mutual assistance of article 213 of the Belgian CC in their relationship property agreement.⁸³ This voluntary submission would entail, for example, that in the event of a relationship breakdown, a claim for alimony could be made.⁸⁴ By putting themselves in a more analogous position to spouses, registered partners would then be allowed to embed solidarity in their relationship property agreements via 'advantages of acquests' (*aanwinstenvoordelen*), analogous to the proposed revisions for the *avantages matrimoniaux* for spouses. As such, the allocation of acquests would be out of reach for reduction claims based on the children's compulsory portion, because of an irrebuttable non-donative qualification.

⁸² E. VYNCKE, , *De eeuwige evenwichtsoefening*, cit., p. 495–499.

⁸³ For a detailed account of its practical application, refer to E. VYNCKE, , *De eeuwige evenwichtsoefening*, cit., pp 495–499.

⁸⁴ *Cfr.* Cass. (BE) 16 December 2021, C.18.0060.N, ECLI:BE:CASS:2021:ARR.20211216.1N.6.

7. Conclusion

1. *Balancing competing duties* – When given freedom of disposition, an individual may choose to prioritise one duty of solidarity over another. Combined with the diversity of family constellations in societal reality, the reconciliation in family property law of the competing interests of a decedent's children and a surviving spouse/partner presents a considerable challenge. This is certainly the case for *avantages matrimoniaux*, a legal concept in Belgian law that qualifies asset allocations via matrimonial property agreements as non-donative transactions. Such arrangements may *de facto* result in the decedent's children being disinherited. Based on findings from comparative law and a systematic review of social scientific studies, this paper makes several normative recommendations to improve this balance in Belgian law.

Sibel Yılmaz Coşkun*

*Legislatures' Positive Obligations Regarding Environmental Disasters:
Reflections on the Expected Istanbul Earthquake*

ABSTRACT

This paper examines the constitutional responsibility of legislatures in the face of scientifically established seismic risk, using the expected Istanbul earthquake as a case study. It argues that although earthquakes cannot be predicted with precision as to their timing or magnitude, the sustained scientific knowledge regarding the likelihood and potential consequences of a catastrophic seismic event has important constitutional implications. As the degree of scientific certainty concerning a risk progressively increases — even in the absence of exact predictability — the legislature's margin of discretion correspondingly narrows, transforming preventive action from a matter of political judgment into a constitutional obligation. The paper analyses this proposition through the framework of positive obligations under Article 2 of the European Convention on Human Rights and Article 17 of the Turkish Constitution. Particular attention is given to the European Court of Human Rights' evolving approach to foreseeability, precaution, and causation. The paper argues that the reasoning developed in *Cannavacciuolo and Others v. Italy*, which locates the core of the violation in prolonged legislative and administrative inaction rather than in the eventual catastrophic outcome, can be extended to the assessment of legislative responsibility in the context of the expected Istanbul earthquake. The paper also draws on recent Turkish Constitutional Court jurisprudence, which has clarified that the state bears a continuous, non-delegable duty to establish and maintain effective regulatory and supervisory frameworks for building safety and earthquake preparedness. Against this legal framework, the paper evaluates Türkiye's preparedness for the expected Istanbul earthquake. It argues that persistent legislative shortcomings, ineffective regulatory design, enforcement failures, structural impunity, and repeated zoning amnesties have allowed systemic vulnerability to persist despite decades of scientific warnings. The paper concludes that where the probability and potential consequences of a disaster have become sufficiently established through scientific knowledge, legislative inertia is no longer adequately explained by political discretion but may amount

* Sibel Yılmaz Coşkun is an Assistant Professor of Constitutional Law at Bursa Uludağ University, Türkiye. Her research focuses on constitutional law and human rights, with particular emphasis on positive obligations of the state, legislative responsibility, and the relationship between legislatures and courts.

This paper is an output of a research project supported by TÜBİTAK 2219 – International Postdoctoral Research Fellowship Program for Turkish Citizens. The author gratefully acknowledges the support of TÜBİTAK.

to a justiciable breach of the State's constitutional positive obligations to protect the right to life. Although meaningful judicial scrutiny is likely to arise only after a catastrophic earthquake has occurred, the constitutional breach itself lies in the legislature's prolonged failure to act before the disaster.

KEYWORDS

Positive Obligations – Legislative Inaction – Right to Life – Istanbul Earthquake – Cannavacciuolo and Others v. Italy.

SUMMARY: 1. Introduction – 2. The Legal Framework of Positive Obligations in the Context of Natural Disasters – 3. Scientific Predictions and Legislative Gaps in the Context of the Expected Istanbul Earthquake – 4. Establishing Legislative Accountability and Causation: From Inaction to Violation – 5. Conclusion.

1. *Introduction*

On 6 February 2023, Türkiye was struck by two devastating earthquakes that claimed the lives of more than 50,000 people and left thousands injured, displaced, or permanently harmed. Long anticipated by seismologists, the disaster sharpened public anxiety about the expected Marmara earthquake threatening Istanbul, the country's most populous and economically critical city.

Advances in seismology and risk modelling demonstrate that many so-called 'natural' disasters are foreseeable and, to a significant extent, preventable. This renders the State—particularly the legislature—constitutionally obliged to act proactively. Legislative inaction increases vulnerability, undermines the protection of fundamental rights, and erodes public trust, thereby creating structural rights issues.

A human-rights-based approach in international law to disaster governance is widely recognised, yet its constitutional articulation, especially with regard to legislative duties, remains underdeveloped. As scientific certainty increases, the legislature's discretion narrows, and preventive action shifts from political choice to constitutional necessity. In this respect, legislative inaction in the face of scientifically verified threats may constitute a breach of constitutional duty, justiciable before constitutional courts.

Accordingly, this paper proceeds from the premise that legislatures bear positive obligations grounded in constitutional guarantees of the right to life, bodily integrity, and environmental protection, reinforced by binding international human rights norms. It asks to what extent

legislative omissions in the context of foreseeable seismic risks can violate these obligations. This paper aims to fill this gap by arguing that, in the face of a scientifically crystallised risk such as the Istanbul earthquake, the legislature's duty to act ceases to be a matter of political discretion and becomes a justiciable constitutional obligation. The core of the violation lies not in a specific catastrophic outcome, but in the prolonged legislative inaction itself.

Because the severe consequences of earthquakes implicate multiple actors, responsibility is often diffused. This analysis, however, focuses specifically on the legislature as the constitutional actor charged with establishing preventive regulatory frameworks. Where foreseeable risks persist, causation can be traced from legislative omissions to systemic vulnerability, rendering breaches of positive obligations amenable to judicial scrutiny.

