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Contents

Symposium

Orsolya Szeibert[*]

Preface to the Contributions Regarding 'Crossroads of Codification: A Comparative Dialogue'

Professor Lajos Vékás, former Head of the Department of Civil Law and Ordinary Member of the Hungarian Academy of Sciences, celebrated his 85th birthday in November 2024. The Department of Civil Law at Eötvös Loránd University's Faculty of Law, as well as iconic professors and researchers of European civil law whose careers have intersected with that of Professor Vékás's at several points, solemnly greeted him on his birthday. The ceremonial event, where the speakers delivered their presentations,[1] took place at the Hungarian Academy of Sciences on 8 November 2024, as part of a full-day conference. The event, of course, provided an opportunity not only for heartwarming and friendly greetings,[2] but also for an intensive and thought-provoking legal exchange following the presentations.

The lectures gave an overview of several aspects of civil law codification, such as some evergreen and crucial issues concerning the connections and intersections between 'common law' and 'civil law'. The audience could discover new details and had the chance to follow the lecturers on their exciting spiritual journey. The conference presentations had several dimensions, and while not all the lectures are published here, the reader may perceive the depth and comprehensiveness of the scientific impact of this international event.

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[1] Besides the presentations, which are published in the following – *CISG and Unforeseeable Events* by Ulrich Magnus, *Codifications at European Level* by Peter-Christian Müller-Graff, *Codification in the Common Law* by John Cartwright, *The Civil Law's Common Law* by Christian von Bar and *Learning from the Common Law? The Binding Nature of the Hungarian Curia's Judgments* by Péter Gárdos – other speakers also appeared at the conference: Helmut Koziol with the lecture *Learning from the Common Law? Caveats from the Civil Law's Perspective,* Attila Menyhárd with the lecture *The Role of the Courts and Legislator in Shaping Private Law,* Ádám Fuglinszky with the lecture *One Last Time on Non-cumul* and Balázs Tőkey with the lecture *General Part of Civil Codes: Advantages and Disadvantages.* The conference closed with joyful words from the celebrant, Lajos Vékás.

[2] Alongside all speakers who expressed their best wishes, Pál Sonnevend, Dean of the Faculty and Orsolya Szeibert, Head of the Department of Civil Law, gave celebratory speeches on behalf of the Faculty and the Department, respectively.

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The conference was enriched by presentations which reflected on several issues that are very significant today. The approaches the presentations (the texts of some of which are published below) took are diverse, but they build on each other. Diversity is reflected in the fact that different geographical, temporal and national/transnational approaches were chosen by authors who otherwise all dealt with issues of 'civil law', 'common law', and codification, whether national, international or supranational. We know that a huge pillar of law is based on words, phrases and their interpretations. A common feature of all the pieces of writing below (and all the contributions that are not published here) is that they also deal with fundamental issues regarding the essence of private law/civil law and interpretation – whether the CISG's clause applicable to unforeseeable events in temporary and turbulent times, the connection between codification and the EU's constitutional integration concept, the meanings of 'codification' and 'codes' in common law, the 'common law of the civil law' or the quasi precedent regime of the Hungarian Supreme Court (Kúria).

The paper by Ulrich Magnus reflects on very topical events regarding international sales transactions. He outlines the UN Convention on Contracts for the International Sale of Goods of 1980 (CISG) in a nutshell and describes the provisions of CISG applicable to unforeseeable events, such as the exceptional character of these rules. The issue of whether parties can be released from their contractual obligations with reference to the COVID-19 pandemic, Brexit or the Russo–Ukrainian war is dealt with in detail. Using the example of the 'Sea Bass' case, he shows that although the answer to the question of whether it is possible to be released from contractual obligations due to the COVID-19 pandemic seems to be 'yes', the situation is, in fact, not that simple. He guides us through solutions and possible choices by asking questions about the case. In relation to Brexit, the contribution analyses what emerged as the foreseeable consequence of international transactions in chronological order, following and addressing the successive steps of Brexit. The paper involves a thought-provoking journey through time that includes an overview of the legal ramifications of the Russian war against Ukraine. After drawing conclusions about the events, legal arguments and decisions related to the latter three topics, Art 79 of CISG, the provision under examination, is evaluated as well.

Peter-Christian Müller-Graff deals with the possibility of codification at the level of the European Union and poses a central question: to what extent are the objectives of the idea of codification compatible with the constitutional integration concept of the European Union. Regarding the main objectives of the codification, the following are identified upon the basis of an ELTE-Heidelberg-Partnership: legislative planfulness, concept-led consistent systematisation, substantive completeness, complexity-reducing abstraction and a law-transcending purpose. The author underlines and analyses both the substantive and organisational elements of the EU's constitutional integration concept, as well as the undistorted market and the EU's federal policy, respectively. The author deeply analyses and evaluates the effect of the purposes of the mentioned codification and the points of conflict between these and the constitutional integration concept, considering the Treaty establishing a Constitution for Europe and the Proposal on a Common European Sales Law. In concluding, Müller-Graff derives lessons about EU-level future codification in light of the objectives of the idea of codification and goes into detail about the need for 'more sensitive' and more cautious codification.

John Cartwright's contribution focuses on the role of codification in English law and on private law, in particular contract law. In the introduction, the author provides the broad context about the main topic in a few sentences and mentions how the nature of codification can differ under different legal systems. It is exciting to read about how historic perceptions of 'codification' and 'codes' have been shaped, and how modern English law has responded since 1965 to the idea that it would be worthwhile promoting specific legal reforms through codification. In connection with the evaluation of codification efforts, Cartwright also raises the question of whether further codifications of English law may be expected in the future. In what follows, the author outlines a broad temporal and pan-European context in relation to the possible roles of codification, then dissects a question closer to the topic at length – namely, the debate that took place between Dame Mary Arden and Professor Burrows regarding the need for an English commercial code in the late 1990s. The presentation of arguments for and against codification is echoed in the last chapter, which deals with whether codification has a future in English contract law.

Christian von Bar discusses through a specific example how customary law and statutory law stand side by side and immediately raises the question of whether this approach – according to which only these two exist – is the correct one. After stating that he believes that the binary system is not sufficient, he invites the reader on a journey, the goal of which is to identify the 'common law of the civil law', namely the set of 'countless judicial legal developments' which are complicated to specify. He calls the 'common law of the civil law' a language game, and the reader understands that it is a challenge to determine the 'real name' of this very complex set of so many 'extras' which influence the law in operation. The author points out that the interpretation of common law also raises questions. Then, accepting the significance of the binding force of court decisions in a common law system, he deals with some special problems, one of which is the recently established 'precedent system' of the Hungarian Kúria. At the end of the 'journey', von Bar draws attention to the need for deeper knowledge of the legal matters we deal with and calls for recognition of the 'common law of civil law'.

The aim of the paper by Péter Gárdos is to present and evaluate the Hungarian 'quasi precedent system' or 'limited precedent system' that was introduced in 2019 by Act CXXVII of 2019, *amending certain acts in connection with the establishment of single-level district office procedures*. The author outlines and briefly explains the main legal steps which happened before the enactment of the 2019 Act. This Act represented a 'fundamental transformation' of the Hungarian legal system and judiciary. Gárdos paints a brief but complex picture of the changes this new regulation has brought to Hungarian judicial practice. Some of the changes are identified as changes to the rules on so-called extraordinary revision. The possibility of this has been extended to further legal grounds, all of which are connected to the deviation from the precedents defined by the Hungarian Kúria. After mentioning all the significant novelties of the Act, the author compares the precedent system in Hungary to that in England and highlights the significant theoretical and practical differences that may be traced back to several reasons. In his closing remarks, the author assesses the potential benefits of the new system but also draws attention to its potential drawbacks.

I am certain that the reader will find the discussions and analyses presented here as interesting as the assembled audience did, who enjoyed the extremely thought-provoking atmosphere and charm of this international conference in the celebratory surroundings of the Hungarian Academy of Sciences.

Ulrich Magnus*

The CISG and Unforeseeable Events

Abstract

This paper pursues the question how under the CISG, the world-wide sales law, unforeseen events relieve parties from their contractual obligations in practice. The practical examples are COVID 19, Brexit and the Russo-Ukrainian war. Finally, it will be seen whether, and if so, which general conclusions can be drawn from these examples for the application of the CISG's exclusion clause.

Keywords: Contracts, CISG, excuse, unforeseeable events, COVID 19, Brexit, Russian war against Ukraine

I Dedication

The following lines are dedicated with great appreciation and personal affection to Lajos Vékás on the occasion of his 85th birthday. Whenever Hungary and her civil law are mentioned in a European context, Lajos' name is mentioned first, or even alone. He is the father of the new Hungarian Civil Code. Not only is he a brilliant scholar, but what is more, he is a very charming person with a good sense of humor, a true friend and a wonderful colleague. It must have been in the early 1970s – now half a century ago – when we first met at Hamburg's Max-Planck-Institute, and since then, our connection has stayed strong.

I hope that my subject, 'The CISG and unforeseeable events,' is of interest to Lajos. I will not add to the many articles that have treated this topic mainly from a theoretical perspective. I will discuss whether recent events, namely the COVID-19 pandemic, Brexit and the Russo-Ukrainian war, affect international sales transactions in practice, and if so, how.

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II Introduction

This conference in Lajos' honor very aptly focuses on the subject of codification and the different understandings of this term, particularly in countries with Common Law and Civil Law. The CISG or UN Sales Convention of 1980[1] is a codification of sales law on the global level, for it is an instrument that tries to systematically regulate all, and not only all practically relevant, questions of sales law,[2] although it is almost exclusively designed for international commercial sales.[3] Its general system of contractual liability and many policy decisions follow, to a large extent, Common Law. On the other hand, the Convention also contains strong elements of French and German law and even of Roman law. This mixture was the fruit of a long and intense comparison of law.[4] However, the CISG's legislative style is that of a comprehensive and systematic continental codification, not that of the famous English Sale of Goods Act[5] that codified, or better, compiled, merely a number of essential sales rules.

Today, the CISG has become a true world sales law adopted by 97 states,[6] applicable to most international sales of movable goods and is often applied in practice. The leading database has collected more than 7,000 judgments and arbitration awards concerning the CISG.[7] Nonetheless, it is an astonishing phenomenon that parties often exclude the Convention, mainly because they fear they are not fully familiar with its content and are accustomed to contracting on their own terms, including their own laws. It is evident that this course of action does not succeed if both parties insist on their own law, as often, if not regularly occurs. The result in this situation is the application of the – then ineffectively excluded – CISG.

In essence, the Convention is a good example of a successful international codification. How this codification functions, and that it functions, I will show with respect to a central legal question, namely, when a party is relieved from its duty to perform if an unforeseeable circumstance distorts the original contractual balance. As a fundamental principle, also under the CISG, a party is obliged to perform or to pay damages for non-performance.

1 United Nations Convention on Contracts for the International Sale of Goods of 11 April 1980. Its most familiar abbreviation is CISG.

2 There are only a few exceptions; the CISG does, for instance, not regulate most matters concerning the material validity of – sales – contracts. This field, which touches too much on general contract law, is left to the applicable national law [Art. 4 (a) CISG].

3 Consumer sales fall within the ambit of the CISG only if the – professional – seller did not, and could not, know that the buyer bought for private purposes and was therefore a consumer [Art. 2 (a) CISG]. But astonishingly enough, fundamental elements of the CISG have also been found to apply to consumer sales; see, eg, the EU Directive on Consumer Sales of 1999 (Directive 1999/44/EC) and its successor, the Digital Sales Directive of 2019 (Directive EU/2019/771).

4 The creation of a uniform sales law based on comparison of laws started as early as with Ernst Rabel in 1928; see v. Staudinger, Magnus Einl zum CISG note 19 et seq.

5 First, the Sale of Goods Act 1893 was replaced by the Sale of Goods Act 1979; the latter was modified by the Supply of Goods and Services Act 1982 and the Consumer Rights Act 2015.

6 See the Status Report by UNCITRAL (www.uncitral.org).

7 See the collection of cases at CISG-online.org.

This is the starting point in all legal systems, expressed in the Roman Law rule: *pacta sunt servanda*.[8] However, all modern laws[9] provide for – generally rare – exceptions from this maxim, namely, where, in the circumstances, it would be unfair and unjust to hold a party to its promise. Where does the CISG draw the line between the strict duty to perform and the relief from this duty? Which are the conditions for such relief?

III The CISG's regulation for unforeseeable events

The CISG regulates the problem in its Art. 79. As far as it is of interest here, the Article runs as follows:

> (1) A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to any impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.
> (2) …
> (3) The exemption provided by this article has effect for the period during which the impediment exists.
> (4) …
> (5) Nothing in this article prevents either party from exercising any right other than to claim damages under this Convention.

Thus, the article provides in para 1 that a party is not liable for any non-performance if an 'impediment beyond his control' hinders the performance. This impediment must have been such that it could not be reasonably expected that the party had taken it into account when it concluded the contract, nor could it have avoided or overcome it. It must be mentioned that the new Hungarian Civil Code contains a rather similar (and by the way, CISG-inspired) provision in its Section 6:142, second sentence.[10]

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[8] Dig. 2, 14, 7 § 7 (Ulpian). The CISG does not express this principle as such but indirectly insofar as any termination of the contract or other remedy that allows a deviation from the agreed contract requires a breach of the contract; see Art. 45 and 61 CISG.

[9] See L. DiMatteo, 'Excuse: Force majeure and hardship' in L. DiMatteo, A. Janssen, U. Magnus, R. Schulze (eds), *International Sales Law. A Handbook* (2nd edn, Hart 2021, Oxford) 691. – Those laws which base contractual liability on the fault principle exempt the debtor all the more from liability if unforeseeable circumstances prevent correct performance because fault is then lacking in any event.

[10] Section 6:142 (in its English translation): '[*Liability for damage caused by breach of contract*] A person causing damage to the other party by breaching the contract shall be required to compensate for it. He shall be exempted from liability if he proves that the breach of contract was caused by a circumstance that was outside of his control and was not foreseeable at the time of concluding the contract, and he could not be expected to have avoided that circumstance or averted the damage.'

The CISG provision requires, therefore, that three elements must be satisfied:[11] first, the mentioned impediment must be beyond the control of the debtor; traditional examples include flood, fire, earthquake, but also war, strikes,[12] that cause the party's inability to perform. The causality between the impediment and the non-performance is, to some extent, self-evident[13] Second, that the impediment could not have been taken into account; this expression is generally understood to mean that the impediment was unforeseeable[14] the decisive point of time concerning such foresight is the conclusion of the contract. Third, neither the impediment nor its effects could have been avoided or otherwise overcome. This third element comes into play if the impediment was unforeseeable. Where it was foreseeable, the defaulting party regularly remains liable. The provision assumes that this party then had an opportunity to avoid or overcome any failure to perform and should have used this opportunity. However, unavoidability and insurmountability may support the conclusion that an event was already unforeseeable.

The provision is primarily regarded as a force majeure clause, which relieves the party from performance and, in any event, from damages for non-performance due to an unforeseeable and irresistible natural or man-made event.[15] There is wide agreement in case law and legal literature that the excuse should be granted in rare cases only,[16] namely when events outside the affected party's control and sphere of risk disabled this party from performing.[17] If Art. 79 were to be too easily applied, the mentioned maxim *pacta sunt servanda*, the Convention's foundation, would be undermined. In most cases, courts have therefore declined to apply Art. 79 and relieve a party from its contractual obligations.[18] For instance, rapid price increases

[11] Others count six but mean the same elements, see, eg, Flechtner, Belgrade L. Rev. LIX (2011) No. 3 p. 84 et seq. (91).

[12] See for many more examples: S. Kröll, L. Mistelis, P. Perales Viscasillas and C. Atamer (eds), *UN Convention on Contracts for the International Sale of Goods (CISG) Commentary* (C.H. Beck 2011, München) Art 79 note 46.; P. Schlechtriem, I. Schwenzer, U. G. Schroeter (eds), *Commentary on the UN Convention on the International Sale of Goods (CISG)* (7th edn, 2019) Art 79 note 16 et seq.; U. Magnus, J. von Staudinger, Der *Staudinger Kommentar zum Bürgerlichen Gesetzbuch: Wiener UN-Kaufrecht (CISG)* (Sellier, de Gruyter 2013) Art 79 note 27 et seq.

[13] M. Bonell, C.M. Bianca (eds), *Commentary on the International Sales Law: The 1980 Vienna Sales Convention* (Giuffrè 1987, Milan) Art 79 note 2.6.6.; C. Brunner, B. Gottlieb (eds), *Commentary on the UN Sales Law (CISG)* (Wolters Kluwer 2019, Alphen aan den Rijn) Art. 79 note 1; Kröll, Mistelis, Perales Viscasillas, Atamer Art. 79 note 58; Schlechtriem Schwenzer, Schroeter Art. 79 note 14.

[14] Kröll, Mistelis, Perales Viscasillas, Atamer 79 note 50 et seq.; v. Staudinger, Magnus Art. 79 note 32.

[15] For examples, see supra at fn. 11.

[16] DiMatteo, Excuse… 698 note 27; P. Mankowski (ed), *Commercial Law. Article-by-Article Commentary* (Hart, Nomos 2019, CISG 9 et seq.) Dornis Art. 79 CISG note 2 ('high threshold for exemption'); v. Staudinger, Magnus Art. 79 note 4; similarly Schlechtriem, Schwenzer, Schroeter Art. 79 note 14 ('ultimate limit of sacrifice').

[17] Where a party has taken over the contractual risk, for instance of an absolutely punctual delivery irrespective of all contrary circumstances, Art. 79 does not excuse any delay even if the latter was caused by an unforeseeable impediment, for example by a strike of transport workers.

[18] See only in recent years, eg, Cour d'appel de Versailles 30 May 2024, CISG-online No. 7027 para. 46 et seq.; OLG München 25 October 2023, CISG-online No. 6641 para. 90; Rechtbank Limburg 8 March 2023, CISG-online No. 6250 para. 51.

or decreases of up to 100% have generally been no excuse and have not exempted from performance.[19] In special situations, in particular, where the market price of the goods changes rapidly and is subject to speculation, even higher percentages provided no excuse.[20]

As is the case with almost all provisions of the CISG, Art. 79 comes into play only if the parties did not agree otherwise, since the Convention is governed by the principle of freedom of contract.[21] Any force majeure clause or similar clauses in the contract enjoy priority over Art. 79.

IV The example of COVID-19

In the recent past, the question was raised whether the COVID-19 pandemic relieved parties from their contractual obligations. Intuitively, one is inclined to answer this question with a clear 'yes' since nobody could foresee or avoid the pandemic. However, as will be seen, the answer must be much more differentiated.

I will take the example of the 'Sea Bass' case (*Chilean Sea Bass Inc. v Kendell Seafood Imports, Inc.)*, which came before a US District Court and was decided in May 2024.[22] The plaintiff was a business domiciled in Chile with three ships. It caught and sold fish, almost exclusively sea bass. It did this generally in the following order: first, it sold the prospective catch to its customers; only then did its ships start to catch fish, which were afterwards delivered to the client. This happened in 2020 with the buyer, a US-based company, whose business it was to resell the fish to restaurants. In early January 2020, the parties entered a contract for an estimated 350 tons of fish – the intended total catch of the three ships – at a price of 21 US$ per kilo. This came to (finally) ca. 6 million US$. The buyer paid an advance payment of 1.3 million US$. In February, before delivery, the COVID-19 pandemic broke out in the USA, and by March 2020, the US government had ordered a nationwide closure of restaurants.

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19 See, for instance, Cour d'appel de Colmar 12 June 2001, CISG-online No. 694, confirmed by the French Cour de cassation 30 April 2004, CISG-online No. 870 (price decrease of 50% insufficient); Swiss Federal Court *(Bundesgericht)* 15 September 2000, CISG-online No. 769 (price increase of 8.5 – 9% insufficient); Tribunale Monza Giuris. It. 1994 I 145 with note Bonell (change of 30% insufficient); Rechtbank van Koophandel t'Hasselt 2 May 1995, www.unilex.info/cisg/case/263 (price decrease of 20% insufficient); but contrast with Belgian Cour de cassation 19 June 2009, CISG-online No. 1963 (price increase of 70% sufficed to adapt contract) with strong and justified critique, Flechtner, Belgrade L. Rev. LIX (2011) No. 3 p. 84 et seq. (93 et seq).; see also the survey of the caselaw by Tobias Eckardt, Ulrich Magnus, Burghard Piltz, 'Art. 79 CISG in der internationalen Rechtsprechung – eine Auswahl französischer, schweizerischer, belgischer, US-amerikanischer, niederländischer und spanischer Entscheidungen' (2020) (4) Internationales Handelsrecht 140 et seq.

20 OLG Hamburg For. Int. 1997, 168 (tripling of market price insufficient because goods and sales were subject to speculation); French Cour de cassation 17 February 2015, IHR 2017, 111 (price increase of 118% insufficient); also, but without giving precise figures on the price fluctuation, Audiencia Provincial de Valladolid 6 April 2015, CISG-online No. 2619.

21 See Art. 6 CISG.

22 *Chilean Sea Bass Inc. v Kendell Seafood Imports, Inc.*, US Dist. Ct. Dist. Rhode Island 24 May 2024, CISG-online 6990.

Was the buyer entitled to refuse the fish and any payment and to reclaim the advance payment when the seller wanted to deliver the March catch and litigated for the total price?

The answer depends on the interpretation of Art. 79 of the applicable CISG. Was the closure of restaurants through an order of the state an impediment that hindered, in an unforeseeable and unavoidable way, the buyer's performance, namely the payment of the price? The intuitive answer would probably be 'no'. True, the sudden closure was certainly not foreseeable when the contract was concluded. The merely abstract and general foresight that something unexpected can happen and influence the contract balance does not suffice to make the concrete event, such as the outbreak of a pandemic, foreseeable. However, whether the consequence of the closure was also unavoidable for the buyer appears to be doubtful, as the buyer could, for instance, have frozen and stored the fish for as long as the closure lasted. What is more important: the closure was no direct barrier that hindered the buyer from paying the Chilean seller. The fact that the buyer's customers, the restaurants, suddenly did not buy any fish made the sale uneconomical and therefore unattractive to the buyer, but payment did not become impossible. The transfer of money was in no way forbidden or restricted. The closure measure as such constituted thus no hindrance to the payment of the full contract price. As a principle, it is the buyer's contractual risk that they can use the delivered goods and have the money to pay for them.[23]

However, it is disputed whether Art. 79 CISG also covers cases such as the present one, where events outside a party's control do not directly hinder the performance of contractual duties. Instead, the event – the closure of the restaurants – distorted the agreed-upon balance between delivered goods and price only indirectly but significantly. The buyer could no longer resell the fish. The majority view encompasses these so-called hardship cases, where performance is not strictly impossible but only economically overly burdensome, as well as under Art. 79.[24] Others see a gap in the Sales Convention that the applicable national law

[23] For buyer's risk related to use or resale of goods, see BGH 27 November 2007, IHR 2008, 49 (53); for buyer's risk regarding ability to pay, see, eg, ICC Arbitration Award No. 7197, JDI 1993, 1028; Schlechtriem, Schwenzer, Schroeter Art. 79 note 25, 33; v. Staudinger, Magnus Art. 79 note 18, 22.

[24] See CISG-AC Opinion 7 note 26 et seq. and Opinion 20; Brunner, Gottlieb, *Commentary on the UN Sales Law* Art. 79 note 26; J. Honnold, H. M. Flechtner, *Uniform Law for International Sales under the 1980 United Nations Convention* (4th edn, Kluwer Law International 2009) not 432.2; Kröll, Mistelis, Perales Viscasillas, Atamer Art. 79 note 81 (by analogy); *Münchener Kommentar zum Bürgerlichen Gesetzbuch, CISG* (9th edn, 2024), P. Huber Art. 79 CISG note 21; *Münchener Kommentar zum Handelsgesetzbuch* (5th edn, 2021) Mankowski Art. 79 CISG note 38; Schlechtriem, Schwenzer, Schroeter Art. 79 note 25, 33; v. Staudinger, Magnus Art. 79 note 18, 22; Flechtner, Belgrade L. Rev. LIX (2011) No. 3 p. 84 et seq. (91); in the same sense, eg, Arbitration Award 19 February 2023 of the Cairo Regional Center for International Commercial Arbitration (CRCICA) CISG-online No. 6272 para. 251. At least for 'a more flexible standard than that of traditional *force majeure*' already Bianca, Bonell, Tallon Art. 79 note 3.1 (p. 592).

should fill.[25] Indeed, many national laws provide for a separate rule concerning the adaptation of the contractual balance to drastically changed circumstances.[26]

I prefer the majority view that Art. 79 also fits hardship cases because they are of close similarity to the performance impediments primarily envisaged by Art. 79, although it must be admitted that the legislative history of the Article is in favor of an exclusion from, rather than inclusion of hardship into the provision.[27] As the Sea Bass case shows, the distinction between total impossibility because of force majeure and almost total impossibility because of hardship can be rather fine. If Art. 79 covers both, a strict delimitation between them becomes unnecessary. This is in the interest of a practical application of the Convention. Moreover, the CISG contains no other provision on which a solution for these cases could be based. But like the force majeure cases, hardship cases also belong at the center of sales law, which a comprehensive sales codification should cover. Furthermore, Art. 79 (1) mentions at its end 'the impediment … or its consequences'. Indirect effects of impediments ('consequences') shall evidently be taken into account. Indirect effects will often not fully exclude the ability to perform, but make performance only more onerous. This is characteristic of hardship cases. The anyway rather neutral wording of Art. 79 (1) therefore cautiously supports the inclusion of these cases rather than their exclusion. However, two questions remain: when should the contractual balance be readjusted; when is the hardship hard enough? And second, what is the remedy if Art. 79 covers hardship?

In the Sea Bass case, different options were on the table: first, the termination of the contract, freeing the buyer from any payment duty due to the (temporary) closure of its customers. Second, the full performance duty of both parties. Third, a split of the burden that the closure caused by reducing the contract price and/or the duty to accept the goods. It is widely accepted that an exemption from the performance duty or an adaptation of the contractual balance can only be granted if the unforeseeable and unavoidable event has dramatically changed this balance.[28] On several occasions, courts have refused any exemption or adaptation where the price (or value of the goods) had changed by 100% or

25 See, eg, BeckOGK/Bach Art. 79 note 36; DiMatteo, Excuse… 701 note 38 et seq.; Lookofsky JL&Comm 29 (2011) 141 et seq. (168). The Belgian Cour de cassation 19 June 2009, CISG-online No. 1963 (price increase of 70% sufficed to adapt contract) with strong and justified critique by Flechtner, Belgrade L. Rev. LIX (2011) No. 3 p. 84 et seq. (93 et seq) held that Art. 79 covered hardship but left an internal gap in the Convention concerning the consequential remedy. The Court filled this gap with the hardship rule of the UNIDROIT Principles for International Commercial Contracts (PICC).

26 See, eg, Section 6:192 new Hungarian Civil Code; § 313 German BGB.

27 An early proposal to adopt the formulation 'Performance of that obligation has become impossible or has so radically changed as to amount to performance of an obligation quite different from that contemplated by the contract' was not successful; as to the legislative history, see DiMatteo, Excuse… 701 note 38 et seq.

28 See also Schlechtriem, Schwenzer, Schroeter Art. 79 note 30: if the 'ultimate limit of sacrifice' *('äußerste Opfergrenze')* is exceeded. The same borderline is mentioned in CISG-Advisory Council Opinion 7 Comment 38.

less.[29] In other words, the threshold for any exemption or adaptation must be high in order not to undermine the principle that contracts must be observed.

In our Sea Bass case, it shall be assumed that the goods, if fully delivered, were literally useless to the buyer who could neither store nor resell them, and that their full payment was of such magnitude that it could easily ruin the buyer's business. In such a situation, the risk the sale entailed should not be borne by one party alone. Neither should the seller completely lose the sale and the respective profit (if the seller could have sold the fish to customers in other countries, he could have terminated the contract because of the buyer's unwillingness to pay),[30] nor should the buyer bear the burden of having to fully pay for useless goods. This is a commandment of solidarity in catastrophic situations for which no one can be blamed. A reduction in the price appears as the only alternative. This solution can be based on the good faith maxim of the Convention in its more specific form of the duty of cooperation.[31] In situations of unforeseeable urgent need, which neither party is responsible for, justice and the contract as a relationship of cooperation require the division of risk rather than burdening one party alone. If the parties cannot agree on the reduction and the seller insists on delivery, the price should be reduced to half against delivery of the totality of the agreed-upon goods unless the circumstances of the case recommend another division rate.[32]

In the concrete Sea Bass case, the parties indeed agreed during the COVID-19 pandemic on a price reduction from 21 to 15 US$ per kilo. The court confirmed this agreement, in my view, correctly. The seller was obliged to deliver the full agreed quantity and could claim only the reduced price. If parties modify or readjust their contract to changed circumstances, there is generally no reason for the court to interfere. An exception would only apply if one party reached the agreement by fraud, threat, or other illegal means. In respect of the validity of such an agreement, Art. 4 CISG refers to the applicable national law.

The essence of the Sea Bass case is therefore that contracts concluded before the outbreak of a pandemic or a similar unforeseen but lasting event can also be indirectly affected by that event. If no opportunity exists to avoid or overcome the indirect consequences of the event and where contract performance would most likely ruin one party, then the parties should themselves adapt their contract to the new situation. If they fail to reach an agreement,

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29 See the references in fn. 19. That courts in the great majority have refused to accept price changes as an excuse under Art. 79 must not be misunderstood to mean that they held hardship cases as not covered by the provision. The contrary is correct; the courts accepted hardship as an excuse, but only if a high threshold was exceeded; see the cases in fn. 19 et seq.

30 Final non-payment amounts to a fundamental breach that allows the termination of the contract; see Art. 64 (1) (a) CISG.

31 In the same sense, eg, *Münchener Kommentar zum Bürgerlichen Gesetzbuch,* CISG, Huber Art. 79 CISG note 21; v. Staudinger, Magnus Art. 79 note 24b; to the same result Kröll, Mistelis, Perales Viscasillas, Atamer Art. 79 note 80 (by including a tacit reference to Art. 6.2.3 (4) PICC into the contract and the application of Art. 79 CISG); similarly Schlechtriem, Schwenzer, Schroeter Art. 79 note 54 (other party is obliged to accept reasonable modified offer of the party aggrieved by the unforeseeable event).

32 If the seller kept the goods, he should be entitled to half of his profit from the sale.

the court has to step in. It is clear that the party claiming adaptation must prove that full performance would ruin it.

The Sea Bass case concerned the situation that the parties concluded their contract shortly before the outbreak of the pandemic (it can be assumed that there was no prior outbreak of the pandemic in other countries that could have warned US citizens; by the beginning of January 2020, the situation in China, where the pandemic started was too unclear). However, the solution to this situation should also, and all the more, apply to cases of long-term contracts that were concluded long before the entry of the unforeseeable event.

But what about the situation if the parties in our case had entered into their contract shortly after the outbreak and after it became apparent that COVID-19 was an extremely dangerous pandemic? That happened in the USA around mid-February 2020. Unless the personnel of the Chilean seller had been infected and became ill due to COVID-19, the outbreak as such was again no direct hindrance to the performance of the contract and, in particular, no hindrance to paying the contract price. Art. 79 CISG would not exempt the parties from their duties. Would the situation change with the further progress of the pandemic? The next event relevant to the parties was the closure of restaurants. If the contract had been concluded after the outbreak but before such closure was announced or unexpectedly executed, the situation is the same as if the contract had been concluded before the outbreak, as discussed above. The closure ordered by the state was not foreseeable to the buyer and dramatically altered the contractual balance, as the fish, presumably, became useless to the buyer. The solution should be a division of the contractual risk between the parties.

If the parties concluded the contract after the announcement or entry into force of the closure, the shutdown was no longer unforeseeable for the buyer. The latter knew or could have known this fact and nevertheless concluded the sales contract. Therefore, the buyer bought at their own risk that the fish could still be resold or otherwise used. Even if no resales were possible, Art. 79 CISG does not relieve them of the duty to pay.

In sum, the COVID-19 outbreak as such did not exempt parties from the performance of their contractual obligations. Only if there was a direct effect of the pandemic on the contract parties (illness of their personnel and no substitutes available) did Art. 79 relieve them from their duties as long as the illness lasted or if the whole business broke down.[33] The state-ordered consequences of the pandemic, such as shutdowns, also led to an excuse for non-performance of already concluded contracts if they made fulfillment impossible, illegal, or ruinous for one party. In that latter case of economic hardship, however, a high threshold is required to overcome the actually binding character of a contract. If the threshold is exceeded, in hardship cases, a division of the contractual risk, either agreed

[33] Even the first commentary on the CISG made it clear that under Art. 79 'a war or a strike does not, in itself, exonerate the defaulting party from his obligation' but only if the event is an actual and concrete hindrance to performance and meets the further requirements of the provision; see Bianca, Bonell, Tallon Art 79 note 2.6.7, 584.

between the parties or set by the court, appears preferable over a solution that burdens one party with the entire contractual risk.

Essential for any excuse or right to readjust the contract is the time at which the contract was concluded. If the conclusion occurs before the concrete entry of the unexpected event that hinders performance, the concerned party will regularly be exempted from the performance of its duties unless there is a reasonable opportunity to overcome the consequences of the event. In hardship cases, either an agreement of the parties or, where they cannot reach one, a court decision is necessary.

However, if there were already serious signs of the entry of the event – for instance, the outbreak of the pandemic in neighboring countries (an outbreak reported, eg, in Austria at an international tourist hotspot close to the German border = foreseeable in Germany) – parties should be expected to adapt their contracts to the threatening situation, for example by force majeure/hardship clauses, price adjustments or the like, even by an abstention from the conclusion of the contract. The general CISG standard requires the conduct of 'a reasonable person of the same kind as' the addressee of the conduct.[34] A reasonable merchant would take preventive measures as soon as there were sufficient and reliable signs of a coming catastrophe. Yet, the parties need not expect all and every possible consequence of the threatening event. With respect to the COVID-19 pandemic, parties having heard of the dangerous outbreak and rapid development in close countries and still concluding contracts should have considered the possibility that their business would have to be partly or totally closed because of the illness of their personnel. This would have been the natural and foreseeable consequence of the pandemic. In my view, at this time of the developing pandemic, parties were, however, not obliged to foresee the official shutdown of almost all public activities, in particular of restaurants. To this latter state intervention, they could only adapt their contracts after the intervention was announced or – without prior announcement – directly executed.

V The example of Brexit

My next example is Brexit. Did the exit of Great Britain from the EU provide an excuse for the non-performance of contracts under Art. 79 CISG? The question may astonish you because the CISG is not in force in the UK. Nonetheless, is the CISG often applicable to transactions between EU and UK businesses, namely, if private international law leads to

[34] Art. 8 (2) CISG.

the application of the CISG.[35] In the EU, this is the case if the seller is seated in an EU-CISG State[36] and if the parties did not exclude the CISG.[37]

To come back to the initial question, whether Brexit provides an excuse under Art. 79 CISG, giving a clear yes or no is impossible. Brexit was a long and complicated process. Can we identify unforeseeable and unavoidable steps in that process that hindered parties from fulfilling their contractual duties? The first step was the June 2016 referendum, which resulted in a small majority voting for the UK to exit the EU. The outcome of the referendum was unforeseeable. For many, the vote for leave was also unexpected. But the referendum was not binding. It had no impact on legal relationships and did not hinder contractual performance. It might have warned cautious parties to take preventive measures, but of what kind? It was still quite unclear in which way the British government would react to the exit vote and what possible consequences could follow. Therefore, the referendum provided no excuse for the non-performance of any contractual duty.

The next step came in March 2017 when the British government notified the EU of its intention to leave. Now, it was clear that Brexit would occur, but again, no direct effects or consequences for contracts were set in force. On the other hand, a very cautious merchant could already at that time have expected the following: after the implementation of Brexit, the UK would be a third state in relation to the EU; in particular, the customs situation would change. However, great uncertainties remained because only negotiations between the EU and the UK had begun, with an open outcome. For instance, it remained open whether already implemented EU law would continue to have the force of law in the UK, and, if so, to what extent and for how long. Again, neither the notification nor the negotiations as such should be regarded as an impediment in the sense of Art. 79 CISG.

As early as 2018, the UK enacted the European Union (Withdrawal) Act despite the fact that the necessary Withdrawal Agreement between the EU and the UK had not yet been finally concluded. The Act stated that EU law implemented until the future exit day should principally remain in force, but afterwards be subject to amendment and repeal. Since the Act had no immediate impact on the present law concerning contracts, it did not hinder performance in any way.

In the end, the protracted negotiations in January 2020 led to a finally accepted Withdrawal Agreement between the EU and the UK that only minimally deviated from the 2018 Agreement Draft. In the same month, the 2020 British Withdrawal Act was enacted.[38]

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35 See Art. 1 (1) (b) CISG. Courts in Great Britain also apply the CISG if private international law leads to its application; see *Kingspan Environmental Ltd et al. v Boralis A/S et al.* 1 May 2012 [2012] EWHC 1147 (Comm.) para. 536, 617, 999.

36 Only Ireland and Malta are non-EU-CISG States.

37 See Art. 6 CISG. The exclusion can also follow from the choice of law of a non-CISG state; see, eg, OLG Linz, 23 January 2006, CISG-online No. 1377; Tribunale di Padova, 1 November 2005, CISG-online No. 967; OLG Düsseldorf, RIW 1993, 845.

38 European Union (Withdrawal Agreement) Act 2020.

According to these instruments, the UK would leave the EU by the end of January 2020. However, a further transition period was agreed, which postponed the final exit until the end of 2020. Did the Withdrawal Agreement or the respective British Act directly affect international sales contracts of British businesses with businesses in EU Member States? Indeed, there were legal effects: the Agreement and the Act ordered that goods put on the market before the end of the transition period could further freely circulate in the EU and the UK;[39] also the customs[40] and tax duties[41] remained in force until that end. But after the end of the transition period, the UK as well as the EU were free to legislate as they liked.[42] An immediate consequence did not follow from the enactment of these instruments but only from the end of the transition period: then, customs tariffs and procedures changed for deliveries of goods between the EU and the UK. We all remember the long queues of trucks in British ports by that time. Was that change an unforeseeable and unavoidable event that relieved parties from both sides of the Channel from their contractual duties? The new customs duties and procedures made sales between the EU and the UK more difficult and less profitable, but generally not impossible or so expensive that their performance would regularly ruin the involved business. Furthermore, it was foreseeable that contracts concluded after the beginning of the Brexit process in 2016 and still running after the final exit might face problems of the kind that in fact happened. Whether the Brexit-related consequences were avoidable or could have been overcome may be uncertain, but these two elements no longer played a role if the impediment – here, the change in factual circumstances after the end of the transition period – was foreseeable. If foreseeable, the respective impediment should have been avoided or otherwise overcome, if necessary, by abstaining from concluding the contract. Therefore, in my opinion, neither Brexit as such nor its different stages of development nor the changed legal and factual situation beginning on January 1, 2021, were an excuse for the non-performance of contractual duties associated with contracts concluded before and continued after that date.

Should the answer be the same or different in the case of long-term delivery contracts already concluded before the referendum of 2016 but still in force after December 31, 2020? For the performance of such contracts, a change in circumstances may provide an excuse only if performance indeed became impossible or economically unacceptable and without any alternative of avoidance, because, at the time of the conclusion of the contract, the parties could not foresee the changes. That the preconditions of impossibility or unacceptability and unavoidability are met is, however, except in rare cases, not at all likely. In my opinion, if the

39 Art. 41 Withdrawal Agreement 2020.

40 Art. 47 Withdrawal Agreement 2020.

41 Art. 51 Withdrawal Agreement 2020.

42 The UK formally abrogated hundreds of EU Regulations, Directives and Decisions which had actually remained in force in the UK even after the end of the transition period due to the Retained EU Law (Revocation and Reform) Act 2023.

conditions for an excuse were present, this is a situation that again calls for an adaptation of long-term contracts to the new situation because neither of the parties should bear the contractual risk alone.

VI The example of Russia's war against Ukraine

As already mentioned, war is generally accepted as one of the standard force majeure events, and thus, war can amount to an excuse for the non-performance of contracts. This is also true regarding Art. 79 CISG.[43] However, again, it is not war as such but only its concrete effect on a party's ability to fulfill its contractual obligations that can exempt it from liability under Art. 79 CISG. With respect to Russia's war against Ukraine,[44] numerous different situations must be distinguished.

1 Contracts concluded before the war

a) Contracts between Ukrainian parties and parties from other states (except for Russia)

The first situation is the following: The war destroyed factories or the workplaces of Ukrainian sellers, killed their workers, or led to the recruitment of their workers for the military service, so that sellers based in Ukraine can no longer deliver the promised goods that they used to produce or trade. Their exemption from their duty to perform presupposes that the relieved party, as mentioned in Art. 79 (1), 'could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract'. When concluding contracts before the war, neither the war nor the destruction of the factories nor the other consequences were foreseeable. Russia had carefully hidden its intention to attack Ukraine, at least to the general public.[45] General foresight that a war may break out and lead to the death of persons, destruction of buildings, etc., is – without serious indicia for the entry of these events – not sufficient to constitute foreseeability. In times of war, sellers can regularly also not avoid or overcome the impossibility of producing or trading the contracted goods if the impossibility results from the mentioned destruction, death, or similar events. For instance, buying substitute goods from other sources is normally unacceptable in such

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43 *Hilaturas Miel SL v Republic of Iraq*, US Dist. Ct. (South. Dist. NY), 20 August 2008, F. Supp, 573 2nd 781 = IHR 2009, 206 = CISG-online No. 1777 (impossibility to deliver because of the outbreak of the war in Iraq); Schlechtriem, Schwenzer, Schroeter Art. 79 note 16; v. Staudinger, Magnus Art. 79 note 28.

44 Ukraine has been a CISG Member State since 1 February 1991.

45 Even until the day that Russian troops crossed the Ukrainian border and began the war, Russia justified the deployment of troops at the Ukrainian frontier as the mere preparation of an internal military maneuver.

circumstances. Non-delivery also does not trigger the seller's liability for damages.[46] Article 79 (1) and (5) would exempt the seller from both the duty to deliver and the duty to pay damages. The exemption will last at least as long as the war lasts;[47] however, unless the impediment can be overcome within a short time, for example, because a factory can easily be repaired and production resumed, the exemption is final.

The counterparty – under the CISG regime – may on the other hand, terminate the contract and is then itself not obligated to pay the contract price. Long-lasting or final non-delivery constitutes a fundamental breach, which allows the other party to terminate the contract.[48]

The same solution as sketched before applies if the Ukrainian State forbids any export of goods during wartime. Such a ban relieves sellers from their delivery duty and their liability for damages as long as the ban lasts.