The paper is structured as follows. Section 2 outlines the framework of positive obligations under the European Convention on Human Rights and the Turkish Constitution, together with the relevant jurisprudence. Section 3 examines the Istanbul context by outlining the prevailing scientific views on a major earthquake and identifying regulatory gaps that entrench vulnerability. Section 4 analyses legislative accountability through the lens of causation and reflects on the constitutional limits of legislative discretion where scientific evidence renders preventive action imperative.

2. The Legal Framework of Positive Obligations in the Context of Natural Disasters

This section outlines the legal framework of positive obligations in the context of disaster prevention, primarily derived from the right to life under Article 2 of the ECHR and Article 17 of the Turkish Constitution. It first analyses the evolving jurisprudence of the European Court of Human Rights (ECtHR), establishing the state's duty to act in the face of foreseeable risks. This analysis draws on and advances the analytical framework established in landmark ECtHR decisions concerning both man-made and environmental hazards. Such cross-contextual transfer of principles is methodologically justified, as it reflects the Court's increasing move away from rigid categorical distinctions (e.g., between 'natural' and 'man-made' disasters) and towards a unified focus on the state's knowledge

of a risk and its failure to take reasonable preventive measures. The section then examines how these principles have been adopted and applied by the Turkish Constitutional Court (TCC), arguing that where a likelihood of a severe Istanbul earthquake exists, legislative discretion transforms into a justiciable constitutional duty.

2.1. ECtHR Jurisprudence

The ECtHR's approach is grounded in the principle that the Convention must be "practical and effective".¹ In the context of disaster prevention, this principle finds its most compelling expression in the right to life under Article 2. While natural disasters may also engage other Convention rights, such as the right to respect for private and family life (Article 8) or the protection of property (Article 1 of Protocol No. 1), the Court affords states a significantly wider margin of appreciation in relation to these rights.² In contrast, the positive obligations stemming from Article 2 are more unequivocal and stringent. Therefore, given the fundamental nature of the right to life and the gravity of the risk in question, this paper will focus primarily on the framework established under Article 2.

2.1(a). General Duties in the Context of Disasters

The ECtHR has developed a body of jurisprudence on States' positive obligations under Article 2, particularly in contexts of foreseeable disasters. This body of case law moves beyond theoretical guarantees to impose concrete duties of prevention, especially where scientific warnings exist. Under Article 2, the right to life encompasses not only protection from direct threats but also proactive measures to prevent foreseeable risks. States are required to establish clear legislative and administrative frameworks for effective disaster risk and emergency management to safeguard life.³

¹ ECtHR, *Airey v. Ireland* (Chamber), no. 6289/73, 9 October 1979, §24.

² E. SOMMARIO – S. VENIER, *Human Rights Law and Disaster Risk Reduction*, in *QIL*, Zoom-in 49, 2018, p. 29 ff. and 45; K. İSTREFi, *Earthquakes in Türkiye and the Right to Life: Whither Positive Obligations?*, in *ECHR Blog*, 2023; C. HERİ, *Vindicating the ECtHR's Role in Environmental Matters: Cannavacciuolo and Others v. Italy*, in *Strasbourg Observers Blog*, 2025.

³ ECtHR, *Öneryıldız v. Turkey* (GC), no. 48939/99, 30 November 2004, §89; ECtHR, *Budayeva and Others v. Russia* (Chamber), nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, 20 March 2008, §129; ECtHR, *Kolyadenko and Others v. Russia*, nos. 17423/05, 20534/05, 20678/05, 23263/05, 24283/05 and 35673/05, 28 February 2012, §157; E. SOMMARIO – S. VENIER, *Human Rights Law*, cit., p. 43.

The ECtHR has addressed states' positive duty to protect individuals in natural disasters through multiple judgments, notably *Budayeva and Others v. Russia*⁴ and *M. Özel and Others v. Turkey*.⁵ In *Budayeva and Others*,⁶ the Court held that repeated, credible warnings regarding an imminent disaster (in this case, mudslides) triggered a duty to adopt reasonable preventive measures. The authorities' failure to act on expert alerts, repair protective infrastructure, or adequately inform the public breached their positive obligation to establish an effective legislative and administrative framework. Similarly, in *M. Özel and Others*,⁷ which concerned the 1999 Marmara earthquake, the Court stressed that although earthquakes are largely uncontrollable, States must minimise catastrophic impacts through spatial planning and building supervision. The local authorities' neglect contributed directly to loss of life, violating Article 2.

These cases demonstrate that foreseeable natural hazard risks cannot be ignored without breaching the right to life. At the same time, the Court recognises that States retain a margin of discretion in prioritising and allocating resources,⁸ and should not face an "impossible or disproportionate burden".⁹ For inherently uncontrollable events like earthquakes, the obligation manifests as measures 'to reinforce the State's capacity to deal with their unexpected and violent nature'.¹⁰ This includes: (1) technical precautions (e.g., resilient infrastructure), (2) contingency planning and emergency warning systems, and (3) mechanisms to detect failures in enforcement,¹¹ thereby ensuring accountability.

This framework, however, remains insufficiently equipped to capture systemic and legislative responsibility for a long-foreseen catastrophic risk, a gap that the Court's evolving approach to causation and precaution now seeks to address.

⁴ ECtHR, *Budayeva and Others*, fn. 3 above.

⁵ ECtHR, *M. Özel and Others v. Turkey*, nos. 14350/05, 15245/05 and 16051/05, 17 November 2015.

⁶ ECtHR, *Budayeva and Others*, fn. 3 above, §§ 134, 149–160.

⁷ ECtHR, *M. Özel and Others*, fn. 5 above, §§ 173–175.

⁸ ECtHR, *Kolyadenko and Others*, fn. 3 above, § 160.

⁹ ECtHR, *Budayeva and Others*, fn. 3 above, § 135; E. SOMMARIO – S. VENIER, *Human Rights Law*, cit., p. 42.

¹⁰ ECtHR, *M. Özel and Others*, fn. 5 above, § 173.

¹¹ ECtHR, *Öneryıldız v. Turkey*, fn. 3 above, §§ 89–90; ECtHR, *Budayeva and Others*, fn. 3 above, §132; ECtHR, *Kolyadenko and Others v. Russia*, fn. 3 above, §159; E. SOMMARIO – S. VENIER, *Human Rights Law*, cit., p. 44.

2.1(b). *Causation and the Precautionary Principle*

The scope of positive obligations triggered by a foreseeable risk is shaped not only by its nature but also by the requisite standard of causation. Whether a particular risk triggers stricter duties depends on its foreseeability and preventability¹². State authorities are obligated to “assess all potential risks”¹³ and diligently gather knowledge on specific hazards. Natural hazards are generally considered “beyond human control”, but recurring calamities affecting specific areas may constitute an aggravating factor if negligence worsens the damage.¹⁴ For man-made hazards, such as hazardous industrial activities, stricter procedural duties apply immediately,¹⁵ including continuous monitoring and early preventive measures.¹⁶

The landmark 2025 ruling in *Cannavacciuolo and Others v. Italy*¹⁷ (a case concerning industrial pollution) expands the *Budayeva and Others* and *Öneryıldız* jurisprudence in the context of systemic state inaction, establishing a lower threshold for establishing state responsibility. First, it confirmed that a “sufficiently serious, genuine and ascertainable” risk to life—applying the *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*¹⁸ standard of a “real and imminent risk”—is sufficient to trigger the State’s due diligence obligations under Article 2. Second, and most critically, it dismantled the requirement for applicants to prove a direct, “but-for” causal link between state inaction and specific harm. Invoking the precautionary principle (as in *KlimaSeniorinnen*), the Court held that the ‘fact that there was no scientific certainty about the precise effects the pollution may have had on the health of a particular applicant cannot negate the existence of a protective duty’.¹⁹

This dismissal of the strict “but-for” test exemplifies a significant evolution in the ECtHR’s approach to causation, refocusing the inquiry from direct, individual causal links onto the systemic legislative failure

¹² ECtHR, *Budayeva and Others*, fn. 3 above, §§ 136-137.

¹³ ECtHR, *Kolyadenko and Others*, fn. 3 above, § 166.

¹⁴ ECtHR, *Budayeva and Others*, fn. 3 above, §§ 135, 182.

¹⁵ ECtHR, *Öneryıldız v. Turkey*, fn. 3 above, § 90.

¹⁶ ECtHR, *Kolyadenko and Others*, fn. 3 above, § 166; D. Xenos, *Asserting the Right to Life (Article 2, ECHR) in the Context of Industry*, in *German Law Journal*, 2007, p. 231 and ff.; E. SOMMARIO – S. VENIER, *Human Rights Law*, cit., p. 43.

¹⁷ ECtHR, *Cannavacciuolo and Others v. Italy*, no. 51567/14, 30 January 2025.

¹⁸ ECtHR, *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* (GC), no. 53600/20, 9 April 2024.

¹⁹ ECtHR, *Cannavacciuolo and Others v. Italy*, fn. 17 above, §391. See also C. HERI, *Vindicating the ECtHR’s Role*, cit.

itself. Most significantly, the Court pinpointed the core of the violation of Article 2 as prolonged legislative and administrative inaction itself, rather than a specific catastrophic outcome.²⁰ This reasoning, while a landmark step, must be seen as part of the Court's broader, and often inconsistent, jurisprudence on causation in human rights law, which frequently blends factual and legal causation without a clear standard.²¹ This evolution, which reframes harm as a preventable risk arising from systemic failure,²² provides an analytical framework that can be extended to the assessment of complex and foreseeable threats such as earthquakes.

Although *Cannavacciuolo* concerned man-made pollution, its logic erodes the traditional barrier between “man-made” and “natural” disasters. It focuses on the state's knowledge of a risk and its conscious choice to ignore the predictable *human-made consequences* of a natural event—namely, the catastrophic collapse of improperly regulated infrastructure. In this way, the reasoning extends to natural disasters where human-made factors—such as construction standards, urban density, and regulatory enforcement—interact with seismic risks, reinforcing that legislative inaction, even amid “natural” hazards, may breach positive obligations. The legislature's procedural duty to systematise, assess, and act on scientific data thus becomes a justiciable component of Article 2 and a concrete expression of due diligence.

Moreover, *Cannavacciuolo* highlights the Court's willingness to employ systemic remedies, including pilot judgment procedures under Article 46, requiring comprehensive strategies, monitoring, and public information platforms. Applied to earthquake preparedness, such mechanisms could mandate the legislature not only to enact robust building codes and urban planning regulations but also to establish independent oversight and early-warning communication strategies, ensuring that systemic vulnerabilities are addressed proactively.

The implications of this reasoning, developed in *Cannavacciuolo*, find further illustrative resonance in the recent case of *L.F. and Others v. Italy*.²³ While the Court chose to examine the case under Article 8 rather than Article 2, its condemnation of the state's “prolonged passivity” and “multiple failures” in the face of known risks, and its flexible application

²⁰ C. HERI, *Vindicating the ECtHR's Role*, cit.

²¹ V. STOYANOVA, *Causation and Breach of Positive Obligations under the European Convention on Human Rights*, in *Strasbourg Observers Blog*, 2025.

²² *Ibid.*

²³ ECtHR, *L.F. and Others v. Italy*, no. 52854/18, 6 May 2025.

of the precautionary principle without requiring conclusive individual proof, underscores the dangers of legislative inertia and a growing judicial willingness to hold States accountable for regulatory failure.²⁴ The judgment is significant for its recognition of cumulative harm, its critique of the authorities for focusing on the prospective situation while disregarding historical harm, and its condemnation of an inadequate balancing exercise that unduly allowed economic interests to override human rights.²⁵

At the same time, the Court's decision not to engage Article 2 reveals a persistent jurisprudential tension, demonstrating that the scope of the State's preventive duties under the right to life remains underdeveloped. As Judge Serghides emphasised in his dissent in *L.F. and Others*, the mere existence of a credible, systemic risk to human life – including measurable increases in mortality supported by scientific evidence – can in principle engage the State's preventive obligations, even before harm materialises.²⁶ Applied to Istanbul's earthquake risk, the scientifically modelled predictions of mass casualties reveal the existence of a credible and systemic threat to human life. Coupled with decades-long legislative inertia, this would arguably be sufficient to engage the State's preventive obligations under Article 2. This underscores that the State's duty to protect life is triggered by statistical risk, not by waiting for disaster to claim its first victims, and points to the need for more consistent judicial recognition of positive obligations in the context of foreseeable natural hazards.

2.2. Turkish Constitutional Law

Article 17 of the 1982 Constitution guarantees personal inviolability, including the protection of life and the safeguarding of an individual's material and moral existence. Read together with Article 5, which obliges the State to remove obstacles to the exercise of rights and create conditions for human development, this provision establishes a constitutional duty to protect life. Article 11, which binds all State organs and institutions to the Constitution, and Article 12, which affirms the inherent and

²⁴ A. RADİNA, *Is Article 8 Enough? L.F. and Others v. Italy and the Sidelining of Article 2 in Environmental Cases*, in *Strasbourg Observers Blog*, 2025.