Second situation: If a Ukrainian buyer had already received goods from a foreign seller and subsequently became unable to pay due to a loss of financial means resulting from the war, the seller's payment claim remains intact. But the Ukrainian buyer's payment default does not entitle the seller to any damages. The seller may terminate the contract because long-lasting or final non-payment also amounts to a fundamental breach of contract.[49] The seller may, in addition, reclaim the already delivered goods.[50] However, the buyer may also be unable to restitute the goods because of the war, either because war-related acts destroyed them or Ukraine disallowed their (re-)export. In both cases, Art. 79 (1) would free the buyer from restitution duty, in the first case finally, and in the second case as long as the export ban lasts.

Third situation: Let us assume the contrary situation that the seller is seated in an EU or other country and is obliged to deliver goods to a Ukrainian buyer. In this case, there generally exists no impediment to perform for the seller, and the seller is not relieved from his duty to deliver the contracted goods to the Ukrainian buyer even if the latter's factory is destroyed.[51] Only if, as Art. 71 (1) states, 'it becomes apparent that the other party will not perform a substantial part of his obligations' is the EU seller entitled to suspend its performance.

46 Art. 79 (5) CISG.
47 See Art. 79 (3) CISG.
48 See Art. 49 (1) (a) CISG.
49 See already supra fn. 26.
50 Art. 81 (2) CISG.
51 For an example of when the outbreak of the war as such led to the seller's impossibility to deliver, see *Hilaturas Miel SL v Republic of Iraq*, US Dist. Ct. (South. Dist. NY), 20 August 2008, 573 F. Supp. 2nd 781 = IHR 2009, 206 = CISG-online No. 1777. There, the seller needed certification by UN officials in Iraq for the conformity of the goods to be delivered (yarn) with the UN program 'Oil for Food'. However, due to the outbreak of the war in Iraq, these officials had left the country, and no certification was available. Since the seller had not tried other ways to get a UN delivery license nor had delivered the goods, its payment claim against Iraq failed. The court regarded Iraq as exempt from any liability.

If the prospective non-performance is concerned with war, as probably in most cases, it would again constitute a fundamental breach, and if that fact were clear,[52] the seller could also prematurely terminate the contract [Art. 72 (1) CISG]. The provision requires that this fact becomes clear 'prior to the date of performance'. If the fact of threatening non-performance was already clear prior to the conclusion of the contract, no right of premature termination is granted because the aggrieved party accepted the risk with open eyes.[53] After the performance date, termination for non-performance remains possible.

b) Contracts between EU parties and Russian parties

Are sellers and buyers who are seated in EU states affected by the war if they had concluded contracts with Russian parties before the war? Since 2014, the EU has enacted 14 sanction packages with ever stricter sanctions against Russia.[54] Now, the sanctions forbid the export of almost all kinds of goods that can be used for military purposes, in particular weapons, but also dual-use goods such as electronic devices, chemicals, cameras, etc. Likewise, the import of many Russian products is prohibited, in particular oil, coal, liquid gas, most metals, alcoholic beverages, cigarettes, etc. The sanctions have no retroactive force but must be observed from the date of their formal entry into force.[55] It is evident that the sanctions affect and exclude most, if not all, sales transactions between EU parties and Russian parties. If a concrete contract was concluded before the release of the respective sanction and should be performed thereafter, the EU ban disallows its performance. This is an impediment in the sense of Art. 79 CISG. The EU party is freed from delivery or payment duties and is not liable for damages as long as the EU sanctions are in force.

2 Contract concluded during the war

What is the fate of contracts that are concluded during wartime? Contracts between EU parties and Ukrainian parties remain fully in force and must be fulfilled as concluded unless the Ukrainian party becomes unable to perform due to the war, be it that its factory is destroyed, or state sanctions forbid the export of goods or the transfer of money. These events, if unforeseeable and unavoidable, rank as impediments under Art. 79 CISG and relieve the party from performance. Not surprisingly, parties must thoroughly evaluate the contractual risk when concluding contracts during wartime.

52 'Clear' means a higher degree of evidence than the expression 'it becomes apparent' in Art. 71 (1) CISG.

53 See also Honsell (ed), *Kommentar zum UN-Kaufrecht* (2nd edn, Springer 2010), Brunner, Hurni Art. 72 note 6; *Münchener Kommentar zum Handelsgesetzbuch*, Mankowski Art. 72 note 6; v. Staudinger, Magnus Art. 72 note 14.

54 See Council Regulation (EU) No. 833/2014 concerning restrictive measures in view of Russia's actions destabilizing the situation in Ukraine, OJ L229 of 31 July 2014, p. 1 with amendments up to 10 September 2024.

55 Art. 14 Regulation 833/2014 (preceding fn.).

Sales contracts concluded between EU parties and Russian parties after 2014 or during the war must not contravene the prohibitions that the EU has enacted step by step since 2014. If they do, the EU party is released from the duty to perform and actually should have refrained from contracting. Any violation of a prohibition is subject to sanctions against the perpetrator and their helpers.[56]

VII Summary

1. Under Art. 79 CISG, a party is excused for non-performance of a contractual duty if an unforeseeable, unavoidable, and insurmountable event hinders performance for which neither party is responsible. The threshold for the application of the provision is high. Courts are right in granting this excuse only very rarely.

2. The event must hinder actual and concrete contract performance. The mere occurrence of long-lasting events, such as COVID-19, Brexit, and the Russian war against Ukraine, does not yet, in itself, excuse non-performance.

3. Indirect consequences of events that do not directly hinder performance can nonetheless lead to exoneration from contractual duties if unforeseeability, unavoidability, and insurmountability are determined. This is often true for hardship cases where the contractual equilibrium is highly distorted, in particular, where performance would ruin the party involved. According to the to-be-supported majority view, these cases are also covered by Art. 79 of the CISG.

4. In hardship cases, it will often appear that, in particular, with long-term contracts, exemption from performance is an inapt remedy. A readjustment of the originally agreed-upon contractual balance, initially made by the parties but in their default by the judge, is preferable to prevent an unjust division of the contract risk. The duty of cooperation and solidarity, inferred from the CISG's good faith principle, provides the basis for this solution.

5. Foreseeability of an event is given if a reasonable person in a comparable situation would have expected the event in the mainly concrete form in which it happened and would have taken preventive measures against it.

6. Unavoidability and insurmountability merely play a role if the event was unforeseeable. In such a situation, the involved party is obliged to take all reasonable and acceptable steps to avoid or mitigate the non-performance or its consequences.

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[56] According to Art. 8 Regulation 833/2014, the EU Member States are obliged to determine 'effective, proportionate and dissuasive' penalties against those who violate the prohibitions of the Regulation. It is however no violation of the sanctions if a notary public authenticates a contract for the sale and purchase of a house or a flat even if the transaction as such would fall under the sanctions mainly because the notary is generally neutral and does not act in the interest of one of the parties; his or her activity is therefore no 'legal advisory service' which Art. 5n (2) (b) of the mentioned Regulation forbids regarding Russian parties; see CJEU in Case C-109/23 *GM, ON v PR* ECLI:EU:C:2024:681, 5 September 2024.

CISG's regulation of the influence of unforeseeable events on the contract's fate appears to be a suitable and practical solution. It has been adopted by a number of countries. Among many other features, the provision of Art. 79 proves the CISG is a reasonable codification that can and does serve as a good regulation for international sales, and moreover, as a model for national legislators. The success of the CISG is mainly due to the fact that it borrowed and merged ingredients from many national laws, in particular from Common and Civil Law. This is also a model for good legislation.

Peter-Christian Müller-Graff*

Codification at the European Level

Abstract

The article deals with the question to what extent the objectives of the codification idea (legislative planfulness, concept-led consistent systematisation, substantive completeness, complexity-reducing abstraction, law transcending purpose) are compatible with the constitutional integration concept (both substantive and organisational) of the European Union. It assesses the impact of these elements and the Union´s constitutional concept of integration on the failure of the projects of the Constitutional Treaty for Europe (CTE) and of the Common European Sales Law (CESL) in a comparative manner. Eventually it draws as lesson to be learnt for future codification projects at the European level to pursue a careful approach to sovereignty-related or identity-related issues inherent in an international federal polity, shows the chances for codifications below this threshold and outlines the consequences for the future successful handling of the main codification purposes in the more sensitive projects.

Keywords: codification functions, Common European Sales Law, Constitutional Treaty for Europe, European integration, federal polity, internal market, systematisation

The idea of great codifications[1] is not found in the recent mission letters of the European Commission's President.[2] Rather, it seems to have stalled due to previous experiences. *Two* textually finalised great beacons of conceptual and dogmatic systematization in different

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1 The text is based on the author's opening lecture at the conference 'Crossroads of Codification' celebrating Professor Lajos Vékás's 85th birthday at the Hungarian Academy of Sciences in Budapest on November 8th 2024. The style of speech has essentially been retained.

2 See Mission letters of 17 September 2024, in: European Commission, Commissioners-designate (2024–2029), <https://commission.europa.eu/about/commission/-2024-2029/commissioners-designate-2024-2029_en> accessed 1 December 2025.

normative areas *failed* within one decade: in *2005* the *Treaty establishing a Constitution for Europe*[3] (rejected by the French 'optional' referendum[4]); and in *2014* the Commission's Proposal of a *Common European Sales Law (CESL)*[5] (blocked by Member States[6] – despite general discontent with the constant increase in single-topic private law directives with system fragmentation effect[7] [recent headword, 'right to repair'[8]] and also despite [in the words of today's *jubilarian*] the 'blatant contradiction' ['im krassen Widerspruch'] of this method with the idea of codification[9]). One involuntarily thinks of the scepticism of some authors in the second half of the 20th century (such as *Franz Wieacker,*[10] *Friedrich Kübler,*[11] and *Gerhard Dilcher*[12]) about the suitability of codifications in times of rapid developments in the living conditions of pluralistic societies and democratically changing majorities. *However*, the idea has its timeless justification,[13] and the word 'codification' is alive in the titles of several pieces of the Union's secondary law [eg, in the area of private law, Directive (EU) 2017/1132 on certain aspects of company law[14]].

Today, 20 years after Hungary's accession to the EU, in honour of the spiritual father of Hungary's modern Civil Code of 2014,[15] offers a fitting opportunity to reflect on the future

3 Treaty establishing a Constitution for Europe, [2004] OJ C 310/1; Klemens H. Fischer, *Der Europäische Verfassungsvertrag* (Nomos 2005, Baden-Baden); Peter-Christian Müller-Graff, 'Strukturmerkmale des neuen Verfassungsvertrages für Europa im Entwicklungsgang des Primärrechts' (2004) 27 (3) Integration 186–201.

4 Nicholas Startin, 'The French Rejection of the 2005 EU Constitution in a Global Context: A Public Opinion Perspective' in Mairi Maclean, Joseph Szarka (eds), *France on the World Stage* (Palgrave Macmillan 2008, London) 91–110.

5 Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law, COM/2011/0635 final; Martin Schmidt-Kessel (ed), *Der Entwurf für ein Gemeinsames Europäisches Kaufrecht-Kommentar* (Sellier European Law Publishers 2014, München).

6 Commission, 'Withdrawal of Commission proposals' [2020] OJ C 321/37.

7 Lajos Vékás, 'Schuldrechtsmodernisierung und Gemeinschaftsprivatrecht aus ungarischer Sicht' in Peter-Christian Müller-Graff, Lajos Vékás (eds), *Privatrechtsreform in Deutschland und Ungarn* (Heidelberger Schriften zum Wirtschaftsrecht und Europarecht, Band 50, Nomos 2009, Baden-Baden, 9–28) 10.

8 Directive (EU) 2024/1799 of the European Parliament and of the Council of 13 June 2024 on common rules promoting the repair of goods and amending Regulation (EU) 2017/2394 and Directives (EU) 2019/771 and (EU) 2020/1828, OJ L2024/1799, 10.7.2024.

9 Vékás, Schuldrechtsmodernisierung 17.

10 Franz Wieacker, Aufstieg, Blüte und Krisis der Kodifikationsidee' in Josef Esser (ed), *Festschrift für Gustav Boehmer* (Röhrscheid 1954, Bonn, 34–51) 48.

11 Friedrich Kübler, 'Kodifikation und Demokratie' (1969) 24 (20) Juristenzeitung 645–651.

12 Gerhard Dilcher, 'Vom Beitrag der Rechtsgeschichte zu einer zeitgemäßen Zivilrechtswissenschaft' (1984) 184 Archiv für die civilistische Praxis 247–288 (266 et seq.).

13 As a critical examination of the skepticism regarding the relevance of the idea of codification, eg, Karsten Schmidt, *Die Zukunft der Kodifikationsidee* (C. F. Müller 1985, Heidelberg).

14 Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law (codification) [2017] OJ L169/46.

15 See https://ptk2013.hu. For the first draft, see Lajos Vékás (ed), *Szakértői Javaslat az* új *Polgári Törvénykönyv tervezetéhez* [*Draft of a New Civil Code for Hungary: An Expert Proposal*] (CompLex – Wolters Kluwer 2008, Budapest).

of codification at the European level. The question is: To what extent are the objectives of the codification idea compatible with the constitutional integration concept of the European Union? In exploring this relationship, this contribution will proceed in four steps: firstly, the main *objectives* associated with codification are analysed (I); secondly, the Union's constitutional concept of integration is briefly recalled (II); then, the text will attempt to assess the impact of the idea of codification and the Union's constitutional concept of integration on *the failure* of the two projects mentioned earlier in a comparative manner (III); and finally, the lessons to be learned *for the future* of codification at Union level will be discussed (IV).

I The main objectives of the codification idea

Firstly, as regards the main objectives of the codification concept, let me refer to the *five* functions discussed 16 years ago within Eötvös Loránd University's (ELTE's) academic biotope at a symposium celebrating the 25th anniversary of the fruitful ELTE-Heidelberg partnership[16] (which was co-founded and is still cultured by *Lajos Vékás*) – *five* aspects that have been filtered out of the rich pool of generations of scientific thought since the 17th century (and here follows an extremely short name-dropping list: *Leibniz* and *Pufendorf, Svarez* and *Portalis, von Zeiller* and *Thibaut, Bentham* and *Windscheid, Wieacker* and *Coing, Llewellyn* and *Viora, Guhl* and *Vanderlinden*). Five functions were ascribed to the codifications, which went beyond mere collections of legal texts such as the Corpus iuris.

1 Legislative 'planfulness'

The first main objective of codification can be seen in the intent of legislative planfulness.[17] This aims at solving a tension associated with *legitimation*.[18] It opposes an *erga-omnes* binding effect of *inter partes* judicial decisions (eg, Hungary's civil law situation until 1960,

16 Peter-Christian Müller-Graff, 'Kodifikationsgewinn durch Inkorporation des Inhalts von Schuldrechtsrichtlinien der EG in das BGB' in Peter-Christian Müller-Graff, Lajos Vékás (eds), *Privatrechtsreform in Deutschland und Ungarn* (Heidelberger Schriften zum Wirtschaftsrecht und Europarecht, Band 50, Nomos 2009, Baden-Baden, 29–60) 36–43.

17 Müller-Graff, Kodifikationsgewinn 37.

18 Eg Joachim Münch, 'Strukturprobleme der Kodifikation' in Okko Behrends, Wolfgang Sellert (eds), *Der Kodifikationsgedanke und das Modell des Bürgerlichen Gesetzbuchs (BGB)* (Abhandlungen der Akademie der Wissenschaften, phil.-hist. Klasse, Dritte Folge, 236, Vandenhoeck & Ruprecht 2000, Göttingen) 147–174 (148 et seq., 164 et seq.); Franz Wieacker, *Privatrechtsgeschichte der Neuzeit* (2. Aufl., Vandenhoeck & Ruprecht 1967, Göttingen) 475; Helmut Coing, Heinrich Honsell, 'Die politischen Motive der Kodifikation' in Julius von Staudinger (ed), *Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen* (Buch 1, 14. Aufl., Sellier – de Gruyter, 2004, München) Einleitung zum BGB Rdz. 19 et seq.

according to *Vékás*[19]). Legislative planfulness implies the rule-making primacy claim of the first (today democratically bestowed) power over the third power (without prejudice to the reviewability of legislative acts by constitutional courts[20]). Insofar it overlaps with any legislative act that does not give leeway to the judicial *erga omnes* binding interpretation of statutes (as in common law[21]). It also aims to replace a conglomerate of historically diverse and potentially inconsistent legal texts with a single coherent text of hoped-for duration.[22] This is well reflected in *Wieacker's* understanding of natural law codes as an enlightenment claim to comprehensive social planning ('umfassende Gesellschaftsplanung'[23]).

2 Concept-led consistent systematisation

Legislative planning is associated with, yet distinct from, the objective of a concept-led *consistent systematisation*.[24] In its essence, it aims at solving a *content-related* challenge. It is about designing an 'external' and 'internal' system of all individual rules guided by overarching principles, which parallels a genuine task of jurisprudential dogmatics.[25] By avoiding contradictory provisions (eg, the aim of the *Hondius* group on sales law[26]), it intends to realise the ideal of justice to help decide like things alike and different things differently.[27]

3 Substantive completeness

Consistent systematisation is associated in some theories of codification with an even more mature *third* dimension: the idea of *substantive completeness*.[28] In this respect, *Wieacker* ascribes to the natural law codes the aim of creating a comprehensive (exhaustive)

19 Vékás, Schuldrechtsmodernisierung 15.

20 Eg § 78 Gesetz über das Bundesverfassungsgericht (*Bundesverfassungsgerichtgesetz* – BVerfGG).

21 Robert S. Summers, Precedent in the United States (New York State) in D. Neil MacCormick, Robert S. Summers, *Interpreting Statutes. A Comparative Study* (Dartmouth, 1997, Aldershot, 355–406) 365: 'a precedent interpreting a statute becomes a binding interpretation for future cases'.

22 Müller-Graff, Kodifikationsgewinn 37.

23 Wieacker, *Privatrechtsgeschichte* 323.

24 Müller-Graff, Kodifikationsgewinn 38.

25 Horst Dreier, 'Rechtswissenschaft als Wissenschaft – Zehn Thesen' in Horst Dreier (ed), *Rechtswissenschaft als Beruf* (Mohr Siebeck 2018, Tübingen, 1–65) 25–45.

26 Christian von Bar, 'Europäisches Zivilgesetzbuch, Staatsverträge, Richtlinien' in Christian von Bar u.a., *Untersuchung der Privatrechtsordnungen der EU im Hinblick auf Diskriminierungen und die Schaffung eines Europäischen Zivilgesetzbuches* (Generaldirektion Wissenschaft des Europäischen Parlaments, Reihe Rechtsfragen, JURI 103DE 1999, Brüssel, 149–153) 151.

27 Claus-Wilhelm Canaris, *Systemdenken und Systembegriff in der Jurisprudenz: entwickelt am Beispiel des deutschen Privatrechts* (Duncker & Humblot 1969, Berlin) 16. For the practice, see, eg, CJEU, Case C-236/09 *Test-Achats ASBL*, EU:C:2011:100, para 28.

28 Eg, Wieacker, *Privatrechtsgeschichte* 475; Helmut Coing, Heinrich Honsell, Die politischen Motive Rdz. 44; Müller-Graff, Kodifikationsgewinn 39.

reorganisation of the law.[29] This idea is based on an *axiomatic* assumption. It claims that any conflict in the relevant subject area can find a system-compliant solution within the framework of the provisions and inherent principles of the code. It therefore holds that the judicial decision in a dispute that was not considered by the legislator has to be and can be achieved by using the classical methods of interpretation, in particular systematic interpretation with *argumenta e contrario* and closing gaps by analogy as well as teleological interpretation.[30] This concept implies that the legislator entrusts the judiciary with the task of finding code-immanent solutions – different from the famous Article 1 s. 2 of the Swiss Civil Code that puts the judge in the role of a legislator.[31]

4 Complexity-reducing abstraction

A *fourth* objective of codification can be seen in the idea of the *complexity-reducing abstraction of rules and wording*.[32] This intention found its specific expression in the pandectistic search for general rules[33] and a culminating realisation in the General Part of the German Civil Code. It is oriented towards solving a *system-theoretical* task, namely, avoiding the growth of legislative redundancies[34] as seen, eg, in EU secondary law (eg, on unfair practices in competition[35]).

5 Law transcending purpose

Finally, a decisive impulse for codification often comes from a *fifth* consideration: a *law-transcending purpose*,[36] eg facilitating cross-border economic transactions (such as the

29 Wieacker, *Privatrechtsgeschichte* 323.

30 See, eg, D. Neil MacCormick, Robert S. Summers, 'Interpretation and Justification' in D. Neil MacCormick, Robert S. Summers (eds.), *Interpreting Statutes. A Comparative Study* (Dartmouth 1991, Aldershot, 511–551) 513–515.

31 'Kann dem Gesetz keine Vorschrift entnommen werden, so soll das Gericht nach Gewohnheitsrecht und, wo auch ein solches fehlt, nach der Regel entscheiden, die es als Gesetzgeber aufstellen würde.'

32 Müller-Graff, Kodifikationsgewinn 40; Theodor Bühler, *Gewohnheitsrecht, Enquete, Kodifikation (Rechtsquellenlehre)* (Schulthess 1977, Zürich) 104.

33 Eg Wieacker, *Privatrechtsgeschichte* 430 et seq., 486 et seq.

34 Müller-Graff, Kodifikationsgewinn 40.

35 See, eg, Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising (codified version), [2006] OJ L376/21; Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices and amending Council Directive 84/450/EEC, Directives 97/7EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council, [2005] OJ L149/22.

36 Müller-Graff, Kodifikationsgewinn 41.

former ADHGB[37] or the UCC[38]); ***or*** forming social and political identity and unity through a common legal culture (such as ***Thibaut's*** call for a General Civil Law for Germany[39] and the national codifications in the 19th and 20th century;[40] ***or*** enforcing political ideas (such as the codifications in the Soviet-Russian occupied Europe with – in ***Lajos Vékás'*** words – the paradox of private law without private property[41]); or familiarising people with the law (eg ***Bentham's*** desire[42]). The EU Parliament's various calls since 1989 for the creation of a European Civil Code[43] can certainly be understood as the wish to promote European unity and identity.

II The constitutional integration concept of the European Union

The question arises whether these objectives of codification are in line with the European Union's constitutional concept of integration. In general, this is made up of two elements: a substantive one and an organisational one.

1 The substantive concept of integration

The *substantive* concept of integration of the Treaties (in particular, the concept of the internal market without distortions of competition) is the legitimising core for the *content* of supranational law and its *categorical* specificities (such as direct applicability[44] and primacy[45] or the requirement of interpreting national law in conformity with Union law[46]).[47] This concept is summarised in the basic Article 3 TEU on the Union's objectives. Its highly

37 Allgemeines Deutsches Handelsgesetzbuch of 31 May 1861.

38 Uniform Commercial Code as an offer of the Uniform Law Commission; see Karl Llewellyn, 'Why a Commercial Code?' (1953) 22 Tennessee Law Review 779; Eugene F. Mooney, 'Old Kontract Principles and Karl's New Kode [sic!]: An Essay on the Jurisprudence of Our New Commercial Law' (1966) 11 Villanova Law Review 213.

39 Peter-Christian Müller-Graff, 'Recht überwindet Grenzen: Thibaut, Bluntschli, Goldschmidt und andere Heidelberger' in Christian Baldus, Herbert Kronke, Ute Mager (eds), *Heidelberger Thesen zu Recht und Gerechtigkeit* (Mohr Siebeck 2013, Tübingen, 67–94) 68–79.

40 Vékás, Schuldrechtsmodernisierung 9–10.

41 Vékás, Schuldrechtsmodernisierung 15.

42 Helmut Coing, 'Benthams Bedeutung für die Entwicklung der Interessenjurisprudenz und der allgemeinen Rechtslehre' (1968) 54 Archiv für Rechts- und Staatsphilosophie 69–88.

43 [1989] OJ C 158/400 and [1994] OJ C 205/518.

44 CJEU, Case C-26/62 *van Gend en Loos v Nederlandse administratie der belastingen*, EU:C:1963:1.

45 CJEU, Case C-6/64 *Costa v E.N.E.L.*, EU:C:1964:66.

46 CJEU, Case C-14/83 *von Colson und Kamann v Land Nordrhein-Westfalen*, EU:C:1984:153.

47 Peter-Christian Müller-Graff, 'Binnenmarktrecht vor mitgliedstaatlichen Gerichten' in Stefan J. Geibel, Christian Heinze, Dirk A. Verse (eds), *Binnenmarktrecht als Mehrebenensystem* (Heidelberger Schriften zum Wirtschaftsrecht und Europarecht, Band 100; Nomos 2023, Baden-Baden) 11–69.

abstract *key objective triad*[48] (to promote peace, its values and the well-being of its peoples) is to be achieved by a *main operational target quartet*:[49] namely, by establishing (1) an internal market, (2) an area without internal border controls, (3) an economic and monetary union and (4) international self-assertion by means of external action. All the following competences of the Union arise from these goals and are limited by them.

2 The organisational concept of integration

The *organisational concept* of integration serves to realise this quartet. It can be characterised as a *federal* polity,[50] but without the specific original state power to constitute its own federalism and power. It is based on two principles: the principle of the joint competence of the Member States in the creation of primary Union law[51] and the principle of conferral for the Union's competence to adopt secondary Union law.[52]

III Reasons for the failure of the two codification projects?

The analytical interest of a modestly involved academic observer and counsellor in both cases[53] centres on finding out whether the codification functions have already been called into question and whether there has been a collision between the codification functions and the constitutional concept of integration.

1 Impact of the codification functions

a) Legislative planfulness

In the search for the impact of the codification functions on the failure of the two projects, the *first* observation relates to the idea of *legislative planfulness*.

a. In the case of the Constitutional Treaty, no serious conflict emerged regarding this aspect. On the contrary, a strong desideratum had developed in the scholarly and political

48 Peter-Christian Müller-Graff, 'Artikel 3 EUV' in Matthias Pechstein, Carsten Nowak, Ulrich Häde, *Frankfurter Kommentar EUV – GRC – AEUV,* (Band I, 2. Aufl., Mohr Siebeck 2023, Tübingen) Rn. 4-23.

49 Müller-Graff, Artikel 3 EUV Rn. 24-44.

50 Peter-Christian Müller-Graff, 'The German Länder: Involvement in EC/EU Law and Policy Making' in Stephen Weatherill, Ulf Bernitz (eds), *The Role of Regions and Sub-National Actors in Europe* (Hart 2005, Oxford and Portland, 103–117) 105–106.

51 Article 54 TEU; Article 357 TFEU.

52 Article 5 para 2 TEU.

53 Concerning the Constitutional Treaty, the author was an external advisor to the European Constitutional Convention and to the German Bundesrat member of the European Constitutional Convention; concerning the Common European Sales Law, the author was an advisor to the German Federal Ministry of Justice.

assessment of the then existing different sources and qualities of primary law: to bring them together[54] and combine them with the not yet ratified Charter of Fundamental Rights in one comprehensive basic Treaty[55] – thereby giving the blessing of a democratically ratified base to certain judicial developments (such as the primacy doctrine and the protection of fundamental rights in the Union).

b. In contrast, the legislative concept of the CESL competed with the idea of an 'organic' alignment of national and EU-level judicial or legislative principles and rules, developed through comparative and creative legal scholarship in the search for the 'best' common rules. This approach drew on the valuable treasure chest created through the collaboration of hundreds of dedicated scholars from all over Europe: whether in the form of a common core recommended for national laws (such as the Principles of European Contract Law – PECL – of the *Lando*-Commission,[56] the model rules of *von Bar's* Study Group[57]), the Draft Common Reference Frame's (DCFR's) combination of these rules and Community private law acquis,[58] or European law books (eg, by *Hein Kötz*[59]).

b) Conception-led consistent systematisation

As to the *second* aspect, *conception-led consistent systematisation*, it appears that in both cases the concerns were not raised in relation to the *systematisation* of the provisions (what serious mind would oppose intellectual order?), but against the substantive *concept* of the projects and their ramifications in single rules.

a. As far as the *CESL* is concerned, in addition to weighty academic criticism of the text's 'maturity',[60] opposition was also voiced to its alleged *consumer protection orientation,* and its scope of applicability was also questioned,[61] with the latter two points being questionable. The concept was based on the principle of optionality, hence on free choice (Article 8 of

54 Peter-Christian Müller-Graff, 'The Future of the European Treaties: A Systematic Approach to a Basic Treaty' in Armin von Bogdandy, Petros C. Mavroidis, Yves Mény (eds), *European Integration and International Co-ordination. Studies in Transnational Economic Law in Honour of Claus-Dieter Ehlermann* (Kluwer Law International 2002, The Hague, 331–350) 336–349.

55 Id., 349.

56 Commission on European Contract Law, *The Principles of European Contract Law* (Kluwer Law International 1995, The Hague).

57 von Bar, Europäisches Zivilgesetzbuch… 135–140.

58 Christian von Bar, Eric Clive, Hans Schulte-Nölke (eds), *Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR)* (Sellier European Law Publishers 2009, München).

59 Hein Kötz, *Europäisches Vertragsrecht* (2. Aufl., Mohr Siebeck 2015, Tübingen).

60 For example, Horst Eidenmüller, Nils Jansen, Eva-Maria Kieninger, Gerhard Wagner, Reinhard Zimmermann, 'Der Vorschlag für eine Verordnung über ein Gemeinsames Europäisches Kaufrecht – Defizite der neuesten Textstufe des europäischen Vertragsrechts' (2012) 67 (6) Juristenzeitung 269–289; Florian Faust, 'Der Vorschlag für ein Gemeinsames Kaufrecht' (2012) 6 Bonner Rechtsjournal 123–134.

61 Eg individual statements in Jörg-Uwe Hahn (ed), *Gemeinsames Europäisches Kaufrecht: Moderner Ansatz oder praxisferne Vision?* (C.H. Beck 2012, München).

the Proposal[62]) and therefore posed no risk to unwilling enterprises. Secondly, it was well connected to the internal market's classic ordo-liberal principle of freedom of contract within mandatory law, including freedom-enabling consumer law;[63] and thirdly, it was confined to border-crossing contracts.[64] But it seems that its designation as 'European Sales Law' was perceived as potentially more far-reaching.

b. With regard to the Constitutional Treaty, an objection that was ***not*** rooted in French internal politics (though this was perhaps a decisive element in the rejection; keyword: opposition to President *Chirac*[65]) can be seen in the misleading labelling of a Treaty as a 'Constitution'. Although the Treaty would have doubtlessly fulfilled the necessary classic constitutional function of constituting and controlling public power,[66] the Treaty and its further amendments required the democratic legitimation of the Member States[67] as the ultimate source of legitimate collective power (keyword 'principle of conferral'[68]).

c) Substantive completeness

As far as the *third* aspect is concerned, the idea of the *substantive completeness* of the subject area may also have played a role in the failure. Scepticism surfaced towards the *Court of Justice*'s interpretative and gap-filling potential. But why distrust a common court?

a. With regard to the CESL, this scepticism was linked to the need for the interpretation of provisions such as those on the obligations of good faith and fair dealing,[69] and of co-operation,[70] or on the definition of reasonableness,[71] as well as to the general provision on interpretation. The latter stated that the CESL 'is to be interpreted autonomously and in

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62 See above, note 5.

63 For this aspect of consumer law see Peter-Christian Müller-Graff, 'Das Prinzip der Selbstverantwortung im heutigen Privatrecht – Europarechtliche Grundlagen' in Karl Riesenhuber (ed), *Das Prinzip der Selbstverantwortung* (Mohr Siebeck 2011, Tübingen, 139–158) 147–150.

64 Article 4 of the Proposal (see above, note 5).

65 Jody K. Biehl, 'Chirac Gets French Fried' in <https://www.spiegel.de/international/france-says-no-to-european-constitution-chirac-gets-french-fried-a-358226.html> accessed 1 December 2025.

66 Müller-Graff, Strukturmerkmale 196–198; for the necessary constitutional elements see Peter-Christian Müller-Graff, 'Europäische Verfassungsordnung – Notwendigkeit, Gestalt und Fortentwicklung' in Dieter H. Scheuing (ed), *Europäische Verfassungsordnung* (Ius Europaeum, Band 22, Nomos 2003, Baden-Baden, 11–36) 21–26; for the assessment criteria Peter-Christian Müller-Graff, 'Eine neue Verfassung für Europa. Kriterien der Europarechtswissenschaft' in Klaus Beckmann, Jürgen Dieringer, Ulrich Hufeld (eds), *Eine Verfassung für Europa* (2. Aufl., Mohr Siebeck 2005, Tübingen) 311–328.

67 Article IV-443 and IV-444 CTE.

68 Article I-1 para. 1 and I-11 para. 2 CTE (today: Article 5 para. 2 TEU).

69 Article 2 of the Proposal CESL; eg Peter-Christian Müller-Graff, 'Art. 2 GEK-E' in Martin Schmidt-Kessel (ed), Rdz. 4-5.

70 Article 3 of the Proposal CESL; eg, Peter-Christian Müller-Graff, 'Art. 3 GEK-E' in Martin Schmidt-Kessel (ed), Rdz.1-3.

71 Article 5 of the Proposal CESL; eg, Peter-Christian Müller-Graff, 'Art. 5 GEK-E' in Martin Schmidt-Kessel (ed), Rdz.1-11.

accordance with its objectives and the principles underlying it'.[72] This was accompanied by the obligation 'to settle issues not expressly settled by the CESL in accordance with the objectives and principles underlying the CESL' and by the explicit prohibition of recourse to the national law that would be applicable in the absence of an agreement to use the CESL.[73]

b. As for the Constitutional Treaty, even its all-encompassing *name*, together with its range of policy issues (which were, however, far from new), gave rise to speculation about the unclear implications of the Court of Justice's gap-filling jurisprudence on the unwritten *principle of effectiveness*.[74]

d) Complexity-reducing abstraction

With regard to the *fourth* aspect, the idea of reducing the complexity of rules and *wording*, both projects faced criticism, albeit of a different nature.

a. The *CESL's* first chapter (titled 'General principles and application') was academically attacked, not so much on the grounds of its abstraction, but on the grounds of its lack of serving as a *roter Faden* [guiding thread] and of sufficient coherence with the following chapters.[75]

b. In contrast, a general impression of the Constitutional Treaty from those days is that it was welcomed for its concise legal wording and abstraction by knowledgeable scholars and the legal services of the three political institutions of the Union. However, the necessarily legal-technical wording of the text that was released for the field test of a referendum overtaxed the perception of a considerable part of the public.[76]

e) Law-transcending purpose

The *fifth* aspect, the impetus of a *law-transcending purpose*, proved to be ambiguous in both cases.

a. While the basic idea of the *CESL* promoting cross-border trade in the internal market[77] was not seriously questioned, the partly proclaimed aim of creating the cornerstone of a

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72 Article 4 para. 1 of the Proposal CESL; eg, Peter-Christian Müller-Graff, 'Art. 4 GEK-E' in Martin Schmidt-Kessel (ed), Rdz. 1-8.

73 Article 4 para. 2 of the Proposal CESL; eg Peter-Christian Müller-Graff, 'Art. 4 GEK-E' in Martin Schmidt-Kessel (ed), Rdz.9.

74 For this principle and its ramifications, see, eg, Takis Tridimas, 'The Principle of Effectiveness' in Takis Tridimas, *The General Principles of EU Law* (Oxford EC Law Library 2006, Oxford) 418–476.

75 Eg, Martin Schauer, 'Einleitende Bestimmungen' in Christiane Wendehorst, Brigitta Zöchling-Jud (eds), *Am Vorabend eines Gemeinsamen Europäischen Kaufrechts* (Manz 2012, Wien, 43–67) 44.

76 See as underlying problem, eg, Jan Scheffler, 'Das französische Verfassungsverständnis angesichts der Anforderungen des EG/EU-Rechts' (2007) 67 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 43–88.

77 Eg, Martin Schmidt-Kessel (ed), Einl. GEK-VO-E Rdz. 15-16.

European Civil Code was viewed with scepticism in academia[78] and pressure groups.[79] It even ignited concerns about the future of identity-linked national civil codes such as the French 'Code civil' and the German BGB.

b. A similar *perception* emerged with regard to the Constitutional Treaty. While the intended merger of the existing different Treaties was widely considered a welcome simplification,[80] this purpose was overshadowed by another public understanding. The parallel drawn by the Convention's President *Giscard d'Estaing* to the Philadelphia Convention of 1787[81] as well as the state analogue language of the Constitutional Treaty[82] and the media abbreviation of the project as 'European constitution' triggered a widespread, though legally wrong, public perception that this text would transform the Union into a State in its own right (keyword: 'superstate').

2 Points of conflict between the two projects and the then existing constitutional integration programme?

If one looks for points of conflict between the two projects and the then-existing constitutional integration programme, it cannot be assumed that its *substantive* dimension was an obstacle to the adoption of the CESL, as its objective was seamlessly integrated into the promotion of the good functioning of the *internal market*. The *Constitutional Treaty* also did not exceed the quartet[83] of key operational objectives of the Union. *However*, it can be said that the *organisational dimension* of the constitutional integration programme ultimately caused the decisive political obstacles in both cases.

a) Constitutional Treaty

Regarding the Constitutional Treaty, there was a certain impression that in parts of the (not only French) public perception the (international) federal structure of the Union and the principle of conferral was partly overshadowed by the consistent grammatical self-designation of the Treaty as 'constitution' in the individual articles and by the state-analogue terminology (such as *'la loi européenne'* replacing the term *'règlement'* or *'la loi-cadre européenne'*

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78 For an early sceptic, Herbert Kronke, *Brauchen wir ein europäisches Zivilgesetzbuch?* (Institut für Rechtspolitik an der Universität Trier 2002, Trier) = <https://nbn-resolving.org/urn:nbn:de:0168-ssoar-325256> accessed 1 December 2025.

79 See, eg, some individual statements in Jörg-Uwe Hahn, *Gemeinsames Europäisches Kaufrecht…*

80 See for the preceding discussion Peter-Christian Müller-Graff, The Future of the European Treaties…

81 Eg, Lisbeth Kirk, 'Giscard prijst Europese Grondwet aan in Amerika', <https://www.eumonitor.eu/9353000/1/j9vvik7m1c3gyxp/vgymdlqt76wt?ctx=vggd1fum7n7f&tab=1> accessed 1 December 2025.

82 Eg, the language 'this Constitution' in the articles of the CTE; the list of the symbols of the Union (Article I-8 CTE); the wording 'European law' replacing the term 'regulation' (Article I-33 para 2 CTE).

83 For this 'quartet', see Article I-3 and Article III-177 CTE (nowadays Article 3 para. 2 to 5 TEU).

replacing the term *'directive'*) as well as by elements such as the European anthem and European flag.[84] Nevertheless, the Constitutional Treaty's text explicitly clarified that the continued international *federal* organisation required its ratification[85] (as well as its future revisions in the ordinary revision procedure[86]) by all Contracting Parties in accordance with their respective constitutional requirements.

b) CESL

In the case of CESL, the international federal character of the Union also became a political roadblock – due to the Council's power to prevent it. Resistance developed in Germany, Austria, France and the United Kingdom in particular. The Bundestag raised (according to Protocol (No 2) to the Treaty of Lisbon) the so called 'subsidiarity complaint'.[87] The Commission had tried to circumvent the unanimity requirement of Article 352 TFEU by basing its proposal of an *optional* CESL on the competence for legal harmonisation in the internal market law (Article 114 TFEU), which allows for the adoption of legal acts by a qualified majority in the Council. Nevertheless, even this move (in my view, legally not sustainable[88]) could not overcome the political strength of the Union's international federal decision structure.

84 Article I-8 CTE.

85 Article IV-447 CTE.

86 Article IV-443 CTE.

87 Bundestags-Drucksache 17/8000.

88 Peter-Christian Müller-Graff, 'Ein fakultatives europäisches Kaufrecht als Instrument der Marktordnung?' in Hans Schulte-Nölke, Fryderyk Zoll, Nils Jansen, Reiner Schulze (eds), *Der Entwurf für ein optionales europäisches Kaufrecht* (Sellier European Law Publishers 2012, München, 21–45) 35; Peter-Christian Müller-Graff, 'Der Introitus des optionalen Europäischen Kaufrechts: Das erste Kapitel im Kontext von Kodifikationskonzept und Primärrecht' in Martin Schmidt-Kessel (ed), *Ein einheitliches europäisches Kaufrecht?* (Sellier European Law Publishers 2012, München, 51–86) 59–61; Peter-Christian Müller-Graff, 'Der Begriff der Rechtsangleichung des Art. 114 AEUV im Licht eines gemeinsamen europäischen Kaufrechts' in Ulrich Becker, Armin Hatje, Michael Potacs, Nina Wunderlich (eds), *Verfassung und Verwaltung in Europa. Festschrift für Jürgen Schwarze zum 70. Geburtstag* (Nomos 2014, Baden-Baden, 617–640) 634–640.

IV Lessons to be learnt for future codification projects at the European Level?

Concerning lessons to be learnt regarding future codification projects at the European level, three can be named.

1 Careful approach to sovereignty-related or identity-related projects

The *first* lesson is obvious. Codifications driven by a law-transcending purpose that touch on the sensitive area of national sovereignties or identities (inherent in an international federal polity[89]) must be treated with utmost care. Our *jubiliarian* would this lesson perhaps label – in the tradition of *Konrad Zweigert's* terminology – the position of the third school: synthesism (between idealism and positivism[90]).

2 Chances for codifications below the threshold of sovereignty or identity

On the other hand, the first lesson shows that the chances of codifications *below* this threshold are higher. This can be seen in several areas of *secondary* law, where various existing legal acts have been summarised in a single systematic regulation, such as, eg, the common organisation of the markets regarding agricultural products;[91] ***or*** the regulation declaring certain categories of aid compatible with the internal market.[92] These acts, even if the purpose of technically consolidating the text situation might have been predominant (as with the Schengen Border Code [which designates itself a 'codification'[93]] or with the Visa

[89] See for their respect by the Union Article 4 para.2 TEU.

[90] Lajos Vékás, 'Nach der "dritten Schule"' in Christian von Bar, Oliver L. Knöfel, Ulrich Magnus, Heinz-Peter Mansel, Arkadiusz Wudarski (eds), *Gedächtnisschrift für Peter Mankowski* (Mohr Siebeck 2024, Tübingen) 37–50.

[91] Regulation (EU) No 1308/2013 of the European Parliament and of the Council of 17 December 2013 establishing a common organisation of markets in agricultural products and repealing Council Regulation (EEC) No 922/72, (EEC) No 234/79, (EC) No 1037/2001 and (EC) No 1234/2007, [2013] OJ L347/671.

[92] Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty, [2014] OJ L187/1.

[93] Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) (codification), [2016] OJ L77/1.

Code[94] or with the Union Customs Code[95]), overlap at least with the codifying endeavour to achieve legislative planfulness, concept-led, consistent systematisation and substantive completeness, though sometimes at the price of increasing text complexity.

3 Consequences for the more sensitive codifications

The third lesson refers to the federally more sensitive codifications. It arises from the other two lessons and concerns their implications for the future handling of the first four codification purposes.

a) Legislative planfulness

As far as the desideratum of *legislative planfulness* is concerned, the federally most cautious approach is to build on the *acquis* (be it primary law, secondary law, or the Court of Justice's settled jurisprudence).

a. Exactly this happened after the failure of the *Constitutional Treaty*. Instead of combining the three texts (TEU, EC-Treaty, CFR) into one, they were retained by the *Lisbon* Treaty, but their content was nearly totally maintained in line with the Constitutional Treaty[96] and mutually dovetailed.[97] Only the state-analogue wording was dropped and the primacy provision reduced to a recalling Declaration of the Court of Justice's 'well settled' relevant (misleadingly called) 'case law'.[98] Nevertheless, a *Basic Treaty* is desirable for (also legitimation-enhancing) clarity and the Union's identity in the future.

b. As far as *Union private law* is concerned, it is advisable to use the *acquis communautaire* as a basis for development, taking into account its rich interpretation by the Court of Justice (which has been carefully monitored by the journal GPR[99] for two decades). Developing the acquis along the lines of the mentioned precious fruits of European research collaboration groups would support a planful, coherent and gradually codifying *consumer contract legislation,* which would imply the strengthening of an internal market law of

94 Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code), [2009] OJ L243/1.

95 Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code (recast), [2013] OJ L269/1.

96 Peter-Christian Müller-Graff, 'Die Zukunft des Europäischen Verfassungstopos und Primärrechts nach der deutschen Ratspräsidentschaft' (2007) 30 Integration 223–237 = in Ingolf Pernice, Miroslav Angelov (eds), *Auf dem Weg zum Vertrag von Lissabon – Forum Constitutionis Europae – Band 9* (Nomos 2008, Baden-Baden) 105–124.

97 See Article 1 para 3 TEU and Article 1 para. 2 TFEU.

98 Declaration no.17 concerning primacy.

99 GPR = Gemeinschaftsprivatrecht – Zeitschrift für das Privatrecht der Europäischen Union/European Union Private Law Review/Revue de droit privé de l'Union européenne (established in 2003).

unilateral commercial transactions (*einseitige Handelsgeschäfte*[100]). There is no consumer protection in private law without enterprises.

b) Conception-led consistent systematisation

As to the objective of a *conception-led consistent syste-matisation*, the federally most compatible approach is also a close link with the *acquis*. In particular, this implies a conceptual orientation towards the first main operational objective as the foundation of the European Union: the *internal market*.[101]

a. Therefore, when codifying its *secondary private law*, the European Union is on a safe path if it focuses on improving the functioning of the four basic transnational market access freedoms (Article 26 para. 2 TFEU), thereby increasing the acquis and *gradually strengthening the need* to bring its parts together from the particular to the general: perhaps one day to an internal market commercial code.[102] The Union's legislation is already partly like this in the areas of company law and consumer law, however, mostly in the form of directives (eg, Directive 2019/770 on contracts for the supply of digital content;[103] Directive 2024/1799 on the repair of goods;[104] Directive 2017/1132 on certain aspects of company law[105]). *As long as* codifications in the form of *regulations* (as occurs in the area of international private law[106]) are not feasible in substantive private law, directives should, as far as meaningful, be implanted in the system of national codifications (as managed in a differentiated way by today's *jubilarian* in the Hungarian Civil Code[107] or promoted by the German legislator in its Civil Code[108]).

b. Also, for codifying primary law, the reconnection to the *internal market* concept facilitates such a development. It easily explains the reasons for the need for supranational

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[100] Category of § 345 of the German Commercial Code (HGB).

[101] See Müller-Graff, Artikel 3 EUV Rn. 25; see also Peter-Christian Müller-Graff, 'Das Recht des Binnemarktes: Grundfreiheiten und Wettbewerbsordnung' in Armin Hatje, Peter-Christian Müller-Graff (eds), *Europäisches Organisations- und Verfassungsrecht, Enzyklopädie Europarecht* (Band 1, 2. Aufl., Nomos 2022, Baden-Baden, 401–468) 410–415.

[102] Peter-Christian Müller-Graff, 'Die Europäische Privatrechtsgesellschaft in der Verfassung der Europäischen Union' in Peter-Christian Müller-Graff, Herbert Roth (eds), *Recht und Rechtswissenschaft. Signaturen und Herausforderungen zum Jahrtausendbeginn* (C. F. Müller 2000, Heidelberg, 271–305) 303–304; see also Ulrich Magnus, 'Die Gestalt eines Europäischen Handelsgesetzbuches' in Jürgen Basedow, Klaus J. Hopt, Hein Kötz (eds), *Festschrift für Ulrich Drobnig zum siebzigsten Geburtstag* (Mohr Siebeck 1998, Tübingen) 57–79.

[103] Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services [2019] OJ L 136/1.

[104] See above note 8.

[105] See above note 14.

[106] See the so-called Rome Regulations (EC) No 593/2008, (EC) No 864/2007, (EU) No 1259/2010 and (EU) No 650/2012.

[107] Vékás, Schuldrechtsmodernisierung 17–27.

[108] Müller-Graff, Kodifikationsgewinn 43–56.

law elements (keyword: avoidance of distortions of competition due to national peculiarities to the detriment of market participants[109]). It also provides the substantive reasons for previous extensions of EU competences[110] and for the insertion of the Article on values in primary law (Article 2 TEU).

c) Substantive completeness

As far as the aspect of substantive completeness of a codification is concerned, the decision on this is essentially a *political* one (without prejudice to the Court of Justice's systemic understanding). In the area of *primary law*, this includes the sovereignty-sensitive link with law that has already been *ratified* (as experienced in the internal-market-driven expansion of *private law relevant* competences on intellectual property law[111] and on judicial cooperation in civil matters (including international private law).[112] In the future, this could perhaps also promote the extension of the ordinary legislative procedure (Article 289 para 1 TFEU) to the creation of European company forms and to an optional law for cross-border contracts. The recommendation of such an 'organic' enlargement is also valid for new projects of secondary private law.

d) Complexity-reducing abstraction

The objective of a codification to foster the *complexity-reducing abstraction* of legal terminology is a requirement for the optimal use of scarce resources, such as intellectual concentration and time. However, it *clashes* with the everlasting vision of formulating legal texts in an understandable way for their addressees.[113] Nevertheless, legal texts require precise linguistic fabric. Significantly enough, the layman's understanding was no topic in the debate on the *CESL*, but it was among the issues arising in debates before the French referendum on the Constitutional Treaty (although presumably not a dominant one[114]). This, however, raises the question of whether a complex international Treaty (with its power-balancing content and its necessarily own technical terminology) can seriously be put to a referendum. Should one abstain from a referendum in the case of a combination of the three texts in a *Basic Treaty*? The Member States have defined the functioning of the Union as 'representative democracy' (Article 10 TEU) – wisely enough in the interest of its stability.

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109 Müller-Graff, Binnenmarktrecht…, 23–25, 37–38, 42, 48–49, 63–64.

110 Müller-Graff, Binnenmarktrecht…, Artikel 3 EUV Rn. 36–40.

111 Article 118 TFEU.

112 Article 81 TFEU.

113 See Lena Kunz, Vivianne Ferreira Meşe (eds), *Rechtssprache und Schwächerenschutz* (Nomos 2018, Baden-Baden).

114 Jan Scheffler, 'Das französische Verfassungsverständnis angesichts der Anforderungen des EG/EU-Rechts' (2007) 67 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 43–88 (44).

Although this Article addresses only the Union (and leaves the Member States free in their forms of democratic ratification), this principle also has a certain appeal as serving as the preferable procedure for the legitimisation of the founding Treaties of a transnational polity of 27 states with 450 million inhabitants.

V Conclusion

The idea of codification will continue to appeal to enlightened minds as a constant task, also at the European level. This is my submission to the *European celebration* of *a unique great codificator* in and from Europe – *Lajos Vékás*.

John Cartwright[*]

Codification in the Common Law

Abstract

Codification is generally thought of as a feature of modern legal systems in the civil law world. However, codification is also used by common law systems, although there is a real question whether the form of 'codification' employed by common law legislators is comparable to the codification employed by civil law legislators. The focus of the discussion here will be on the role of codification in English private law, in particular contract law, where codification has been explored in the modern era, but abandoned. There may, however, still be a role for the intervention of codifying legislation to solve some of the problems faced within the general rules of English contract law.

Keywords: codification, common law, English contract law

I Introduction

Codification is a natural topic of discussion to mark a celebration of the career of Professor Lajos Vékás – although it may seem less obvious to discuss codification in the common law. However, as a common lawyer, I have learnt much about the nature of codification from Professor Vékás. I had the privilege of visiting Budapest as a member of the Hungarian-British Joint Academic Research Programme in the early years of this century when we discussed the form and structure of private law, and in particular the law of contract, in the context of the project that was then underway for the drafting of the new Hungarian Civil Code to replace the Code of 1959. I have particularly fond recollections of the gentle wisdom injected into our discussions by Professor Vékás. I learnt a great deal, not just about comparative contract law, but about the nature and purpose of codification, and the challenges of using a code that had been drafted for another time, and in another political and social context – and the process of rewriting it for a new time and a new political and social context.

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We think of codification as a technique employed by modern legal systems in the civil law world – typically, contrasting 'codified' systems with the 'non-codified' systems of the common law world. However, as comparative lawyers, we know that we need to be wary about drawing hard lines and categories in our taxonomy of legal systems, and we shall see that the technique of codification is also used within the common law, although there is a real question about whether the form of 'codification' employed by common law legislators is comparable to the codification employed by civil law legislators. This could be a very broad area of study, and different legal systems and different areas of the law will be mentioned in this article, although the focus within the common law systems will be on the role of codification in English law; and on private law – in particular contract law. The main discussion will be of the modern context, but we need to begin with a historical perspective.

II The notion of 'Codification' and 'Codes' in the common law: A historical herspective

There are very many discussions of codification in the common law world, not just internationally by comparative lawyers comparing the modern civil law codes, but also in purely national contexts.[1] Although references in the English language to a 'code' as a systematic collection or digest of laws date back to the late Middle Ages,[2] according to the Oxford English Dictionary the use of the active noun 'codification' (the making of a code) and the verb 'to codify' in the English language can be dated to the nineteenth century. 'Codification' was first used, chiefly, in the writings of Jeremy Bentham – the earliest cited example is a letter he wrote in 1806;[3] the evidence cited for 'codify' is from 1816, again from

1 See, eg, SJ Stoljar (ed), *Problems of Codification* (Dept of Law, Research School of Social Sciences, Australian National University 1977, Canberra); Denis Tallon, 'La Codification dans le Système de *Common Law*' (1998) 27 Droits 39–47; Peter M North, 'Problems of Codification in a Common Law System' (1982) 46 Rabels Zeitschrift für ausländisches und internationales Privatrecht 490–508; Gunther A Weiss, 'The Enchantment of Codification in the Common-Law World' (2000) 25 Yale Law Journal 435–532; Eva Steiner, 'Codification in England: The Need to Move from an Ideological to a Functional Approach – A Bridge too Far?' (2004) 25 (3) Statute Law Review 209–222; Catherine Skinner, 'Codification and the Common Law' (2009) 11 (2) European Journal of Law Reform 225–258; Mary Keyes and Therese Wilson (eds), *Codifying Contract Law: International and Consumer Law Perspectives* (Ashgate Publishing 2014, Farnham); Paula Giliker, 'Codification, Consolidation, Restatement? How Best to Systematise the Modern Law of Tort' (2021) 70 International and Comparative Law Quarterly 271–305.

2 *Oxford English Dictionary*, 'code (n.)' December 2024, DOI: https://doi.org/10.1093/OED/1158564901

3 *Oxford English Dictionary*, 'codification (n.)' July 2023, DOI: https://doi.org/10.1093/OED/1189587696; Jeremy Bentham, Letter 20–22 August 1806 in F. Rosen and J. R. Dinwiddy (eds), *The Collected Works of Jeremy Bentham: The Correspondence of Jeremy Bentham* (vol 7, January 1802 to December 1808, Clarendon Press 1988, Oxford) 366.

a letter written by Bentham.[4] The modern continental European codification movement – and the enactment of the French *Code Civil* in 1804 – predate these references, but it appears that even in the French language the use of the active noun *'codification'* and the verb *'codifier'* are a little later.[5]

Bentham seems to have been in tune with the spirit of codification that we know from the French Code of 1804, and it is well known that he was an enthusiast of codification for English law, as well as for other jurisdictions, notably the United States. He wrote a *General View of a Complete Code of Laws* (published posthumously in 1843)[6] which described a structure for a code (including a civil code); and on his death in 1832 he left his unfinished *Constitutional Code*.[7] None of this was enacted, but Bentham was not alone in his promotion of codification; and elsewhere in the common law world there were attempts from the nineteenth century onwards to introduce codes. In the United States some failed, such as a proposed Civil Code in New York,[8] but a few succeeded in the western States, such as the Civil Code of California which took effect on 1 January 1873 and, with amendments made from time to time, is still in force today.[9]

In this same period a range of legislative Acts were passed in India which are commonly referred to (informally) as the Indian Codes.[10] This included the Indian Contract Act 1872,

4 *Oxford English Dictionary*, 'codify (v.)' July 2023, DOI: https://doi.org/10.1093/OED/4969576613; Jeremy Bentham, Letter 23 February 1816 in F. Rosen and Stephen Conway (eds), *The Correspondence of Jeremy Bentham* (vol 8, January 1809 to December 1816, Clarendon Press 1988, Oxford) 510.

5 1819 and 1836 respectively: Jean Dubois, Henri Mitterand and Albert Dauzat (eds), *Dictionnaire étymologique* (Larousse 2014, Paris) 176 ('Code').

6 John Bowring (ed), *The Works of Jeremy Bentham* (vol 3, William Tait 1843, Edinburgh) 155.

7 F. Rosen and J. H. Burns (eds), *The Collected Works of Jeremy Bentham: Constitutional Code* (vol 1, Clarendon Press 1983, Oxford).

8 Weiss 506–511; Lawrence M Friedman, *A History of American Law* (4th edn, Oxford University Press 2019, New York) 383–385; Charles M Cook, *The American Codification Movement, A Study of Antebellum Legal Reform* (Greenwood Press 1981, Westport, Conn) 185–198.

9 Weiss 512–513. The current text is available on the California Legislative Information website: <https://leginfo.legislature.ca.gov/faces/publicationsTemplate.xhtml> accessed 1 December 2025. However, these codes did not remove the traditional common law role of the courts as lawmakers, and they were, in effect, only partial codifications: Cook 198; Friedman 385 ('Lawyers and judges had common-law habits and prejudices, and they handled the Codes accordingly. Sometimes code provisions were simply ignored'). Louisiana, with its French and Spanish heritage and its Civil Code, was (and remains) quite different, part of the civil law tradition: K. Zweigert and H. Kötz, *An Introduction to Comparative Law* (3rd edn, Tony Weir tr, Clarendon Press 1998, Oxford) 116–117.

10 Dame Mary Arden, 'Time for an English Commercial Code?' (1997) 56 Cambridge Law Journal 516–536, 522–523; Weiss 485 ['Within about twenty years, the following codes were enacted: Civil Procedure Code (1859), Penal Code (1860), Code of Criminal Procedure (1861), Indian Succession Act (1865), Indian Contract Act (1872), Specific Relief Act (1877), Transfer of Property Act (1882), and Indian Trusts Act (1882)'].

which was enacted 'to define and amend certain parts of the law relating to contracts'. With modern amendments, it is still in force today.[11]

In the later nineteenth and early twentieth centuries, there were also some Acts of the United Kingdom Parliament which are not 'codes' by name, but whose long titles[12] described them as codifying Acts. The Bills of Exchange Act 1882 was 'An Act to codify the law relating to Bills of Exchange, Cheques, and Promissory Notes'; the Sale of Goods Act 1893 was 'An Act for codifying the Law relating to the Sale of Goods' and the Marine Insurance Act 1906 was 'An Act to codify the Law relating to Marine Insurance'. The Partnership Act 1890 was not described as codification, but as 'An Act to declare and amend the Law of Partnership'. This was a period when it was seen as beneficial to put into legislative form the rules of the common law on these areas of (commercial) contract law – perhaps with amendments, but principally to provide the legal rules in the form of a clear, authoritative text.

The driving forces behind these various codification projects in the nineteenth century, in the various jurisdictions, were largely individuals who promoted the value of codification both generally and in particular areas of law. We have seen the significance of Bentham in the early years of the century; in the United States a leading proponent of codification was David Dudley Field;[13] the 'codifying' Acts in the United Kingdom in the sphere of commercial contract law in the later years of the century were drafted by Sir Mackenzie Chalmers – or, in the case of the Partnership Act 1890, Sir Frederick Pollock.[14]

III 'Codification' projects in modern English law

In the modern English law there has been some revival of the idea that it might be beneficial to codify certain areas of the law. Indeed, codification as a tool for law reform was put firmly on the map by the UK Parliament in enacting the Law Commissions Act 1965, which

11 See <https://www.indiacode.nic.in/handle/123456789/2187> accessed 1 December 2025. See also Warren Swain, 'History and Drafting of the Indian Contract Act 1872' in K. V. Krishnaprasad, Niranjan Venkatesan, Shivprasad Swaminathan and Umakanth Varottil (eds), *Foundations of Indian Contract Law* (Oxford University Press 2024, Oxford) 3–21.

12 The 'long title' of an Act is not the name by which the Act is usually known but the wording at the start of an Act which begins 'An Act to …' and lists its purposes: Diggory Bailey and Luke Norbury, *Bennion, Bailey and Norbury on Statutory Interpretation* (8th edn, LexisNexis 2020, London) [2.5], [16.3].

13 Weiss 503–507; Friedman 373–375; cf. Cook 187–188 ('the American codification movement hardly began with him … [but his] importance as a codifier derives in goods measure from his relentless, but what became his almost solitary, promotion of codification throughout most of his professional career').

14 Arden 518–521. Efforts during this same period to introduce a code of criminal law and procedure into English law, promoted by Sir James Fitzjames Stephen, were unsuccessful: Law Commission, *Codification of the Criminal Law: A Report to the Law Commission* (Law Com No 143, 1985) [3]–[6].

constituted two Law Commissions for the purpose of promoting the reform of, respectively, the law of England and Wales and the law of Scotland.[15] The Commissions have the duty

> to take and keep under review all the law with which they are respectively concerned with a view to its systematic development and reform, *including in particular the codification of such law,* the elimination of anomalies, the repeal of obsolete and unnecessary enactments, the reduction of the number of separate enactments and generally the simplification and modernisation of the law…[16]

The first Chairman of the English Law Commission was enthusiastic about its role in promoting codification, whilst noting that – as we shall see further below[17] – the notion of codification envisaged by the 1965 Act is different in character from civil codes such as those found in France and Germany.[18]

Every few years the Law Commission publishes programmes of projects – topics for examination with a view to possible reform. In its very first programme in 1965, the Commission included amongst its 17 topics two codification projects: a full codification of the law of contract (including quasi-contract and other connected topics); and codification of (parts of) the law of landlord and tenant.[19] Two years later, the Commission added a project on the codification of criminal law and a preliminary research project with a view to the eventual codification of family law.[20]

The Commission's optimism and enthusiasm for codification did not, however, last. The English and Scottish Law Commissions worked together on the project to codify the law of contract until 1972, when the Scottish Law Commission withdrew from the collaboration,[21] and the English Law Commission suspended work on the project even though preliminary drafts of the whole of the general law of contract had already been completed.[22] For our purpose, the point to note is the English Commission's explanation for suspending the project:

15 Law Commissions Act 1965 ss 1 and 2.

16 Ibid s 3(1) (emphasis added).

17 See section IV.

18 Mr Justice Scarman, 'Codification and Judge-Made Law: A Problem of Coexistence', a lecture delivered on 20 October 1966 and later published at (1967) 42 Indiana Law Journal 355–368, 358 ('codification not as a panacea but as an instrument of systematic development and reform in those branches of law where reform is thought to be needed, that is to say, a legal world in which there may be many codes but not necessarily a fully codified world').

19 Law Commission, *First Programme of Law Reform* (Law Com No 1, 1965) 6 and 10.

20 Law Commission, *Second Programme of Law Reform* (Law Com No 14, 1967) 6 and 7.

21 Scottish Law Commission, *Seventh Annual Report 1971–1972* (Scots Law Com No 28, 1973) [16].

22 Law Commission, *Seventh Annual Report 1971–1972* (Law Com No 50, 1972) [7]. The drafts were never published officially, but Harvey McGregor, who had been engaged as consultant by the English Commission to draft it, later published his draft code: H McGregor, *Contract Code Drawn up on Behalf of the English Law Commission* (Giuffrè 1993, Milan).

> We think that the publication of a draft [contract] code, however fully annotated, is not the best way of directing public attention to particular aspects of the law of contract which may be in need of amendment or of promoting examination and discussion of those aspects in depth. We think, further, that the question whether the general principles of contract law require amendment, and if so in what way, is logically anterior to codification and should be disposed of first. ...
> We have suspended work on the production of a contract code, and we now intend to publish a series of Working Papers on particular aspects of the English law of contract with a view to determining whether and if so what amendments of general principles are required. We expect to publish a number of such papers in the coming year, though the work as a whole will probably extend over several years. When it is complete, it is our intention to consider afresh the production of a contract code.[23]

Codification of the whole of English contract law appears to have been too much of a challenge; while codification remained a long-term aim, piecemeal reform of areas of particular concern were the priority. And although since 1972 the Law Commission has published a significant number of proposals for reform of particular areas of English contract law, many of which have been enacted by Parliament,[24] the question of a general codification has not been reconsidered.

A similar view was eventually taken in relation to the other major codification project on which the Law Commission embarked: the codification of criminal law.[25] This project proceeded to a more advanced stage than the codification of contract law. After substantial work on the project over many years, in 1989 the Law Commission proposed that there should be a Criminal Code for England and Wales, and published a draft Criminal Code Bill, with a detailed commentary, to give effect to their recommendations.[26] However, this was not taken forward for legislation, although the codification of criminal law remained on the Commission's list of active projects until 2008 when they removed it in favour of particular

23 Law Commission, *Eighth Annual Report 1972–1973* (Law Com No 58, 1973) [3]–[4].

24 Eg the Unfair Contract Terms Act 1977, implementing the Law Commission Report on *Exemption Clauses: Second Report* (Law Com No 69, 1975); the Contracts (Rights of Third Parties) Act 1999, implementing the Law Commission Report on *Contracts for the Benefit of Third Parties* (Law Com No 242, 1996).

25 In 1997 the then Chair of the Law Commission, Dame Mary Arden, gave a public lecture (but in her private capacity) raising the question of whether there should be a commercial code in English law, whilst also noting that the Commission might not have the resources to complete such a project, and that (even if the Commission produced a draft Code) there was no guarantee that Parliament would enact it: Arden 536. In 1999 the Commission considered the possibility of a commercial code as a future project: Law Commission, *Seventh Programme of Law Reform* (Law Com No 259, 1999) [1.12]–[1.15], but did not pursue it, and decided instead to focus on particular areas of commercial law which might merit reform: Law Commission, *Eighth Programme of Law Reform* (Law Com No 274, 2001) [1.11].

26 Law Commission, *A Criminal Code for England and Wales* (Law Com No 177, 1989).

reform projects designed to simplify the criminal law, which they said was a necessary precursor to eventual codification.[27]

The difficulties in achieving the codification of criminal law appear to have led the Commission to reflect more generally on the future of codification within their remit:

> With forty-two years' experience of seeking to codify the law, the Commission has taken the opportunity of the Tenth Programme to reappraise whether projects with codification as their principal outcome are realistic and whether effort and resources should explicitly be given to achieving that outcome. ...
>
> The complexity of the common law in 2007 is no less than it was in 1965. Further, the increased pace of legislation, layers of legislation on a topic being placed one on another with bewildering speed, and the influence of European legislation, continue to make codification ever more difficult.
>
> The Commission continues to believe that codification is desirable, but considers that it needs to redefine its approach to make codification more achievable. Accordingly the Commission has decided that:
>
> (1) It will continue to use the definition of codification used by Gerald Gardiner in *Law Reform Now*,[28] that is, 'reducing to one statute, or a small collection of statutes, the whole of the law on any particular subject.'
>
> (2) Consistently with Gardiner's concerns in 1964, the Commission's main priority is first to reform an area of the law sufficiently to enable it to return and codify the law at a subsequent stage. If it can codify at the same time as reforming, it will do so.[29]

There are other examples of legislative enactments which might be described as codifying Acts, both in English law[30] and in other common law jurisdictions.[31] But in English law, any

27 Law Commission, *Tenth Programme of Law Reform* (Law Com No 311, 2008) [1.6], [2.24]–[2.25].

28 Gerald Gardner and Andrew Martin, 'The Machinery of Law Reform' in Gerald Gardner and Andrew Martin, *Law Reform Now* (V Gollancz 1963, London; second impression, 1964) 11.

29 *Tenth Programme of Law Reform* [1.2], [1.4]–[1.5].

30 Eg a range of Acts passed by the UK Parliament in 1925 (in force from 1 January 1926) to embody a new set of rules for various aspects of property law: the Settled Land Act 1925, the Trustee Act 1925, the Law of Property Act 1925, the Land Registration Act 1925, the Land Charges Act 1925 and the Administration of Estates Act 1925. This systematic statement of rules of property law was preceded by legislation in 1922 and 1924 which reformed the law, and the 1925 Acts were therefore described in their long titles (see n 12) not as reforming statutes but as Acts 'to consolidate' the law on the various topics.

31 Eg the Uniform Commercial Code, enacted by each of the State legislatures in the United States; E Allan Farnsworth, *Farnsworth on Contracts* (4th edn with updates by Zachary Wolfe, Wolters Kluwer 2019, New York) §1.10. In New Zealand, the Contractual Mistakes Act 1977 and the Contractual Remedies Act 1979 were legislative reforms (and, in effect, partial codifications) of areas of the law of contract; indeed, section 5 of the 1977 Act was explicit that that Act was to be a code: see Rick Bigwood, 'The Partial Codification of Contract Law: Lessons from New Zealand' in Keyes and Wilson 165–203. These two Acts were replaced and re-enacted by Contract and Commercial Law Act 2017.

general form of codification is still seen as exceptional: piecemeal reform of particular areas of law, or of particular topics within some areas of law, is more usual. This raises broader questions about whether there is a future for codification (either general or in discrete areas) within the English legal system.

IV The role of codification

A legal system does not need 'a code' or 'codes' – as evidenced by the classical system of Roman private law, set out in the writings of Gaius (even if it was later taken up by Justinian's legislative enactment of the law in the sixth century);[32] the legal systems in continental Europe in the centuries before the modern codification movement;[33] and – of course – the common law systems which still continue their tradition of judge-made law, as well as other modern systems which have not engaged in general projects of codification of the law, but may still be seen as belonging to (or at least are very close in spirit to) the 'civil law' (codified) jurisdictions, such as the Nordic legal systems.[34] All these systems have legislation as a primary source of law alongside such law as may recognised as being based in, and developed through, non-legislative sources. But legislation is not in itself codification. Although different definitions of a 'code' may be used,[35] within the topic we are discussing here it carries at least the sense of a legislative enactment[36] which constitutes the whole of the law within its scope of operation.

The scope of operation of a legislative code may be more or less broad. A whole system may depend on codification in the sense that substantially the whole of the law is embodied in a set of legislative texts; codification is used as a mechanism for the definition of the system. General codification of this kind provides the authority of the legislator for the totality of the legal rules of the system; and it may require a network of separate but complementary codes for separate areas of law. A code within such a generally codified system may be a first codification of its area of law, replacing a hitherto uncodified system,[37] or a new codification replacing the whole or part of an existing code and thereby providing a new start, and even a new structure, for historical or political reasons.[38] A whole system may not, however, depend

32 Barry Nicholas, *An Introduction to Roman Law* (Clarendon Press 1962, Oxford) ch 1.
33 Zweigert and Kötz 75–80 (France), 133–141 (Germany).
34 Zweigert and Kötz 277–285.
35 *Oxford English Dictionary*, 'code (n.)'.
36 Non-legislative instruments, such as a soft-law 'code' or a 'Restatement' of the law, may have a certain persuasive authority but are not themselves sources of legal rules in the sense discussed here.
37 Eg the codification of French private law, beginning with the *Code Civil* of 1804.
38 Eg the new Hungarian Civil Code passed by the Hungarian Parliament in 2009 (which ultimately did not enter into force); the new Dutch Civil Code brought into force from 1970 onwards (1992, in the case of the new Books 3, 5, 6 and 7, dealing with property and obligations); and the new Belgian Civil Code, still being finalised and brought into force (book 5, dealing with obligations, came into force on 1 January 2023).

in this way on codification, but codes may be used within the system as partial codification, giving a set of rules which are complete authority for their limited area, replacing rules that were hitherto uncodified but leaving other rules uncodified outside the scope of the newly codified area.

Codification in English law is of this last kind. The Law Commission's remit in 1965[39] was not to turn the English common law system into a fully codified system on the continental European ('civil law') model. The English common law system is here to stay. But we have seen that some projects of (partial) 'codification' have been undertaken since the later nineteenth century,[40] designed to replace particular areas of law – of greater or lesser scope – with legislative texts.

Even amongst English Law Commissioners there have been debates about the merits of codification. In her lecture in 1997 raising the question of whether there should be a commercial code in English law,[41] Dame Mary Arden, then Chair of the Commission, cited the views of one of her fellow Commissioners, Professor Burrows, as an expression of the 'deep-seated fears of common lawyers about the effect of codification'. Professor Burrows had written[42] that he was 'not a great fan of legislative reform of the non-criminal common law. I have too much faith in the judiciary and too much love of the deductive technique of common law development to wish to see the law frozen by widespread legislative intervention', preferring to limit legislative reform to areas of the law which are already contained in legislation or to remedy particular defects in the common law which need speedier action than waiting for intervention by the courts in new cases. Dame Mary Arden, by contrast, expressed herself in favour of codification, at least of areas where the general principles have already been settled by the courts. Whilst recognising the practical limitations of the process of codification, and in particular the challenges of finding human and financial resources for work on such a project, and of persuading Parliament to enact it,[43] Dame Mary set out a list of advantages of codification:[44] it makes the law more accessible; it is quicker and easier to find the answer to a legal problem in a code; the process of codification enables the law to be updated and modernised as part of the process; revision and development of the law through codification avoids the need to wait for an uncertain point to come before the courts; it can resolve uncertainties from conflict or absence of authority; and a code constitutes a clean break from the past, superseding the existing excessive case law, whilst also providing in the text of the code a springboard for further judicial development.

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39 Above, n 16. See also Scarman.

40 Above, sections II and III.

41 Arden 531–532.

42 Andrew Burrows, 'Legislative Reform of Remedies for Breach of Contract: The English Perspective' (1997) 1 Edinburgh Law Review 155, 156.

43 Arden 536.

44 Arden 532–534.

A debate in this form is perhaps natural amongst common lawyers. On the one side, there is the argument that we do not need codification. The structure of the common law system, with its balance between the role of the courts and the role of the legislator, is well established. The general principles of private law, at least, do not depend on legislative authority, but the intervention by the legislator to address particular problems as they arise – and to implement matters of policy which are properly within the domain of the legislator rather than the judges[45] – is appropriate and well understood. In areas of the law which have been developed historically by the common law, codification is not how we do things; the time and cost of codification is of doubtful benefit, and would produce a new set of legal norms, apparently dissociated from the preexisting common law, and giving rise to uncertainties over their interpretation and future development.

On the other side, however, there are practical arguments – such as those set out by Dame Mary Arden in her lecture[46] – in favour of legislative texts which do not merely intervene to solve particular problems within an area of law, but take the whole of an area of law and replace the general common law (case-law) with a new and definitive text, albeit a text which can then be developed by judicial interpretation.

There is inevitably a question of principle about the relationship between the courts and the legislator in the interpretation and development of a code. Andrew Burrows referred to the deductive technique of common law development, and his concern that legislation tends to freeze the law.[47] One point of concern may be how to adapt to a code the well-established rules of statutory interpretation in English law, where the general rule is to start from the objective meaning of the legislative text, read in the general context of the statute.[48] The more extensive the scope of operation of the code, the more likely it will need to be drafted in broad terms, stating rules and principles in a looser form than the traditional English style of legislative drafting, and increasing uncertainty over how the courts might interpret it. Set against this, however, is the fact that the courts already take a different approach in relation to those (limited) 'codes' in English law which place into statute rules that were originally developed by the courts themselves. The objective meaning of the text remains the starting point, but in case of doubt or ambiguity, the courts may refer to relevant case law which was itself codified into the legislative text.[49] For example, in interpreting the 'codifying' legislation of particular topics within commercial law in the late nineteenth

45 Eg to define and implement the appropriate scope of protection for weaker parties, including a regime for consumer protection. In English law, there is extensive legislation providing special rules for consumer contracts and other transactions; the courts do not see it as their role to regulate inequality of bargaining power: *Times Travel (UK) Ltd v Pakistan International Airlines Corp* [2021] UKSC 40, [2023] AC 101 [26].

46 Arden.

47 Burrows.

48 Bailey and Norbury ch 11; John Bell and Sir George Engle, *Cross: Statutory Interpretation* (3rd edn, Butterworths 1995, London) ch 3.

49 Bailey and Norbury [24.8].

century, such as the Sale of Goods Act 1893,[50] the courts continued to cite cases pre-dating the legislation to interpret the text of rules which were now in a new (legislative) form.[51] A statute which takes over an area of law from the common law might even state explicitly that the authorities already developed by the common law should continue to apply.[52]

There is also a significant question of judicial attitude to the development of the law contained in the text of the code, particularly where it is expressed in broad terms. Neither in the common law nor in the interpretation and application of legislation do the English courts normally reason from general principle. The common law is applied and developed by inductive reasoning from the body of relevant existing, particular cases, which may (where necessary) be extended by analogy;[53] statutes are applied textually, with a rather restrictive palette of tools of interpretation – and although there are cases where the courts have developed the common law by analogy with statute[54] the emphasis is on interpretation of the text, [55] not on its expansion and development by analogy.[56]

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50 Above, section II.

51 Michael G Bridge (ed), *Benjamin's Sale of Goods* (12th edn, Sweet & Maxwell 2023, London) [1-002].

52 Eg Companies Act 2006 s 170: the general duties of a director, set out in the Act, 'are based on certain common law rules and equitable principles as they apply in relation to directors and have effect in place of those rules and principles as regards the duties owed to a company by a director. […] The general duties shall be interpreted and applied in the same way as common law rules or equitable principles, and regard shall be had to the corresponding common law rules and equitable principles in interpreting and applying the general duties.'

53 *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349 (HL) 378 (Lord Goff: 'In the course of deciding the case before him [the judge] may, on occasion, develop the common law in the perceived interests of justice, though as a general rule he does this "only interstitially," to use the expression of OW Holmes J in *Southern Pacific Co v Jensen* (1917) 244 US 205, 221. This means not only that he must act within the confines of the doctrine of precedent, but that the change so made must be seen as a development, usually a very modest development, of existing principle and so can take its place as a congruent part of the common law as a whole'). See also Lord Hodge, 'The Scope of Judicial Law-Making in the Common Law Tradition' (2000) 84 Rabels Zeitschrift für ausländisches und internationales Privatrecht 211–227.

54 See J. Beatson, 'The Role of Statute in the Development of Common Law Doctrine' (2001) 117 Law Quarterly Review 247–272; Andrew Burrows, *Thinking About Statutes* (Cambridge University Press 2018, Cambridge) 48–56; Bailey and Norbury [25.17].

55 See text to n 48, above.

56 Bell and Engle 46 ('Overall, judges are wary of treating statutes as generating principles which can be applied generally within the law').

V Is there a future for codification in English law? The example of contract law[57]

As we have seen,[58] the production of a Contract Code was the first project proposed by the Law Commission when it began its work in 1965, although it was suspended in 1972 and has never been resurrected. The Commission preferred to focus instead on individual projects of reform within the law of contract. The question still remains, however, whether there would be benefit in returning to a project of codification of contract law.

The general debate for and against codification in English law, discussed in section IV above, applies equally to the particular context of contract law. Critics of codification would say that contract law is a classical topic within the English common law. The structure and general rules of English contract law are well settled through lines of cases which can largely be traced back to original decisions in the mid-nineteenth century or earlier,[59] and although Parliament has intervened with legislation to address particular issues, it has left the common law rules of the general law of contract broadly unchanged. The place of contract law within private law, and its relationship to other areas – notably tort, unjust enrichment and property law – have also been determined by the common law. Taking away the common law of contract and replacing it by a new code would disturb the complex ecosystem of English private law – to which can be added the uncertainties that would flow from the fact that the legal rules of the law of contract would become statute-based, raising questions which we have already seen about how judges should interpret the text, and their powers in developing the law beyond the text.[60]

These arguments against codification of the law of contract are strong, unless there is a convincing counter-argument that a greater benefit can be obtained through codification: are there defects in the law of contract that cannot (or, at least, cannot better) be remedied through the operation of the existing mechanisms of the law – development through judicial decisions in later cases or through particular (rather than general, codifying) legislation.

The English law of contract is generally settled, and well recognised. But there are some significant points on which reform is called for – and, indeed, where the courts themselves have called for clarification or reform. To take just one area by way of illustration: the law on pre-contractual misrepresentation is based in the common law, with some amendment by legislation over the years – a history which has left the law 'fragmented, complex and unclear',

57 Some of the points discussed in this section were discussed by the author in an earlier publication: John Cartwright, 'The English Law of Contract: Time for Review?' (2009) 17 European Review of Private Law 155–175.

58 Above, text to nn 19–23.

59 David Ibbetson, *A Historical Introduction to the Law of Obligations* (Oxford University Press 1999, Oxford) chs 11, 12.

60 Above, text to nn 47–56.

according to the Law Commission,[61] although when the Commission itself considered undertaking a broader review of this area with a view to simplification, it pulled back and added new provisions which only served to add a new level of complexity.[62] There are very significant questions in the law of misrepresentation, both in relation to the interpretation of existing legislation[63] and within the common law,[64] which the courts have not yet settled – and, indeed, the Court of Appeal has recently said of some such issues that the case law authorities are in such a state of disarray that only the Supreme Court can reconcile them.[65]

It might appear that, in a common law system, it should be for the courts to address such issues themselves – judicial, rather than legislative – reform. However, there are significant practical and legal hurdles to the effective remedying of perceived defects by judicial reform.

The practical hurdle is that an appropriate case must be brought to a court which has the power to develop the relevant rule of law, typically the Court of Appeal or the Supreme Court; and this depends on the parties being willing to spend the time and money to obtain the judicial decision. The parties' interest is not in improving the law, but on resolving their dispute – and the very legal uncertainty involved in a case might encourage the parties to reach a settlement rather than prolong the litigation. Even where a higher court has given permission to bring an appeal on a point of law, the parties may settle their dispute before the hearing, depriving the appeal court of the opportunity to address it.[66]

A major legal hurdle to the remedying of defects by the courts is the strength of the doctrine of precedent in English law.[67] Judges will follow precedents through deference to their binding authority, whilst making clear that they regard the law as defective and urge

61 Law Commission, *Consumer Redress for Misleading and Aggressive Practices* (Law Com No 332, 2012) [S.12].

62 Ibid [S.38]–[S.39]. Since the Commission's terms of reference from the Government limited their project to contracts between businesses and consumers, they declined to undertake a broader simplification of the general law of misrepresentation: ibid [1.10], [1.11].

63 Eg the measure of damages under Misrepresentation Act 1967 s 2(1): *Royscot Trust Ltd v Rogerson* [1991] 2 QB 297 (CA), heavily criticised by authors and by later cases but to be followed unless overruled by the Supreme Court: John Cartwright, *Misrepresentation, Mistake and Non-Disclosure* (7th edn, Sweet & Maxwell 2025, London) [7-35]; the measure of damages under Misrepresentation Act 1967 s 2(2): *William Sindall Plc v Cambridgeshire CC* [1994] 1 WLR 1016 (CA), on which no case has yet reached the Supreme Court: Cartwright [4-76]; the applicability of the statutory limitation period under the Limitation Act 1980 s 36 to claims for rescission of a contract for fraudulent misrepresentation: *IGE USA Investments Ltd v Revenue and Customs Commissioners* [2021] EWCA Civ 534, [2021] Ch 423; Cartwright [4-54]–[4-55].

64 Eg the test for reliance/inducement: *Leeds City Council v Barclays Bank Plc* [2021] EWHC 363 (Comm), [2021] QB 1027; Cartwright *Misrepresentation…* [3-53]; and whether the remedy of rescission requires a court order: *IGE USA Investments Ltd*; Cartwright *Misrepresentation…* [4-19].

65 *IGE USA Investments Ltd* [91] (Henderson LJ).

66 Eg in *IGE USA Investments Ltd* the Supreme Court gave permission to appeal, but the appeal was settled by the parties without a hearing. Similarly, in *Leeds City Council* the trial judge gave permission to appeal against her own decision, and the appeal was listed to be heard by the Court of Appeal but was settled.

67 See John Cartwright, 'Precedent in English and Welsh Private Law' in Christina Ramberg (ed), *The Role of Legal Precedent in Private Law: A Comparative Study* (Intersentia 2024, Cambridge) 67–88.

review and reform by a higher court.[68] And even the Supreme Court, which has the power to change the common law and to depart from its own previous decisions, is reluctant – in the interests of certainty and predictability in the law – to change well-settled rules,[69] and will do so only in a case on which the relevant point is a necessary part of its decision.[70] Significant changes – and certainly changes which affect fundamental principles of the law of contract, or which involve broader matters of policy – are better made by legislation.[71]

There appears to be a good case for significant legislative intervention to address recognised defects within the English law of contract. The question is whether this should take the form of *codifying* legislation – not just legislation addressing a particular rule or a narrow area of the law, but which reforms the law within its context, restating in legislative form the whole set of relevant rules.[72] If not a full Contract Code (for which a case could be made, but which might be too challenging given the fate of the earlier attempts to codify whole areas, including the law of contract)[73] then it could be at least partial codification of sections of the law of contract in which there are a sufficient number of uncertainties to merit a broader (codifying) Act. There are precedents for this in the partial codifications of the law of mistake and misrepresentation, and contractual remedies, in New Zealand,[74] and in the late nineteenth and early twentieth century codifications of areas of English commercial law.[75] And in Scotland, the Scottish Law Commission began in 2010 a general review of Scots contract law in light of the Draft Common Frame of Reference,[76] which led to their recommending in 2018 that there should be a statutory statement on the Scots law on formation of contract, and certain particular reforms within the law on remedies for breach

68 Eg *South Caribbean Trading Ltd v Trafigura Beheer BV* [2004] EWHC 2676 (Comm), [2005] 1 Lloyd's Rep 128 [108] (Colman J: 'But for the fact that *Williams v Roffey Bros Ltd* [1991] 1 QB 1 […] was a decision of the Court of Appeal, I would not have followed it').

69 *Cavendish Square Holding BV v Makdessi* [2015] UKSC 67, [2016] AC 1172 [36] (Lord Neuberger and Lord Sumption: 'We rather doubt that the courts would have invented the rule [against contractual penalty clauses] today if their predecessors had not done so three centuries ago. But this is not the way in which English law develops, and we do not consider that judicial abolition would be a proper course for this court to take').