²⁵ *Ibid.*

²⁶ ECtHR, *L.F. and Others v. Italy*, fn. 23 above, partly dissenting opinion of Judge Serghides, §§ 5-9. See also ECtHR, *Guide on Article 2 of the European Convention on Human Rights: Right to Life*, 2025, available at: https://ks.echr.coe.int/documents/d/echr-ks/guide_art_2_eng (accessed 14.01.2026).

inalienable nature of fundamental rights and freedoms, further reinforce this duty. Article 56 adds an environmental dimension by requiring the State to secure a healthy environment²⁷. In addition, Article 90/5 gives the ECHR binding force in the domestic order, and Article 148/3 allows individual applications based on both constitutional and Convention rights, encouraging the Constitutional Court (TCC) to align its reasoning with Strasbourg standards. Taken together, these provisions frame the protection of life not as a matter of political discretion but as a binding constitutional obligation incumbent upon all branches of the State.

Derived from this obligation, accountability²⁸ for disaster governance is not merely retrospective but a forward-looking duty. As prevailing scientific views reduce uncertainty, legislative discretion narrows: inaction amid foreseeable seismic harm may breach Article 17. This constitutional duty has been given concrete shape by the jurisprudence of the Constitutional Court.

The TCC has underlined this duty in earthquake-related cases. In *Serpil Kerimoğlu*²⁹ and *Ömür Kınay*,³⁰ it emphasised that the State bears a positive obligation to protect the right to life by using all available means to establish deterrent legal frameworks, adopt preventive administrative measures, and ensure accountability for both public and private actors endangering life. According to the TCC, 'the States' obligation to protect life in the occurrence of unavoidable natural disasters, such as earthquakes, relates to taking scientifically feasible measures to minimize the damage of the disaster within the framework of financial resources. It should be emphasized that the powers of the State regarding zoning plan implementation and land regulation hold critical importance in this context'.³¹ In *Ömür Kınay*, arising from the 1999 Marmara earthquake, the applicant lost her mother and was herself left disabled; since the applicant had not raised complaints concerning preventive obligations, the Court confined its examination to the procedural limb of the right

²⁷ TCC, *Ömür Kara and Onursal Özbek*, no. 2013/4825, 24 March 2016, § 46; TCC, *E.Ü.* [General Assembly], no. 2016/13010, 17 September 2020, § §65.

²⁸ K. DA COSTA – P. POSPIESZNA, *The Relationship between Human Rights and Disaster Risk Reduction Revisited: Bringing the Legal Perspective into the Discussion*, in *Journal of International Humanitarian Legal Studies*, 2015, p. 64 ff.

²⁹ TCC, *Serpil Kerimoğlu and Others*, no. 2012/752, 17 September 2013, §§ 50-52; TCC, *Ömür Kınay*, no. 2015/4686, 19 February 2019, § 39.

³⁰ There are also judgments of the Constitutional Court in which it found violations of the State's positive obligations concerning the right to a fair trial and the right to property.

³¹ TCC, *Ömür Kınay*, fn. 29 above, § 40.

to life, finding a violation due to excessive delays and the dismissal of criminal proceedings. The Court nevertheless stressed that the State's duty in unavoidable disasters entails taking scientifically feasible measures and highlighted the critical importance of zoning and land-use powers, extending to safeguarding individuals against all kinds of danger and violence whenever the right to life is at risk.

More recent judgments signal an evolving doctrine. The Court has recognised that identifying and strengthening unsafe buildings, or ordering their demolition where necessary, forms part of the State's positive duty to protect life.³² This suggests a doctrinal shift whereby, under conditions of established foreseeability, legislative inertia may increasingly be framed as a relevant causal factor in constitutional rights violations. In the context of the expected Istanbul earthquake, prolonged legislative inaction may therefore constitute a justiciable breach of constitutional obligations rather than a matter of political discretion.

3. Scientific Predictions and Legislative Gaps in the Context of the Expected Istanbul Earthquake

The anticipated "Istanbul earthquake" along the North Anatolian Fault poses a direct and long-anticipated threat to the city and its surroundings.³³ While the exact timing and magnitude cannot be predicted, probabilistic models make clear that major destruction is highly likely.³⁴

Earthquake risk assessment is complex, shaped by seismic hazard, land use, demographic structure, and economic conditions; yet it ultimately translates into expected loss of life.³⁵ This relationship is commonly summarised as $\text{Risk} = \text{Hazard} \times \text{Vulnerability} \times \text{Exposed Assets}$.³⁶ Expected

³² TCC, Decision no. 2024/141, 23 July 2024, Official Gazette 3/12/2024-32741, § 11.

³³ S. KUNDAK – H. TÜRKOĞLU, *İstanbul'da Deprem Riski Analizi*, in *İTÜ Dergisi A: Mimarlık, Planlama, Tasarım*, 2007, pp. 37 ff. and 39.

³⁴ H. EYİDOĞAN, *Deprem Olacak mı Hocam?*, in *Bilim ve Gelecek Dergisi*, 2007, pp. 10 ff. and 13.

³⁵ R. SPENCE, *Earthquake Protection: The Need for Legislation to Strengthen High-Risk Buildings*, in *13th World Conference on Earthquake Engineering*, Vancouver, B.C., Canada, 1–6 August 2004, Paper no. 2082; S. KUNDAK – H. TÜRKOĞLU, *İstanbul'da Deprem Riski Analizi*, cit., p. 40.

³⁶ H. EYİDOĞAN, *Deprem Olacak mı Hocam?*, cit., p. 13; S. KUNDAK – H. TÜRKOĞLU, *İstanbul'da Deprem Riski Analizi*, cit., p. 39.

casualties depend largely on the vulnerability of residential buildings, with masonry structures accounting for approximately 75% of deaths.³⁷ This reality underscores the scope of the State's responsibilities regarding earthquake risk.

Türkiye's formal risk-management architecture largely developed in the aftermath of the 1999 Kocaeli and Düzce earthquakes.³⁸ Nevertheless, earthquake-specific preventive measures remain persistently insufficient. The earthquakes of February 2023, which claimed more than 50,000 lives, revealed systemic failures in healthcare capacity, housing safety, and institutional coordination.³⁹ These failures were not isolated or unforeseeable but reflect structural weaknesses that would likely be replicated—if not magnified—in Istanbul's densely populated districts.⁴⁰

Prevailing scientific views leave little room for uncertainty: a major Marmara earthquake is not a question of if but when. Since 1999, studies have consistently estimated a 60–90% probability of a magnitude 7 or higher earthquake occurring within the coming decades.⁴¹ Modelling conducted by JICA and the Istanbul Metropolitan Municipality projects tens of thousands of deaths and injuries, alongside extensive structural damage to the housing stock and critical infrastructure.⁴² These projections

³⁷ SPENCE, *Earthquake Protection...*, fn. 35 above; Kundak and Türkoğlu, *İstanbul'da Deprem...*, fn. 33 above, p. 40.