70 *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2018] UKSC 24, [2019] AC 119 [18] ('if [*Williams v Roffey Bros Ltd*] is to be overruled or its effect substantially modified, it should be before an enlarged panel of the court and in a case where the decision would be more than obiter dictum').

71 One of the most significant reforms of the general law of contract in recent years was to the doctrine of privity of contract, which the Courts had found unsatisfactory but had resisted reforming themselves: *Beswick v Beswick* [1968] AC 58 (HL) 72 (Lord Reid: 'if one had to contemplate a further long period of Parliamentary procrastination, this House might find it necessary to deal with this matter. But if legislation is probable at any early date I would not deal with it in a case where that is not essential'). Following a project undertaken by the Law Commission, the law was eventually reformed by the Contracts (Rights of Third Parties) Act 1999.

72 Cf. Gardner and Martin ('reducing to one statute, or a small collection of statutes, the whole of the law on any particular subject').

73 Above, section III.

74 Bigwood.

75 Above, section II.

76 Scottish Law Commission, *Eighth Programme of Law Reform* (Scots Law Com No 220, 2010) [2.16]–[2.21].

of contract.[77] This has not yet been implemented, but it is still a live project and in 2024 the Scottish Government issued a consultation paper seeking views on the proposals.[78]

However, any codification of the English law of contract, whether a general Contract Code or partial codifications of sections of contract law, would not be ‘codification’ as it is generally understood by legal systems such as those in continental Europe which have adopted a fully codified system. In England, the common law system remains the background and context within which such partial ‘codes’ take effect, a system which is based on a characteristic relationship between the legislator and the courts, significantly different from the relationship between the legislator and the courts in a codified civil law system.

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77 Scottish Law Commission, *Report on Review of Contract Law: Formation, Interpretation, Remedies for Breach, and Penalty Clauses* (Scots Law Com No 252, 2018).

78 See <https://www.gov.scot/publications/scottish-government-consultation-scottish-law-commission-report-review-contract-law/> accessed 1 December 2025.

Christian von Bar*

The Civil Law's Common Law

Abstract

Continental legicentrism can no longer convincingly explain the growing importance of precedent. Today's Civil Law systems need to modernise their understanding of what counts as a source of law. They, too, need the notion of common law.

Keywords: common law, civil law, customary law, sources of the law, binding precedents, methodology, comparative law, *culpa in contrahendo.*

I Two German classics in connection with culpa in contrahendo

I would not dare to start a lecture with such an old chestnut in front of such a learned audience if I had not recently come across two classics of German legal history in connection with a methodological study. It was about *culpa in contrahendo*. As you know, this remained unregulated by statute in Germany for a whole century.[1] Nevertheless, its 'time of origin' can be dated with astonishing precision, namely to 7 December 1911, the day on which the German Imperial Court of Justice – albeit more *en passant* and in a very unspectacular subordinate clause – spoke of 'a legal relationship preparatory to the purchase' in the context of a department store accident, 'which has a contract-like character'.[2] The court did not deem it necessary to say any more. Almost seventy years later and after a long series of interim decisions, the German Federal Court of Justice wrote: 'The commencement of contractual negotiations […] established a legal obligation between the parties, which is now recognised as "customary law" *(Gewohnheitsrecht)*'.[3] It would be another forty years before *culpa in contrahendo* in § 311(2)] made it into the German Civil Code. Today, it appears to be a legal

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1 In contrast to the Prussian Allgemeines Landrecht (ALR I §§ 284 and 285), the German Civil Code was silent on *culpa in contrahendo*. This only changed in 2010.

2 RG 7.12.1911, RGZ 78 p. 239, 240 (the so-called *Linoleumrollenfall*).

3 BGH 11.5.1979, NJW 1979 p. 1983.

institution recognised throughout the European Union and can also be found in a large number of other civil codes.[4]

II Customary law (Gewohnheitsrecht)?

a. I did not mention the two decisions because the first refers to a 'contract-like' obligation and the second to a 'statutory' obligation. I will let this aspect rest. I am concerned with another point, which I must confess I have only just realised: *Culpa in contrahendo*, long before its career in statutory law, is said to have been a piece of 'customary law' *(Gewohnheitsrecht)* according to the Federal Court of Justice. The Court was and is not even alone in this. This is also how things are seen in Austria. *Barta*, for example, assumed as early as 2004 that not even the courts that once created *culpa in contrahendo* could remove it now.[5]

b. But is this correct: *customary law (Gewohnheitsrecht)*? The qualification is surprising. This is because we are dealing here with nothing other than the result of a line of case law (albeit a long one), the foundation of which (at least in Austria: § 7 ABGB) can probably be traced back to a legal analogy. In any case, it was the courts, in Germany, even a single court that gave birth to *culpa in contrahendo*. In other words, the corresponding 'law' was not something that the Imperial Court of Justice would have already identified in actual legal practice when it began to rule in this direction. And it was obviously not open to proof either. What the court did have were, at best, a few literary sources, which remained uncited in the background. It was therefore not about the perception of a traditional practice to which certain circles of traders had submitted themselves concerning certain objects (eg the trade in horses in a rural region of northern Germany) in the conviction that they were legally bound by this practice – ie, only a handshake seals the purchase. It was about something completely different. For the necessary *opinio juris ac necessitatis* was created *(i)* by state courts, *(ii)* with a claim to apply to the whole of Germany and *(iii)* for all kinds of circumstances, provided that they only occur in the preliminary stages of a contract of some kind. Until the end, ie until the codification of *culpa in contrahendo*, the final point of reference always remained previous decisions. This was not a law that arose spontaneously from a non-state root. And it was never just a matter of local law. The qualification as 'customary law' was probably solely due to the fact that German legicentrism does not seem to allow any other 'sources of law' than statutes and customary law (Article 2 EGBGB). In Poland, the corresponding idea is even directly part of the constitution, with

4 After the Second World War (1950), it was initially Article 12 of the Bulgarian Law on Obligations and Contracts that codified the liability for damages arising from the breach of pre-contractual obligations. This was preceded by Article 1337 of the Italian Civil Code, later followed by Article 227 of the Portuguese Civil Code. Since the French reform of contract law in 2016, *culpa in contrahendo* has also been incorporated into the French Civil Code with Article 1104 and 1112 to 1112-2 CC.

5 Heinz Barta, *Zivilrecht: Grundriss und Einführung in das Rechtsdenken* (WUV Universitätsverlag 2004, Vienna) 373.

the peculiarity that Article 87 of the Polish constitution does not even accept customary law as a source of law.[6] But that only exacerbates the problem. If no statutory source can be found, the rule that is to be applied in its place must be something else. In this respect, Poland has even obstructed the German emergency solution of resorting to the category of 'customary law' *(Gewohnheitsrecht).*

III Common law

a. I would like to ask again: Is at least the binary approach correct? Do we in this part of Europe, if we have it at all, have at best statutory and customary law – and nothing else? That would be strange. Quite a few European civil codes also include the 'natural' or 'general principles of law', or at least the 'general principles of the state legal system',[7] among the sources of law, and thus offer a third point of reference that is worth considering, even if it is rarely used. But we do not have it in Germany, at least not in the BGB. Should this really mean that we therefore have no other positivisation process for law and that everything that happens must therefore be stored in either the 'statute' or 'customary law' drawer? That does not convince me. Rather, it seems to me that in parts of our legal system, we have now returned to where we were in pre-codification times, namely the concept of common law or *jus commune*. We have tried to cover it up with thick layers of grey laws. But fresh greenery has long been growing through them. Common law has always remained 'there', so to speak, and the older a codification became, the more vigorously the former worked its way back through it.

b. I understand common law to be that part of the state legal system which is formed within its network of rules of law and therefore with effect for all subjects of private law from tradition, reason, intellectual permeation, commitment to values and precedents. These are indispensable components of all legal systems, regardless of the reason, the number and the claim to omnipresence with which a state legislates. In England and all its daughter and sister legal systems, the existence of such common law is a matter of course. Incidentally, it also governs questions of method. Not only are the rules on dealing with and being bound by precedents a piece of English *common law*, but also the rules on the interpretation of statutes.[8] *Statutory law* includes only the numerous legal definitions, regardless of whether

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[6] Marek Henryk Safjan, *Prawo cywilne- część ogólna, System Prawa Prywatnego I* (2nd edn, C.H. Beck, Instytut Nauk Prawnych PAN 2012, Warsaw) 226 no. 60.

[7] Thus eg § 7 Austrian Civil Code, Art. 12(2) Italian *preleggi*, Art. 10(3) Portuguese Civil Code and Art. 1(1) Spanish Civil Code.

[8] Concerning this, impressively, Lord Burrows, *Statutory Interpretation in the Courts Today* (Sir Christopher Staughton Memorial Lecture 2022) (to my knowledge, only published on the website of the Supreme Court: https://www.supremecourt.uk/docs/sir-christopher-staughton-memorial-lecture-2022.pdf). See in the German language also Stefan Vogenauer, *Die Auslegung von Gesetzen in England und auf dem Kontinent* (unrevised e-book edition 2021, Tübingen).

they are found in the catalogue of terms preceding a statute or in the general (and very unwieldy to read) Interpretation Act of 1978.

c. I would like to invite you to accompany me a little further in my search for the 'common law of civil law'. Of course, this is a language game. But the question remains: How should we qualify those countless judicial legal developments that are constantly taking place in the systems of civil law? Further development of the law is our daily bread. It takes place not only through legislation, ie through 'statute-making', but also through the art of judging, the object of which is the determination of the law. Courts concretise the current legal situation. In the rarer, but therefore more spectacular cases, courts even create new bases for claims and/or defences in this way. Both are manifestations of the further development of the law. At the latest, when one of these two approaches has become established, is no longer questioned by any reasonable person and has become basic knowledge in legal examinations, it has all the characteristics of common law. There are so many examples that it must suffice to recall the French judicial decisions on the liability of the *gardien*, the Spanish decisions on the reversal of the burden of proof for fault (in Hungary, on the other hand, it is defined in statutory law), the Italian decisions on the concept of *danno evento* and the German decisions on liability related to the violation of the so-called 'general right of personality'.

d. Courts are, of course, bound by the 'law', and *only* by the law – and not by political influence. What must happen when politicians enact a law that is contrary to the law in the sense of justice is another question. Such transgressions still occur. The Hungarian concept of unchangeable birth sex, for example, quite deliberately negates the judicial decisions of the European Court of Human Rights and therefore violates the European Convention on Human Rights. The fact that the 'birth sex' was also secured under constitutional law does not make things any better. Nevertheless, the threshold at which injustice turns into non-law has probably not yet been crossed here.

e. Binding the judge 'to the law' does not, however, mean binding the judge strictly to the *wording* of a law. For that would amount to the abolition of our entire set of instruments of legal methodology. It would be the end of any teleological interpretation, which in turn should be one of the building blocks of the general principle of the rule of law. In addition, no European court may refrain from ruling on the grounds that there is no statute or that its wording is so ambiguous that no result can be achieved with it. Not to decide would be a denial of justice, and a denial of justice is generally even a criminal offence. Courts are therefore not only allowed to develop the law, they *must* actually do so. This is particularly evident when a state entrusts entire parts of its private law to its judges. There is no statutory property law in Denmark and no statutory enrichment law in Sweden. However, the task of developing the law is no less important when a statute that is not sufficiently clearly formulated needs to be interpreted or when it must be decided whether a certain reference rule can be replaced in favour of another to give it priority. This is not only done by analogy. Constitutional and European law-led interpretation also follows this basic pattern. And they also produce common law.

IV Civil law and common law (gemeines Recht)

a. However, the notion of 'common law' must be used with caution. For there are not only different statutory laws, but there are also different common laws. Common law, which is characterised by English law, is only one common law among many. It derives its peculiarity primarily from the instruments that stabilise it. However, it is a completely different question whether this also shifts the doctrine of the sources of law. For it is by no means certain that the decisions of the Royal Courts of Justice can be said to create law themselves. Although the details are disputed, there is much to be said in favour of the thesis that only common law is the source of law, whereas the courts, like everywhere else, are limited to 'recognising' it.[9] From this perspective, common law develops itself to a certain extent;[10] there is no 'active' development (from the outside).

b. 'Common law' is predominantly 'common' because it is the law which is ***common to the whole of England***. In this (but only in this) sense, you can therefore also refer to statute law as 'common law'. What is different here from the continent is only the amount of ***legal material*** that has not been placed on a statutory basis. The number of ***statutes*** in some areas of private law, on the other hand, is far greater than on the continent. This is due to the often very narrow scope of application of English statutes. In tort law, for example, England is the country with the highest number of statutes in Europe. And the crossovers are even increasing. English land law has long been predominantly laid down in statutes, whereas Danish property law has not. What is 'common' law in Denmark can be 'statutory' law in England. 'Common law' is an iridescent term whose meaning is only revealed through pairs of opposites.

V Stare decisis

a. *Common law* (like *equity*) can therefore also be described as a legal system that not only binds the courts of first and second instance to the decisions of courts of the respective higher instance, but also the chambers of the same instance. The Court of Appeal may only deviate from an earlier decision of the same court in very exceptional cases, and even the Supreme Court very rarely uses its privilege to revise one of its previously expressed legal opinions. It is therefore appropriate to say that 'common law is precedent'. But where do we continental Europeans stand when it comes to being bound by precedents? I will spare you and myself the general comment that no European supreme court could fulfil its task

9 If one follows the leading speech of Lord Goff of Chieveley in *Kleinwort Benson Ltd. v Lincoln City Council* [1999] 2 AC 349, then English decisions of the higher courts are also not among the actual sources of law, but among the sources of legal knowledge. However, the doctrine of *binding precedent* then again ensures that the distinction is practically irrelevant in the vast majority of cases.

10 Thus Jane Stapleton, 'Legal Scholarship and the Changing Common Law' (Graya 136, Hilary 2023) 13–14.

of ensuring the uniform application of the law if the lower courts, for whatever reason, did not naturally base their own decisions on the decisions of 'their' supreme court. Much more interesting is the observation that some continental European legal systems have now begun to transform this traditionally purely factual habit into a legal obligation. The result is *common law 'light'*. And this is now also happening in the opposite direction, a kind of *civil law 'light'*. A striking example of this is the referral procedure that allows the English High Court to submit a *preliminary question* to the Court of Appeal in an endeavour to reduce the almost unbelievable post-Brexit chaos.[11]

b. In terms of legal policy, this is tantamount to rolling backwards. The procedure is not only reminiscent of the referral procedure to the ECJ that the former British government hated so much at the time. It is also reminiscent of the much older interpretative decisions of a Supreme Court that Bulgaria[12] and Poland[13] have been working with for decades. Sweden does not have such procedures, but operates with a special form of restriction on the admissibility of appeals to the Supreme Court. It decides for itself whether the matter belongs to the group of legal issues for which its leading function is required. However, it was only after the turn of the millennium that common law techniques were consciously adopted, and that was in Italy. Here, too, it refers to the question of limiting admissibility, but specifically of being able to reject a cassation as inadmissible (and not merely unfounded) if the Court of Cassation has already ruled on the relevant legal issue and the Court of Appeal has taken this into account. A consolidated judicial decision of the Italian Supreme Court can no longer be challenged with any prospect of success in accordance with Article 360-*bis* Italian Code of Civil Procedure.

c. Hungary, I do not need to tell you, has recently even established the formal binding effect of the decisions of the Kúria.[14] In this country, since the reform, it is therefore not only possible to contest a lower court decision on the ground that it violates the law, but also on the ground that it deviates from the Kúria's assessment of a point of law. The Kúria's decisions are thus given parity of treatment to objective law. This goes a significant step further than the Italian system, but still lags behind the English system. However, I have not yet understood all the details. For example, I am not sure what the reform means for judicial training. After all, the number of legal sources has increased enormously. I once heard that

11 Sec. 6A(1)–(8) Retained EU Law (Revocation and Reform) Act 2023.

12 According to Art. 130(1) Bulgarian Act on Judicial Power, interpretative decisions are binding on the bodies of the judiciary and the executive, the bodies of the municipal authorities and all other authorities that issue administrative acts.

13 Under Art. 87 and 88 of the Polish Act on the Supreme Court, the corresponding decisions are formally binding only on the other senates of the Supreme Court, but are in fact consistently followed by all other courts as well, Krzysztof Szczucki, *Ustawa o Sądzie Najwyższym. Komentarz* (2nd edn, Wolters Kluwer Polska 2021, Warsaw) Art. 87 no. 2.

14 Act CXXVII of 2019 on the Amendment of Certain Acts Related to the Establishment of One-level District Office Procedures; § 406(1) Hungarian Code of Civil Procedure. See further Gárdos (in this issue).

in England an English student must have read and know about 800 decisions (but I cannot verify this). Will something similar perhaps soon apply in Hungary – but here alongside and in addition to the study of codification? Have clear criteria for the distinction between *rationes decidendi* and *obiter dicta* already emerged, without which, I suspect, it will not be possible to concretise the binding effect? Legislation and the application of law take place everywhere within the framework of a highly complex communication process. Therefore, if they are treated as a legal source, it is not only necessary to have access to the text of all decisions of the Kúria. A sophisticated reporting system and highly developed search engines are also required to enable the courts of first instance to access the legal situation in a reasonable time. An alternative would be to partially privatise the determination of the legal situation, as is the case in England. *Da mihi facta, dabo tibi jus* does not apply there. I do not even exclude the possibility that the standards for providing correct reasons for a judgement could shift, for example, in the sense that a court of first instance must state that it has researched the decisions of the Kúria but has not found anything relevant.

VI Methodological law and comparative law

a. Be that as it may. I think I can at least say that continental European private law is preparing to revitalise its common law in a variety of ways. This, in turn, could be the key to better understanding even more recent developments. I would therefore like to conclude by briefly addressing two further points: the foundation of our law governing methodology law, and the concept of a *jus commune europaeum*.

b. The notion of a 'law governing methodology' will raise eyebrows here and there. In Germany, for example, it has long been doubted that the rules of interpretation are legal norms at all.[15] This had to do with the fact that the German Civil Code (as well as the French Civil Code and the Polish Civil Code) does not contain a single reference to questions of its interpretation and the filling of its gaps. It thus represents a sharp contrast to the vast majority of other codifications, such as the Italian, Portuguese and Spanish, but also the Romanian and Czech codifications, which continue the tradition established by the Austrian Civil Code in a modernised form. In terms of content, however, it makes virtually no difference whether methodological issues have been regulated by statute or not. Spain may be somewhat more progressive;[16] overall, however, the European rules of interpretation differ at most in their nuances. This also applies to filling gaps by analogy. Whether its requirements are derived from statute or exclusively from consistent judicial decisions is

[15] In particular Karl Larenz, *Methodenlehre der Rechtswissenschaft* (6th edn, Springer 1991, Munich, Heidelberg) 248.

[16] According to Art. 3(1) span. CC '[r]ules shall be construed according to the proper meaning of their wording and in connection with the context, with their historical and legislative background and with the social reality of the time in which they are to be applied, mainly attending to their spirit and purpose'.

irrelevant to the outcome. 'General' *(allgemeines)* and 'common' law *(gemeines Recht)* show no differences in this field; so why should only the former belong to the sources of law? Methodological rules apply regardless of whether they can be derived from a Code or not. The phrase that methodological questions are 'constitutional questions', which has recently been frequently propagated in Germany to save the honour of statutory law, does not hold water, if only because it does not go beyond a reformulation of the general prohibition of arbitrariness. And the fact that ordinary law may not be interpreted against the constitution simply follows from its hierarchical status.

c. It would perhaps be more promising to investigate why one country has a statute on certain legal issues and another does not. I do not rule out the possibility that one of the reasons for the varying degrees of utilisation of statutes is the different levels of trust the population has in their judiciary, and another is the varying degrees of ability to deal with uncertainty from culture to culture.

d. The concept of common law could, and this brings me to my last point, also serve to prevent the further marginalisation of comparative law within Europe on the grounds that 'the' law by which a judge is bound is exclusively his or her national law. I have never liked the term 'comparative law' because, in essence, it is completely irrelevant which nationality is assigned to a rule of private law. It is not a question of comparing national laws, but rather of gaining a deeper understanding of the legal matter that is to be analysed. The superimposition of European legal systems produces a wealth of common convictions, which, since legislators have not coordinated, must have a deeper reason than politically organised law-making. Private law largely follows an internal logic. This, in turn, generates not only the law that is common to us, but also our common law. Some national codifications, such as Article 1(1) of the Spanish Civil Code, already include 'the general principles of law' among the sources of law alongside statute and customary law. I would like to see something similar for Europe.

Péter Gárdos*

Learning from Common Law? The Binding Nature of the Hungarian Curia's Judgments

Abstract

This paper critically examines the Hungarian legal system's recent turn toward a limited precedent model, introduced by the 2019 Precedents Act. Originally presented at a conference celebrating Professor Vékás's 85th birthday, the study situates this development within the broader debate over the role of courts in shaping civil law and evaluates whether the new framework enhances legal certainty or instead obfuscates the applicable law. Through a detailed comparison with the English common law precedent system, the paper identifies structural weaknesses in Hungary's quasi-precedent regime, including the lack of clarity around binding elements, challenges in accessing and navigating a vast body of precedents, and the rigidity imposed on the Curia's jurisprudential development. The analysis raises fundamental questions about the viability and legitimacy of the Hungarian precedent system and calls for greater transparency, judicial infrastructure and professional engagement to ensure the rule of law. The paper concludes by reaffirming the importance of comparative legal dialogue, as advocated by Professor Vékás.

Keywords: precedent system, legal comparison, role of courts, legal uniformity, judicial reasoning

I Introduction

The recodification of Hungarian civil law presented a unique opportunity for significant reforms in private law. While many legal scholars advocated for extensive changes, Professor Vékás proposed a more restrained approach. He argued that codification should be rooted

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in the 'law in action' – the law as interpreted and applied by the courts – and that reforms should only be introduced when societal or economic changes necessitate them.[1]

This paper focuses on 'law in action', or what Professor Vékás aptly termed 'living law'. Presented at the conference celebrating Professor Vékás's 85th birthday, this brief overview explores the complexities introduced by Hungary's adoption of a quasi-precedent system.

I will argue that this development has made it difficult to tell what the law is. The discussion begins with an analysis of the Supreme Court's role in maintaining the uniform interpretation of the law, followed by an overview of the Precedents Act of 2019. Finally, I will reflect on the key differences between the Hungarian and English precedent systems, highlighting the challenges posed by Hungary's evolving legal framework.

II Background: unification by the Supreme Court

Courts have always played a major role in shaping Hungarian civil law. Before the adoption of the first Hungarian Civil Code in 1959,[2] the courts created law. Legal literature held that it is not the individual cases, but the consistency of judgments that create law.[3] This is inevitably a cumbersome procedure. As Szászy aptly put it: 'It is striking how slowly, how difficultly, and at what cost to the parties seeking justice such a law comes into being, and how uncertain and unstable its validity remains thereafter.'[4]

This situation significantly changed with the adoption of Hungary's Civil Code. Since 1960, the courts' task has been to apply and interpret the Civil Code. The Hungarian Constitution has consistently stipulated, in various forms, that the Supreme Court is responsible for the uniform application of the law. To fulfil this mandate, the Supreme Court has traditionally had the authority to issue binding decisions for lower courts.[5] This function underwent some modification in 1997 with the introduction of the four-tier court system, but the fundamental principle remained unchanged: the Supreme Court ensured the uniform interpretation of the law, with its so-called uniformity decisions being binding on the courts.[6] This rule was subsequently reaffirmed in the Fundamental Law.[7]

1 Lajos Vékás: Bevezetés [Introduction] in Lajos Vékás, Péter Gárdos (eds), *Nagykommentár a Polgári Törvénykönyvhöz* [*Large Commentary on the Civil Code*] (Wolters Kluwer 2020, Budapest) 25.

2 Act IV of 1959 on the Civil Code that was in force between 1960 and 2014.

3 Gusztáv Schwarz, 'Magánjogunk felépítése' [Structure of our private law]. (1893) 8 (10) Magyar Jogászegyleti Értekezések (Franklin Budapest) 17. I am grateful to the anonymous reviewer for this reference.

4 Béla Szászy, 'Magyarország magánjogi törvénykönyvének törvényjavaslatáról' [About the bill on Hungary's Civil Code. (1928) 20 (98) Magyar Jogászegyleti Értekezések (Franklin, Budapest) 11.

5 Article 38 of Act XX of 1949 of the Constitution of the Republic of Hungary (hereinafter: Constitution), subsequently Article 47 (2) of the Constitution.

6 Section 27 of Act LXVI of 1997 on the Organisation and Administration of Courts (hereinafter: 1997 Court Administration Act).

7 Article 25 of the Fundamental Law.

The 1997 judicial reform also introduced an additional rule: a panel of the Supreme Court could only deviate from an earlier judgment of another panel of the Supreme Court after conducting a uniformity procedure that justified such deviation.[8] This rule has only been infrequently used.[9]

The Supreme Court sparingly exercised the right to issue uniformity decisions. Between 1997 and 2022, only around 30 uniformity decisions were issued in the field of private law. Uniformity decisions became subject to constitutional review, as these decisions have normative force.[10]

Beyond uniformity decisions, the Supreme Court has provided both binding and non-binding interpretations of the law. Some judgments had binding force for lower courts, while others, in the form of non-binding opinions, offered abstract interpretations resembling the legal norms of the Civil Code. Although Professor Vékás has expressed critical views about these non-binding acts,[11] these guidelines undeniably influenced judicial practice.[12]

Until 2007, individual court judgments were not systematically published or made publicly accessible. Instead, selected and edited judgments were disseminated through journals of the Supreme Court and appellate courts, which played a crucial role in highlighting key rulings. However, the limited availability of judgments made it difficult to detect discrepancies in how courts – and sometimes even panels within the same court – interpreted the same legal norms. Such differences were typically brought to light only when journal editors intentionally highlighted them. To provide some examples, we refer to the conflicting judgments of regional courts of appeal and the various panels of the Supreme Court in the field of fiduciary securities[13] as well as the scope of damages to which parents are entitled in the case of a child born with a genetic disorder.[14]

A pivotal change occurred in 2005 with the enactment of the Electronic Freedom of Information Act, which established the Collection of Judicial Decisions. This electronic database made nearly all appellate court decisions publicly accessible, enabling the easier

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8 Section 29 of the 1997 Court Administration Act.

9 András Varga Zs., 'A jogegységi határozatok és az Alkotmány rendje' [Uniformity decisions and the order of the Constitution] (2004) (6) Magyar Jog [Hungarian Law] 333–338.

10 Mátyás Bencze, '42/2005. (XI. 14.) AB határozat – jogegységi határozatok felülvizsgálata' in Fruzsina Gárdos-Orosz, Kinga Zakariás (eds), *Az alkotmánybírósági gyakorlat. Az Alkotmánybíróság 100 elvi jelentőségű határozata 1990–2020.* [*Consitutional Court decision 42/2005. (XI. 14.) – revision of uniformity decisions' Jurisprudence of the Constitutional Court – One Hundred Landmark Decisions of the Constitutional Court, 1990–2020*] (Vol I, Társadalomtudományi Kutatóközpont, HVG-ORAC 2021, Budapest) 629–646.

11 Lajos Vékás, 'Az új Polgári Törvénykönyvről' [On the new Civil Code] (2013) (5) Jogtudományi Közlöny [Legal Studies Bulletin] 225–242, 241–242.

12 Zsolt Ződi, 'Búcsú a kollégiumi véleménytől?' [Farewell to department opinions?] (2014) (11) Magyar Jog [Hungarian Law] 609–623.

13 See, eg, Péter Gárdos (ed), *Tanulmányok a fiduciárius biztosítékok köréből* [*Studies from the field of fiduciary securities*] (HVG-ORAC 2010, Budapest).

14 This issue was only settled in 2022, when the Curia published its decision [2/2022. JEH (Jpe.III.60.011/2022/15.)].

identification of inconsistencies in legal interpretation.[15] For the first time, it became evident that different courts – and often even different chambers within the same court – frequently rendered divergent rulings on identical facts. Moreover, it also became apparent that, oftentimes, the various panels of the Supreme Court also interpreted the law differently.[16] While this phenomenon was not new, its visibility was significantly enhanced after 2007.

In response to these observations, calls for more effective mechanisms to ensure legal unity grew louder. Some legal scholars even contended that the 1997 Court Administration Act implicitly granted normative force to all Supreme Court decisions.[17]

III Overview of the Precedents Act

The Hungarian legal system underwent a fundamental transformation in 2019 with the introduction of new legislation.[18] This reform introduced significant changes to the rules governing civil procedure and the role of judicial precedents. The new structure rests on the following principles.

In first- and second-instance civil proceedings, the legislation imposed new requirements regarding the court's reasoning obligations. Courts are now mandated to explicitly justify any departure from decisions of the Curia (Supreme Court) that are published in the Collection of Judicial Decisions on matters of law. Additionally, judgments must explain why requests by parties to deviate from such published decisions were rejected.[19]

The legislation introduced the following three significant changes to the rules on extraordinary revision, a legal remedy available against certain final and binding judgments.[20]

First, the legislator introduced an additional reason for seeking extraordinary revision. Under the new rules, parties may now request extraordinary revision not only on the basis of a legal error affecting the merits of the case but also if the court has departed from

[15] The exact scope of the decision was listed in Section 17 of Act XC of 2005 on Freedom of Electronic Information. The Act provided that judgments of the Supreme Court and the regional courts of appeal have to be published in anonymised form with certain exceptions. Eg, court decisions made in payment order procedures, enforcement proceedings, company registration, bankruptcy, and liquidation cases did not need to be published. In other cases, such as marital cases, termination of parental custody, and guardianship, publication was not possible if any of the parties requested it. The Act was replaced in 2011 when Act CLXI of 2011 on the Organization and Administration of Courts (hereinafter: Court Administration Act) was introduced. The new rules can be found in Chapter 51 of the Court Administration Act.

[16] See, eg, the examples in the previous paragraph.

[17] László Kecskés, Péter Tilk, 'A jogegységi határozatok alkotmánybírósági kontrolljának tervezett törvényi szabályozásáról' [On the planned regulation of constitutional control of uniformity decisions] (2004) (1) Magyar Jog [Hungarian Law] 11–20; Varga Zs., 333–338.

[18] Act CXXVII of 2019 amending certain acts in connection with the establishment of single-level district office procedures (hereinafter: Precedents Act).

[19] Section 346 (5) of Act CXXX of 2016 on the Civil Procedure (hereinafter: Civil Procedure Code).

[20] Chapter XXIX of the Civil Procedure Code.

a published decision of the Curia on a matter of law.[21] This implicitly limits second-instance courts' ability to deviate from Curia precedents, as such deviations can now be challenged through extraordinary revision.

Second, the general rule is that an extraordinary revision is excluded where the value in dispute is less than HUF 5 million or if the judgment of the first instance court has been upheld by the second instance court with the same legal reasoning.[22] A Civil Procedure Code provides that the Curia may allow the review even in such cases, if it is required *(i)* for the unity or development of case law, *(ii)* due to the particular gravity or social importance of the legal issue raised or *(iii)* the need for a preliminary ruling by the Court of Justice of the European Union.[23] While in these cases, it is at the discretion of the Curia whether to allow the review, a new rule was introduced that provides that the Curia must allow the review if the judgment deviates on a matter of law from the published decision of the Curia.[24]

The third rule on extraordinary revision concerns the Curia's right to deviate from its earlier precedent. If a panel of the Curia wishes to deviate from its earlier published decision on a matter of law, it must initiate a uniformity procedure.[25] The uniformity chamber is chaired by the President or Vice-President of the Curia. The chamber comprises the President or Vice-President and at least eight other judges from the Curia, appointed by the President. The law provides that at least one member from each department sits in the chamber.[26] The chamber may decide to hear the case either with all members of the given department of the Curia or by referring the case to the Full Bench of the Curia. The quorum of the supplemented uniformity chamber or of the Full Bench shall be constituted if more than two-thirds of its members are present; a decision of the full meeting shall require the vote of two-thirds of the members present.[27] According to the case allocation system of the Curia, there are currently two panels of 21 and 22 judges, respectively.[28] Both panels have nine civil judges, which means that matters requiring expertise in the field of civil law are decided by panels in which the majority of the judges do not handle civil law-related lawsuits.

21 Section 406 (1) of the Civil Procedure Code.

22 Section 408 of the Civil Procedure Code.

23 Section 409 (2) of the Civil Procedure Code.

24 Section 409 (1) of the Civil Procedure Code.

25 Section 32 (1) *(b)* of the Court Administration Act.

26 Section 41/A (1) of the Court Administration Act.

27 Section 35 of the Court Administration Act. According to the case allocation system of the Curia, there are currently two panels of 21 and 22 judges respectively, each with 9 civil judges, so that civil law issues in the case-law proceedings are decided by panels in which the majority of the judges are not civil judges.

28 The case allocation order of the Curia is available on its website. The most recent case allocation order is only available in Hungarian: <https://kuria-birosag.hu/sites/default/files/szabalyzatok/a_kuria_2024_november_1_napjatol_hatalyos_ugyelosztasi_rendje_modositasokkal_egyseges_szerkezetben.pdf>, a previous version is also available in English: <https://kuria-birosag.hu/sites/default/files/Kuria_ugyelosztasi_rend_20230101_EN_AM.pdf> accessed 1 December 2025.

The Precedents Act also introduced a new form of legal remedy that substantially transformed the structure of legal remedies. Traditionally, the parties had the right to file an appeal in civil cases. The second instance judgment became final and binding.[29] As we have referred to above, in certain cases, the parties may request from the Curia the extraordinary revision of the final and binding judgment, but no further remedy was available against the judgment of the Curia.[30] The Precedents Act changed this structure by inserting an additional remedy against the judgment of the Curia. This remedy is available in two situations. First, a uniformity complaint can be filed against certain decisions of the Curia if the party that requested the extraordinary revision argues that the second instance judgment deviated from a published decision of the Curia on a matter of law, and the Curia had not remedied the infringement. Second, a uniformity complaint can also be filed if the Curia departed from a published decision of the Curia on a matter of law without initiating the uniformity procedure described above.[31]

Finally, the Precedents Act abolished the previous practice of publishing non-binding legal interpretations under the names of various judicial bodies, such as the department of courts, consultations of heads of departments etc. Moving forward, no interpretation of the law may be published in the name of a judicial body unless the law expressly provides the authority to do so.[32] In the future, only uniformity decisions, opinions of the departments of the Curia, and summaries of case-law analysis groups established at the Curia can be published.[33]

These rules show that the Precedents Act significantly impacted the civil procedure, from first instance proceedings to extraordinary remedies, and substantially affected the role of the parties involved in the procedure. In the sections that follow, I will argue that these procedural changes have profound implications not only for the procedural framework but also for substantive law.

IV Some thoughts on the comparison between the domestic and the English precedent system

The new system introduced by the Hungarian Precedents Act is often referred to as a 'limited precedent system', which might initially suggest an obvious comparison with the English precedent rules. However, a fundamental difference must be recognised: in the

29 See Section 228 (4) of Act III of 1952 on the Civil Procedure Code and Section 385 (5) of the Civil Procedure Code.

30 The Fundamental Law provides an additional remedy. Any party may request in a constitutional complaint that the Constitutional Court review whether the judgment is in conformity with the Fundamental Law [Article 24 (2) *d)* of the Fundamental Law].

31 Section 41/B (1)-(2) of the Court Administration Act.

32 Section 27/A of the Court Administration Act.

33 Article 25 (3) of the Fundamental Law, Sections 27 (1), 30, and 32 of the Court Administration Act.

English common law system, the courts create law, whereas in the Hungarian system, the courts are confined to interpreting the laws enacted by the legislature. While this difference is undeniably significant, it does not render the comparison irrelevant. On the contrary, such an examination can shed light on critical challenges within the Hungarian system. To this end, I will focus on five major differences between the two systems.

The first key difference lies in the scope of decisions that qualify as precedents. In the English precedent system, nearly all court decisions may serve as precedents. By contrast, the Hungarian system limits precedents exclusively to decisions of the Curia. This limitation raises concerns about its effectiveness in achieving the goal of unifying the interpretations of the laws. Given that only a small fraction of civil cases reaches the Curia,[34] the capacity of this solution to ensure uniform legal interpretation across all courts is, at best, questionable. If the aim of the regulation is to unify the law, this solution raises at least some doubts since the number of civil cases that reach the Curia is negligible. For cases decided at the second instance and not brought before the Curia, their influence on judicial practice is limited to persuasive authority rather than binding force.

The second issue pertains to whether the UK Supreme Court and the Hungarian Curia have the authority to deviate from their own precedents. Since 1966, the House of Lords and later the UK Supreme Court have been able to depart from their precedent in justified cases.[35] In practice, however, this authority is exercised sparingly, reflecting a balance between the need for flexibility and the importance of maintaining legal certainty.[36] In contrast, the Hungarian Curia is strictly bound by its own decisions and may depart from them only through the specialised uniformity procedure described earlier.

The third question focuses on the binding nature of precedents. In English law, the lower courts are bound by the precedents of the higher courts.[37] Hungarian law has not adopted this solution. Although the Ministerial Explanatory Memorandum of the Precedents Act states that ‘the courts are obliged to follow the interpretation of the law of the Curia’ and may only deviate from it if the deviation is ‘necessary in the circumstances of the case or to comply with the Fundamental Law’,[38] this requirement is not reflected in the norm itself. The Civil Procedure Code only requires the judge to explain in the reasoning of the judgment

[34] In 2023, over 85% of first instance judgments in civil law matters became final and binding. Only less than 9,000 appeals were filed, and the Curia received a little over 1,700 requests for extraordinary revision in civil cases. For the detailed statistics, see <https://birosag.hu/sites/default/files/2024-04/ugyforgalom_2023.ev_.pdf> accessed 1 December 2025.

[35] Practice Statement [1966] 3 All ER 77.

[36] See, e.g., *Murphy v Brentwood* [1991] 1 AC 398, in which the House of Lords deviated from the *Anns v Merton* [1978] AC 728 judgment. [James W. Harris, ‘Murphy Makes It Eight – Overruling Comes to Negligence’ (1993) (3) Oxford Journal of Legal Studies 416–430.

[37] See, eg, Simon Whittaker, ‘Precedent in English Law: A View from the Citadel’ (2006) (5–6) European Review of Private Law 705–746. For the fight between Lord Denning and the House of Lords concerning the Court of Appeal’s right to deviate from a judgment of the House of Lords, see, *Cassell v Broome* [1972] AC 1027, 1054.

[38] Ministerial explanatory memorandum to Sections 65–74 of the Precedents Act.

why the judge has departed from the published decision of the Curia.[39] However, the law does not impose any requirement regarding the limits of the judge's right to derogate from the Curia's decisions. Still, if we assume that it is relevant for the professional career of judges whether their decisions are upheld by higher courts, we can at least expect that the published decisions of the Curia will determine the practice of lower courts, even in the absence of an explicit norm stating that the Curia's published decisions are binding on lower courts.

The fourth point I want to raise concerns the distinction between the mandatory content of a judgment and the findings and reasoning beyond it. English law distinguishes between the binding *ratio decidendi* (the legal reasoning essential to the decision) and non-binding *obiter dicta* (incidental comments). Although drawing this distinction is not always straightforward, English judges strive to clarify the core reasoning within judgments, aided by headnotes summarizing the *ratio decidendi*.[40]

In Hungarian law, such a clear distinction is largely absent. The Civil Procedure Code refers to deviations 'in matters of law' without defining the term, leaving room for ambiguity. It seems plausible to infer from the wording of the Code that even *obiter dicta* statements are binding as long as they concern a matter of law. Striking the right balance in defining what constitutes a 'deviation in matters of law' is critical. Overly narrow definitions could render precedents irrelevant, while overly broad interpretations might undermine legal certainty.[41]

The Curia has already published several cases where it provided guidance on how it interprets this requirement, but its explanations remain vague: 'Identity of cases is a complex legal concept influenced by multiple factors and must always be examined on a case-by-case basis. When the Curia examines the identity of decisions on matters of law, it must strictly consider the identity of the substantive legal provisions applied (validity, normative content) and the identity of facts relevant to legal interpretation in the compared judicial decisions.'[42] While these statements offer some direction, they fall short of providing a robust framework for identifying binding elements within judgments.

The last point for my comparison concerns the ease with which precedents can be found. The accessibility of precedents also differs markedly between the two systems, influenced by both the volume of cases and the structure of judgments.

39 See also András Osztovits, 'Törvénymódosítás a bírósági joggyakorlat egységesítése érdekében – jó irányba tett rossz lépés?' [Amendment of the law to harmonise judicial practice – A wrong step in the right direction?] (2020) (2) Magyar Jog [Hungarian Law] 72–80, 75; and Miklós Boronkay, 'A "korlátozott precedensrendszer" ügyvédi szemmel' [The "limited precedent system" from a lawyer's perspective] (2022) (11–12) Polgári Jog [Civil Law] paragraphs [18]-[21], DOI: http://dx.doi.org/10.55413/193.A2200601.POJ

40 Michael Zander, *The Law-Making Process* (6th edn, Cambridge 2004, Cambridge) 268–275; Rupert Cross & J. W. Harris, *Precedent in English Law* (4th edn, Clarendon Press 1991, Oxford, repr. in 2004) Chapter II.

41 Bence Rajkai, 'A precedensek értéke és értéktelensége – a Kúria Jogegységi Panasz Tanácsának Jpe. II.60.054/2022/14. jogegységi hatályú határozata elemzése' [The value and worthlessness of precedents – analysing the Jpe.II.60.054/2022/14. uniformity decision of the Uniformity Complaint Panel of the Curia] (2024) (5–6) Polgári Jog [Civil Law] DOI: 10.55413/193.A2400303.POJ

42 Paragraph [31] of Jpe.I.60.005/2021/5 judgment of the Uniformity Complaint Panel of the Curia.

Let us start with the number of judgments. The English Supreme Court delivered 52 judgments in 2023.[43] By contrast, the Curia delivered 5,000 judgments in the same period, of which about 2,000 were civil law cases.[44] In addition to the precedents of the Curia published since the Precedents Act entered into force, the law retroactively turned the judgments of the Curia delivered since 2012 into precedents.[45] As a result of this rule, some 40,000 decisions of the Curia became precedents overnight.[46] When these judgments were delivered, the judges did not know that their judgments would later become binding precedents. The sheer volume of these judgments makes identifying relevant precedents in Hungary an almost insurmountable challenge. However, it is not just the number of precedents that makes it virtually impossible to identify precedents in Hungary.

The English law reports contain a lot more information than the judgment itself.[47] They also include a subject heading of the judgment according to a predefined, consolidated index; they state the facts of the case concisely, and each case is accompanied by a headnote that sets out the rule laid down by the court. To ensure that the system works, publishers process the precedents cited in the judgment and the judgments that subsequently reflect on it. They do not simply list them but indicate the relationship between the two precedents (eg, upheld, departed from, distinguished). This ensures that one can identify whether a given precedent is still good law.