³⁸ R. SPENCE, *Earthquake Protection*, cit.; Z. ÖZEL MAZLUM – Ö. YALÇINER ERÇOŞKUN, *İstanbul'un Depreme Dirençliliğini Artırmak İçin Coğrafi Bilgi Sistemlerinin Kullanımı*, in *Journal of Management Theory and Practices Research*, 2023, pp. 148 ff. and 172.

³⁹ E. LYAPINA, *Earthquakes in Türkiye as a Violation of Human Rights: Role and Position of the ECtHR*, in *CYL*, 2023, 14, p. 190 ff.

⁴⁰ AFAD – DISASTER AND EMERGENCY MANAGEMENT AUTHORITY, *Istanbul Provincial Disaster Risk Reduction Plan* (İstanbul İl Afet Risk Azaltma Planı – İRAP), 2022, available at: https://istanbul.afad.gov.tr/kurumlar/istanbul.afad/PDF-Dosyalar/irap_istanbul.pdf (accessed 14.01.2026); S. NAİMİ – T. TUFAN, *Olası İstanbul Depremi ile Yapılan Kentsel Dönüşüm Çalışmaları ve Alınan Önlemlerin İrdelenmesi*, in *Aurum Journal of Engineering Systems and Architecture*, 2021, 1, pp. 89 ff. and 95.

⁴¹ H. EYİDOĞAN, *Deprem Olacak mı Hocam?*, cit., p. 29; S. NAİMİ – T. TUFAN, *Olası İstanbul Depremi ile*, cit.; Z. ÖZEL MAZLUM – Ö. YALÇINER ERÇOŞKUN, *İstanbul'un Depreme Dirençliliğini*, cit., p. 172; S. KUNDAK – H. TÜRKOĞLU, *İstanbul'da Deprem Riski Analizi*, cit., p. 39; P.W. BURTON et al., *Extreme Earthquake and Earthquake Perceptibility Study in Greece and Its Surrounding Area*, in *Natural Hazards*, 2004, 32, p. 277 ff.

⁴² H. EYİDOĞAN, *Deprem Olacak mı Hocam?*, cit., p. 28; Z. ÖZEL MAZLUM – Ö. YALÇINER ERÇOŞKUN, *İstanbul'un Depreme Dirençliliğini*, cit., p. 172; R. SPENCE, *Earthquake Protection*, cit.; JAPAN INTERNATIONAL COOPERATION AGENCY (JICA) & İSTANBUL METROPOLITAN MUNICIPALITY, *The Study on a Disaster Prevention/Mitigation Basic Plan in Istanbul including Seismic Microzonation in the Republic of Turkey, Final*

have repeatedly underlined the urgency of proactive legislative and administrative intervention.⁴³ Experts have further warned of tsunami risks along Istanbul's coastline and emphasised the need for immediate implementation of the Provincial Disaster Risk Reduction Plan.⁴⁴ Large-scale projects such as Kanal Istanbul have been widely criticised for potentially exacerbating seismic vulnerability rather than mitigating it.⁴⁵

Despite being home to approximately one-fifth of Türkiye's population, Istanbul remains structurally fragile. Illegal construction, non-compliant buildings, and decades of unplanned urban growth persist, notwithstanding urban transformation initiatives implemented under Law No. 6306.⁴⁶ Vulnerabilities are unevenly distributed across districts, particularly those characterised by pre-2000 unpermitted construction, high occupancy rates, and insufficient green and open spaces, all of which intensify the anticipated human cost of a major earthquake.⁴⁷

Notably, seismic preparedness has shown little meaningful improvement over the past quarter-century.⁴⁸ The 2004 Earthquake Council report, with 268 recommendations, was largely ignored.⁴⁹ Retrofitting under urban transformation covers only a small fraction (approximately 3–9%) of high-risk buildings. Meanwhile, designated earthquake assembly areas decreased

Report (Summary), December 2002, available at: <https://openjicareport.jica.go.jp/pdf/11707825.pdf> (accessed: 14.01.2026).

⁴³ H. EYİDOĞAN, *Deprem Olacak mı Hocam?*, cit., pp. 11-13; T. HORİ et al., *The Next Marmara Earthquake: Disaster Mitigation, Recovery, and Early Warning*, in *Earth, Planets and Space*, 2017, 69, article no. 65, p. 69 ff.

⁴⁴ DW, *Prof. Dr. Oruçtan Marmara Denizi'nde Deprem Uyarısı*, 30 July 2022, available at <https://www.dw.com/tr/prof-dr-oruc-tan-marmara-denizinde-deprem-uyarisi/a-62657402> (accessed 14.01.2026); DW, *Uzmanlardan TBMM'de İstanbul Depremi Uyarısı*, 4 April 2023, <https://www.dw.com/tr/uzmanlardan-tbmmde-istanbul-depremi-uyarisi/a-65229982>, available at (accessed 14.01.2026).

⁴⁵ Ö. OR, *Deprem Tehlikesi Karşısında Kanal İstanbul ve İstanbul Şehri*, in *İnşaat Mühendisleri Odası İstanbul Şubesi Bülteni*, 2021, 166, available at: <https://www.imo.org.tr/Eklenti/451,imobulten166ozerormakalepdf.pdf?0> (accessed 14.01.2026); İSTANBUL BÜYÜKŞEHİR BELEDİYESİ, *Kanal İstanbul Çalıştay Raporu*, 10 January 2020, available at: https://kanal.istanbul/wp-content/uploads/2021/12/kanal_istanbul_calistay_raporu.pdf (accessed 14.01.2026).

⁴⁶ AFAD, *İstanbul Provincial Disaster* cit.; Z. ÖZEL MAZLUM – Ö. YALÇINER ERÇOŞKUN, *İstanbul'un Depreme Dirençliliğini*, cit., p. 172.

⁴⁷ S. KUNDAK – H. TÜRKOĞLU, *İstanbul'da Deprem Riski Analizi*, cit., p. 44.