In the Hungarian system, such infrastructure is largely lacking. The typical wording of the Curia's uniformity decision is that the Curia's interpretation expressed in Decision X 'and any similar judgments' can no longer be relied upon. At a professional conference, the President of the Curia also admitted that he finds it problematic that, at present, it is impossible to identify whether a judgment is still good law, ie, whether it still binds the Curia.[48] Compounding this issue, Hungarian judgments lack headnotes comparable to those in English law and are challenging to search effectively. This lack of transparency and accessibility significantly undermines the practical utility of the precedent system in Hungary.

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43 The statistics are available at the website of the National Archives: <https://caselaw.nationalarchives.gov.uk> accessed 1 December 2025.

44 The statistics for the case load of the various courts are available at the Courts of Hungary website: <https://birosag.hu/sites/default/files/2024-04/ugyforgalom_2023.ev_.pdf> accessed 1 December 2025, see page 126 for the detailed statistics concerning the Curia.

45 Section 41/B (1) of the Court Administration Act.

46 György Wellmann, 'Kritikai észrevételek a jogegység biztosításának új rendszerével kapcsolatban' [Critical observations on the new system for ensuring legal uniformity] (2020) (11) Magyar Jog [Hungarian Law] 648–655, 653. No official statistics are available on the exact number of published decisions of the Curia. The Collection of Judicial Decisions does not indicate how many decisions it contains.

47 Each law report follows a partially different structure. Here we describe the Law Report solution. The ICLR website shows the different parts of the law reports (<https://www.iclr.co.uk/knowledge/case-law/whats-the-difference-between-a-law-report-and-a-transcript/> 1 December 2025) through a case (<https://www.iclr.co.uk/wp-content/uploads/media//2018/10/R-Evans.pdf> accessed 1 December 2025).

48 'What is the law? The first experiences with the limited precedent system in Hungary.' A roundtable discussion organised by the Centre for Social Sciences Institute for Legal Studies and the Civil Law Department of ELTE Law School on 4 May 2023.

The comparative analysis of the Hungarian and English precedent systems highlights profound differences in their structure, scope and application. While the English system benefits from centuries of refinement and institutional support, the Hungarian system, as currently implemented, faces significant challenges in achieving its intended goals of legal uniformity and predictability. Addressing these issues will require not only technical improvements but also a shift in judicial culture and legislative clarity.

V Comments on the national legislation

Whether one finds this unique precedent system preferable depends on one's approach to law and the legal system.

There is no doubt that the new system, if it works well, could lead to more predictable outcomes. However, predictability comes at a cost. For instance, under the new rule, the Curia can only depart from its own decision through a uniformity decision. This eliminates the possibility of its legal interpretations gradually evolving as new cases are adjudicated.

The drawbacks of this rigidity become evident when we consider historical examples. One prominent case is the Curia's handling of foreign currency loan contracts following the 2008 financial crisis. Initially, for several years, the Curia upheld the validity of the disputed clauses in these contracts. Beginning around 2012, however, the court gradually shifted its position, ultimately recognizing the invalidity of many such clauses.[49]

This iterative, adaptive process – crucial for addressing complex, evolving legal issues – will no longer be possible under the current system. Instead, the Curia's first decision on a legal question will settle the matter, with deviations permitted only through the cumbersome uniformity procedure.

It may not be a surprise to see that the legal literature has so far made very limited attempts to explore the published decisions of the Curia. Commentaries continue to follow traditional methods, analysing the legislative history, the intentions of lawmakers, and court decisions published in legal journals. University education similarly remains unchanged, focusing on journal-published cases rather than binding precedents. This disconnect creates a troubling paradox: tens of thousands of binding decisions define the current state of Hungarian civil law, yet there is no practical way for legal practitioners or scholars to familiarise themselves with these decisions comprehensively.

The President of the Curia has argued at several conferences that comparisons between the Hungarian and English precedent systems are fundamentally flawed. He contends that Hungary's system was deliberately designed to differ from the common law approach, making

[49] This interpretation might, once again, change, in light of the Court of Justice of the European Union's judgment of 30 April 2025, *AxFina Hungary*, C-630/23, ECLI:EU:C:2025:302, which describes the consequence of the invalidity of a financial lease agreement in a way that seems incompatible with the Civil Code.

such comparisons irrelevant – particularly regarding the volume of decisions, which courts' rulings are binding and other structural differences. While this argument may be formally correct, it misses the broader point. The point of such a comparison is to learn from foreign examples to create a more functional domestic solution.

If the criticisms and concerns I have expressed in my brief presentation are valid, there seems to be considerable doubt about the viability of the Hungarian precedent system. If the accessibility of the law is called into question, fundamental concerns about the rule of law arise.

At present, discussions about the Hungarian precedent system can best be described as a 'dialogue of the deaf'. However, there is always hope for constructive engagement. Professor Vékás has consistently emphasised the importance of professional dialogue, even amid contentious debates and differing opinions. In this spirit, I remain optimistic that there is room for meaningful discussion about the challenges of the precedent system to improve domestic regulation, and ultimately achieve a better legal framework for Hungary.

Articles

Alireza Safarpour*

Artificial Intelligence and Democracy: A Systematic Literature Review Covering One Decade

Abstract

Artificial intelligence (AI) is playing an increasingly important role in democratic governance, impacting elections, political communication and citizen participation. The rapid adoption of AI technologies in democratic processes holds promise by potentially enhancing civic engagement and governmental efficiency, but also raises significant concerns, including the spread of misinformation, surveillance and algorithmic bias. Despite substantial scholarly attention to these individual aspects, a comprehensive overview of AI's multifaceted impact remains lacking. To address this gap, a systematic literature review (SLR) was conducted to examine studies from 2014 to 2024 using PRISMA guidelines. Based on 97 selected studies from Web of Science and Scopus databases, the review identifies AI's role in five key areas: public participation, technocratic decision-making, transparency and accountability, media and political communication and surveillance. While AI can enhance democratic processes through improved civic participation and efficient governance, it simultaneously raises ethical and regulatory challenges. The findings highlight the critical need for effective governance frameworks that emphasise transparency, legal accountability and the protection of individual rights. Balancing AI innovation with democratic values is essential to maintaining democratic integrity and trust.

Keywords: artificial intelligence, democracy, governance, transparency and accountability, ethical AI

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I Introduction

Artificial intelligence (AI) is increasingly becoming a powerful force in shaping political systems and democratic governance. This marks a new and complex intersection between technological innovation and the foundational structures of society. Historically, every major technological shift, from the printing press to the internet, has left its mark on democracy by reshaping how information circulates, how citizens engage, and how governments are held accountable. AI now represents the next wave of transformation. On the one hand, it offers the promise of enhancing democratic decision-making, boosting creativity, and ushering in an era of intelligent automation. On the other hand, it introduces new risks, including challenges to employment, difficulties in verifying the truth, and concerns about the resilience of democratic institutions.[1] Among the most prominent examples of AI's growing role are large language models (LLMs). These tools offer policymakers unprecedented access to synthesised expertise, potentially strengthening the deliberative and problem-solving capacities of democratic bodies.[2] At the same time, the increasing use of AI in political communication, particularly in branding and content creation, is changing how leaders engage with the public. These developments are not only reshaping voter perceptions but also influencing democratic processes in ways that were unimaginable just a few years ago.[3] These developments highlight both the opportunities and risks AI poses to democracy, necessitating careful regulation and governance to align AI's growth with democratic values and societal well-being.

Democracy is fundamentally built on the principles of transparency, accountability, citizen participation and fairness. Transparency means that government decisions are communicated clearly and are accessible to the public, which is essential for maintaining trust and legitimacy.[4] Accountability ensures that institutions are answerable for their actions, helping them remain responsive to the needs and concerns of society.[5] Genuine opportunities for citizen participation allow individuals to engage in shaping policies, which strengthens the resilience and responsiveness of democratic systems. Fairness safeguards against power imbalances and promotes inclusive decision-making that reflects diverse societal

1 Yoshija Walter, 'Managing the Race to the Moon: Global Policy and Governance in Artificial Intelligence Regulation – A Contemporary Overview and an Analysis of Socioeconomic Consequences' (2024) 4 Discover Artificial Intelligence 1–25, 14, DOI: https://doi.org/10.1007/s44163-024-00109-4

2 Petr Špecián, 'Machine Advisors: Integrating Large Language Models Into Democratic Assemblies' (2024) 38 Social Epistemology 1–13, DOI: https://doi.org/10.1080/02691728.2024.2379271

3 Varsha Jain, Himani Sharma, 'Discovering AI-Driven Purposeful Political Brand Content to Influence the Voters' Attitude' (2024) 67 (2–3) International Journal of Market Research 296–313, DOI: https://doi.org/10.1177/14707853241309294

4 Jane Nielsen, Lisa Eckstein, Dianne Nicol and Cameron Stewart, 'Integrating Public Participation, Transparency and Accountability Into Governance of Marketing Authorisation for Genome Editing Products' (2021) 3 Frontiers in Political Science 1–13, DOI: https://doi.org/10.3389/fpos.2021.747838

5 Dirk Helbing and others, 'Democracy by Design: Perspectives for Digitally Assisted, Participatory Upgrades of Society' (2023) 71 Journal of Computational Science 1–19, DOI: https://doi.org/10.1016/j.jocs.2023.102061

interests. As artificial intelligence and other digital technologies become more embedded in public governance, it is crucial that their integration supports, rather than undermines, these democratic foundations. AI refers broadly to technologies that can perform tasks traditionally requiring human intelligence, including machine learning, automation and data-driven decision-making.[6] In recent years, the use of AI in the public sector has grown rapidly. Its influence is visible across multiple areas, such as election management, policy development, the delivery of public services and government communication strategies. Increasingly, governments are turning to AI tools to analyse large volumes of data, improve predictions and streamline administrative processes, all with the aim of making governance more efficient and enabling more informed citizen participation.[7] While artificial intelligence can serve as a powerful tool for enhancing the efficiency of democratic systems, it also raises serious concerns. Among the most pressing issues are the spread of misinformation, algorithmic biases in decision-making and the growing reach of surveillance technologies. AI applications such as deepfakes and automated content generation have already been used to distort political discourse, posing risks to the integrity of democratic processes.[8] These developments highlight the dual nature of AI: it offers new opportunities for innovation and improved governance, but also presents ethical and institutional challenges that must be addressed through careful regulation and oversight.

The debate over AI's place in democratic societies is marked by opposing perspectives. On the one hand, proponents argue that AI has the potential to improve government operations, expand civic engagement and strengthen transparency. AI-powered platforms can support participatory governance by collecting citizen input and analysing public sentiment, leading to more informed and responsive policymaking. In some cases, the combination of AI and blockchain technologies has led to increased civic involvement and more efficient governance, reinforcing the view that AI can contribute positively to democratic participation and institutional openness.[9] On the other hand, critics caution that these technologies also involve significant risks. Algorithmic bias, the spread of disinformation, and the expansion of surveillance capabilities can threaten electoral integrity and weaken democratic accountability. These concerns underline the importance of approaching AI integration with both optimism and caution, ensuring that technological advancement does not come

6 Prince Chacko Johnson and others, 'Digital Innovation and the Effects of Artificial Intelligence on Firms' Research and Development – Automation or Augmentation, Exploration or Exploitation?' (2022) 179 Technological Forecasting and Social Change 1–12, DOI: https://doi.org/10.1016/j.techfore.2022.121636

7 Adib Bin Rashid and Md Ashfakul Karim Kausik, 'AI Revolutionizing Industries Worldwide: A Comprehensive Overview of Its Diverse Applications' (2024) 7 Hybrid Advances 1–34, DOI: https://doi.org/10.1016/j.hybadv.2024.100277

8 Wei Sun and others, 'PresAIse, a prescriptive AI solution for enterprise' (2024) 62 (4) INFOR: Information Systems and Operational Research 629–645, DOI: https://doi.org/10.1080/03155986.2024.2383095

9 A Nechesov and J Ruponen, 'Empowering Government Efficiency Through Civic Intelligence: Merging Artificial Intelligence and Blockchain for Smart Citizen Proposals' (2024) 12 (12) Technologies 1–36, DOI: https://doi.org/10.3390/technologies12120271

at the expense of democratic values. The expansion of AI-driven content moderation and political targeting by major technology corporations has transformed them into influential yet unaccountable actors in political discourse. Additionally, regulatory challenges persist, as fragmented governance frameworks struggle to address ethical concerns and the geopolitical competition over AI governance intensifies. While some initiatives, such as the European AI Act, attempt to establish comprehensive oversight, global regulatory measures remain insufficient to mitigate AI's broader impact on democracy.[10]

Despite considerable scholarly attention, existing research on AI's democratic impacts remains fragmented, lacking systematic synthesis. Studies have often examined isolated issues, such as misinformation or surveillance, without providing a comprehensive overview. This gap highlights the need for a comprehensive and systematic review of the academic literature examining the relationship between artificial intelligence and democracy over the past decade, from 2014 to 2024. Given the complexity of the interactions between emerging technologies and governance structures, this study seeks to offer a holistic evaluation of how AI has influenced various aspects of democratic systems. The review aims to identify and synthesise major trends and recurring themes in the literature, with particular attention to AI's role in governance, elections, political communication and democratic participation. In doing so, it also engages with the key ethical and regulatory challenges posed by AI, providing evidence-based insights and outlining practical directions for future research. By offering a structured assessment of AI's multifaceted impacts on democratic systems, this study contributes to the growing body of scholarship at the intersection of technology and political life. It is intended to support both academic inquiry and policymaking by clarifying how AI is reshaping the democratic landscape and where safeguards are most urgently needed. The paper is organised as follows. The opening section introduces the broader context of the relationship between democracy and AI. This is followed by the methodology section, which outlines the systematic literature review (SLR) approach, detailing the rigorous process used to identify, select, and analyse relevant academic work. The findings section categorises and evaluates AI's influence across key democratic dimensions, including public participation, technocratic decision-making, transparency and accountability, media and political communication, as well as surveillance and privacy. The discussion section then critically engages with these findings, examining the implications of AI integration in democratic systems. It emphasises the importance of explainable AI and the development of strong regulatory frameworks to address challenges such as algorithmic bias and data privacy. Finally, the conclusion summarises the main insights, offers actionable policy recommendations, and stresses the urgent need for effective governance mechanisms to ensure the responsible use of AI in democratic societies.

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[10] Jelena Cupać, Hendrik Schopmans and İrem Tuncer-Ebetürk, 'Democratization in the Age of Artificial Intelligence: Introduction to the Special Issue' (2024) 31 (5) Democratization 899–921, DOI: https://doi.org/10.1080/13510347.2024.2338852

II Context: Democracy and artificial intelligence

The integration of artificial intelligence into democratic governance is increasingly reshaping political landscapes. While this shift is leading to notable opportunities for enhancing decision-making and public engagement, it also introduces pressing challenges. Recent developments – such as the rise of deepfakes, AI-generated misinformation and highly targeted political content – highlight the growing complexity of embedding AI within democratic structures.[11] This duality demands a nuanced examination of AI's role in supporting or undermining democratic principles, particularly transparency, accountability and citizen participation.[12] Democracy fundamentally depends on transparency, accountability and inclusive participation. Historically, technological shifts have significantly reshaped democratic processes, simultaneously fostering greater citizen engagement and facilitating misinformation.[13] AI marks the latest stage in this evolution, introducing unprecedented capabilities for data-driven decision-making, streamlined governance and extensive information dissemination. Despite these potential benefits, AI technologies often operate as opaque 'black box' models, challenging democratic transparency and eroding public trust in administrative and political decisions.[14]

Algorithmic bias exemplifies one of AI's critical democratic challenges, often resulting from AI models trained on biased historical data. This bias has manifested prominently in law enforcement tools and social benefits allocation systems, disproportionately impacting marginalised communities and exacerbating social inequalities. The growing use of biometric surveillance and facial recognition technologies has raised serious concerns about civil liberties, particularly given their tendency to misidentify individuals from marginalised or disadvantaged communities. The opaque nature of these AI-driven systems makes it difficult for the public to scrutinise their decisions, which complicates accountability – especially when such technologies produce flawed or discriminatory outcomes.[15] AI is also playing an increasingly influential role in shaping political processes, not least through the rapid spread of misinformation and deepfake technologies. AI-generated disinformation campaigns, including synthetic audio and video content, have been strategically used to manipulate public

11 Jan Denemark, 'The Risk of Artificial Intelligence for Democracy and the EU's First Efforts to Regulate It' (2024) 14 (1) The Lawyer Quarterly 123–134 <https://tlq.ilaw.cas.cz/index.php/tlq/article/view/589> accessed 1 December 2025.

12 Sonia K Katyal, 'Democracy & Distrust in an Era of Artificial Intelligence' (2022) 151 (2) Daedalus 322–334, DOI: https://doi.org/10.1162/DAED_a_01919

13 Christopher Ojeda, 'The Political Responses of Virtual Assistants' (2021) 39 (5) Social Science Computer Review 884–902, DOI: https://doi.org/10.1177/0894439319886844

14 Inga Ulnicane, Aini Aden, 'Power and politics in framing bias in Artificial Intelligence policy' (2023) 40 (5) Review of Policy Research 665–687, DOI: https://doi.org/10.1111/ropr.12567

15 Irena Barkane, 'Questioning the EU Proposal for an Artificial Intelligence Act: The Need for Prohibitions and a Stricter Approach to Biometric Surveillance' (2022) 27 (2) Information Polity 147–162, DOI: https://doi.org/10.3233/IP-211524

opinion and disrupt electoral processes.[16] A notable example is the 2023 election in Slovakia, where manipulated audio recordings were used to influence voter perception, demonstrating how effectively AI-generated content can erode trust in democratic institutions.[17] At the same time, the use of automated systems in public administration offers clear efficiency gains. However, these gains often come at the cost of reduced human oversight. In the case of AI-driven tools used for social welfare decisions, some systems have produced inaccurate or harmful outcomes, highlighting the critical need for transparent procedures and continued human involvement in administrative decision-making.[18] Despite these challenges, AI also presents meaningful opportunities to strengthen democratic engagement. AI-enabled platforms can support participatory governance by gathering citizen input, interpreting public sentiment, and informing more responsive and inclusive policymaking processes.[19] E-governance systems leveraging AI can improve accessibility to public services, streamline bureaucratic processes and foster greater inclusivity, particularly among marginalised populations. To capitalise on these advantages, robust democratic safeguards, including transparency mandates, equitable access policies and oversight mechanisms, are essential to ensure AI-driven governance aligns with democratic values.

The influence of AI also diverges significantly across political regimes. Authoritarian states deploy AI primarily for surveillance, censorship and political control, exacerbating human rights abuses and limiting civic freedoms.[20] In contrast, democracies have the potential to harness AI for civic empowerment, provided robust regulatory frameworks are established. However, the disproportionate influence of major AI developers like Google, Meta and OpenAI poses risks to democratic accountability. These corporations control substantial portions of AI development and information dissemination, raising concerns over their capacity to shape political discourse and policy without adequate democratic oversight.[21] To address AI's inherent risks, comprehensive regulatory responses are gaining traction globally. Initiatives such as the European Union's AI Act, UNESCO's AI Ethics

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[16] Marcela López-Ponce, Daniel Barredo-Ibáñez and Hada Sánchez Gonzales, 'Uses and Risks of Artificial Intelligence in the 2023 Election Campaigns: Delphi Survey of Strategic Experts from Colombia' (2024) 22 (2) Revista ICONO14. Revista científica de Comunicación y Tecnologías Emergentes, DOI: https://doi.org/10.7195/ri14.v22i2.2078

[17] Mateusz Łabuz and Christopher Nehring, 'On the way to deep fake democracy? Deep fakes in election campaigns in 2023' (2024) 23 (4) European Political Science 454–473, DOI: https://doi.org/10.1057/s41304-024-00482-9

[18] Eleni Christodoulou, Kalypso Iordanou, 'Democracy Under Attack: Challenges of Addressing Ethical Issues of AI and Big Data for More Democratic Digital Media and Societies' (2021) 3 Frontiers in Political Science 1–17, DOI: https://doi.org/10.3389/fpos.2021.682945

[19] Michele Estrin Gilman, 'Beyond Window Dressing: Public Participation for Marginalized Communities in the Datafied Society' (2022) 91 (2) Fordham Law Review 503–555.

[20] Shama Ams, 'Blurred Lines: the Convergence of Military and Civilian Uses of AI & Data Use and Its Impact on Liberal Democracy' (2023) 60 International Politics 879–896, DOI: https://doi.org/10.1057/s41311-021-00351-y

[21] Rodrigo R Cyrino, Daury C Fabriz, 'The Fundamental Duty of Information in Elections by Candidates Using Artificial Intelligence' (2024) 18 (3) Revista de Gestão – RGSA, DOI: https://doi.org/10.24857/rgsa.v18n3-177

Guidelines and the OECD AI Principles establish foundational governance standards emphasising transparency, fairness, accountability and human oversight.[22] Key regulatory safeguards include mandatory algorithmic impact assessments, explicit transparency obligations and robust public oversight mechanisms. However, enforcement and global coordination remain challenging, particularly when addressing transnational threats such as AI-driven misinformation and surveillance. Based on these concepts, this study describes how a systematic literature review (SLR) was conducted to examine AI's impact on democracy. Using a structured and transparent methodology, the review synthesised existing research to analyse AI's interaction with democratic values and the principles designed to mitigate AI-related risks.

III Methodology

This study employed a systematic literature review (SLR) to address the research questions. A systematic literature review (SLR) is a rigorous and structured method for synthesising existing research, ensuring comprehensiveness, transparency and replicability in knowledge accumulation.[23] Unlike traditional narrative reviews, which can be selective and prone to bias, SLRs follow explicit methodologies that guide the identification, selection and critical appraisal of relevant studies. This approach aims to provide a synthesised and exhaustive summary of available evidence, helping scholars pinpoint theoretical gaps, inconsistencies and emerging trends within a given domain.[24] By systematically gathering and analysing prior research, SLRs contribute to the advancement of academic inquiry and support evidence-based decision-making in both policy and practice.[25] The SLR process involves defining clear research questions, establishing inclusion and exclusion criteria, systematically searching multiple databases, assessing the quality of retrieved studies and synthesising findings through qualitative or quantitative methods such as meta-analysis or meta-synthesis.[26] This structured approach enhances the reliability of literature reviews, mitigates selection bias, and improves the replicability of findings.

22 Jelena Cupać, Mitja Sienknecht, 'Regulate against the Machine: How the EU Mitigates AI Harm to Democracy' (2024) 31 (5) Democratization 1067–1090, DOI: https://doi.org/10.1080/13510347.2024.2353706

23 Yu Xiao and Maria Watson, 'Guidance on Conducting a Systematic Literature Review' (2019) 39 (1) Journal of Planning Education and Research 93–112, DOI: https://doi.org/10.1177/0739456X17723971

24 Nana Turk, 'Metodologija Priprave Sistematičnih Preglednih Člankov' (2021) 90 (7–8) Slovenian Medical Journal (Zdravniški vestnik) 432–442, DOI: https://doi.org/10.6016/ZdravVestn.3138

25 Rod Dacombe, 'Systematic Reviews in Political Science: What Can the Approach Contribute to Political Research?' (2018) 16 (2) Political Studies Review 148–157, DOI: https://doi.org/10.1177/1478929916680641

26 Martina K Linnenluecke, Mauricio Marrone and Abhay K Singh, 'Conducting Systematic Literature Reviews and Bibliometric Analyses' (2020) 45 (2) Australian Journal of Management 175–194, DOI: https://doi.org/10.1177/0312896219877678

To ensure transparency and methodological rigour, this study followed the PRISMA guidelines (Preferred Reporting Items for Systematic Reviews and Meta-Analyses). Developed as a refinement of the earlier QUOROM framework, PRISMA offers a widely recognised and standardised approach for conducting and reporting systematic reviews and meta-analyses.[27] The framework includes a 27-item checklist and a four-phase flow diagram designed to improve the clarity, consistency and replicability of literature reviews. By reducing potential bias and enhancing analytical transparency, PRISMA strengthens the overall credibility and relevance of systematic reviews for academic researchers, policymakers and practitioners alike. In line with this protocol, the review process was organised into four stages – identification, screening, eligibility and inclusion, ensuring a clear and traceable path from literature selection to final analysis (see Figure 1).

The identification phase focused on locating studies related to the role and impact of artificial intelligence on democracy. A comprehensive search strategy was employed using Boolean operators to combine relevant keywords: ('Artificial Intelligence' OR 'AI' OR 'Machine Learning' OR 'Large Language Models' OR 'LLMs') AND ('Democracy' OR 'Democratic' OR 'Democratization' OR 'Democratize' OR 'Democratically' OR 'Democraticism' OR 'Democrat'). The AI-related search terms were developed based on Sheikh et al.'s (2023) definition of AI to capture a broad range of AI technologies, while the democracy-related terms ensured comprehensive coverage of literature on democratic governance. The search targeted peer-reviewed journal articles published in English between January 2014 and December 2024. The databases Web of Science (WoS) and Scopus were selected for their extensive indexing of high-quality research publications. The initial search yielded 1,114 results (594 from Web of Science and 520 from Scopus). After removing duplicate entries, 786 unique studies remained. The screening phase involved two inclusion criteria: *(i)* the study must examine AI in the public sector with a significant emphasis on democracy, and *(ii)* both empirical and conceptual/theoretical studies were considered.

The screening process was conducted in two stages. First, the author reviewed the titles, abstracts and keywords to assess their alignment with the research scope and study design, eliminating 669 publications through this preliminary filtering. In the second stage, the full texts of the remaining 97 articles were examined to determine their relevance, focusing on whether they directly addressed AI's role in democratic processes. Each article was critically assessed before being included in the final selection. For data analysis, a structured metadata framework was developed, comprising three key components. The first component, publication and general information, captures bibliographic details such as publication type, source database, publication year, author names, article title and journal or conference venue. The second, research characteristics, includes the study's objectives, research questions,

[27] Alessandro Liberati and others, 'The PRISMA Statement for Reporting Systematic Reviews and Meta-Analyses of Studies That Evaluate Health Care Interventions: Explanation and Elaboration' (2009) 6 (7) PLOS Medicine, DOI: https://doi.org/10.1371/journal.pmed.1000100

theoretical framework, empirical approach (if applicable), methods and policy or geographic context. The final component, findings and contributions, documents key study outcomes, highlighting their significance within the broader research landscape.

The study employs thematic analysis to systematically identify, analyse and report patterns (themes) within the collected data. Thematic analysis is a structured yet flexible qualitative method that enables a rich interpretation of qualitative findings by coding and categorising data into meaningful themes.[28] This process involves several phases, including familiarisation with data, generating initial codes, identifying patterns, refining themes, and presenting them using a coherent narrative. Thematic analysis is particularly suitable for exploring complex qualitative datasets, as it allows for both inductive and deductive coding strategies, ensuring a comprehensive understanding of underlying meanings and contextual influences.[29] By applying thematic analysis, the study aimed to capture nuanced insights and provide a structured yet interpretative approach to analysing the role and impact of AI on democracy.

IV Findings

1 Descriptive analysis

Publication Year: Over the past decade, scholarly interest in the relationship between artificial intelligence and democracy has grown dramatically, with a notable surge from 2020 onward. In the early years, research on this topic was scattered; just a handful of studies appeared in 2015 and 2017. But from 2018, the momentum picked up, with the number of publications rising steadily each year. As illustrated in Figure 2, this growth became particularly striking after 2020, jumping from 9 studies that year to 35 in 2024. This surge in academic attention can be attributed to several key factors. As AI technologies became more integrated into public decision-making, elections and digital governance, people started paying closer attention to their ethical, political and social impact. With governments increasingly using AI to streamline processes and make decisions, concerns grew about issues like bias, transparency and accountability. At the same time, the rise of misinformation, deepfakes and algorithmic biases (especially their influence on democratic institutions) sparked critical discussions among researchers. Since AI systems learn from historical data, they can sometimes reinforce existing biases, leading to unfair policy-related and governance outcomes. Meanwhile, the rapid development of generative AI and large language models

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[28] Virginia Braun, Victoria Clarke, 'Using Thematic Analysis in Psychology' (2006) 3 (2) Qualitative Research in Psychology 77–101, DOI: https://doi.org/10.1191/1478088706qp063oa

[29] Ashley Castleberry, Amanda Nolen, 'Thematic Analysis of Qualitative Research Data: Is It as Easy as It Sounds?' (2018) 10 (6) Currents in Pharmacy Teaching and Learning 807–815, DOI: https://doi.org/10.1016/j.cptl.2018.03.019

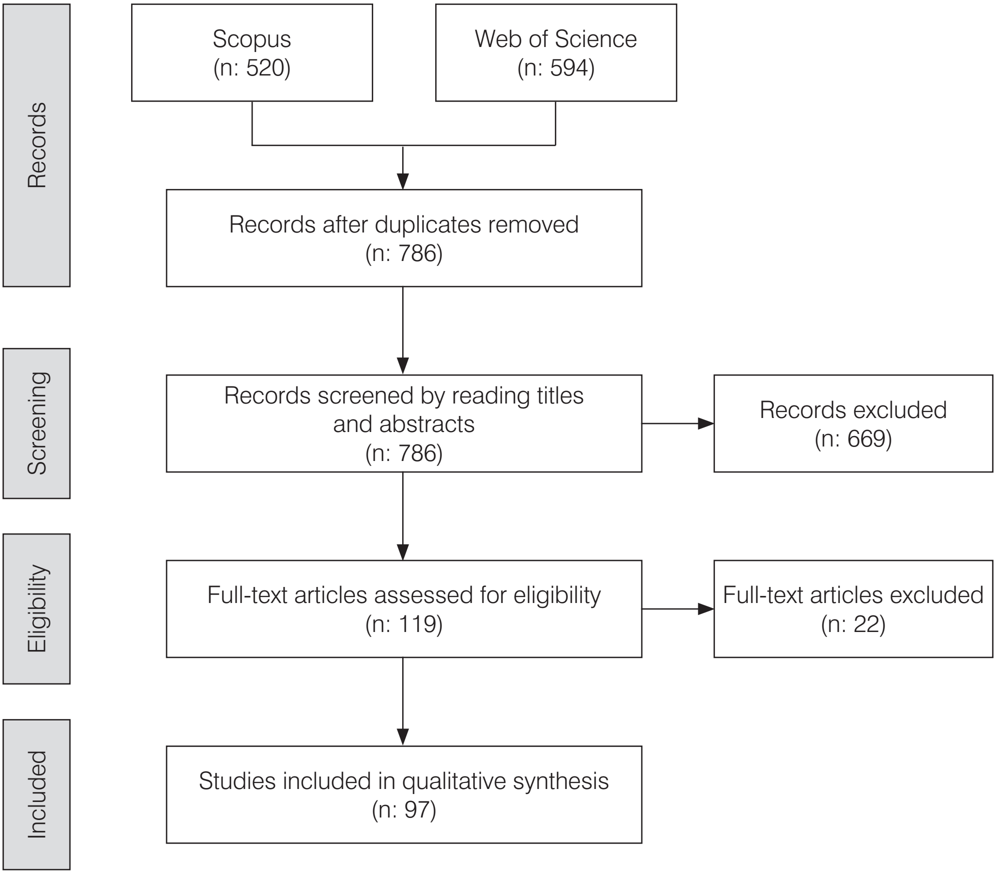

Figure 1. PRISMA flow chart (Source: Author)

between 2022 and 2024 added to the urgency. These technologies, capable of producing convincing text, images and videos, raised concerns about their potential to shape public opinion and influence political decisions. As a result, policymakers and experts began debating how to balance AI's benefits with the need to protect democratic values. With AI evolving so quickly, the challenge lies in ensuring that innovation continues while keeping public trust intact.[30]

Journals: The review shows that while discussions on AI's impact on democracy span a wide range of journals, a few have emerged as key contributors. As shown in *Table 1*, *Philosophy and Technology* leads with six articles (6%), followed by *Turkish Policy*

[30] Gustavo Caiza and others, 'Navigating Governmental Choices: A Comprehensive Review of Artificial Intelligence's Impact on Decision-Making' (2024) 11 (3) Informatics, DOI: https://doi.org/10.3390/informatics11030064

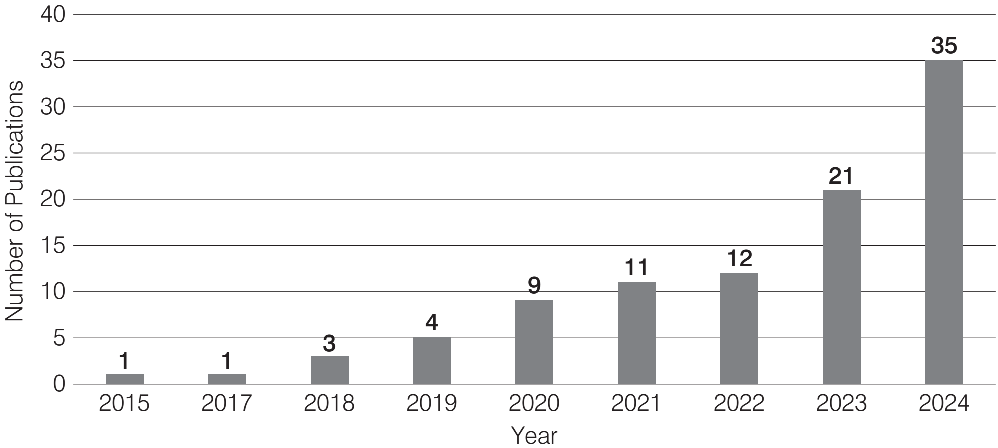

Figure 2. Year of publications (Source: Author)

Quarterly with four (4%). The intersection of ethics, technology and policy is a particularly active area of debate, especially in the context of artificial intelligence governance. AI is increasingly embedded in societal structures, raising concerns over its ethical implications and regulatory frameworks. This discourse is reflected in various academic and policy-oriented platforms. For instance, *Philosophy and Technology* attracts scholars who explore AI's broader philosophical and societal implications, considering questions related to ethical decision-making, transparency and accountability in AI systems. Meanwhile, *Turkish Policy Quarterly* serves as a forum for discussions on region-specific policy challenges, examining how AI governance intersects with local political and regulatory landscapes. The academic engagement with AI and democracy thus demonstrates both a concentrated and diverse nature, as scholars and policymakers engage with AI's implications for governance, ethics and public policy on multiple levels.

Research Approach (Study type): The fact that conceptual articles make up the majority of research in this field, with 66 out of 97 studies falling into this category, suggests that the study of artificial intelligence's impact on democracy is still in its early, exploratory stages. Rather than conducting empirical research, scholars seem to be focused on shaping the conversation, building theoretical models, debating ethical considerations, and speculating on potential effects. The emphasis on theory in the study of AI and democratic systems likely arises from their complexity and evolving nature, making empirical measurement challenging. Furthermore, since AI governance is a relatively new field, researchers often prioritise developing theoretical frameworks before pursuing empirical analysis. As Erman and Furendal[31] note, AI governance is still in its formative stage, with much of the current research

[31] Eva Erman, Markus Furendal, 'The Global Governance of Artificial Intelligence: Some Normative Concerns' (2022) 9 (2) Moral Philosophy and Politics 267–291, DOI: https://doi.org/10.1515/mopp-2020-0046

Table 1. Distribution of reviewed articles and their frequency in journals (Source: Author)

Journal	*Number of publications*	*Percentage (rounded)*
Philosophy And Technology	6	6%
Turkish Policy Quarterly	4	4%
Technology In Society	2	2%
Big Data & Society	2	2%
New Media and Society	2	2%
European Political Science	2	2%
Democratization	2	2%
Government Information Quarterly	2	2%
Digital Journalism	2	2%
Fordham Law Review	2	2%
Philosophical Transactions of The Royal Society A-Mathematical Physical and Engineering Sciences	2	2%
Plos One	2	2%
Journal Of Democracy	2	2%
Social Media + Society	2	2%
Remainder, fewer than two articles/journal	63	65%

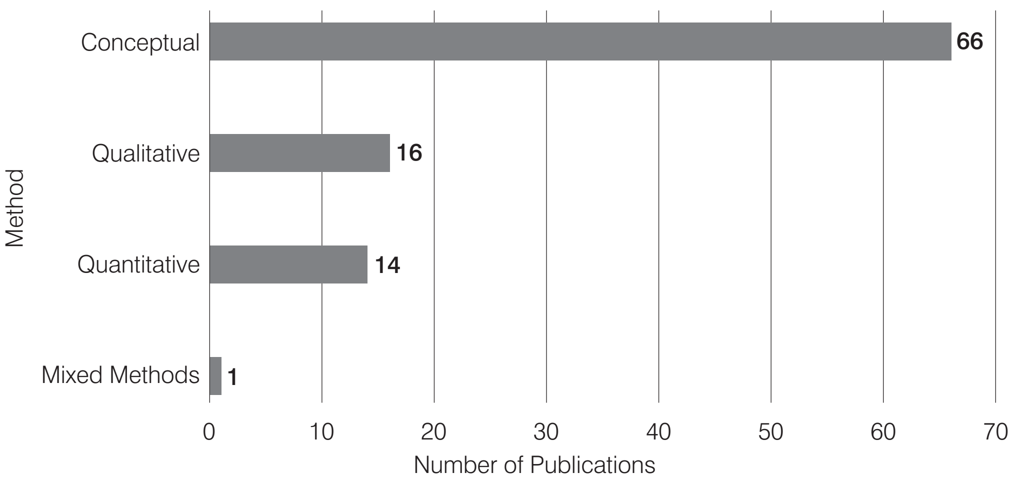

Figure 3. Research approach (Source: Author)

focusing on delineating the key normative questions and categorising them by relevance and urgency. They highlight that much of the existing discourse on AI governance centres on hypothetical scenarios, leaving significant gaps in understanding how political institutions shape AI development and deployment. This trend is further illustrated in Figure 3, which highlights the predominance of conceptual approaches in the existing literature.

2 Content analysis

After carefully reviewing and analysing the selected articles, it became clear that artificial intelligence plays a multifaceted role in democracy, shaping it in five key areas (Figure 4): Public Participation, Technocratic Decision-Making, Transparency and Accountability, Media and Political Communication and Surveillance and Privacy. Each of these areas represents a unique yet interconnected way in which AI influences democratic institutions and processes. In the sections that follow, we take a closer look at each category, drawing on insights from the reviewed studies. We explore how AI is reshaping civic engagement, influencing decision-making, enhancing or challenging transparency in governance, transforming political communication and raising critical concerns about privacy. By examining these dimensions, we gain a deeper understanding of AI's complex impact on democratic governance.

AI and public participation: AI's role in public participation presents a paradox; it has the power to enhance democratic engagement while also posing risks to inclusion and fairness. On one hand, AI-driven tools such as chatbots, digital twins and automated discussion facilitators are expanding access to public debates, improving the quality of deliberation, and making online discussions more structured and inclusive.[32] AI-moderated platforms can help create fairer dialogue by balancing speaking time and reducing power imbalances that often hinder marginalised voices. In the realm of elections, AI is already being used to simplify voter registration, improve election administration, and provide clearer, more accessible information about candidates and policies. However, concerns persist over algorithmic biases that could shape electoral outcomes and the ethical implications

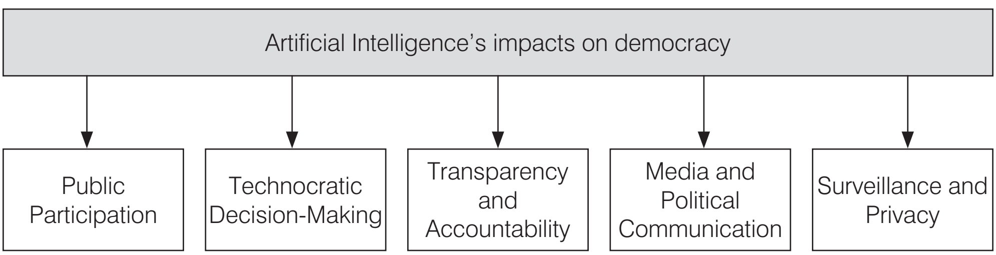

Figure 4. AI's impacts on democracy (Source: Author)

[32] James Hughes, 'Algorithms and Posthuman Governance' (2017) 1 (2) Journal of Posthuman Studies 166–184, DOI: https://doi.org/10.5325/jpoststud.1.2.0166

of AI-driven political targeting.[33] Beyond elections, AI can also support citizen-driven governance through initiatives like citizen science programs and deliberative policymaking, where the public plays an active role in shaping AI's development and use. However, risks such as digital astroturfing and algorithmic manipulation threaten the fairness of these processes.[34] The idea of 'augmented democracy' (where AI assists rather than replaces human decision-making) underscores AI's potential to strengthen, rather than weaken, participatory governance, provided its implementation remains transparent and equitable.[35]

AI and technocratic decision-making: As reliance on artificial intelligence in governance grows, there is an ever-present concern that the pursuit of algorithmic efficiency might come at the expense of democratic debate and ethical oversight. This evolving trend invites us to consider several interrelated issues that deserve careful reflection. On one hand, AI's impressive computational abilities allow for data-driven policymaking that significantly boosts efficiency; however, this same strength risks reducing the complex realm of politics to a set of technical calculations, thereby sidelining essential ethical and moral considerations.[36] At the same time, the rise of concepts like 'Judge AI' (where decisions in policy and law are increasingly driven by algorithms) highlights serious concerns regarding the diminishing role of human judgment, empathy and contextual sensitivity in our decision-making processes. Clearly, while AI can process vast amounts of data quickly, it falls short in replacing the nuanced moral reasoning that only humans can provide, thus underscoring the need for robust mechanisms of democratic oversight.[37] Moreover, as power gradually shifts from transparent, democratically accountable institutions to more opaque, algorithm-based systems, there is a growing risk of developing a 'hyper-technocracy' that could exacerbate social inequalities and weaken citizen agency. To counter these risks, some scholars advocate for algorithmic co-creation models that effectively combine the strengths of AI with essential human insight, ensuring that institutional legitimacy is maintained even as technological advancements reshape the landscape of governance.[38]

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33 Michael Gentzel, 'Biased Face Recognition Technology Used by Government: A Problem for Liberal Democracy' (2021) 34 (4) Philosophy & Technology 1639–1663, DOI: https://doi.org/10.1007/s13347-021-00478-z

34 Sarah Kreps, Maurice Jakesch, 'Can AI Communication Tools Increase Legislative Responsiveness and Trust in Democratic Institutions?' (2023) 40 (3) Government Information Quarterly, DOI: https://doi.org/10.1016/j.giq.2023.101829

35 Aviv Ovadya, 'Reimagining Democracy for AI' (2023) 34 (4) Journal of Democracy 162–170, DOI: https://doi.org/10.1353/jod.2023.a907697

36 Henrik Skaug Sætra, 'A Shallow Defence of a Technocracy of Artificial Intelligence: Examining the Political Harms of Algorithmic Governance in the Domain of Government' (2020) 62 Technology in Society 1–10, DOI: https://doi.org/10.1016/j.techsoc.2020.101283

37 Ludvig Beckman, Jonas Hultin Rosenberg, 'The Democratic Inclusion of Artificial Intelligence? Exploring the Patiency, Agency and Relational Conditions for Demos Membership' (2022) 35 Philosophy & Technology, DOI: https://doi.org/10.1007/s13347-022-00525-3

38 Paolo Cavaliere, Graziella Romeo, 'From Poisons to Antidotes: Algorithms as Democracy Boosters' (2022) 13 (3) European Journal of Risk Regulation 421–442, DOI: https://doi.org/10.1017/err.2021.57

AI, transparency and accountability: The integration of advanced AI systems into governance structures has sparked extensive debate about the need for robust transparency and accountability measures that uphold democratic principles. One of the central challenges is the so-called 'black box' problem, where the opacity of many AI systems makes it difficult to trace decision-making processes, ultimately eroding public trust and hindering accountability. In response, scholars have emphasised the importance of comprehensive regulatory reforms, arguing for the establishment of strong legal frameworks, thorough impact assessments, and the implementation of external oversight to address inherent biases while ensuring that AI adheres to the rule of law.[39] Alongside these regulatory efforts, the development of 'explainable AI' (XAI) techniques is seen as essential, as it can render complex models more understandable to both policymakers and the broader public.[40] Additionally, there is growing concern that AI systems might inadvertently reinforce existing societal biases, particularly in critical areas such as law enforcement, electoral processes and political targeting. Consequently, establishing mechanisms that facilitate contestability and allow for independent review is considered vital for ensuring fairness and maintaining robust democratic oversight.