⁴⁸ BBC News Türkçe, "Uzmanlar Marmara depremi için ne diyor?", 17 December 2025, available at: <https://www.bbc.com/turkce/articles/c4grxe48z9mo> (accessed 14.01.2026); Naimi and T. Tufan, *Olası İstanbul Depremi...*, fn. 41 above, p. 98.

⁴⁹ DW, *Uzmanlardan*, cit.

dramatically, from 470 in 1999 to just 77 by 2018, despite population growth to nearly 16 million.⁵⁰ Parliamentary reports issued between 2023 and 2025 confirm that key measures from the 2003 “earthquake master plan”⁵¹ remain unimplemented.⁵² Even following the April 2025 magnitude 6.2 Marmara Sea earthquake, official statements reiterated that a major Istanbul earthquake remains imminent, implicitly acknowledging persistent unpreparedness.⁵³

Taken together, these scientific and technical assessments demonstrate that Istanbul faces a foreseeable, severe, and well-documented seismic threat. Yet an understanding of hazard alone is insufficient. The magnitude of potential loss of life is shaped not only by geological factors but also by the adequacy of legal frameworks, regulatory enforcement, and institutional accountability. Section 4, therefore, shifts from risk assessment to constitutional responsibility, examining how sustained legislative inaction and systemic failures in accountability convert a foreseeable seismic risk into a justiciable violation of the State’s positive obligations.

4. Establishing Legislative Accountability and Causation: From Inaction to Violation

This section examines how legislative inaction in the face of a well-documented seismic risk may amount to a breach of constitutional positive obligations, and how causation can be established between such inaction and ensuing rights violations.

Before turning to specific legislative failures and their legal consequences under Turkish constitutional law, it is necessary to clarify how legislative discretion operates under conditions of heightened foreseeability and extreme risk. Where the potential interference with fundamental rights, most notably the right to life, is exceptionally severe, and where the

⁵⁰ S. NAIMİ – T. TUFAN, *Olası İstanbul Depremi ile*, cit., p. 102.

⁵¹ İSTANBUL BÜYÜKŞEHİR BELEDİYESİ, *İstanbul Deprem Master Planı*, 2003, available at: <https://depremezmin.ibb.istanbul/uploads/prefix-ibb-deprem-master-planı-66a39b75dc602.pdf> (accessed 14.01.2026).

⁵² DW, *Uzmanlardan*, cit.

⁵³ EURONEWS TÜRKÇE, *Naci Görür'den Deprem Yorumu: Bunlar Bu Fayın Biriktirdiği Stresi Artırıyor*, 23 April 2025, available at: <https://tr.euronews.com/2025/04/23/naci-gorurden-deprem-yorumu-bunlar-bu-fayin-biriktirdigi-stresi-artiriyor> (accessed 14.01.2026).

empirical basis of that risk is supported by long-standing and robust scientific evidence, the space for legislative discretion progressively narrows.

In the context of the expected Istanbul earthquake, decades of consistent scientific warnings, combined with projections of mass casualties and systemic collapse, leave little room for uncertainty. Under such conditions, legislative inaction can no longer be justified as a policy preference or a matter of political prioritisation. Rather, the failure to act on scientifically established risks transforms discretion into a constitutionally enforceable duty to adopt preventive and protective measures. Inaction in the face of such risk therefore ceases to be a political choice and becomes a justiciable breach of constitutional obligations.

Moreover, effective disaster prevention depends not on isolated operational measures but on the existence of a coherent and effectively enforceable legal framework. The legislature's positive obligations thus extend beyond the formal enactment of laws to ensuring that regulatory schemes are capable of producing real-world protection through diligent implementation and effective oversight. Failures at any of these stages—law-making, implementation, or accountability—convert a foreseeable natural hazard into a preventable human rights crisis, as evidenced by the persistent legislative inertia surrounding earthquake preparedness in Istanbul.

4.1. *Legislative Gaps, Flaws, and the Illusion of Completeness*

A common defence of legislative inaction is the claim that Türkiye's legal framework for disasters is largely sufficient and even advanced on paper, pointing to a dense body of legislation enacted since 1999, including laws on compulsory earthquake insurance (No. 6305), building supervision (No. 4708), and urban transformation (No. 6306), as well as the establishment of a central coordinating authority (AFAD).⁵⁴ Yet this formal abundance obscures critical deficiencies. The mere existence of legislation does not fulfil positive obligations; the legislature must ensure that measures are comprehensive, constitutionally sound, participatory, and effectively implemented. Regulatory density, in this sense, often masks structural weakness rather than genuine preparedness.

Law No. 4708 on Building Supervision, frequently presented as a

⁵⁴ S. S. GÖKALP – M. ÇOLAKOĞLU, *Afet Yönetimi; Devletin Pozitif Yükümlülüğü ve İdarenin Sorumluluğu*, in *Ankara Hacı Bayram Veli Üniversitesi Hukuk Fakültesi Dergisi*, 2025, 1, pp. 111 ff. and p. 152; S. KÖSE et al., *Urban Transformation in Istanbul Within the Scope of Disaster Preparedness*, in *Çevre, Şehir ve İklim Dergisi*, 2023, 4, p. 198 ff.

cornerstone of the post-1999 framework, illustrates this problem. Upon its entry into force, the law was applied in only 19 provinces, despite the fact that 50 provinces were classified as first-degree earthquake zones. By commercialising supervision and limiting its geographic scope, the system prioritised economic considerations over universal life safety, thereby undermining its preventive function from the outset.⁵⁵

Similarly, Law No. 6306 on the Transformation of Areas Under Disaster Risk,⁵⁶ enacted in 2012 as the primary legislative response to earthquake risk, exemplifies structural flaws that may exacerbate vulnerability rather than reduce it.⁵⁷ The law centralises extensive powers in the Ministry of Environment and Urbanisation, including the authority to declare risky areas, initiate urgent expropriation, and approve transformation projects by simple majority. In doing so, it marginalises local administrations and property owners, thereby undermining property rights (Article 35 of the Constitution) and the principles of local self-government (Article 127 of the Constitution; European Charter of Local Self-Government). Its initial disregard for the rule of law (Article 2 of the Constitution), most notably through provisions restricting judicial suspension of administrative acts, prompted constitutional review and annulment.⁵⁸ Persistent limitations on public participation, professional oversight, and civil-society involvement further weaken transparency and accountability. By prioritising physical renewal over social justice, excluding environmental and cultural considerations, and constraining participatory mechanisms, the law facilitates profit-driven urban transformation and disproportionately threatens low-income groups' right to live with dignity.⁵⁹

Beyond these deficiencies, significant legislative gaps remain. These include: (i) the absence of a comprehensive zoning and urban-planning statute rigorously aligned with seismic-risk assessments; (ii) an outdated building-inspection regime lacking mandatory and enforceable criminal and administrative sanctions; (iii) an urban-transformation framework

⁵⁵ S. KÖSE et al., *Urban Transformation in Istanbul*, cit., p. 205.