AI, media and political communication: Artificial intelligence has progressively reshaped the media landscape and transformed political communication in ways that extend far beyond mere technical innovation. Its influence can be seen in how news is produced, curated, and ultimately received by the public, with automated systems sometimes generating so-called "filter bubbles' that restrict access to a variety of viewpoints, potentially diminishing the quality of public debate and citizen engagement.[41] At the same time, the reliance on algorithm-driven content has raised concerns about inherent media biases and the reinforcement of partisan perspectives, challenging the balance of information in an increasingly divided public sphere.[42] Moreover, the emergence of AI-generated content such as deepfakes adds another layer of complexity, as these sophisticated imitations threaten the authenticity of political messages and enable disinformation campaigns capable of manipulating public opinion and eroding trust in democratic institutions. Even as AI opens up new avenues for enhancing digital political outreach and engagement, it simultaneously presents challenges in ensuring that online campaigns remain authentic and resistant to

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[39] Ylenia Maria Citino, 'Leveraging Automated Technologies for Law-Making in Italy: Generative AI and Constitutional Challenges' (2025) 78 (3) Parliamentary Affairs 625–647, DOI: https://doi.org/10.1093/pa/gsae040

[40] Alexander Buhmann, Christian Fieseler, 'Deep Learning Meets Deep Democracy: Deliberative Governance and Responsible Innovation in Artificial Intelligence' (2023) 33 (1) Business Ethics Quarterly 146–179, DOI: https://doi.org/10.1017/beq.2021.42

[41] Sacha Molitorisz, 'A Legal Cure for News Choice Overload: Regulating Algorithms and AI with "Light Patterns" to Foster Autonomy and Democracy' (2024) 16 (3) Policy & Internet 643–660, DOI: https://doi.org/10.1002/poi3.412

[42] Natali Helberger, 'On the Democratic Role of News Recommenders' (2019) 7 (8) Digital Journalism 993–1012, DOI: https://doi.org/10.1080/21670811.2019.1623700

manipulation.[43] The ethical considerations surrounding AI in political branding and electoral influence, therefore, demand careful scrutiny, highlighting the necessity for responsible practices that safeguard democratic processes while embracing technological progress.[44]

AI, surveillance and privacy: Recent breakthroughs in artificial intelligence have been quietly transforming how surveillance is conducted, bringing forth a host of challenges that touch every facet of personal and societal life. AI-powered tools, such as facial recognition, predictive analytics and behavioural profiling, are now employed by both state and corporate entities to monitor public spaces and individual behaviours, raising pressing concerns about the erosion of political autonomy and personal privacy. This shift has led to the commodification of personal data, where individuals become 'data subjects' whose everyday actions are continuously observed and, at times, manipulated without clear consent.[45] As these practices become more pervasive, the impact on civil liberties grows ever more significant. The unchecked expansion of AI-driven surveillance not only threatens freedom of expression but also disproportionately targets marginalised groups, further entrenching social inequities. With the potential to steer democratic institutions toward more authoritarian models of control,[46] this evolution compels us to engage in thoughtful debate and implement robust safeguards. Balancing the benefits of technological progress with the imperative to protect individual rights remains a critical challenge that society must address as these powerful tools continue to reshape the fabric of modern governance.

3 Regulatory and ethical principles for AI in democratic systems

The increasing integration of artificial intelligence (AI) into democratic systems offers promising benefits but also significant challenges. AI can enhance governance by making decision-making more informed, clear and accessible, facilitating greater public participation. Nevertheless, it also introduces risks such as biased algorithms, manipulation of political discourse and the concentration of power, potentially harming democratic principles. Based on our systematic review of the literature, we identified four critical ethical and regulatory principles that have emerged across scholarly discussions as essential for

43 Alexandre Perez Casares, 'The Brain of the Future and the Viability of Democratic Governance: The Role of Artificial Intelligence, Cognitive Machines, and Viable Systems' (2018) 103 Futures 5–16, DOI: https://doi.org/10.1016/j.futures.2018.05.002

44 Robert Epstein, Valerie Lee, Robert Mohr and V R Zankich, 'The Answer Bot Effect (ABE): A Powerful New Form of Influence Made Possible by Intelligent Personal Assistants and Search Engines' (2022) 17 (6) PLOS ONE, DOI: https://doi.org/10.1371/journal.pone.0268081

45 Noémi Nagy, '"Humanity's New Frontier": Human Rights Implications of Artificial Intelligence and New Technologies' (2023) 64 (2) Hungarian Journal of Legal Studies 236–267, DOI: https://doi.org/10.1556/2052.2023.00481

46 Silviu Cristian Paicu, 'Data-Driven Security and Democratic Intelligence: Key Role of Critical Engagement by Academia' (2023) 36 (3) International Journal of Intelligence and CounterIntelligence 711–728, DOI: https://doi.org/10.1080/08850607.2022.2032494

guiding AI governance in democracies. These principles, illustrated in Figure 5, synthesise recurrent themes and recommendations found in the analysed studies, rather than being proposed independently by the authors of this study. First, legal accountability and enforcement are vital, ensuring AI technologies operate within clear legal frameworks and are regularly evaluated to prevent misuse or regulatory gaps. Second, transparency, fairness and ethical AI must be integrated by design, developing AI systems that prioritise openness, unbiased outcomes and fairness, thereby serving the public interest rather than private or governmental objectives. Third, strong data governance, privacy protection and decentralisation are necessary to safeguard individual privacy, distribute control over AI, and prevent monopolisation or excessive surveillance. Last, democratic oversight, public participation and resilience-building measures are crucial for establishing accountability, encouraging citizen involvement in AI governance, and defending against AI-driven threats like misinformation and election manipulation. Each of these principles is further discussed in this section, supported by literature highlighting their critical roles in protecting democracy in an era increasingly influenced by AI.

Principle 1 'Legal accountability and enforcement': AI technologies should be governed by legally binding regulations, similar to industries like pharmaceuticals and environmental protection, where both pre-market testing and post-deployment oversight are required to protect public interest rather than serving private or governmental monopolies.[47] To achieve this, enforceable legal provisions must be in place to ensure continuous evaluation of AI's societal impact. High-risk AI applications, such as those affecting democratic processes,

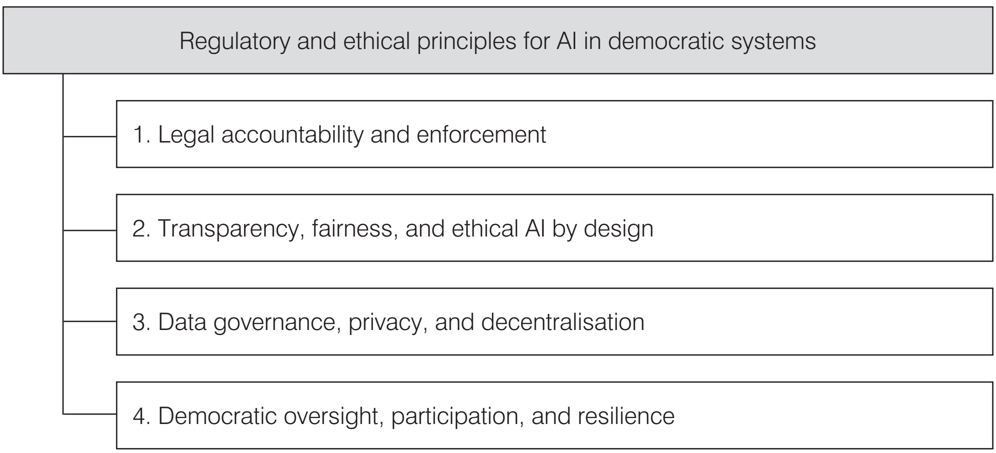

Figure 5. Regulatory and ethical Principles for AI in democratic systems (Source: Author)

[47] Paul Nemitz, 'Constitutional Democracy and Technology in the Age of Artificial Intelligence' (2018) 376 (2133) Philosophical Transactions of the Royal Society, DOI: https://doi.org/10.1098/rsta.2018.0089

should be subject to stricter obligations under frameworks like the EU AI Act,[48] with mandatory impact assessments evaluating their societal and human rights implications before large-scale deployment. Additionally, independent oversight bodies should be established to prevent AI-driven decision-making from undermining democratic institutions, ensuring AI remains subject to democratic oversight rather than technocratic control.[49] These regulatory agencies must have the authority to audit algorithms, impose sanctions for non-compliance, and require AI developers to provide transparent, explainable decision-making processes to prevent opaque "black box' systems from influencing governance.[50] The increasing use of AI in political communication and electoral processes necessitates additional safeguards against AI-driven political manipulation, such as micro-targeting and deepfakes, which threaten democratic integrity.[51] Furthermore, AI governance must address the risks of surveillance capitalism by enforcing strict data privacy regulations to prevent the commodification of personal information for political or economic gain. Continuous monitoring should be conducted, especially for high-risk AI systems in public administration and law enforcement, ensuring AI-driven governance enhances democratic values rather than replacing human oversight. By enforcing strong legal accountability and oversight, AI governance can become more transparent, mitigate the concentration of power, and uphold democratic principles by embedding fairness, transparency and public participation in AI decision-making.[52]

Principle 2 'Transparency, fairness and ethical AI by design': AI systems must be developed with inclusivity and user-centred design in mind, ensuring they serve society equitably rather than becoming tools for authoritarian control. From the outset, they must uphold privacy, freedom of expression and the rule of law, as failing to integrate these principles early on increases the risk of manipulation, mass surveillance, or AI technocracy that undermines democratic legitimacy. Ensuring transparency in AI operations is therefore crucial, particularly for applications that affect society at large, which is why mandated explainability protocols, coupled with legal enforcement mechanisms, are essential to maintain human oversight over critical functions.[53] Equally important is adherence to ethical standards, with global frameworks such as UNESCO's Recommendations on AI Ethics offering guidance on how AI can serve the public interest without compromising

[48] Jelena Cupać, Hendrik Schopmans and İrem Tuncer-Ebetürk, 'Democratization in the Age of Artificial Intelligence: Introduction to the Special Issue' (2024) 31 (5) Democratization 899–921, DOI: https://doi.org/10.1080/13510347.2024.2338852

[49] Marcello Ienca, 'Democratizing Cognitive Technology: A Proactive Approach' (2019) 21 (4) Ethics and Information Technology 267–280, DOI: https://doi.org/10.1007/s10676-018-9453-9

[50] Christodoulou, Iordanou 6.

[51] Thomas Paterson and Lauren Hanley, 'Political Warfare in the Digital Age: Cyber Subversion, Information Operations and "Deep Fakes"' (2020) 74 (4) Australian Journal of International Affairs 439–454, DOI: https://doi.org/10.1080/10357718.2020.1734772

[52] Tegan Cohen, Nicolas P Suzor, 'Contesting the Public Interest in AI Governance' (2024) 13 (3) Internet Policy Review 1–32, DOI: https://doi.org/10.14763/2024.3.1794

[53] Erman, Furendal 6–7.

human rights.[54] However, AI can also reinforce social, racial, or political biases, as seen in areas such as facial recognition and predictive policing, posing threats to democratic equality. Regular bias audits and the demonstration of algorithmic neutrality are therefore imperative, alongside robust regulations that forbid opaque 'black box' systems from making unaccountable decisions that affect citizens' lives.[55] Moreover, the rise of AI-powered political micro-targeting underscores the risk of voter manipulation and misinformation, highlighting the need for strict ethical guidelines and transparent, audited deployment in public-sector and electoral processes. By embedding transparency, fairness and fundamental rights at the design stage and tying ethical codes to legally binding obligations, regulatory frameworks can help mitigate algorithmic discrimination, prevent AI-induced political harm, and protect democratic values.[56]

Principle 3 'Data governance, privacy and decentralisation': The governance of AI must prioritise decentralisation, inclusivity, user-centred design, and stringent data protection to prevent excessive power concentration and safeguard individual rights.[57] When control over AI technologies is concentrated in the hands of a few dominant players, whether public or private, it threatens political pluralism and open discourse. To counter this and avoid AI's weaponisation for surveillance or authoritarian control, open-source AI models, data-sharing practices and ethical governance frameworks should help distribute power more evenly, encouraging transparency, explainability and democratic oversight.[58] Enforcing competition policies and antitrust regulations helps ensure that technology giants do not stifle innovation, thereby contributing to a more competitive and diverse AI ecosystem. At the same time, the growing use of personal data for AI-driven profiling and surveillance capitalism raises concerns about individual autonomy, free speech and the erosion of democratic governance.[59] Strong data protection laws, such as the GDPR, play a crucial role in curbing unchecked data collection, limiting behavioural targeting, and preventing AI-facilitated political manipulation.[60] Equally important are transparency and consent

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54 Sacha Molitorisz, 'A Legal Cure for News Choice Overload: Regulating Algorithms and AI with "Light Patterns" to Foster Autonomy and Democracy' (2024) 16 (3) Policy & Internet 643–660, DOI: https://doi.org/10.1002/poi3.412

55 Seungahn Nah, Fanjue Liu, Chun Shao, Ekaterina Romanova and Gwiwon Nam, 'When Trust in AI Mediates: AI News Use, Public Discussion, and Civic Participation' (2024) 36 (2) International Journal of Public Opinion Research, DOI: https://doi.org/10.1093/ijpor/edae019

56 Maciej Kuziemski and Gianluca Misuraca, 'AI Governance in the Public Sector: Three Tales from the Frontiers of Automated Decision-Making in Democratic Settings' (2020) 44 (6) Telecommunications Policy 1–13, DOI: https://doi.org/10.1016/j.telpol.2020.101976

57 Cohen, Suzor 5–6.

58 Shoshana Zuboff, 'Surveillance Capitalism or Democracy? The Death Match of Institutional Orders and the Politics of Knowledge in Our Information Civilization' (2022) 3 (3) Organization Theory 1–79, DOI: https://doi.org/10.1177/26317877221129290

59 Paul Timmers, 'AI Challenging Sovereignty and Democracy' (2022) 20 (4) Turkish Policy Quarterly 45–55, available at <https://lirias.kuleuven.be/retrieve/692467> accessed 1 December 2025.

60 Cupać, Schopmans and Tuncer-Ebetürk 913.

requirements, mandating that AI developers provide clear rationales for AI-driven decisions and that users have explicit control over how their personal data is processed.[61] Where ethical AI frameworks risk lacking enforceability, legal mechanisms and robust regulatory frameworks must be instituted to uphold accountability and democratic legitimacy. By promoting decentralisation, ensuring explainability, enforcing robust data governance, and embedding human oversight in AI-driven decision-making, policymakers can prevent AI-induced power asymmetries, protect public participation, and preserve the democratic principles of openness, plurality and individual rights.[62]

Principle 4 'Democratic oversight, participation and resilience': Ensuring democratic oversight, participation and resilience in AI governance is essential to maintaining public trust, protecting electoral integrity, and upholding key democratic values such as transparency, inclusivity and accountability. One of the most pressing challenges posed by AI is its ability to generate and disseminate disinformation, particularly deepfakes, which can severely undermine democratic processes and institutional credibility.[63] To counter this threat, a combination of content labelling and platform accountability measures is necessary: AI-generated content should be clearly marked, and digital platforms must be held legally responsible for failing to moderate harmful political manipulation.[64] Furthermore, targeted legislation should criminalise the intentional creation of AI-driven political disinformation, tying ethical principles to enforceable legal obligations to ensure compliance. Such measures must be reinforced through international cooperation and must also address the broader risks of AI technocracy, where unregulated AI systems could erode democratic legitimacy and citizen agency. Safeguarding democracy, however, requires more than just legal and technical interventions; proactive public engagement in AI governance is essential. A lack of inclusivity risks placing decision-making power in the hands of autocratic or technocratic elites, undermining trust and marginalising diverse voices.[65] To prevent this, citizen assemblies and participatory AI design can help shape policies, ensure algorithmic accountability, and bolster societal resilience against emerging threats. Transparent policymaking, ensuring that regulatory decisions and algorithmic audits are publicly accessible, can further empower civic engagement and strengthen democratic oversight. By democratising AI through ethical governance, mandating explainability in AI decision-making, and implementing

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61 Christodoulou, Iordanou 13–14.

62 Erman, Furendal 274–281.

63 Daniele Battista, 'Political Communication in the Age of Artificial Intelligence: An Overview of Deepfakes and Their Implications' (2024) 8 (2) Society Register 7–24, DOI: https://doi.org/10.14746/sr.2024.8.2.01

64 Sarah Kreps, Douglas L Kriner, 'The Potential Impact of Emerging Technologies on Democratic Representation: Evidence from a Field Experiment' (2024) 26 (12) New Media & Society 6918–6937, DOI: https://doi.org/10.1177/14614448231160526

65 Annelies Duerinckx, Carina Veeckman, Karen Verstraelen, Neena Singh, Jef Van Laer, Michiel Vaes, Charlotte Vandooren and Pieter Duysburgh, 'Co-creating Artificial Intelligence: Designing and Enhancing Democratic AI Solutions Through Citizen Science' (2024) 9 (1) Citizen Science: Theory and Practice 1–15, DOI: https://doi.org/10.5334/cstp.732

robust measures against AI-driven disinformation, these frameworks can enhance resilience against threats to democracy, ultimately safeguarding the legitimacy of electoral systems and fostering institutional trust.[66]

V Discussion

The research highlighted five central areas where AI intersects with democratic governance: public participation, technocratic decision-making, transparency, media communication and surveillance. Aligning with Erman and Furendal, it became clear that while transparency and accountability are frequently emphasised as democratic principles in AI ethics guidelines, they often lack concrete enforcement mechanisms, leading to concerns over 'ethics washing' rather than genuine accountability. Daly et al.[67] similarly underscore that despite global acknowledgement of the importance of AI ethics, substantial variations in ethical standards and enforcement practices exist across different jurisdictions, creating inconsistencies that could hinder effective governance and democratic oversight. Moreover, Caiza et al.[68] highlight the tension between AI's potential to streamline decision-making in governance, improving efficiency, and the critical ethical challenges surrounding bias and accountability. These findings collectively address the research objective by illuminating AI's dual potential to both empower democratic processes through enhanced transparency and participation and simultaneously threaten democracy through increased technocratic control and surveillance. However, significant gaps remain concerning how exactly AI-driven decision-making aligns with democratic values in practice, indicating an urgent need for further empirical investigation and stronger normative frameworks to ensure AI governance truly upholds democratic ideals.

AI's involvement in public participation indeed illustrates a complex interplay between enhancing democratic engagement and introducing risks to fairness and inclusivity. Findings from recent studies highlight that AI can significantly broaden public access to decision-making processes, potentially democratizing participation by giving marginalised groups a stronger voice.[69] However, this optimism must be tempered with caution, as AI also presents serious ethical and governance challenges, particularly algorithmic biases and

66 Erman, Furendal 281–287.
67 Kreps, Jakesch 10.
68 Caiza and others 24.
69 Renée Sieber, Ana Brandusescu, Suthee Sangiambut and Abigail Adu-Daako, 'What Is Civic Participation in Artificial Intelligence?' (2025) 52 (6) Environment and Planning B: Urban Analytics and City Science 1388–1406, DOI: https://doi.org/10.1177/23998083241296200

manipulation, which threaten democratic integrity.[70] Although some researchers emphasise AI's potential to facilitate transparent governance and citizen empowerment,[71] others warn that current frameworks often view the public as passive recipients rather than active democratic participants, limiting genuine involvement.[72] Such contradictions underscore that, despite AI's promise, existing mechanisms remain insufficient to safeguard democratic principles, making clear the need for more transparent and participatory AI governance strategies moving forward.

The increasing reliance on artificial intelligence in governance raises critical concerns about the balance between technocratic efficiency and democratic values. The findings from recent studies underline a nuanced narrative about AI's impact on democracy, reflecting both its significant potential and inherent limitations. For instance, Csaszar et al. indicate that AI can substantially enhance strategic decision-making by augmenting human cognitive capabilities, particularly through improved speed and quality in analysing complex data. Such benefits, however, are coupled with significant concerns about the potential erosion of democratic oversight, transparency and human judgment in governance decisions, aligning with concerns raised by earlier research. These tensions underscore the importance of identifying a balanced approach that integrates the computational strengths of AI with indispensable human moral reasoning and ethical judgment.[73] Furthermore, Presuel and Martinez Sierra argue from a Weberian perspective that AI's application in bureaucratic processes contradicts traditional bureaucratic ideals by introducing opacity and a shift in accountability away from clear human decision-makers. This perspective is echoed in literature reviews that indicate that AI can enhance efficiency but also complicate governance due to decreased transparency and accountability, thus potentially diminishing citizen trust in public institutions.[74] While studies largely agree on the duality of AI's capabilities and limitations, some contradictions emerge; for instance, Csaszar et al. suggest that AI is capable of operating at a human level of strategic judgment, while others argue that current AI systems remain insufficiently nuanced to replace human moral reasoning

[70] Moussa Théodore Zidouemba, 'Governance and Artificial Intelligence: The Use of Artificial Intelligence in Democracy and Its Impacts on the Rights to Participation' (2025) 5 Discover Artificial Intelligence 12, DOI: https://doi.org/10.1007/s44163-025-00229-5

[71] Anneke Zuiderwijk, Yu-Che Chen and Fadi Salem, 'Implications of the Use of Artificial Intelligence in Public Governance: A Systematic Literature Review and a Research Agenda' (2021) 38 (3) Government Information Quarterly 1–19, DOI: https://doi.org/10.1016/j.giq.2021.101577

[72] Shuang Wang, Muhammad Asif, Muhammad Farrukh Shahzad and Muhammad Ashfaq, 'Data Privacy and Cybersecurity Challenges in the Digital Transformation of the Banking Sector' (2024) 147 Computers & Security, DOI: https://doi.org/10.1016/j.cose.2024.104051

[73] Cavaliere, Romeo 427.

[74] Zuiderwijk, Chen and Salem 10–12.

fully.[75] The inconclusiveness in these areas points to a significant gap in understanding how AI specifically interacts with political legitimacy and citizen participation, highlighting an urgent need for further empirical research. Thus, while AI's promise to enhance governance efficiency is widely recognised, ensuring it strengthens rather than undermines democracy remains an ongoing challenge, necessitating careful, deliberate integration strategies that emphasise transparency, accountability and inclusive participation.

The findings from this review clearly illustrate that integrating advanced AI systems into governance poses significant challenges and opportunities for democratic processes, particularly concerning transparency and accountability. A recurring theme across various studies is the difficulty in understanding the internal workings of AI systems, often termed the 'black box' problem, which threatens public trust due to opaque decision-making processes.[76] To address this opacity, research underscores the necessity for regulatory frameworks that enforce robust transparency measures and external oversight mechanisms to hold AI systems accountable and ensure fairness. For instance, the European Union's regulatory ethos significantly emphasises safeguarding individual rights and transparency through robust frameworks, such as the AI Act, in stark contrast to approaches in the United States or China, where priorities differ in favour of innovation promotion and state control, respectively.[77] Moreover, studies underscore the promise of 'explainable AI' (XAI) as a solution to address the 'black box' problem, enhancing the interpretability of complex models for policymakers and the public.[78] However, the complexity and technical nature of current explanatory models, such as LIME or CAM, can still create barriers to broad public understanding and trust, highlighting the need for further research into more intuitive and user-friendly explanation methods.[79] Additionally, concerns persist regarding AI inadvertently reinforcing societal biases in critical areas like law enforcement or electoral processes, thus potentially undermining democratic fairness.[80] While these studies consistently affirm the importance of accountability through mechanisms like impact assessments and audits, they also reveal a gap

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75 Rodrigo Cetina Presuel, Jose M Martinez Sierra, 'The Adoption of Artificial Intelligence in Bureaucratic Decision-Making: A Weberian Perspective' (2024) 5 (1) Digital Government: Research and Practice 1–20, 6, DOI: https://doi.org/10.1145/3609861

76 Marta Sofia Marques da Encarnacao, Maria Anastasiadou and Vitor Santos, 'Framework for the Application of Explainable Artificial Intelligence Techniques in the Service of Democracy' (2024) 18 (4) Transforming Government: People, Process and Policy 638–656, DOI: https://doi.org/10.1108/TG-02-2024-0030

77 Petar Radanliev, 'AI Ethics: Integrating Transparency, Fairness, and Privacy in AI Development' (2025) 39 (1) Applied Artificial Intelligence, DOI: https://doi.org/10.1080/08839514.2025.2463722

78 Ben Chester Cheong, 'Transparency and Accountability in AI Systems: Safeguarding Wellbeing in the Age of Algorithmic Decision-Making' (2024) 6 Frontiers in Human Dynamics, DOI: https://doi.org/10.3389/fhumd.2024.1421273

79 Buomsoo Kim, Jinsoo Park and Jihae Suh, 'Transparency and Accountability in AI Decision Support: Explaining and Visualizing Convolutional Neural Networks for Text Information' (2020) 134 Decision Support Systems, DOI: https://doi.org/10.1016/j.dss.2020.113302

80 Gentzel 1640.

in harmonising ethical AI standards globally due to varied political and cultural contexts.[81] Therefore, future research must explore more accessible explanatory frameworks, examine cross-cultural ethical standards more deeply, and develop international governance strategies to mitigate biases effectively and uphold democratic integrity in the age of AI.

The integration of artificial intelligence into the media landscape and political communication significantly influences democratic processes, shaping both opportunities and risks. This review highlights several key findings that directly address the research question of how AI impacts democracy. As observed in recent literature, the deployment of AI technologies in political communication has revolutionised how news is created and disseminated, simultaneously raising critical concerns regarding biases and polarisation.[82] This resonates with concerns raised in other studies, which argue that AI-driven algorithms can lead to 'filter bubbles', limiting the diversity of perspectives available to citizens, thereby potentially weakening the quality of democratic debate.[83] Additionally, the rise of deepfake technology has introduced new complexities, threatening to compromise the authenticity of political discourse by making it increasingly difficult for the public to distinguish fact from fabricated content. Battista[84] argues that deepfakes pose significant risks to democratic stability, echoing the findings of Momeni, who demonstrated that political deepfakes could considerably alter voter perceptions and influence political decisions negatively.[85] However, the literature also reveals notable contradictions; for example, AI has been acknowledged as a tool for potentially enhancing citizen engagement by facilitating direct interactions between politicians and voters through personalised communication. Nonetheless, these potential benefits must be critically balanced against ethical and practical challenges, particularly regarding transparency and the prevention of misinformation campaigns, as AI-generated misinformation becomes increasingly sophisticated. Despite these significant insights, the literature remains inconclusive about effective governance frameworks capable of adequately addressing the ethical dilemmas and manipulative potential of AI. Future research should, therefore, investigate how regulatory policies may be crafted to safeguard democratic values without stifling technological innovation. Additionally, a critical exploration of public literacy concerning AI technologies is needed, given the evidence suggesting widespread inability among citizens to discern genuine from artificially generated political content. Addressing

[81] Petar Radanliev, 'AI Ethics: Integrating Transparency, Fairness, and Privacy in AI Development' (2025) 39 (1) Applied Artificial Intelligence, DOI: https://doi.org/10.1080/08839514.2025.2463722

[82] Joshua C Yang, Carina I Hausladen, Dominik Peters, Evangelos Pournaras, Regula H Fricker and Dirk Helbing, 'Designing Digital Voting Systems for Citizens: Achieving Fairness and Legitimacy in Participatory Budgeting' (2025) 5 (3) Digital Government: Research and Practice 1–30, 26, DOI: https://doi.org/10.1145/3665332

[83] Molitorisz 654.

[84] Battista 14.

[85] Kai Sun, Arkajyoti Roy and Joshua M Tobin, 'Artificial Intelligence and Machine Learning: Definition of Terms and Current Concepts in Critical Care Research' (2024) 82 Journal of Critical Care, DOI: https://doi.org/10.1016/j.jcrc.2024.154792

these areas could identify essential pathways toward a more informed, robust and ethically grounded deployment of AI in democratic contexts.

Recent advancements in artificial intelligence have notably reshaped the landscape of surveillance, significantly influencing the dynamics of personal privacy and democratic governance. AI-driven tools such as facial recognition, predictive analytics and behavioural profiling are increasingly deployed by both governmental and corporate entities, intensifying concerns about political autonomy and individual privacy.[86] This trend aligns with the observations of Fontes et al.,[87] who outline the complexities surrounding AI-enabled public surveillance, pointing out how these technologies can provide critical support in areas such as public health and law enforcement, yet simultaneously pose significant threats to individual liberties due to extensive data collection and monitoring practices. Elliott and Soifer further underscore that privacy concerns with AI often revolve around broader issues of security and autonomy, highlighting how unchecked surveillance capabilities could erode the capacity for individuals to shape their social identities independently. Similarly, Saheb identifies the ethically contentious aspects of AI surveillance, emphasising how these technologies amplify existing social inequities and could pave the way for authoritarian forms of governance, thereby challenging fundamental democratic principles. While the reviewed literature presents a consensus regarding the threats posed by AI surveillance to civil liberties and democratic freedoms, there remains some contradiction about the balance between societal benefits, such as improved public health and security and the risks of violating privacy. These findings confirm the research objective by clearly demonstrating AI's dual role in potentially supporting and simultaneously undermining democratic institutions. However, there remain gaps in our understanding of how AI's adverse impacts on marginalised communities may be mitigated effectively, highlighting a critical area for future inquiry. More comprehensive regulatory frameworks, emphasising transparency, informed consent and the safeguarding of individual autonomy, are essential areas that demand further scholarly investigation and policy development to effectively balance AI's benefits with its inherent ethical challenges.

While AI promises more informed, transparent and participatory decision-making, it simultaneously poses threats through algorithmic biases and the manipulation of political dialogue, potentially undermining democratic principles.[88] Although global ethical guidelines exist, many lack clear justifications or practical means for implementation, leading to ambiguity and ineffectiveness in actual governance scenarios. Furthermore, interpretations

[86] Francesca Palmiotto and Natalia Menéndez González, 'Facial Recognition Technology, Democracy and Human Rights' (2023) 50 Computer Law & Security Review, 1–12, DOI: https://doi.org/10.1016/j.clsr.2023.105857

[87] Catarina Fontes, Ellen Hohma, Caitlin C Corrigan and Christoph Lütge, 'AI-Powered Public Surveillance Systems: Why We (Might) Need Them and How We Want Them' (2022) 71 Technology in Society 1–12, DOI: https://doi.org/10.1016/j.techsoc.2022.102137

[88] Emmanouil Papagiannidis, Patrick Mikalef and Kieran Conboy, 'Responsible Artificial Intelligence Governance: A Review and Research Framework' (2025) 34 (1) Journal of Strategic Information Systems, 1–16, DOI: https://doi.org/10.1016/j.jsis.2024.101885

of these ethical principles differ significantly across countries and sectors, highlighting the complexity of establishing universally accepted standards.[89] Addressing these inconsistencies requires further exploration of effective, context-sensitive governance frameworks to ensure AI supports, rather than compromises, democratic integrity.

The discussion of AI governance and democracy underscores the necessity of legal accountability as a foundational element in ensuring AI technologies align with democratic principles. The argument for legally binding regulations, akin to those in pharmaceuticals and environmental protection, resonates with current debates on AI governance. Scholars have emphasised that AI's increasing autonomy challenges traditional accountability structures, necessitating clear answerability mechanisms, including authority recognition, interrogation and power limitations.[90] Furthermore, the EU AI Act's risk-based framework aligns with calls for targeted oversight of high-risk AI applications, particularly those impacting democratic processes.[91] However, gaps remain in the literature regarding the enforceability of AI accountability mechanisms, especially in contexts where political and legislative consensus has not yet formed. While some scholars advocate for proactive accountability through compliance and oversight, others highlight the risk of regulatory fragmentation, which may undermine democratic control. The challenge of balancing transparency, fairness and security in AI-driven governance remains an area for further investigation, particularly in mitigating risks such as surveillance capitalism and AI-driven political manipulation.

The principle of 'Transparency, fairness and ethical AI by design' aligns closely with contemporary debates on the democratic implications of AI, as highlighted in recent scholarship. Transparency, as emphasised by Felzmann et al.,[92] is not just an ethical ideal but a necessary framework for accountability, particularly in automated decision-making (ADM) systems. This echoes the argument that AI systems must be designed with built-in transparency rather than as an afterthought, ensuring that their decision-making logic is comprehensible and accountable to the public. Similarly, Radanliev[93] underscores the significance of transparency in AI policy frameworks across different regions, revealing that while Europe prioritises safeguarding individual rights through regulatory oversight, the U.S. adopts a more decentralised, innovation-driven approach. This divergence suggests a global gap in ethical AI governance that requires harmonisation. Furthermore, Memarian

89 Nicholas Kluge Corrêa and others, 'Worldwide AI Ethics: A Review of 200 Guidelines and Recommendations for AI Governance' (2023) 4 (10) Patterns 1–12, DOI: https://doi.org/10.1016/j.patter.2023.100857

90 Claudio Novelli, Mariarosaria Taddeo and Luciano Floridi, 'Accountability in Artificial Intelligence: What It Is and How It Works' (2024) 39 (4) AI & Society 1871–1882, DOI: https://doi.org/10.1007/s00146-023-01635-y

91 Cupać, Sienknecht 1078.

92 Heike Felzmann and others, 'Towards Transparency by Design for Artificial Intelligence' (2020) 26 Science and Engineering Ethics 3333–3361, DOI: https://doi.org/10.1007/s11948-020-00276-4

93 Petar Radanliev, 'AI Ethics: Integrating Transparency, Fairness, and Privacy in AI Development' (2025) 39 (1) Applied Artificial Intelligence, DOI: https://doi.org/10.1080/08839514.2025.2463722

and Doleck[94] emphasise that while AI ethics in higher education has focused on fairness and accountability, studies remain fragmented and a comprehensive framework that integrates transparency and public trust is lacking. These perspectives collectively support the necessity of integrating ethical AI governance into democratic institutions to prevent manipulation, surveillance and bias. However, challenges persist, as AI systems often reflect entrenched societal biases, requiring continuous bias audits and legal safeguards. The issue of AI-powered political micro-targeting, as discussed by Paterson and Hanley,[95] further demonstrates the vulnerability of democratic processes to algorithmic influence, making regulatory enforcement essential. While current frameworks, such as UNESCO's recommendations on AI ethics, attempt to mitigate these risks, the literature suggests that enforcement mechanisms remain insufficient.[96] This calls for further investigation into how legal mandates can better uphold AI transparency and accountability without stifling technological advancement. The contradiction between AI's potential to enhance democracy through open access to information and its ability to erode it through opaque decision-making mechanisms suggests that future research should focus on developing globally standardised ethical AI guidelines that balance innovation with fundamental democratic values.

Data governance, privacy and decentralisation collectively serve as fundamental pillars that sustain democratic values in an AI-driven world. Safeguarding individual rights, promoting political pluralism, and preventing authoritarian control require frameworks that place people at the centre of data usage and distribution.[97] In this regard, various studies emphasise the critical role of organised data stewardship, because transparency and accountability in public decision-making help diminish power asymmetries.[98] Equally important are robust data protection laws, such as the GDPR and enforceable ethical standards, which protect citizens from intrusive surveillance while upholding free speech. Furthermore, decentralisation encourages multiple stakeholders to share authority over AI development, thereby reducing the risk of monopolistic control and ensuring that technology giants do not stifle innovation. Additionally, blockchain-based and open-source solutions underscore the value of reliable digital architectures, demonstrating that strong

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94 Bahar Memarian, Tenzin Doleck, 'Fairness, Accountability, Transparency, and Ethics (FATE) in Artificial Intelligence (AI) and Higher Education: A Systematic Review' (2023) 5 Computers and Education: Artificial Intelligence 1–12, DOI: https://doi.org/10.1016/j.caeai.2023.100152

95 Thomas Paterson, Lauren Hanley, 'Political Warfare in the Digital Age: Cyber Subversion, Information Operations and "Deep Fakes"' (2020) 74 (4) Australian Journal of International Affairs 439–454, DOI: https://doi.org/10.1080/10357718.2020.1734772

96 Molitorisz 651.

97 Ienca 274.

98 Erman, Furendal 285.

data governance can help curtail data leaks and still foster democratic oversight.[99] However, emerging research reveals that standards, interoperability and consistent regulation need considerable improvement to safeguard public participation and maintain openness and diversity in AI systems.[100] Ultimately, these findings confirm earlier appeals for rigorous legal mechanisms and highlight unexplored areas, such as ethical audits and long-term data protection strategies, where further investigation can protect democracy in an era increasingly shaped by advanced AI.

Building on the emphasis that democratic oversight, citizen engagement and legal safeguards are crucial to preserving public trust and electoral integrity, these findings underscore the necessity of robust AI governance to counter disinformation and safeguard democratic legitimacy. The call for targeted legislation that criminalises harmful AI-driven political manipulation resonates with recent discussions that argue for a clear, risk-based approach to responsible AI regulation.[101] Labelling AI-generated content and holding platforms accountable can reduce the destabilising effects of deepfakes and malicious political messaging. Yet, simply imposing legal and technical restrictions is insufficient for sustaining comprehensive democratic resilience: encouraging participatory AI design and citizen assemblies aligns with the growing consensus that humans must remain central in shaping and overseeing AI's societal role.[102] At the same time, knowledge gaps persist regarding how best to foster inclusive decision-making without empowering technocratic elites. Further investigation could explore how transparent policymaking and mandatory algorithmic audits align with international cooperation to enhance accountability and civic empowerment. Critically, while there is consensus around fortifying resilience through ethical frameworks, tensions remain concerning how to reconcile data-driven innovation with equity and fairness, an area that warrants more longitudinal, cross-cultural studies.[103] Overall, these insights confirm that proactive engagement with legal, technical and participatory measures strengthens democracy's capacity to integrate AI without sacrificing legitimacy or trust.

99 Ahmed M Shamsan Saleh, 'A Cyclic Framework for Ethical Implications of Artificial Intelligence in Autonomous Vehicles' (2024) 15 (3) International Journal of Advanced Computer Science and Applications 340–353, DOI: https://doi.org/10.14569/IJACSA.2024.0150335

100 Xiongbiao Ye, Yuhong Yan, Jia Li and Bo Jiang, 'Privacy and Personal Data Risk Governance for Generative Artificial Intelligence: A Chinese Perspective' (2024) 48 (10) Telecommunications Policy 1–15, DOI: https://doi.org/10.1016/j.telpol.2024.102851

101 Natalia Díaz-Rodríguez and others, 'Connecting the Dots in Trustworthy Artificial Intelligence: From AI Principles, Ethics, and Key Requirements to Responsible AI Systems and Regulation' (2023) 99 Information Fusion, DOI: https://doi.org/10.1016/j.inffus.2023.101896

102 Mateus de Oliveira Fornasier, 'Artificial Intelligence and Democratic Rule of Law' (2021) 13 (3) Revista de Estudos Constitucionais, Hermenêutica e Teoria do Direito (RECHTD) 351–369, DOI: https://doi.org/10.4013/rechtd.2021.133.06

103 Nah and others 7–9.

VI Suggestions for future research

Through an extensive review of academic articles, policy reports and research centre documents on AI's influence in democratic contexts, we have identified several essential avenues for future research. The following six recommendations reflect critical gaps that warrant deeper investigation. First, a significant research gap persists in understanding the real-world effects of AI-driven participation tools. While numerous studies discuss the ethical and conceptual dimensions of AI in public deliberation,[104] empirical analyses on how AI-powered platforms, such as chatbots and online deliberation systems, shape inclusivity, discourse quality, and long-term civic engagement are scarce. Wilson[105] highlights that despite the fact that national AI strategies frequently reference public engagement, concrete mechanisms for ensuring meaningful participation remain underdeveloped. Moreover, concerns regarding algorithmic biases, particularly those related to gender, socioeconomic status and political representation, have been examined mainly in theoretical discourse rather than through longitudinal empirical research. Given the increasing reliance on AI for decision-making in governance and public administration, there is a pressing need for mixed-method studies that assess user interactions, the impact of AI moderation on public debate, and the extent to which these technologies either mitigate or exacerbate systemic biases.[106] The implications of this research extend beyond technological optimisation; they touch on fundamental democratic values, including transparency, accountability and equitable participation. Addressing this gap is crucial for developing AI systems that genuinely support and enhance democratic deliberation rather than reinforcing existing power asymmetries. Therefore, future research should prioritise longitudinal, multi-stakeholder investigations that evaluate how AI influences public discourse, policy outcomes and civic trust in participatory platforms. Such research will provide policymakers and developers with actionable insights into creating more inclusive and ethical AI-driven civic engagement tools.

Second, there is a critical research gap concerning the comparative effects of AI regulations, such as the EU AI Act, on democratic outcomes across different political systems. While various regulatory frameworks exist to oversee AI applications in governance, elections and public services, there is limited systematic cross-country analysis of how these laws translate into real-world impacts, particularly in areas like election integrity, content

[104] Helena Machado, Susana Silva and Laura Neiva, 'Publics' Views on Ethical Challenges of Artificial Intelligence: A Scoping Review' (2025) 5 AI & Ethics 139–167, DOI: https://doi.org/10.1007/s43681-023-00387-1

[105] Christopher Wilson, 'Public Engagement and AI: A Values Analysis of National Strategies' (2022) 39 (1) Government Information Quarterly, DOI: https://doi.org/10.1016/j.giq.2021.101652

[106] Omar Ali, Peter A Murray, Mujtaba Momin, Yogesh K Dwivedi and Tegwen Malik, 'The Effects of Artificial Intelligence Applications in Educational Settings: Challenges and Strategies' (2024) 199 Technological Forecasting and Social Change 1–18, DOI: https://doi.org/10.1016/j.techfore.2023.123076

moderation and citizen participation in policymaking.[107] Given the increasing influence of AI in shaping public discourse and electoral processes, understanding the interaction between regulatory interventions and national political cultures, such as trust in institutions, traditions of direct democracy and public perceptions of AI governance, remains an understudied area. The EU, for example, has positioned itself as a global leader in AI governance, but the extent to which its regulatory measures influence democratic participation and safeguard against algorithmic biases in different member states is still unclear.[108] Additionally, concerns have been raised about the AI Act's ability to balance innovation with democratic safeguards, as well as its potential to create unintended disparities in AI adoption between technologically advanced and less advanced nations.[109] Future research should, therefore, aim to map out the practical implications of AI governance on democratic processes, analysing both the intended and unintended consequences of regulatory measures across diverse political contexts. Addressing this gap is crucial to ensuring that AI regulations not only promote ethical AI use but also enhance, rather than undermine, democratic resilience.

Third, AI-driven voter analytics and targeted political advertising have bought about significant advancements in election campaigns, yet there remains a pressing need for further research on their ethical, regulatory and behavioural impacts. While AI technologies have introduced new levels of efficiency to political campaigning – particularly through microtargeting and predictive analytics – they also raise important concerns about fairness, transparency and the potential manipulation of voters. Much of the research on these issues has focused on single-country case studies, leaving a noticeable gap in cross-national comparisons that examine how different regulatory environments shape the ethical use of AI in political contexts. Some countries have taken initial steps by introducing transparency measures, such as requiring disclosure for AI-generated political advertisements. However, there is limited empirical evidence on whether these measures effectively reduce misinformation or limit undue influence.[110] Additionally, AI-powered campaigns raise critical concerns about privacy, as the collection and use of voter data often occur without explicit consent, challenging democratic accountability and autonomy. Although some research highlights the risks of algorithmic biases reinforcing political polarisation, there

[107] European Parliamentary Technology Assessment (EPTA), 'Artificial Intelligence and Democracy' (EPTA 2024) <https://eptanetwork.org/database/policy-briefs-reports/2894-artificial-intelligence-and-democracy-epta> accessed 1 December 2025.

[108] H Akın Ünver and Arhan S Ertan, 'Democratization, State Capacity and Developmental Correlates of International Artificial Intelligence Trade' (2024) 31 (5) Democratization 1018–1048, DOI: https://doi.org/10.1080/13510347.2023.2259318

[109] Forum on Information & Democracy (FID), 'AI as a Public Good: Ensuring Democratic Control of AI in the Information Space' (Forum on Information & Democracy 2024) <https://informationdemocracy.org/wp-content/uploads/2024/03/ID-AI-as-a-Public-Good-Feb-2024.pdf> accessed 1 December 2025.

[110] Itumeleng Michael Maine and Bukohwo Michael Esiefarienrhe, 'The Impact of Artificial Intelligence, Ethical Implications and Technologies on the Electoral Process' (2024) 5 (16) E-Journal of Humanities, Arts and Social Sciences 3211–3219, DOI: https://doi.org/10.38159/ehass.202451641

remains an insufficient understanding of how AI-driven persuasion tactics actually shape voter decision-making in real electoral contexts.[111] To bridge these gaps, future studies should focus on cross-national regulatory comparisons, assess the long-term effects of AI-powered microtargeting on democratic participation, and develop ethical frameworks that balance technological innovation with electoral integrity. Addressing these issues is crucial to ensuring that AI enhances rather than undermines democratic processes in political campaigns.

Fourth, there is a pressing need for further research into the impact of AI-driven news recommenders and automated content moderation on media pluralism, the diversity of viewpoints and the quality of public discourse in democratic societies. While AI-driven tools can enhance the accessibility and personalisation of news, they also raise concerns about algorithmic bias and the reinforcement of ideological filter bubbles. AI's ability to curate and prioritise content influences public opinion formation, yet research suggests that these systems may inadvertently amplify misinformation and reduce exposure to diverse perspectives.[112] Furthermore, the role of AI in content moderation remains contentious, as automated systems often lack the nuance to differentiate between harmful content and legitimate political discourse, potentially restricting freedom of expression. The concentration of power among a few dominant platforms further exacerbates these challenges, as proprietary algorithms shape the digital information ecosystem in ways that remain largely opaque to users and regulators.[113] Given the significant societal and democratic implications of AI-mediated news distribution and moderation, further research is essential to assess the extent of its influence and to explore regulatory and design interventions that could ensure a more pluralistic and balanced digital media landscape.

Fifth, a significant research gap remains in understanding the effectiveness and challenges of AI-facilitated deliberative processes, such as digital town halls and deliberative polling, in enhancing civic participation and representation. While deliberative democracy has been extensively studied, the integration of artificial intelligence into these processes remains underexplored. Scholars argue that AI-driven deliberative mechanisms hold great potential for improving inclusivity, scalability and decision-making efficiency.[114] However, recent research indicates that public scepticism toward AI involvement in democratic

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[111] Anya Adebayo, 'Campaigning in the Age of AI: Ethical Dilemmas and Practical Solutions for the UK and US' (2024) 7 (12) International Journal of Social Science and Human Research 9330–9336, DOI: https://doi.org/10.47191/ijsshr/v7-i12-65

[112] Magdalena Wojcieszak and others, 'Can AI Enhance People's Support for Online Moderation and Their Openness to Dissimilar Political Views?' (2021) 26 (4) Journal of Computer-Mediated Communication 223–243, DOI: https://doi.org/10.1093/jcmc/zmab006

[113] Forum on Information & Democracy (FID), 'Pluralism of News and Information in Curation and Indexing Algorithms' (FID 2023) <https://informationdemocracy.org/publications/pluralism-of-news-and-information-in-curation-and-indexing-algorithms/> accessed 1 December 2025.

[114] Mikko Rask, Bokyong Shin, 'Integrating Paths: Enhancing Deliberative Democracy Through Collective Intelligence Insights' (2024) 14 Societies 270–296, DOI: https://doi.org/10.3390/soc14120270

deliberation may hinder participation and diminish perceived deliberative quality.[115] This phenomenon, termed the 'AI penalty', suggests that AI moderation and facilitation could introduce a new deliberative divide, shaped by attitudes toward technology rather than traditional socioeconomic factors. Furthermore, while digital platforms have revolutionised public discourse by expanding access to deliberative processes, they also pose risks such as misinformation, algorithmic bias and political polarisation.[116] Further empirical research is needed to evaluate AI's role in fostering meaningful and equitable deliberation, ensuring that digital democratic innovations do not inadvertently exclude or alienate citizens.

Sixth, there is a need to develop comprehensive methods for identifying and mitigating biases in artificial intelligence systems, particularly those deployed in elections, public policy formulation and governance. While AI has the potential to enhance decision-making efficiency, recent studies highlight the persistent risks of algorithmic bias, which can disproportionately impact marginalised communities. Research suggests that biases in AI emerge from various sources, including biased training data, algorithmic design and human decision-making processes.[117] Therefore, further research should develop robust methodologies for bias identification and mitigation, incorporating legal, ethical and technological perspectives to create AI systems that are both fair and inclusive.

VII Conclusion

The rapid advancement of artificial intelligence (AI) over the past decade has fundamentally reshaped various aspects of governance, political participation and democratic institutions. Recognising the growing significance of AI in democracy, this systematic literature review examined 97 scholarly articles published between 2014 and 2024 to provide a comprehensive analysis of AI's multifaceted role in democratic processes. The motivation for this study stemmed from the urgent need to understand how AI-driven innovations influence democratic principles such as transparency, accountability, fairness and civic participation while also presenting new challenges related to misinformation, surveillance and algorithmic biases. Our review revealed several critical insights into AI's impact on democracy. On the one hand, AI has the potential to enhance governance efficiency, streamline bureaucratic processes and foster greater political participation through AI-driven decision-making tools and automated deliberation platforms. These innovations can reduce information

115 Andreas Jungherr, Adrian Rauchfleisch, 'Artificial Intelligence in Deliberation: The AI Penalty and the Emergence of a New Deliberative Divide' (2025) arXiv preprint 1–16, DOI: https://doi.org/10.48550/arXiv.2503.07690

116 Ali Çiçek, 'Deliberative Democracy in the Digital Age: Opportunities and Challenges of Online Public Discourse' (2024) 6 (2) Electronic Journal of Social Sciences 62–75, DOI: https://doi.org/10.54089/ecider.1549272

117 J. M. Alvarez and others, 'Policy Advice and Best Practices on Bias and Fairness in AI' (2024) 26 Ethics and Information Technology 1–26, DOI: https://doi.org/10.1007/s10676-024-09746-w

asymmetries, empower citizens, and promote more inclusive policy-making.[118] On the other hand, AI also poses significant risks to democratic integrity, particularly through algorithmic bias, manipulation of political communication and the proliferation of disinformation. The increasing use of AI in political campaigns, news curation and electoral processes has introduced concerns about transparency, ethical governance and potential threats to fundamental democratic values.[119]

A key pattern that emerged from the literature is the dual nature of AI's role in democracy. While AI-driven technologies can democratise information access and improve governance efficiency, they also risk reinforcing existing power imbalances and undermining trust in democratic institutions. Several studies highlight the 'black box' problem, where AI's opaque decision-making processes hinder transparency and accountability, leading to reduced public trust in AI-governed systems.[120] Another significant trend is the growing reliance on AI for surveillance and social control, raising ethical concerns regarding privacy, freedom of expression and human rights.[121] Furthermore, research gaps were identified in understanding how different regulatory frameworks influence AI's democratic implications across diverse political contexts, suggesting the need for further empirical research on AI governance strategies. This review contributes to the existing body of knowledge by synthesising diverse perspectives on AI and democracy, offering a structured overview of the opportunities and risks associated with AI-driven governance. By highlighting key trends, challenges and gaps in current research, this study provides a foundational understanding for future scholarship on AI's democratic implications. Despite its comprehensive approach, the author acknowledges certain limitations of the review. The scope of this study was constrained by database selection, keyword parameters and exclusion criteria, which may have resulted in the omission of relevant but non-English or non-peer-reviewed literature. Additionally, the review primarily focused on AI's role in democratic governance within a general framework, potentially overlooking region-specific nuances that warrant further investigation. Future research could expand the scope to explore AI's democratic impact across different political systems, regulatory environments and cultural contexts.

The findings of this review have significant practical relevance for policymakers, industry leaders and civil society organisations. Given AI's expanding role in shaping political

[118] Pascal D König and Georg Wenzelburger, 'Between Technochauvinism and Human-Centrism: Can Algorithms Improve Decision-Making in Democratic Politics?' (2022) 21 (1) European Political Science 132–149, DOI: https://doi.org/10.1057/s41304-020-00298-3

[119] Daniel Barredo-Ibáñez, Daniel-Javier De-la-Garza-Montemayor, Ángel Torres-Toukoumidis and Paulo-Carlos López-López, 'Artificial Intelligence, Communication, and Democracy in Latin America: A Review of the Cases of Colombia, Ecuador, and Mexico' (2021) 30 (6) Profesional de la Información, DOI: https://doi.org/10.3145/epi.2021.nov.16

[120] Niva Elkin-Koren, 'Contesting Algorithms: Restoring the Public Interest in Content Filtering by Artificial Intelligence' (2020) 7 (2) Big Data & Society 1–13, DOI: https://doi.org/10.1177/2053951720932296

[121] Elise Racine, 'The Far-Reaching Implications of China's AI-Powered Surveillance State Post-COVID' (2023) 21 (3) Surveillance & Society 269–275, DOI: https://doi.org/10.24908/ss.v21i3.16111

discourse, electoral processes and governance models, regulatory interventions must be designed to ensure transparency, fairness and accountability. Policymakers should consider implementing robust AI ethics guidelines, mandatory transparency measures for AI-driven political advertising and stronger oversight mechanisms to prevent AI-enabled electoral manipulation.[122] Industry practitioners, particularly in the technology sector, must prioritise ethical AI development by embedding fairness and accountability into AI design. Moreover, civil society organisations and academic institutions should advocate for AI literacy initiatives to equip citizens with the knowledge needed to critically engage with AI-driven political and social systems.

122 Zuboff 56.

Anita Kisborsó*

Legal Aspects of Data Sharing in the European Health Data Space

Abstract

This article explores the legal framework for data sharing established by the European Health Data Space Regulation (EHDS), the European Union's first sector-specific data space initiative. The study critically examines the legal implications of the EHDS's mandatory data sharing mechanism, which aims to address structural imbalances in the data economy by compelling both public and private data holders to grant access to electronic health data. The article analyses the EHDS's data access model and contrasts it with traditional data contracts governed by private law. Key legal challenges are identified, including the ambiguous scope of the *general interest of society,* the *limitations of data holders' autonomy* and the lack of established legal concepts for electronic data. The author argues that while the EHDS offers significant benefits, such as a unified dataset catalogue and enhanced access to health data for research and innovation, it also raises concerns about legal clarity, liability allocation, and investment incentives. The article concludes that further harmonisation and clarification are necessary to ensure legal certainty and market trust in the evolving European data economy.

Keywords: European Health Data Space (EHDS), European data strategy, secondary use of electronic health data, data sharing, data permit

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I Introduction

In the global competition, the European Union plans to catch up with the American and Chinese data economies, a goal outlined in the European Data Strategy published on 19 February 2020,[1] as well as the EU legislation based on it and the creation of a single data market. The European Union encourages the free flow of electronic data through regulation and the implementation of EU-level projects to improve the data-driven economy within the European Union.[2]

To achieve this goal, the European Commission has proposed ambitious legislation to make data access easier for businesses and researchers. Furthermore, the European Union aims to create data spaces, genuine single markets for digital data, where economic entities can access high-quality data, both personal and non-personal, public and non-public, to improve their products and services, make informed decisions, and promote innovation. These interoperable, domain-specific, common data spaces[3] – such as those for health, finance, agriculture, energy and mobility – are currently being created. The first and pioneering data space is the European Health Data Space.

The EHDS regulation[4] (EHDS) creates the European Health Data Space by providing common mechanisms, rules, standards, infrastructure and a governance framework for the primary and secondary use of electronic health data.[5] It introduces a *new legal framework for data sharing* in the European data economy through strict regulation and *compulsory data sharing*. The fundamental assumption behind the EHDS is that the insufficient volume of voluntary data sharing is hindering the economy's growth. Imbalances in the data economy and restricted access to digital data result in broad economic inefficiencies. There are two main reasons for this. First, big data companies that have high-quality, large datasets do not have an interest in sharing data, especially with their competitors. Second, despite the EU legal acts[6] already in force, data held by public sector organisations does not enter the data

1 A European strategy for data, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Brussels, 19.2.2020, COM(2020) 66 final, 3.

2 European strategy for data, 16.

3 European strategy for data, 12.

4 Regulation (EU) No 2025/327 of the European Parliament and of the Council of 11 February 2025 on the European Health Data Space and amending Directive 2011/24/EU and Regulation (EU) 2024/2847 [2025] OJ L327.

5 EHDS Article 1(1).

6 The most relevant legal acts for data sharing in the public sector: Regulation (EU) 2022/868 of the European Parliament and of the Council of 30 May 2022 on European data governance and amending Regulation (EU) 2018/1724 (Data Governance Act) OJ L152, and Directive (EU) 2019/1024 of the European Parliament and of the Council of 20 June 2019 on open data and the re-use of public sector information OJ L172.

economy in volumes sufficient to have a significant impact.[7] The EU legislator hopes to reduce such imbalances by introducing a mandatory data-sharing mechanism in the EHDS, which is aimed at combating the concentration of data in the hands of a few powerful players and their low level of transparency.[8]

The aim of this article is to provide an interpretation of the legal characteristics of data sharing under the EHDS mechanism and consider the possible effects of mandatory data sharing in terms of the legal aspects of the data economy. In this article, I will present the subjective and objective scope and objectives of the EHDS, as well as the administrative legal relationship granting access to data in comparison with private law instruments. Furthermore, I will present the elements that may affect the development of the data economy.

The article focuses on the question of the extent to which the new legal framework transforms the legal relationship between data owners and data users, as well as third parties who provide access to data, and what its new elements are compared to the current practice in the data economy.

The main method of this study is interpreting the text of the EHDS and analysing the legal environment of the European data economy and the legal characteristics of data sharing agreements based on model law. The article is structured around three aspects: (1) the legal framework of the EHDS and its administrative decisions concerning data access; (2) a comparative analysis of mandatory data-sharing obligations under the EHDS and private data contracts; and (3) potential impacts of mandatory data sharing and of the EHDS on the health data market. This analysis is both a descriptive and a critical examination of the changes in the data economy introduced by the EHDS for those involved in sharing electronic health data.

II The EHDS and the European Union's data regulation framework

The EHDS entered into force on 26 March 2025. Most provisions of the regulation will become applicable after four years, in 2029. The legal basis is Articles 16 and 114 of the Treaty on the Functioning of the European Union.[9] Article 16 TFEU provides the legal

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7 The reason for this is that the safeguards for data sharing (data protection, technology) and the rules for interoperability have not been developed to the extent that they can ensure the secure provision of data uniformly in the EU. The incentive for Member States to start reusing electronic health data held by public sector organisations is market demand, particularly the need for data from researchers. To meet these needs, the reuse of public sector health data has already been actively initiated in some Member States (eg, Finland and France), providing important knowledge for the implementation of the EHDS.

8 Marta Musidlowska, *Power to the Health Data Access Bodies. Addressing Governance Challenges for the Secondary Use of Electronic Health Data* (Part 1/3) (EHDS Blogpost Series 2024) <https://www.law.kuleuven.be/citip/blog/power-to-the-health-data-access-bodies-addressing-governance-challenges-for-the-secondary-use-of-electronic-health-data-part-1-3-ehds-blogpost-series/> accessed 1 December 2025.

9 Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C326/47.

basis for EU rules that protect personal data while enabling its free movement within the Union. According to Article 114 TFEU, 'the European Parliament and the Council shall adopt measures for the approximation of the provisions laid down by law, regulation, or administrative action in Member States that have as their objective the establishment and functioning of the internal market'. The creation of uniform rules, as explained by the EHDS, improves the functioning of the internal market, especially in relation to the development and use of health records systems.[10]

Based on the legislative plan of the European strategy for data, the first pillar of the regulatory basis for the European data economy is the development of a horizontal framework.[11] The Data Governance Act (DGA)[12] and the Data Act[13] are the two regulatory legs of this horizontal framework. The two regulations determine how the process and access to data should be structured.[14] Both regulations contribute to increasing access to data, and they are transversal legislation that applies to data across sectors. The DGA promotes voluntary data sharing by structuring the data economy, while the Data Act defines who can create value from data and under what conditions. The Data Act complements the provisions of the DGA and harmonises fair access to data in the case of connected products on online platforms and also defines the overall technical interoperability framework required for data exchange.[15]

The EHDS, building on the rules of the DGA and the Data Act, contains sector-specific rules[16] as *lex specialis* law by establishing data sharing tools and platforms, governance frameworks, and establishing data quality, availability and interoperability.[17] The EHDS focuses on two major areas regarding the exchange of electronic health data: the primary and secondary use of health data.

The primary use of health data refers to the processing of health data for the provision of healthcare, which involves assessing, maintaining, or restoring the state of health of the natural person to whom those data relate.[18] For instance, if a Hungarian citizen needs to see

10 EHDS Recital 1.

11 Quentin Fontaine, Jan Clinck, 'The European Health Data Space Proposal: A First Look at the Newest Piece of the EU Data Sharing Puzzle' (2022) 6 European Pharmaceutical Law Review 87, DOI: 10.21552/ehpl/2022/2/8

12 Regulation (EU) 2022/868 of the European Parliament and of the Council of 30 May 2022 on European data governance and amending Regulation (EU) 2018/1724 (Data Governance Act) OJ L152.

13 Regulation (EU) 2023/2854 of the European Parliament and of the Council of 13 December 2023 on harmonised rules on fair access to and use of data and amending Regulation (EU) 2017/2394 and Directive (EU) 2020/1828 (Data Act) OJ L2023/2854.

14 Jürgen Taeger, Jan Pohle, *Computerrechts-Handbuch, Informationstechnologie in der Rechts- und Wirtschaftspraxis* (C.H. Beck 2025, München) Teil 12: 120.5 Rn.18.

15 European strategy for data 8.

16 B. Martens, 'Are new EU data market regulations coherent and efficient?' (2023) Working Paper, 21/2023, Bruegel, 1.

17 Fontaine and Clinck 88.

18 EHDS Article 2(1)(d).

a doctor in Germany, the German doctor can access important data related to the Hungarian patient. The primary use of electronic health data, as defined in the EHDS, therefore supports the free movement of individuals.[19]

This article deals only with the *secondary use of electronic health data*, the second major part of the regulation. The DGA lays down generic conditions for the reuse of public sector data and does not create a genuine right to its reuse, but rather ensures that no data users are discriminated against. EDHS, however, supplements this framework with a *right to secondary data use*, which establishes a purpose-bound, genuine data access claim as a subjective right.[20]

While the DGA adopts the term *'re-use', the EHDS regulation uses the term 'secondary use',* which refers to the processing of electronic health data for purposes set out in the EHDS, other than the initial purposes for which it was collected or produced (primary use). The term 'secondary use' used by the EHDS specifically refers to the reuse of electronic health data according to the mechanism set out in Chapter IV of the EHDS. Thus, the EHDS uses a unique term for the reuse of electronic health data that only applies to the reuse of data under the scope of this legislation. In other words, when we talk about the secondary use of health data, in legal terminology, we are talking only and exclusively about the use of data associated with the EHDS procedure.

III Subjective and objective scope of the EHDS

1 Data holders

The regulation contains obligations for all health data holders from both the private and public sectors. The subject matter of the regulation includes both publicly held data and data held by for-profit, non-profit businesses, non-governmental organisations or any other legal entities. Only natural persons and microenterprises are exempted from the regulation.[21] Member States may provide in their national law that the data-holder-related duties of certain categories of data holders are to be fulfilled by intermediation entities.[22]

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19 Éva Gellérné Lukács, Az európai egészségügyi adattérről szóló rendelettervezet (Draft regulation on the European Health Data Space) (2024) (2) EU Jog 3, DOI: 10.55413/561.A2400201.EUO

20 Thomas Hoeren, Ulrich Sieber, Bernd Holznagel, *Handbuch Multimedia-Recht, Rechtsfragen des elektronischen Geschäftsverkehrs* (C.H. Beck 2024, München) Teil 16.8 Rn. 18, 19.

21 EHDS Article 2(2)(t).

22 EHDS Article 50(3).

2 Data users

The regulation does not contain any provisions regarding who can request data. In terms of the purposes of secondary use and the process of accessing data, it can be stated that data can be requested by anyone from the European Union or the EEA[23] who can ensure the conditions required by the regulation during data processing (data protection and security conditions) and uses the data for the purposes specified in the regulation. Based on the intended use of the data identified in the regulation, the main target audience of the EHDS includes economic actors interested in healthcare research, product and service development and treatment processes, as well as AI developers, public sector organisations and educational institutions. In other words, anyone from PhD researchers to researchers at large pharmaceutical companies, AI developers to universities, to Member States and EU decision-making bodies.

3 Health data access bodies

All Member States will designate one or more health data access bodies (HDAB) as governance and decision-making bodies responsible for secondary use in line with the EHDS mechanism. The HDABs assess requests for data, issue permits to the data users, and request that the data holders provide data to data users. The HDAB has authority and supervisory powers. The HDAB can be considered a kind of intermediary between the data holder and the data user.[24]

These designated authorities will play a significant role in the development of the single health data market, as the right to issue data permits remains within the competence of the Member States.[25] The development of a uniform decision-making practice based on objective criteria will decisively determine the efficiency of the single health data market and the trust of data subjects, data holders and data users, as per the EHDS data-sharing mechanism.

4 Operators of the secure processing environment (SPE)

The HDABs shall provide access to pseudonymised or anonymised personal electronic health data only through an SPE, which is subject to technical and organisational measures and security and interoperability requirements.[26] A SPE is a safeguard intended to preserve

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23 The EHDS will provide the opportunity for international organisations and third countries to access the HealthData@EU platform on the basis of Article 75, 10 years after the entry into force of the EHDS, on the basis of reciprocity. The international expansion of the EHDS is one of the longer-term objectives.

24 Musidlowska.

25 Mark Ryan, Paula Gürtler, Artur Bogucki, 'Will the real data sovereign please stand up? An EU policy response to sovereignty in data spaces' (2024) 32 International Journal of Law and Information Technology 25, DOI: doi.org/10.1093/ijlit/eaae006

26 EHDS Article 73(1).

the rights and freedoms of natural persons and other persons who have certain rights related to the processing of their electronic health data.[27] The EHDS is not clear as to whether the HDAB must have an SPE or whether the data must be loaded into an SPE designated by the data user from the market. The requirements for the SPE will be included in an implementation act of the European Commission, where this should be clarified. If the data user must use an SPE provided by the HDAB, they may only use those technical tools during the processing of data that are available in that SPE, while in the case of an SPE chosen from the market, the data user has the option of using one with technical tools appropriate to their purposes. This interpretation of the EHDS would contribute to the revival of market competition among SPE operators, while the HDABs would not be burdened with the operation of the SPE.

5 Minimum categories of data

The scope of the regulation covers a wide range of health data. The regulation lists as a minimum category those data that are to be considered health data under the scope of the regulation. These data types go far beyond health data in the general sense. Health data is not only data related to the patient's condition, but also data generated in connection with the process of health care, the activities performed by professionals, data related to the distribution of financial resources and the expenditures of care institutions, social security data, social care data, personal data collected by IoTs or wellness applications and data generated by health devices.

With regard to data protected by intellectual property or trade secrets, the regulation requires that this must also be made available under appropriate contractual obligations. This means that the data holder cannot prohibit the release of data on the grounds that the data is part of intellectual property or a document protected by trade secrets.

The EHDS provides an opportunity for Member State regulation to allow natural persons, as data subjects, to exercise an opt-out right to the processing of their data for secondary use. Without this right, the data protection rights of data subjects would be significantly limited.[28] This option, however, greatly influences the usability of the data and, ultimately, the goals sought to be achieved through processing. The effectiveness of the mandatory sharing of personal health data and the achievement of the public interest objective it seeks to achieve, therefore, largely depend on the trust of the data subjects. The socio-cultural structure of the Member States, their ethical rules and the creation of social trust in data sharing will be decisive in the development of a single health data market.

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[27] EHDS Recital 77.

[28] Taeger, Pohle Teil 12: 120.5 Rn. 30–33.

IV Purposes of the secondary use of health data – Objectives of the EHDS

The EHDS creates a right to data for secondary use only according to the purposes set out in the regulation. There are four main categories of purpose. The first is public purposes, namely decision-making, regulatory activities, public health surveillance, and compiling statistics. These purposes are reserved for public sector bodies. The second category is education and teaching activities. The third category is scientific research for development and innovation activities for products or services, as well as training, testing and evaluating AI algorithms, including, for example, medical devices. The fourth category is the improvement of healthcare delivery, the optimisation of treatment and the provision of healthcare.[29] All four categories serve one overarching goal: access to data for secondary use should contribute to the general interest of society.[30]

Unfortunately, the definition and scope of the *general interest of society* remain unclear. The secondary use of health data should benefit society by enabling the development of new medicines, medical devices and healthcare products and services at affordable and fair prices for Union citizens.[31] A data permit can only be issued if the purposes outlined in Article 53 are met – for example, scientific research. The definition of scientific research is quite broad, including innovation activities associated with products and services and training algorithms. These criteria are very general, and it would probably not be difficult to demonstrate an intention to meet them.[32] Without additional clarification, it will be difficult to distinguish between secondary use serving the general interest of society and profit-oriented secondary use, particularly in the case of scientific research.

V Administrative decisions concerning the secondary use of health data

1 Legal concept regarding electronic data

The EHDS introduces a new legal relationship in the European data market concerning health data. Horizontal regulations on the data economy of the EHDS involve adapting rules from contract law to prevent contractual imbalances and ensure data sharing by data

[29] EHDS Article 53.
[30] EHDS Recital 61.
[31] EHDS Recital 61.
[32] Maret Kruus, 'The Public Interest Requirement in the Secondary Use of Health Data in Scientific Research: The Examples of Estonia and Finland' (2023) 32 Juridica International 64, 72, DOI: https://doi.org/10.12697/JI.2023.32.06

holders.[33] Even when data is held by governmental institutions, horizontal legal acts presume a contractual relationship between the data holder and the data recipient or data user. The terms and conditions of contracts or agreements concerning data sharing between parties depend on the governing contract law, sector-specific rules and other mandatory regulations of the European Union.[34]

Electronic data is non-competing,[35] non-rivalrous,[36] and tradable,[37] and it has economic value within the data economy. Through copying, transmitting, or sharing, information of economic value can be reproduced without limit. An important element of the data economy is that products and services based on data, with added value, appear on the market through the use of raw digital data.[38] With the emergence of the data economy, data law as a new legal regime has arisen that does not abide by state law. It rather demands transnational legal institutions because the territory of the data economy is the territory of the digital world, not the physical one. The internet has made data borderless. The ubiquitous nature of digital data determines the legal regime governing the legal relationship between data holders and data users, which is established by the law chosen by the parties.

In most legal systems, data as the subject matter of a contract covering data sharing is difficult to bundle into traditional legal concepts that usually focus on trade in items that are either real property, goods, or intangible assets such as shares, intellectual property rights and licences.[39] The reason for this lies in the characteristics of digital data mentioned above. There is no common legal concept regarding electronic data in the European Union either. The European Union does not create legal institutions for data and does not establish sui generis law for data. Determining the terms and conditions for data shared between businesses, governmental institutions and individuals remains the responsibility of the parties; however, applicable binding regulations must be taken into account.

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33 For example, Regulation (EU) 2023/2854 of the European Parliament and of the Council of 13 December 2023 on harmonised rules on fair access to and use of data and amending Regulation (EU) 2017/2394 and Directive (EU) 2020/1828 (Data Act) OJ L2023/2854 or Regulation (EU) 2022/1925 of the European Parliament and of the Council of September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act) OJ L265.

34 For example, in the case of the Internet of Things, the rules of the Data Act must be taken into account.

35 Jiang Ye, 'Solution to the Dilemma of Data Factor Circulation and Transaction in the Context of Law-Based Business Enabling Environment' (2024) 12 China Legal Sci 29, 46.

36 Josef Drexl, 'Designing Competitive Markets for Industrial Data – Between Propertisation and Access' (Max Planck Institute for Innovation & Competition Research Paper Series, 2016) 28, 46.

37 Herbert Zech, 'Data as a Tradeable Commodity' in Alberto De Franceschi (ed), *European Contract Law and the Digital Single Market* (Cambridge University Press 2017) DOI: https://doi.org/10.1017/9781780685212.004; Bingwan Xiong, Jiangqiu Ge, Li Chen, Unpacking data: China's 'bundle of rights' approach to the commercialization of data (2023) 13 (2) International Data Privacy Law 104, DOI: https://doi.org/10.1093/idpl/ipad003

38 Jiang Ye 42–44, 49, 51.

39 The Principles for a Data Economy (Data Transactions and Data Rights) – American Law Institute and European Law Institute, as Adopted and Promulgated BY The American Law Institute on May 18, 2021 and The European Law Institute on September 1, 2021, 6.

The legal framework for the processing of personal data is coherent throughout the EU, as the protection of personal data is ensured as a fundamental right by the GDPR.[40] However, a comprehensive legal framework has not been implemented in the field of non-personal data, as there has been no EU regulatory requirement to uniformly define the legal nature of non-personal data as data that does not enjoy protection, thereby ensuring its free flow and breaking down legal barriers within the EU.[41]

Therefore, with regard to the system of secondary use of EHDS, the legal assessment of data (whether pseudonymised personal or anonymised or non-personal data), regardless of whether it is health data or not, *does not have a uniform dogmatic background*, which may result in differences in legal assessment between Member States. Therefore, the need for legal interoperability, ie the compatibility of the laws of the Member States,[42] also arises in order to ensure the predictability and legal certainty of the operation of data spaces.

2 Data permits and data requests are two types of administrative decisions

Regarding data sharing, the EHDS does not regulate specific contractual agreements between the data holder and the data user, except in cases where contractual agreements address data containing information protected by intellectual property rights or trade secrets.[43] The regulation establishes an administrative relationship between a designated public sector body, the HDAB and the data user. The HDAB is not necessarily the same entity as the data holder from which the data user seeks the dataset. If the HDAB and the data holder are the same entity, the HDAB does not act as a data holder. Within this legal framework, data holders and data users are not directly contractually linked with each other;[44] they do not have a direct legal relationship.

A data applicant may submit either a data access application for pseudonymised or anonymised data at the personal level or a data request for data in an anonymised statistical

[40] 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) OJ L119, 4.5.2016.

[41] Anastasiya Kiseleva, Paul De Hert, 'Creating European health data space: obstacles in four key legal areas' (2021) 5 (1) European Pharmaceutical Law Review 28, DOI: https://doi.org/10.21552/eplr/2021/1/5

[42] Krisztina Davidovics, Réka Kovács, Péter András Gaál, 'Az egészségügyi adatok másodlagos használata az EU-ban: Az európai egészségügyi adattér rendelet kapcsán felmerülő jogi kihívások a TEHDAS közös fellépés eredményeinek tükrében' [Secondary use of health data in the EU: Exploring the legal challenges of the upcoming European Health Data Space Regulation in light of the findings of the TEHDAS project] (2024) 23 (Special Issue) Digitális Egészségügy 10, DOI: 10.53020/IME-2024-KSZ-101

[43] F. Casarosa, F. Gennari, 'Data Sharing in the Internet of Medical Things: Between the Data Act and the EHDS' (2025) 16 (Special Issue) European Journal of Risk 21, DOI: doi:10.1017/err.2025.18

[44] Manon Vanderhaeghe, 'Owning What You Make: Commercially Sensitive Information and Secondary Use of Electronic Health Data for Research Purposes in the EHDS' (EHDS Blogpost Series, 2024) <https://www.law.kuleuven.be/citip/blog/owning-what-you-make-commercially-sensitive-information-and-secondary-use-of-electronic-health-data-for-research-purposes-in-the-ehds/> accessed 1 December 2025.

format. In the first case, the data user is entitled to access the data specified in the data permit within an SPE operated by the HDAB or a third party. In the second case, the anonymised data in statistical format is transmitted directly to the data user.

Once the HDAB issues a data permit or approves the data request, the data holder is obligated to provide the dataset specified in the permit or the request to the HDAB or directly to the data user if the data holder is designated as a trusted health data holder.[45] Data holders do not have the right to object to the HDAB's decision. However, they may consult on the possibilities and technical requirements of data collection.

Within the legal framework of the EHDS, the issuance of a data permit or approval of a data request by the HDAB means that health data specified in the data access application or in the data request and held by entities subject to data-sharing obligations must be provided to the data user under the law of the HDAB of the given Member State in whose jurisdiction the data holder falls. Given that the application and the request are submitted by the applicant to a public sector body, which is obliged to provide access to the data through a specific procedure and on the basis of criteria specified in a regulation, it can therefore be stated that the request is a public law right of access to data.[46]

The EHDS does not regulate the relationship between the two types of decisions. The difference between the two decision methods is that, in the case of a data permit, personal or anonymised data is made available by the HDAB in an SPE, while in the case of a data request, the data is transferred in a statistical format. The regulation only defines the data permit as an administrative decision; it does not attach a definition to a data request. The decision-making process is not regulated either; during the assessment of a data application, the HDAB, taking into account the principles of risk- and data minimisation, may decide, after consultation with the data requester, to release data only in a statistical form instead of a data permit, treating the request as if it had been a data request, not a full application. The question then arises as to whether this constitutes a refusal, whether the data is transferred through a new procedure, or whether it is the result of a tacit agreement between the parties – the HDAB and the data user – within the same official procedure.

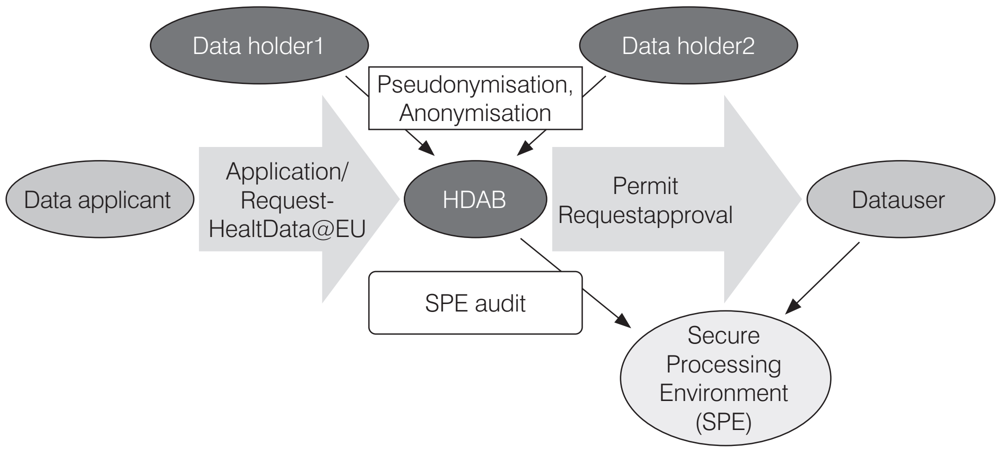
3 Process of data access

The process of applying for data access begins with the submission of a data access application form. The data applicant must complete and submit a form on an online platform to initiate the process. The applicant selects the datasets to which they wish to apply for access from the dataset catalogue. The applicant does not even specify the data holder, but the dataset.[47]

[45] In a simplified procedure for access to health data from a trusted health data holder, the permit is issued by the HDAB on the proposal of the trusted data holder.

[46] Hoeren, Sieber Teil 16.8 18.

[47] Hoeren, Sieber Teil 16.8 24.



The HDAB's task is to contact the data holder.[48] The HDAB assesses the application and, if necessary, requests additional information from the applicant. The HDAB evaluates the application and request based on principles of data minimisation and purpose limitation. The HDAB ensures that access is granted only to data that is adequate, relevant and limited to what is necessary for the purpose outlined in the application.[49] If the application meets the regulatory requirements, the HDAB issues the data permit.

For a data permit, the HDAB fulfils its obligation by providing access to the data user in an SPE. The data user can only access and process the data through authorised natural persons approved by the HDAB and listed in the data permit. The SPE enables the HDAB to control and monitor the use of the data, meaning that every action performed by authorised individuals is logged and can be traced by the HDAB. The medium remains under the HDAB's control, preventing unauthorised copying or transfer of the original data from the SPE. Only non-personal electronic health data which do not contain any personal electronic health data should be downloaded by the health data users from such an SPE.[50]

In the case of an approved data request, the anonymised data in statistical format is transferred directly to the data user by the HDAB. This type of data is associated with a low risk of re-identification, so it does not require processing within a controlled environment. In this scenario, the HDAB transfers full control of the data to the data user. Furthermore, the data user is solely responsible for implementing the safeguards outlined in the data request to prevent any misuse of the data. Once transmitted, the data is entirely under the data user's control, allowing them to process, copy, modify, or transfer it.

48 If the application concerns data located in multiple Member States, the HDAB will contact the HDAB of the relevant Member State via the HealthData@EU service in order to fulfil the data request (Article 75).

49 EHDS Article 66(1).

50 EHDS Recital 77.

One of the most significant obligations of data users in the EHDS mechanism is that they must publicly disclose the results or outputs of secondary data use, including information relevant to healthcare provision, within 18 months of completing the data processing. By publishing the results, the data user demonstrates that the use of digital health data according to the EHDS mechanism has fulfilled the purpose outlined in the data permit and has ultimately contributed to the benefit of European society.

The data access process is illustrated in the figure on page 130.

4 Enforcement

According to the EHDS, data holders are obliged to make their data available to the HDAB.[51] If a data holder withholds the requested health data from the HDAB or fails to meet the deadline, the HDAB will enforce compliance. In cases of non-compliance or delays, the HDAB may impose periodic penalty payments or exclude the data holder from the system.[52] Additionally, or as an alternative to these enforcement measures, the HDAB may impose administrative fines.[53] Ultimately, the secondary use of health data is a right of the data user and an obligation of the data holder. The goal of the EHDS is to ensure the availability of electronic health data held by any entity within the European Union with a high level of certainty while at the same time upholding private interests in data protection and data subject to intellectual property protection or confidentiality. To achieve this equilibrium between individual and collective interests,[54] EHDS treats data requests as official matters and applies coercive measures to ensure compliance in a centralised procedure subject to administrative control.[55]

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51 EHDS Article 60(2).

52 EHDS Article 63 and 64. During the period of the exclusion, the data holder remains obliged to make their data accessible.

53 EHDS Article 64.

54 Valentina Colcelli, Roberto Cippitani, 'Circulation of Personal Data and Non-Personal Data within the European Research Area for Research and Health Purposes' (2023) 11 (2) Journal of Open Access to Law 17.

55 F. Casarosa and F. Gennari.

VI Data permits versus data contracts[56]

1 Data contracts

The EHDS applies to electronic health data held by both public and private sector bodies without hindering or replacing contractual arrangements or other existing mechanisms. The regulation does not affect access to electronic health data for secondary use as agreed upon within the framework of contractual or administrative decisions between public or private sector entities.[57] The EHDS will therefore not exclude or prohibit data users from obtaining electronic health data under other legal frameworks. Namely, the EHDS mechanism will not be the exclusive legal framework for sharing health data.[58] If, for example, concluding a data license agreement is burdensome for a data requester and its purposes of use are in line with the EHDS, the EHDS mechanism is an alternative solution.[59] Data users will have the opportunity to choose between the EHDS mechanism and other legal relationships to access electronic health data on the data market. They may apply for health data through the EHDS mechanism and enter into an administrative legal relationship with the HDAB, or they may enter into a contract with the data holder. The data requester must consider several aspects when choosing which path to take.

As mentioned above, the legal framework for data sharing in the data economy varies depending on which party's law is applied. In most legal systems, atypical contracts are concluded with regard to digital data, for which the method of analogy is applied. This approach is also reflected in the ALI-ELI Principles,[60] the jointly conducted project by the American Law Institute and the European Law Institute. The ALI-ELI Principles provide model agreements and provisions on the subject of digital data to be used voluntarily by parties. They are designed to promote the harmonisation of existing legal concepts in the data economy.[61] The principles facilitate the drafting of data contracts by providing default rules.[62] The ALI-ELI Principles distinguish nine types of contracts based on their subject

56 The EHDS defines only the data permit as an administrative decision. Although the EHDS does not mention the data request among the definitions, it is also an administrative decision, given its regulation in the EHDS, which is based on the data permit rules. Hereinafter, a data permit should also be understood as a data request.

57 EHDS Recital 52 and Article 1(8).

58 EHDS Recital 52.

59 Claudia Tessenow, Christian Teichter, Bernard Ziesche, Internet of Medical Things (IoMT): Was bedeuten Data Act und European Health Data Space (EHDS) im Kontext des Post-Market Clinical Follow-up (PMCF)? (2025) (55) Medicina Produkte Recht 64.

60 The Principles for a Data Economy (Data Transactions and Data Rights).

61 The scope of the ALI-ELI Principles covers all aspects of the value chain in the data economy. They provide different types of model data contracts, establish a legal framework for data rights, and include model rules for third-party aspects in the value chain.