⁵⁶ The rationale of Law No. 6306 highlights the urgent need for legislation to address unsafe and illegal buildings in high-risk disaster areas before disasters occur. İnşaat Mühendisleri Odası Denizli Şubesi, Deprem Bhanesi ve Kentsel Dönüşüm Projeleri, 2012, available at: <https://denizli.imo.org.tr/Eklenti/562,deprem-bahanesi-ve-kentsel-donusum-projeleripdf.pdf?0> (accessed 14.01.2026), p. 11.

⁵⁷ F. DAŞKIRAN – D. AK, *6306 Sayılı Kanun Kapsamında Kentsel Dönüşüm*, in *Yönetim ve Ekonomi Araştırmaları Dergisi*, 2015, 3, pp. 264 ff. and 276-284.

⁵⁸ TCC, Decision no. 2014/41, 27 February 2014, Official Gazette 26/7/2014-29072.

⁵⁹ F. DAŞKIRAN – D. AK, *6306 Sayılı Kanun*, cit., pp. 277-284.

insufficiently attuned to social equity and the protection of vulnerable communities; and (iv) the lack of a unified, open-access national earthquake data infrastructure capable of addressing institutional fragmentation.⁶⁰

Taken together, these structural flaws demonstrate that the existence of legislation on paper cannot be equated with effective protection. Centralisation, weak oversight, and the neglect of social and environmental dimensions transform foreseeable seismic risk into a preventable threat, thereby establishing a direct causal link between legislative omissions and systemic vulnerability. Under these conditions, the legislature's failure to design and implement an effective, participatory, and socially sensitive framework amounts to a justiciable breach of its positive obligations, particularly under Article 17 of the Constitution.

Moreover, existing legislative schemes largely fail to address the specific needs of vulnerable groups – such as persons with disabilities, the elderly, and children – in evacuation, shelter, and emergency planning, running counter to Türkiye's international human-rights commitments.⁶¹ In the face of a scientifically established and long-foreseen catastrophe, the absence of targeted and inclusive legislative measures is constitutionally indefensible.

4.2. *The Implementation Deficit and Systemic Impunity*

The problem is not solely one of legislative gaps but of a systemic failure in enforcement that the legislature has a duty to rectify. In practice, the administration consistently fails to supervise its personnel effectively. Corruption, abuse of office, and negligence frequently go uninvestigated and unprosecuted, creating a pervasive culture of impunity.⁶² This impunity is not merely an administrative oversight but the product of a legal framework that fails to secure accountability. The persistence of enforcement failures points to structural deficiencies in the legislative framework, particularly its inability to establish clear, accessible, and deterrent forms of legal and criminal liability.

This deficit is starkly illustrated by the chronic failure to hold anyone criminally responsible for building collapses resulting in deaths and injuries. Although thousands of cases were initiated after past earthquakes,

⁶⁰ H. EYİDOĞAN, *Deprem Olacak mı Hocam?*, cit.; S. KUNDAK – H. TÜRKOĞLU, *İstanbul'da Deprem Riski Analizi*, cit.; Z. ÖZEL MAZLUM – Ö. YALÇINER ERÇOŞKUN, *İstanbul'un Depreme Dirençliliğini*, cit., pp. 154 and 172 f.

⁶¹ E. SOMMARIO – S. VENIER, *Human Rights Law*, cit., pp. 37-39.

⁶² S. S. GÖKALP – M. ÇOLAKOĞLU, *Afet Yönetimi*, cit., p. 152.

most were dismissed due to statutes of limitation or amnesties, with only a handful resulting in unsuspended prison sentences.⁶³ In a democratic state governed by the rule of law, neither public officials nor contractors can enjoy de facto immunity for unlawful conduct that costs human lives.⁶⁴

This culture of impunity is further exemplified by the judicial aftermath of the 2011 Van earthquake. The Constitutional Court initially found a violation of the procedural aspect of the right to life due to the authorities' failure to conduct an effective investigation into the alleged negligence of high-ranking officials.⁶⁵ However, this finding yielded no concrete accountability. The Ministry of Interior's subsequent refusal to grant investigation permission—upheld by the Council of State and, in a retreat from its earlier stance, ultimately by the TCC itself in 2019—demonstrated how Law No. 4483 on the prosecution of public officials functions as a structural barrier to justice.⁶⁶

This domestic deadlock was further entrenched by the ECtHR's 2023 ruling in *Erdal Muhammet Arslan and Others v. Turkey*.⁶⁷ By treating administrative compensation as an adequate remedy, the ECtHR effectively marginalised the preventive dimension of Article 2, which requires criminal accountability precisely to deter future neglect. This troubling stance is underscored by Judge Derenčinović's concurring opinion, which highlighted contradictory statements by state agents and the recurring pattern of devastating earthquakes in Türkiye, regretting that the Court avoided examining whether the authorities' conduct went beyond mere negligence.⁶⁸

This jurisprudential trajectory reveals a fatal convergence at both domestic and international levels: monetary compensation is treated as a substitute for genuine criminal accountability, while structural mechanisms

⁶³ B. AKBULUT, *Deprem Nedeniyle Meydana Gelen Ölüm ve Yaralanmalara Ait Ceza Hukuku Sorunlarına İlişkin Bazı Tespitler*, in *Selçuk Üniversitesi Hukuk Fakültesi Dergisi*, 2023, 2, pp. 569 ff. And p. 574; TMMOB MAKİNA MÜHENDİSLERİ ODASI, *Türkiye'de Deprem Gerçeği ve TMMOB Makina Mühendisleri Odası'nın Önerileri*, available at: https://www.mmo.org.tr/sites/default/files/d4419b4a44bde5f_ek_0.pdf (accessed 14 January 2026).

⁶⁴ B. AKBULUT, *Deprem Nedeniyle Meydana*, cit., p. 622.

⁶⁵ TCC, *Serpil Kerimoğlu and Others*, fn. 30 above; TCC, *Mehmet Ali Emir ve Diğerleri* [General Assembly], no. 2012/850, 7 November 2013.

⁶⁶ TCC, *Mehmet Ali Emir ve Diğerleri*, fn. 65 above.

⁶⁷ ECtHR, *Erdal Muhammet Arslan and Others v. Turkey*, no. 42749/19, 21 November 2023.

⁶⁸ F. Z. GIUSTINIANI, *Regional Human Rights Bodies*, in *Yearbook of International Disaster Law*, 2023, p. 497 ff.

insulating high-level officials from scrutiny remain unchallenged. For the expected Istanbul earthquake, this precedent signals that the prospect of holding the legislature or senior executive officials accountable for preventive failures is effectively foreclosed, regardless of the scale of the catastrophe. The judicial system itself thus becomes a guarantor of impunity.

4.3. Zoning Amnesties: Legislative Action that Violates Positive Obligations

Perhaps the most egregious example of legislative failure is the repeated enactment of zoning amnesties. Since 1948, Türkiye has enacted over twenty such amnesties, the most recent being the 2018 amendment to Zoning Law No. 3194 (provisional Article 16). These measures legalise unauthorised and non-compliant buildings through the payment of a simple fee, without any assessment of the structure's risk to human life. Framed as "zoning peace", these laws actively legitimise unsafe construction, perpetuate structural vulnerability, and raise serious concerns of unconstitutionality.⁶⁹

These concerns are not merely theoretical. The Constitutional Court's annulment⁷⁰ of a legislative amendment extending a zoning amnesty to the protected Bosphorus area constitutes a pivotal precedent. The Court found that the legislature had failed to strike a reasonable balance between economic expediency and its positive constitutional obligations to protect environmental and cultural heritage under Articles 56 and 63 of the Constitution. Although the case concerned environmental and cultural protection, the same constitutional logic applies with even greater force to zoning amnesties that exacerbate seismic risk and directly endanger the right to life under Article 17.

By repeatedly enacting zoning amnesties despite well-documented seismic risks, the legislature does more than fail to act: it actively entrenches structural vulnerability. In doing so, it directly jeopardises the right to life under Article 17. This demonstrates that the same constitutional reasoning the Court applied in environmental and cultural protection cases applies with even greater force to the context of seismic risk.

⁶⁹ B. AKBULUT, *Deprem Nedeniyle Meydana*, cit., pp. 618-619.

⁷⁰ TCC, Decision no. 2020/51, 24 September 2020, Official Gazette 15/12/2020-31335.

4.4. Establishing the Causal Link: Legislative Inaction as a Legally Attributable Cause

Recent Constitutional Court jurisprudence has further clarified the state's non-delegable duty in regulating building safety and earthquake preparedness. In 2024, the Court annulled⁷¹ Article 16 of the Zoning Law No. 3194, which placed sole responsibility for a building's earthquake resistance on the owner, holding it incompatible with the state's positive obligations under Articles 17 (right to life) and 40 (right to an effective remedy). The Court emphasised that the state bears a continuous duty to establish and maintain an effective supervisory and judicial system; the issuance of permits or certificates cannot absolve the administration of its responsibility to protect life.

This jurisprudence enables a reframing of the causation analysis. As articulated in *Cannavacciuolo*, the core violation lies in 'prolonged legislative and administrative inaction itself'. The causal link is not between a specific legislative vote and a specific death occurring years later, but between the legislature's failure to construct an effective regulatory and accountability framework on the one hand, and the systemic vulnerability that predictably results in mass casualties on the other. In this sense, the legislature's omission constitutes the primary cause, while the earthquake operates merely as the trigger.

By knowingly allowing this vulnerability to persist through inadequate regulation, non-deterrent sanctions, and repeated zoning amnesties, the legislature breaches its positive obligations to protect the right to life. The expected Istanbul earthquake thus exposes not only a natural hazard but a legally attributable constitutional failure.

⁷¹ TCC, Decision no. 2024/141, 23 July 2024, Official Gazette 3/12/2024-32741.

5. Conclusion

To date, the Turkish Constitutional Court has not yet received any individual application⁷² explicitly challenging the legislature's overarching failure to fulfil its positive obligations against the foreseeable Istanbul earthquake. The prevailing official narrative suggests that the post-2012 legal framework is largely complete, which tends to attribute any remaining unpreparedness to implementation failures. However, as this paper has demonstrated, this narrative is constitutionally untenable. The systemic legislative gaps, the culture of impunity fostered by inadequate accountability mechanisms, and the repeated enactment of zoning amnesties collectively represent a failure of the legislature's core duty to protect life.

Consequently, the reasoning developed in this paper – mirrored in the Court's approach in *Cannavacciuolo* – provides a clear legal pathway for such a constitutional challenge. Should the long-anticipated catastrophe materialise, judicial scrutiny would be unavoidable. In such an assessment, the legislature could not credibly seek refuge in belated or piecemeal regulatory measures. The decisive question would be whether it acted with the requisite due diligence in light of decades of consistent scientific warnings. Where prolonged legislative inertia persists despite foreseeable and catastrophic risk, the ensuing violation would stem not from the earthquake itself, but from the legislature's failure to discharge its constitutional duty—thereby transforming a natural hazard into a preventable constitutional disaster.

Importantly, while neither the TCC nor the ECtHR is likely to take initiative and issue a violation ruling preemptively, the human and material losses resulting from an actual earthquake would be compounded by a delayed legal reckoning. In other words, the tragedy would not only be measured in lives and property, but also in the subsequent legal accountability that arrives too late to prevent the damage. This underscores the urgent need for proactive legislative action rather than reliance on post-disaster adjudication.

⁷² In the Turkish constitutional system, individual applications cannot be lodged directly against legislative acts.

Since the great revolutions of the XVII and the XVIII centuries, rights have dominated the legal discourse in the western world. Either individual or collective, constitutional, fundamental or human, rights dominate modern understandings of what actions are permissible and which institutions are just. The centrality of rights in the development of law, increasingly so in the last five decades, has, however, overshadowed the notion of duty and its relevance in European and non-European legal traditions and law more generally in different fields. The essays collected in this volume, which originate from the 17th Annual Conference of the Legal Research Network (LRN), invite readers to revisit this neglected dimension, exploring the evolving relationship between rights, duties, responsibilities, and collective interests in contemporary legal systems.

SIMONE BENVENUTI

is Associate Professor of Comparative Public Law in the Department of Law at Roma Tre University, where he teaches Comparative Legal Systems, Comparative Constitutional Law and Eurasian Legal Systems. His main research interests are judicial organization and the constitutional systems of Central and Eastern Europe.

LIVIA SICLARI

holds a PhD in Law and Social Change, with a specialization in Comparative Law, from the Department of Law at Roma Tre University. Her main research interests concern the intersections between Competition Law, Privacy Law, and Consumer Law within the European Union. She works as legal officer at the RGS State General Accounting Department, where she deals with pre-legislative analysis.



Roma Tre