62 The Principles for a Data Economy (Data Transactions and Data Rights) Principle 1.

matter, including contracts for the transfer of data, contracts for simple access to data, contracts for the processing of data, and data trust contracts.

Within the EHDS mechanism, the HDAB provides data without any added value, such as analysis or other services. However, this does not mean that raw data is provided to the data user as it exists at the data holder. Only anonymised or pseudonymised data can be provided to the data user, along with anonymised data in statistical format. Furthermore, only data that meets the purpose defined by the data user and does not go beyond what is necessary to achieve this purpose may be made available to them. In order for these requirements to be met, the data holders or the HDAB must first sort, aggregate, anonymise, etc., the data. In this sense, the data is processed to a certain extent, but this does not mean added value in the classical sense, since this processing is carried out in order to comply with the requirements prescribed by the regulation. In other words, the information transmitted by the data must be extracted from the data by the data user through the data processing activity they perform (eg, analyses, AI training, construction of longitudinal patient health histories).

The EHDS is clear regarding the content of accessible data: the data user is not allowed to download the accessed data directly from the SPE. Only non-personal data, including anonymised statistical data, can be downloaded.[63]

According to Principle 7 of the ALI-ELI Principles, a contract for the transfer of data is a transaction in which the supplier[64] undertakes to put the recipient[65] in control of specific data by transferring it to a medium under the recipient's control or by delivering a medium on which the data is stored. According to Principle 8, a contract for simple access to data is one in which the supplier undertakes to provide the recipient with access to specific data on a medium controlled by the supplier, without transferring control. This includes contracts where the supplier allows the recipient to read the data and enables them to process or transfer data within the medium controlled by the supplier. The difference between the two types of contracts is in the characteristics of the service. In the case of data transfer, the usual elements of a sale contract are primarily present (eg transfer of control over data). In the case of providing access to data, the recipient does not receive the data itself, but only access to it. In most jurisdictions, the closest analogy would be a service contract, where the primary service is granting access to data. If the contract includes elements of downloading and transferring non-personal data or derived or inferred data, it may also resemble a contract of sale or lease. The greater the portion of data the recipient is allowed to transfer, the more the transaction resembles a contract for the transfer of data, making it closer in effect to a sales contract.[66]

63 EHDS Article 73(2).

64 Data holder, as defined in European Union terminology.

65 Data user, as defined in European Union terminology.

66 The Principles for a Data Economy (Data Transactions and Data Rights) Principle 8.

Compared to the EHDS mechanism, a data permit, according to its content, closely resembles a contract for simple access to data but contains elements of contracts for the transfer of data. However, with the approval of the data request, the data in statistical format will be transferred to the data user, which is similar to a contract for the transfer of data.

From a formal point of view, a data permit is significantly different from a data-sharing contract, as the data holder cannot choose the applicant or the entity submitting the data request, which could even be a direct competitor.[67]

2 Liability

In the EHDS mechanism, only the HDAB and the data user are in a direct legal relationship. However, *liability issues* may arise from different aspects beyond this relationship. A significant difference between a data contract and this administrative relationship is the lack of control power held by the data holder and the pivotal role of the HDAB.[68] In a contractual relationship, the data transaction typically involves only the data holder (as the supplier) and the data user (as the recipient). In a contract for access to data, only the data holder is liable for performance. In the EHDS mechanism, the applicant may consult the HDAB and, indirectly, the data holder or, directly, if the data holder is designated as a trusted data holder. The HDAB, along with relevant data holders, should assist applicants in selecting suitable datasets or data sources for their intended purpose.[69] Based on these provisions and interpretations, negotiations may occur between the three relevant parties. The HDAB should have the necessary expertise[70] to provide support, and if it does, it assumes full liability for ensuring that the dataset fits the applicant's purpose. Data holders are liable only for ensuring that the dataset conforms to the description provided in the dataset catalogue. In the network of legal relationships created by EHDS, the responsibility of data holders does not exist within the framework of the legal relationship established with the data user. The HDABs are responsible for monitoring and supervising the compliance of both data holders and data users with the regulation's requirements, including ensuring the conformity of datasets for secondary use and the compliance of the data permit by the data users. If they do not comply with the EHDS, they may be subject to administrative penalties.

Data users have the right to lodge a complaint with the HDAB if their rights or interests are negatively affected.[71] Under this provision, data users may also lodge complaints regarding dataset non-conformity. Since the data user can only submit his complaint to the HDAB, it is the obligation of HDAB to have the data holder correct the incorrect or incomplete

67 Vanderhaeghe.
68 Vanderhaeghe.
69 EHDS Recital 73.
70 EHDS Article 55(2)(b).
71 EHDS Article 81(1).

dataset. In other words, HDAB is responsible to the data user to fulfil the data user's warranty claims. To this end, the EHDS provides administrative enforcement tools to the HDAB as mentioned above. However, the EHDS does not explicitly contain these rules regarding the data user's warranty claims, but an administrative supervision and control system ensures the fulfilment of the data user's claims in the event that the data holder (or the HDAB) does not fulfil its obligations specified in the EHDS.

The regulation only provides brief guidelines on the complaint process and decision. The HDAB informs the data user about the progress of proceedings and the final decision, but no further procedural details are outlined. It is unclear where the burden of proof lies. Since the issuance of a data permit involves an administrative decision, complaints regarding its content must also be resolved through administrative procedures, which vary by Member State law. If rectification is required, the process is unclear, raising concerns about how non-conformity or performance deficiencies will be resolved by the HDAB or the data holder.

This way, the liability is shared by the data holders, data users and the HDAB. The impact of this shared responsibility on potential non-compliance remains to be seen. However, it can already be stated that the balance of power between the parties is not equal, as the HDAB appointed by the Member States has the most decision-making power.[72]

Without uniform, standardised criteria, the assessment on which the HDAB bases its decision may lead to different results in different Member States. In order to create a single European data market, it is absolutely necessary to create uniform legal, theoretical and political criteria on which the HDABs can base their decisions. Since HDABs are public bodies, the political dependence of HDABs on the current governments of the Member States may also arise.[73]

Liability issues may be more complicated if the HDAB assessing the application also makes a decision on the access to data of data holders from other Member States, particularly if the data application concerns data falling under the jurisdiction of several states.

3 Operator of the SPE

The HDAB provides access to data in an SPE, allowing it to control access and monitor data usage by the data user. Within this controlled environment, the HDAB or the data holder retains full control over data access at all times.[74] The SPE may be operated by the HDAB, the data holder, or an independent service provider. The HDAB has the authority to monitor and regulate data usage by the data user for up to 10 years.[75] Over this period, the HDAB, the data user and the SPE provider will hold rights and have obligations towards each other.

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72 Ryan, Gürtler 26.

73 Musidlowska.

74 EHDS Recital 77.

75 The duration may be extended once in a period which does not exceed 10 years – EHDS Article 68(12).

However, the exact nature of these legal relationships is not yet well-defined. An independent provider is likely not subject to the data permit, but the HDAB can only fulfil its role if it has full access to the data and its associated logs. The data user may designate the SPE, making them responsible for concluding a contract with the service provider, paying the associated processing fees and ensuring the HDAB retains control over data access through contractual provisions. The outline of this agreement will remain subject to negotiation by the parties, as the EHDS does not provide further provisions.

4 The other route

The EHDS will provide one option for health data access in the European Union, but only for public interest purposes. For commercial purposes, such as marketing, data users may still enter into contracts with any data holder. For example, if a data user intends to increase the sales of a healthcare product and requires in-depth analysis to make marketing decisions, they may negotiate and conclude data contracts with health data holders to obtain digital health data. If the HDAB rejects an application, the data applicant still has the option to rely on freedom of contract and procure digital data from the data economy. In this case, however, the data user's right to access the data can only arise based on the joint contractual will of the parties.

VII Potential impacts of mandatory data sharing

1 Public control over health data held by private data holders

Mandatory data sharing raises legal concerns for private data holders. The scope of the EHDS covers the electronic health data categories set out in Article 51, held by data holders as defined in Article 2(2)(t), with exemptions provided in Article 50 for natural persons and microenterprises. Among others, data holders include all legal persons developing products or services intended for the health, healthcare, or care sectors, as well as those developing or manufacturing wellness applications. Private sector data holders are obligated to share their data under an administrative decision enforceable by the authorities of the Member States. Moreover, even based on a decision by an authority of another Member State, if the data application concerns data falling under the jurisdiction of several states.

If data are considered resources in the data economy, enforced sharing by public authorities means that health data holders' control and sovereignty over the data they produce, collect, and use for analysis and predictions will be restricted. It will no longer be the data holders' decision whether to keep their data or share it with other market players. The question arises as to whether forced data sharing enhances the competitiveness of the European Union more effectively than voluntary data sharing by the private sector.

According to the data strategy, the general principle should be to facilitate voluntary data sharing, and only in specific circumstances should access to data be made compulsory in sector-specific cases. This should occur only if a market failure is identified or can be foreseen, which competition law cannot resolve. Furthermore, the legitimate interests of data holders should be taken into account.[76] However, without regulation, private data markets prevent the full realisation of the social value of data.[77] Considering this, the circumstances of the healthcare sector in the European Union justify mandatory data sharing in the field of health. However, the rationale underpinning mandatory data sharing in the EHDS is not clearly specified in its preamble.

The fact that the data holder cannot choose the partner with whom it would share its data, nor the conditions and price according to which it would do this, is difficult to reconcile with the interests of economic operators.[78] Mandatory data sharing at a price fixed by authorities may erode willingness to invest in data collection and could lead to a negative response in terms of data supply.

2 The price of digital data

In an ideal situation, parties mutually agree on the price of data. In contract law, the parties have the right to negotiate and settle the price. However, due to the information paradox, the value of the information contained in the data is not known to the data user until they have access to it. If a particular item of information is of different value to economic agents, this asymmetry leads to both a non-optimal purchase of information at a given price and a non-optimal allocation of the acquired information.[79] This information paradox makes it difficult to agree on the price of data access during contractual negotiations.[80] Furthermore, a consensus-based price is only possible if there is no significant disparity in bargaining power between the parties in the data economy. SMEs are undeniably in a weaker position compared to big tech companies. In other words, the value of data shared on a contractual basis is influenced by several factors, which make it impossible to determine a 'single price' for the data.

Under the EHDS mechanism, the price of data is essentially the cost of making health data available for secondary use. This includes all or part of the cost associated with assessing the application, preparing and anonymising or pseudonymizing the data. The fees for data access and the processing of the data permit are non-negotiable between the parties, with one exception: the data user is required to pay the portion of fees related to the data holder's costs

[76] European strategy for data 13.
[77] Martens 2.
[78] Musidlowska.
[79] Kenneth Arrow, *Economic Welfare and the Allocation of Resources for Invention in The Rate and Direction of Inventive Activity: Economic and Social Factors* (Princeton University Press 1962, Princeton, NJ) 615.
[80] Josef Drexl, 68.

directly to the data holder. If the data holder and the data user fail to agree on the size of the fee, the HDAB may set the fee in proportion to the actual cost of making the data available. In the event of a dispute, both parties may seek resolution through a dispute settlement body established under the Data Act.[81] This rule partially overrides the administrative nature of the EHDS mechanism, allowing a limited negotiation of data access pricing. However, even in such cases, price negotiations remain restricted to marginal costs, meaning that this does not constitute a 'real' consideration freely negotiated by the parties. Furthermore, the data holders transfer the data collected and processed by them without receiving any benefits. The EHDS remuneration system is not suitable for balancing economic interests, thus completely ignoring the value of the data.[82] This may affect the interest of data holders regarding making the necessary investments to improve data quality, as they cannot expect to make a profit from utilising the data that is available as a resource.

3 Data availability

According to the EHDS, the HDAB must evaluate data applications based on the principle that the data requested is adequate, relevant, and limited to what is necessary for the stated purpose in the application. This principle is known as data minimisation.[83] Depending on how the HDABs interpret this principle, data minimisation may affect the market volume covered by data contracts. If data minimization is interpreted broadly and HDABs do not require disproportionate proof that the purpose of the data use can be achieved with less data, the value of data settled in data contracts may decrease, yet obtaining data through the EHDS mechanism may become a more attractive option for data users due to its ease and high certainty of access, legal certainty and low fees. Thus, the uptake of data access through the EHDS mechanism may be large compared to data access through contracts. For actors with less bargaining power (SMEs, start-ups, individual researchers, etc.), the EHDS may be a real solution. It will democratise data access, as opposed to data concentration, where data accumulates in large companies that can afford it.[84] However, in a narrower interpretation, data acquisition from the market through a data sharing agreement remains an option, because it may be easier for data users to obtain data on the data market, as there is no need to enforce the principle of data minimisation or prove that larger amounts of data carrying more information are needed. At the same time, the unequal market power of smaller players will persist, especially compared to that of large online platforms,[85] which the EHDS aims to reduce.

81 EHDS Article 62(4).
82 Tessenow, Teichter, Ziesche 65.
83 EHDS Article 66(1).
84 Gellérné 16.
85 Taeger, Pohle Teil 12: 120.5 Rn. 10, 11.

4 The value of datasets

Data holders are required to provide a description of their data, which must be reviewed annually to ensure that the dataset description in the national dataset catalogue is accurate and up-to-date. The description should be provided in the form of metadata, and each dataset must include information regarding its source, scope, main characteristics, and the nature of the health data contained within it.[86]

The regulation establishes a framework for data quality. Datasets may be denoted by a Union data quality and utility label,[87] which is applied by data holders. The data quality and utility label describe the dataset's quality and usage conditions in the form of a graphic, including a rating scale.[88] Through self-assessment by data holders, this quality framework assists data applicants in identifying appropriate datasets for their purposes as specified in their data access applications. These standardised elements provide an overall picture of a dataset. The standardised elements and labels at the European level help *mitigate the risk of information asymmetry* for data users. Moreover, having a standardised data quality system may contribute to a common assessment of dataset value, potentially leading to the establishment of a measurable valuation for digital datasets as assets.

The HealthData@EU platform will serve as a 'pool' of dataset catalogues, likely providing a comprehensive map of existing health datasets within the European Union. These dataset catalogues will not only serve as a starting point for launching data applications within the EHDS mechanism, but they will also offer a detailed repository with comprehensive metadata and all necessary information about the data holder. This transparent landscape of digital health datasets in the whole European Union may have a significant impact on the data economy and could act as a catalyst for parallel mechanisms, such as helping data users identify suitable datasets and data holders without incurring additional costs.

VIII Summary

The EHDS introduces a range of new terminology, processes and relationships. In seeking to balance data protection with the growing demand for data sharing in the data economy, it establishes a mandatory data-sharing mechanism with detailed and strict safeguards to protect personal health data. The EHDS represents a significant intervention in the relationships between parties in the data economy, aiming to address market failures. The European Union

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[86] EHDS Article 77(1).

[87] Except for datasets collected and processed with the support of Union or national public funding – EHDS Article 78(2).

[88] EHDS Article 2(2)(z) and 2(2)(aa).

legislator has recognised that granting access to data without additional conditions imposed by data holders is only achievable through a mandatory administrative process.

This article aims to present the legal characteristics of data in relation to the EHDS mechanism, as the fundamental elements of the health data space being built, in comparison with market practices commonly found in the data economy. It also analyses the role, responsibility and advocacy ability of the actors within the EHDS mechanism.

The EHDS obliges not only public sector data holders, but also private data holders to share their health data, which represents a form of public control over privately held health data. Through making digital health data held by the private sector publicly available, the European Union integrates all digital health data into a single health data market. The EHDS justifies this intervention in the data economy by asserting that private-sector data should be accessible only when it serves the general interest of society. However, the content of general interest to society remains unclear.

The EHDS does not encourage but rather obliges data sharing, thereby deeply interfering with previously negotiated data sharing agreements between actors in the health data market through official means. At the same time, regarding the rules governing the legal relationship between data holders, the HDAB, data users and SPE operators, the regulation does not provide sufficient answers to questions that could be resolved through data contracts. Such problematic points are the issue of liability between the actors, liability for warranty and the lack of legal regulation of data as a resource for data producers.

Perhaps one of the biggest positive impacts of the EHDS is the creation of an EU-wide map of datasets, which, based on standardised assessments, will enable data users to obtain cost-effective and reliable insight into the health data market.

The other major outcome is expected to be that access to data will promote data sharing across the European Union to such an extent that economic operators can gain significant experience, develop good practices, and develop secure data sharing practices.

In summary, the legal nature of digital data and the absence of a uniform legal assessment create uncertainty in data flows. The mandatory data-sharing regime introduced by the EHDS, with its administrative legal character, may add to this uncertainty by introducing a new type of legal relationship into the European Union. The EHDS demonstrates that establishing a uniform EU legal framework for digital data, as both an object of circulation and a key component of the data economy, appears essential for the harmonised functioning of the EU data economy.

Zoltán Juhász*

About Legal Culture: Main Theories and Their Consequences

Abstract

The terminology of legal culture has been widely used in both common language and jurisprudence over the last few decades without its actual meaning being defined. Almost everyone agrees that the concept of legal culture is undefined and vague. Giving a brief and concise definition is not possible in jurisprudence, as the term refers to several concepts. This study tries to present the essence of some basic theories in connection with legal culture and argues that adopting an approach on the basis of legal culture creates more advantages than disadvantages in jurisprudence. It tries to summarise and review the key findings of the published literature on this topic. Consequently, this article aims to provide a theoretical overview. It is useful to periodically evaluate the progress that academic discourse has made in clarifying the meaning of a contested concept. The paper begins by clarifying the concept of culture, the complex meaning of which gives rise to the even more complex concept of legal culture. The starting point is actually Lawrence M. Friedman, who first introduced the modern concept of legal culture in a book in 1975. A brief summary of Friedman's ideas is provided, alongside a systematic critique by Roger Cotterrell, who developed his own conceptual approach, too. This is followed by a section on the widespread use of the concept of legal culture. Although the term is popular, users always define it slightly differently and attribute their own meaning to it. However, the common thread is that the use of this concept emphasises the study of law as a social phenomenon. From a philosophical point of view, it is possible to recognise that cultural relativism and culturalism can lead to theoretical and methodological problems. However, the conclusion is that the careful and well-founded use of this concept in research has more advantages than disadvantages. This finding is reinforced by an illustration of its application in the fields of legal sociology and comparative legal studies. The conclusion of the majority of the reviewed literature is that when applied correctly, legal

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culture is an effective tool for analysing law. It is a valuable resource for legal studies, the sociology of law, comparative law and legal history. As the examples demonstrate, legal culture can also provide a foundation for empirical research. At an analytical level, legal culture can be used to break down the complex social phenomenon of law into elements that can be effectively examined, either theoretically or empirically, through appropriate conceptualisation and operationalisation.

Keywords: culture, legal culture, sociology, legal sociology, comparative law, analysis of law

I Introduction

The terminology of legal culture has been widely used in both common language and jurisprudence over the last few decades without its actual meaning being defined. While in 'common language' this deficit has not necessarily caused any problem – although there may have been misunderstandings, of course –, serious disputes have taken place regarding the meaning and applicability of the term 'legal culture' in the field of law and in jurisprudence. It is no coincidence that a huge effort has been put into clarification, as the concept of legal culture offers the promise of being able to analyse a complex social phenomenon: the law. Moreover, not only does it seem capable of helping to create holistic 'grand' theories in the sociology of law, but it can also be applied to the more specific fields of jurisprudence (and even to the analysis of particular legal institutions).

Unfortunately, almost everyone agrees that the concept of legal culture is undefined and vague. Giving a brief and concise definition is not possible in jurisprudence, as the term refers to several other concepts.

This article, therefore, draws its conclusions based on a review of recent and relevant literature on the issue of whether the concept of legal culture makes a useful contribution to legal studies (eg the sociology of law and comparative law). The main objective of this paper is to provide an answer to the previous question based on a presentation and evaluation of authoritative authors' views. The cited articles also provide examples of different interpretations and ways of answering the above question. The intention is to trace the emergence, spread and evolution of this scholarly concept.

It is fruitful to summarise and review the key findings of the recently published literature on this topic. Consequently, this article aims to provide a theoretical overview. It is useful to periodically evaluate the progress that academic discourse has made in clarifying the meaning of a contested concept. This notion is special in that it can serve as both a theoretical framework and an approach to help formulate comprehensive explanations (eg of a legal system as a whole, of the similarities and differences of entire legal systems around the world, of a legal institution, or of legal transplantation), as well as being a basic concept that can be the starting point for empirical studies. Of the vast number of relevant publications, I have focused on those that I consider to be essential.

The study begins by clarifying the concept of culture, the complex meaning of which gives rise to the even more complex concept of legal culture (Section II). The starting point is actually Lawrence M. Friedman, who first introduced the modern concept of legal culture in a book from 1975. I will provide a brief summary of Friedman's ideas alongside a systematic critique by Roger Cotterrell, who developed his own conceptual approach at the same time (Section III).

This is followed by Section IV on the widespread use of the concept of legal culture. Although the term is popular, users always define it slightly differently and attribute their own meaning to it. However, the common thread is that the use of this concept emphasises the study of law as a social phenomenon. Authors have examined legal culture as a complex social concept which can be disaggregated by analysis into a number of elements that can be further explored. David Nelken's work is outstanding. He has examined the issue from many angles and concluded that it is useful to employ this concept in a well-defined manner. Others highlight the problems and suggest using other concepts instead, such as tradition (or, as Cotterrell suggests, the notion of legal ideology). From a philosophical point of view, it is possible to recognise that cultural relativism and culturalism can lead to theoretical and methodological problems. However, the conclusion is that the careful and well-founded use of this concept in research has more advantages than disadvantages.

This finding is reinforced by its application in the fields of legal sociology and comparative legal studies (Section V). In the first case (Section V1), I cite an example of the characteristics of Dutch legal culture. Then, referring to the concept of 'culture shock', I analyse the clash between Western (civil and common law) legal cultures and Islamic legal culture resulting from migration. The significant explanatory power of the concept of legal culture is evident here. In the second case (Section V2), I address the inconsistencies in the use of legal culture in comparative legal studies. I start with the study by Balázs Fekete and summarise his article's suggestions for using the concept in legal comparison. The conclusion also emphasises that, with methodological awareness and precise definitions, legal culture can be effectively applied in post-functionalist comparative law. I then demonstrate how useful legal culture is in clarifying the characteristics of post-socialist legal systems in Eastern Europe (or in Central and Eastern Europe).

The evaluation of the literature here summarised, which also highlights the importance of clear, careful and precise conceptual definitions, creates the basis for the main points of the assessment (Section VI) and the conclusion (Section VII). In essence, according to these sections, when applied correctly, legal culture is an effective tool for analysing law. Its ambiguity is precisely its advantage, as scholars can adapt it to their own research with careful work, using it as a conceptual framework or basis. It is a valuable resource for legal studies, the sociology of law, comparative law and legal history. Furthermore, legal culture can also provide a foundation for empirical research.

At an analytical level, legal culture can be used to break down the complex social phenomenon of law into elements that can be effectively examined, either theoretically or empirically, through appropriate conceptualisation and operationalisation. This seems to be the conclusion of the majority of the reviewed literature, which argues that using the concept of legal culture is associated with more advantages than disadvantages in legal scholarship. At the same time, we should not hide the difficulties that can lead to fundamental philosophical questions. Discussion of the concept itself seems to promote its application in concrete research, even if this is only tentative in many case studies.

In my opinion, such an overview is useful in itself as it provides a summary of the discourse for use in further discourse.

II Culture and legal culture

The first appearance of the term 'culture' in its present-day meaning is linked to Cicero, since the concept of culture comes from the Latin verb *colere*, which means cultivating. Cicero, however, used the term *cultura animi* (cultivation of the soul) in his work *Tusculanæ disputationes* (in the first century BC).[1] The meaning of the concept has changed in line with various academic trends and schools in different countries throughout the years. For example, some researchers have contrasted the expression culture with civilisation, thus examining the differences between the uses of the notion of culture and civilisation in Great Britain, France and Germany. The different content of the different meanings has reflected different historical traditions. The meaning of the term 'culture' has thus been approached from many perspectives recently.[2]

Social researchers (eg sociologists) use the concept of culture in a broad sense. In this sense, culture is a complex notion that contains the following elements: the institutions, values and the experiences of a given society. The concept of culture thus encompasses a set of symbols, processes and values that are inherited from generation to generation.[3]

The concept of culture includes material and intellectual work and the habits and lifestyles of societies or social groups – the distinctive features of a group of people. Culture, therefore, means common, learned, symbol-based and interrelated systems of behaviour and mentality. The symbol system that mediates culture primarily is language. The capacity for culture is an innate property of humans, which manifests itself in various forms during the socialisation process. The term 'culture' may indicate the specific process of mental, spiritual and aesthetic development or a particular lifestyle of a social group, a nation, a historical era,

1 Raymond Williams, 'Kultúra' [Culture] in Anna Wessely (ed), *A kultúra szociológiája* [*The sociology of culture*] (Osiris – Láthatatlan Kollégium 1998, Budapest) 28–32.

2 Wessely, 'Előszó: A kultúra szociológiai tanulmányozása' [Foreword: The sociological study of culture] 7–27.

3 Péter Niedermüller, 'A kultúraközi kommunikációról' [Intercultural communication] in István Béres, Özséb Horányi (ed), *Társadalmi kommunikáció [Social communication]* (Osiris 1999, Budapest, 96–113) 98–102.

mankind, and, moreover, the practice and creations associated with intellectual and artistic action. In analysing these phenomena, we can distinguish between elite and mass culture, and we must consider the existence of different subcultures: behavioural patterns and values that are different from the majority.[4]

It is also worth considering some other conceptual interpretations, such as that of David Nelken, who refers to culture as a '…fluid, contested and changing set of values and practices…'[5] I could also quote T. S. Eliot, who employed vivid examples to illustrate the concept: 'Culture includes all the characteristic activities and interests of a people: Derby Day, Henley Regatta, Cowes, the twelfth of August, a cup final, the dog races, the pin table, the dartboard, Wensleydale cheese, boiled cabbage cut into sections, beetroot in vinegar, nineteenth century Gothic churches and the music of Elgar.'[6]

Since the meaning of culture has proven to be so obscure, unclear and generic, we face a bigger challenge when creating a new concept: legal culture. According to Susan Silbey, the concept of legal culture is positioned between law and culture, with open boundaries in both directions. In her opinion, some confusion has arisen due to the '…intermingling of two meanings of culture. One meaning refers to a particular world of beliefs and practices associated with a specific group. The second meaning is analytical rather than empirical, referring to social analysis – an abstracted system of symbols and meanings, both the products and context of social action.'[7]

III Two 'classic' approaches and a remark

One of the classical and committed defenders of the application of legal culture is Lawrence M. Friedman. According to him, the most commonly defined meaning of legal culture is the ideas, values, expectations and attitudes towards law and legal institutions that a community or part of it shares.[8]

Based on his theory, the concept of legal culture analytically highlights the implicit and tacit social interactions that determine the relationship between the legal system and society. At the same time, it helps to describe how people understand, perceive and interact with the legal system (introducing the following related concepts: legal knowledge, legal awareness

4 Zoltán Fleck, *Szociológia jogászoknak* [*Sociology for lawyers*] (Napvilág Kiadó 2004, Budapest) 219.

5 David Nelken, 'Legal Culture, Transnational Legal Processes and Conformity' in Péter Cserne, István H. Szilágyi, Miklós Könczöl, Máté Paksy, Péter Takács, Szilárd Tattay (eds), *Theatrum Legale Mundi* (Societas Sancti Stephani 2007, Budapest, 303–320) 304.

6 Thomas Stearns Eliot, *Notes Toward a Definition of Culture* (University Press Glasgow 1954, Glasgow) 31.

7 Susan S. Silbey, 'Legal Culture and Cultures of Legality' in Hall J. R., Grindstaff L., Lo M.-C. (eds), *Handbook of Cultural Sociology* (Routledge 2010, London – New York, 470–479) 470.

8 Lawrence M. Friedman, 'The Concept of Legal Culture: A Replay' in David Nelken (ed), *Comparing Legal Cultures* (Routledge 1997, Dartmouth-Brookfield, 33–40) 34.

and behavioral patterns related to legal system). These include judgements about the fairness, legitimacy and utility of law.[9] These behavioural patterns and attitudes and their extent are perceptible within a population and vary from one group or state to another, so – Friedman says – it is possible to speak of legal culture(s) of groups, organisations and states.[10] Additionally, Friedman distinguishes between the internal legal culture of professionals working within the legal system and the external legal culture of citizens interacting with the legal system.[11] He argues that legal culture is measurable using certain indicators in connection with descriptive sociological notions (eg attitude, legal consciousness) with empirical methods.[12]

Roger Cotterrell, however, believes that Friedman's theory is inaccurate and contains a lot of uncertainty. In his view, Friedman's theory takes into account two incompatible things at the same time: ideological content, such as the attitudes and values of a group of people towards the legal system and the practice of human actions in connection with the legal system. He considers Friedman's definition of legal culture to be too general, covering many elements far from each other, so the theory loses its significant and substantial explanatory power. Friedman's approach to legal culture is problematic because it is not verifiable with the methodology of legal sociology (empirical research). According to Cotterrell, the elements of Friedman's theory belong to legal ideology rather than legal culture. The latter can be used if we examine the well-defined, separable and determinable set of social phenomena from within a sufficiently narrow circle. This is a more limited, experiential, descriptive framework. Cotterrell believes that 'legal culture' should apply to precisely defined social phenomena and geographical areas. The rules of ethnography and cultural anthropology, laid down by classical researchers such as Bronisław Malinowski, must therefore be followed. Cotterrell also called attention to the fact that legal culture is a specific aspect of culture, involving viewing culture from a legal point of view and researching legally relevant elements in relation to the complex phenomenon of culture.[13]

It is important to point out that the use of the notion of legal culture was not a radical innovation, as elements of culture had already been taken into consideration in jurisprudence. Although the concept of legal culture has only been used by jurisprudence for a relatively short time, this does not mean that the factors that led to the use of this concept earlier were not taken into account.[14]

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9 Silbey, 471–472; Lawrence M. Friedman, *The Legal System: A Social Science Perspective* (Russell Sage 1975, New York) 193–194.

10 Friedman, *The Legal System: A Social Science Perspective* 194.

11 Friedman, *The Legal System: A Social Science Perspective* 223–224.

12 Lawrence M. Friedman, 'Is there a Modern Legal Culture?' (1994) 7 (2) Ratio Iuris 117–131, 118, DOI: https://doi.org/10.1111/j.1467-9337.1994.tb00172.x

13 Roger Cotterrell, 'The Concept of Legal Culture' in Roger Cotterrell (ed), *Law, Culture and Society: Legal Ideas in the Mirror of Social Theory* (Ashgate 2006, Aldershot) 81–96, DOI: https://doi.org/10.4324/9781351217989-6

14 Jørn Oyrehagen Sunde, 'Champagne at the Funeral – An Introduction to Legal Culture' in Jørn Øyrehagen Sund, Knut Einar Skodvin (eds), *Rendezvous of European legal cultures* (Fagbokforlaget 2010, Bergen) 11–28.

IV The diversity of theories and the difficulties of applicability

In fact, almost every social researcher who has dealt with the issue of legal culture has created their own concept about legal culture to enable their work with it, or at least selected one of the existing theories, which they applied to their own research. For example, Jan Winczorek referred to the many different theories in the title of his study, *Systems Theory and Puzzles of Legal Culture*. In his work, he listed twenty-one different attempts to define legal culture, including Friedman's, and then separately demonstrated the explanatory forces attributed by scholars to legal-culture-based approaches.[15]

Ali Acar examined legal-culture-based theories, starting with the situation of Turkey. He also described the positions of several scholars, including Friedman and Cotterrell. He emphasised the work of Hayrettin Ökeçesiz and Volkmar Gessner, who built their own approaches to legal culture from more elements. According to Acar, Gessner perhaps developed the most comprehensive framework for examining legal culture. He differentiated four areas: 1. legal norms, 2. decisions of the supreme court and the judiciary, 3. institutional actors (the courts and the administration), and 4. non-institutional actors (lawyers, citizens and economic companies). Legal and theoretical comparison can work in the first field. The examination involving the second field is legal comparison itself, and extending this to the third field, the operation of legal institutions can be compared. We can talk about comparing legal systems and legal cultures regarding the fourth field. Of course, it can be seen that the theory is concentrated on the comparison of legal cultures, but according to Acar, this framework encompasses all the relevant elements of legal culture; therefore, a complex result may be obtained from the consideration of all the features. In addition, this takes into account the essential elements of legal systems that should be used to map the legal culture of a given country.[16]

Why does Acar think it is so important to argue for the use of legal culture as an interpretative framework? The answer is surprisingly brief, and we can find it in the introduction and at the end of his study. He refers to the need to examine the Turkish legal system in this way, but he highlights just one of the features that should be analysed from the perspective of legal culture. According to him, the Turkish legal system is a specific Western-oriented legal system that was formed through the reception of foreign legal examples (the Civil Code followed a Swiss pattern and the Criminal Code followed an Italian pattern). In his view, the purpose of this process was to unite and unify the country, as non-Muslim social groups in the Ottoman Empire previously had their own traditional laws and dispute resolution procedures. However, the state building based on the one-nation conception

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15 Jan Winczorek, 'Theory and Puzzles of Legal Culture' (2012) 1 Archiwum Filozofii Prawa i Filozofii Społecznej 107–125, 107–108 <https://archiwum.ivr.org.pl/darmowe-artykuly/pl_004_7.pdf> accessed 1 December 2025.

16 Ali Acar, 'The Concept of Legal Culture with Particular Attention to the Turkish Case' (2006) 3 (2) Ankara Law Review 143–153, DOI: https://doi.org/10.1501/Lawrev_0000000036

abolished the validity of other 'legal systems' and developed a specific Western-type legal system. In the conclusions, he points out that during Turkey's preparations for membership of the European Union, it would be essential to analyse the legal culture of the country; in particular, the legal acquis required by the European Union. He also considers this research necessary, since the practical functioning of legislation has to be examined beyond its mere legal adaptation.[17]

David Nelken has studied the possibility of applying legal culture as a theory of interpretation in several studies from several perspectives. These studies have aimed largely at answering the question of whether there is any valuable benefit from legal culture approaches. Nelken did not fail to draw attention to Friedman's uncertainty in connection with the concept of legal culture. Namely, Friedman introduced the theory of legal culture into scholarly debates with great success, but his point of view changed, and he has recently described legal culture as an uncertain, confusing, abstract concept associated with serious difficulties. Perhaps he is uncertain about the usefulness of this concept in legal studies.[18]

Nelken summarised in his study (in 2014) a lot of doubts and difficulties he had about legal culture supported by abundant literature references, but he also stressed the possibilities of this approach at the same time and presented several examples of the use of legal culture as an interpretation framework.[19] He recalled in his writing that Friedman originally used the term 'legal culture' in a specific sense in an effort to demonstrate how social pressures and needs shape legal change and the development of law within a given legal tradition. However, others did not limit themselves and took advantage of the complex meanings of legal culture. Namely, the concept of legal culture can cover many issues and areas, thus it can be a productive – but controversial – framework.[20]

Based on various arguments for and against, it is a correct conclusion that the concept of legal culture can be useful for social research in the field of law due to its complexity, but it remains a controversial concept for the same reason. It might happen that different scholars, in different ways, elsewhere and otherwise, identify legal culture (eg some in legal habits, others in the style of reasoning of judges, while others in the function of institutions). Of course, this also affects where to draw the boundaries of the different legal cultures: should we distinguish between the law of states, customary law and the law of organisations, and so on? Can we also talk about a worldwide – global – legal culture that may conflict with the

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17 Acar 152–153.

18 David Nelken, 'Using Legal Culture: Purposes and Problems' in David Nelken (ed), *Using Legal Culture* (Wildy – Simmonds – Hill 2012, London, 1–51) 4; David Nelken, 'Thinking about Legal Culture' Legal Studies Research Paper Series 2014/33 King's College London Dickson Poon School of Law, 2, DOI: https://doi.org/10.1017/als.2014.15; Here, Nelken refers to Lawrence M. Friedman, 'The Place of Legal Culture in the Sociology of Law' in Michael Freeman (ed), *Law and Sociology* (Oxford University Press 2006, Oxford, 185–199) DOI: https://doi.org/10.1093/acprof:oso/9780199282548.003.0011

19 Nelken, Thinking about Legal Culture.

20 Nelken, Thinking about Legal Culture 5.

local legal culture (which may mean the legal culture of the legal order of the state)? These questions remind us of the plurality of law.[21]

Nelken's other article reviews the relevant literature well and explores '…what is assumed or asserted by given authors with respect to three key issues: the kind of facts that are thought to make up legal culture, the chosen approach within which the concept is deployed, and the normative aspects of the enquiry.'[22] He evaluates the literature widely and concludes that…

> Contributions to the field will be the more valuable the more they offer plausible accounts of why the facts they seek to explain or understand are best illuminated by the theoretical approach they have adopted and the values that guide their research. Whether the facts of legal culture are taken to be attitudes or consciousness or discourses has implications for the appropriate approach and methods to adopt (and vice versa). Moreover, because law is not just a matter of facts but also a matter of counterfactual expectations and aspirations, finding ways to grasp (and evaluate) these is more than just an explanatory task.[23]

The possibilities of application seem broad, but it is advisable to be cautious. On the one hand, the success of interpreting certain legal phenomena through legal culture is questioned in some cases. Thus, for example, it is refuted that the appearance of some kind of global legal culture is demonstrable in East Asia (based on the results of legal awareness research conducted in the second largest city in Thailand). Furthermore, many researchers explain the traditional marginalisation of lawyers, judges and legal disputes in Japan by pointing to politically established institutional barriers instead of the general characteristics of Japanese legal culture.[24] On the other hand, the elements of legal culture can be analysed individually, allowing us to obtain measurable 'sub-concepts'. However, this approach would then make it difficult to restore the 'unit' and draw general conclusions from it, as legal culture can mean everything and nothing at the same time.[25]

Still, the interpretation framework of legal culture can be used to arrive at serious scholarly explanations. Nelken says:

> The different ways of using the term, as cause or result, have also to be understood against the background of theoretical developments that have produced two rather different uses of the term culture. One, the so-called anthropological approach to legal culture, takes it to refer to patterns of law-related behaviour in given places or contexts as contrasted with other times or places. Here, the main task is explaining legal culture. The second approach is more

21 Nelken, Thinking about Legal Culture 1–51.
22 David Nelken, 'Comparative Legal Research and Legal Culture: Facts, Approaches, and Values' (2016) 12 Annual Review of Law and Social Science 45–62, 45, DOI: https://doi.org/10.1146/annurev-lawsocsci-110615-084950
23 Nelken, Comparative Legal Research and Legal Culture: Facts, Approaches, and Values 57.
24 Nelken, Thinking about Legal Culture 2–3.
25 Nelken, Thinking about Legal Culture 30.

> interested in uncovering the ongoing process of meaning making within a given society, as a way of studying legal consciousness (as well as getting 'beyond legal consciousness').[26]

In practice, of course, the interpretation of the legal culture chosen by the particular scholar for the research, as well as the empirical methods and measurements used for explanation, will determine the given explanatory power (and each method may miss something that is captured by another).[27]

For example, Nelken used the framework of legal culture to analyse the practical effectiveness of the 'Palermo Protocol to Prevent, Suppress and Punish Trafficking in Persons'[28] in different countries. This analysis, explicitly presented by the author as a case study, illustrates the potential benefits of such an approach and the importance of considering cultural diversity when examining the practice of law enforcement. Nelken also makes it clear that taking account of the legal culture will help us to understand the 'law in action' dimension of the legal system.[29]

Others warn that although it is indisputable that law and culture influence each other, it is not always easy to demonstrate this, and we would have to take too big a step away from law in the direction of culture in general. Therefore, Reinhard Zimmermann proposes the introduction of the concept of 'legal tradition' as a bridge connecting the concepts of law and culture. In his view, this term emphasises that the character of law and legal culture is something that is undoubtedly determined by history. Moreover, in this way, it is possible to avoid facing the complex and contradictory meaning of the concept of culture.[30] However, it should be noted that the word culture is, therefore, sometimes used synonymously with tradition.[31] Thus, the distinction is not so obvious.

There is one more point I must mention, which can lead to philosophical questions that relate to the possibility of cognition. This refers to the interrelated concepts of 'culturalism' and 'cultural relativism'.

First, it is questionable whether we can abandon our own culture; whether we can be impartial observers, or whether we always evaluate the world and other cultures (in this case, legal cultures) on the basis of the customary values of our own culture.[32] Of course, we may

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[26] Nelken, Thinking about Legal Culture 32.

[27] Nelken, Thinking about Legal Culture 33.

[28] Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, Dec. 15, 2000, 2237 U.N.T.S. 319.

[29] David Nelken, 'Human Trafficking and Legal Culture' (2010) 43 Israel Law Review 479–513, DOI: https://doi.org/10.1017/S0021223700000868

[30] Reinhard Zimmermann, 'Roman Law and European Culture' (2007) 2 New Zealand Law Review 341–372, 345–346.

[31] Peter de Cruz, *Comparative law in a changing world* (Cavendish Publishing Ltd. 1999, London–Sidney) 5, DOI: 10.1017/S0922156500220335.

[32] Nelken, Thinking about Legal Culture 6–9.

arrive at philosophical questions along this path, such as whether we know the world and whether the world is as we think.

András Karácsony also notes these difficulties in an extremely interesting short piece of writing. The most important point in terms of jurisprudence is the undeniable advantage of the cultural approach to the law. It can ensure a wider scope and the possibility of revealing new contexts. Nevertheless, we cannot ignore the fact that, despite all inconsistencies, the law is a normative system with authority over decision-makers.[33]

Second, in Karácsony's above-mentioned work, we can also read about the claimed disadvantageous consequences of a legal comparison based on legal culture, which can be collectively called cultural relativism. These views come from different philosophical traditions, including Ludwig Wittgenstein's linguistic philosophy. Cultural anthropologists and philosophers (such as Peter Winch) have formulated them. Accordingly, all conceptual and moral conceptions and views (as well as language and language usage) are culturally defined. From this point of view, there is no objective, experiential scholarship, nor are there universally valid moral bases. The culturally specific way of life of every society has its own unique value. The identity of a person is determined by their community traditions; for this reason, it is impossible to overcome the moral disputes between cultures using the concept of general human nature. The situation is rendered more complicated by the fact that existing societies are not culturally homogeneous – even in Europe – because they have different subcultures (partly due to migration) that can share mutually exclusive values and views.[34]

However, we would argue against cultural relativism that actually assumes the existence of a universal principle: that all cultures are equally valuable.[35]

The difficulties are evident, but we can apply the framework of legal culture to interpret and explain legal phenomena carefully and successfully. For example, we can attempt to approach and evaluate several aspects of various elements of legal culture, and then incorporate them into a more or less unified conceptual framework. All of this makes it easier to understand how some social groups (lawyers and non-lawyers) think about the law in a given society. Moreover, we can get an idea of how issues arise within the given legal system, how disputes are handled, how legal arguments are used, what values are attributed to law, when it is considered valid, why, and to what extent the laws are followed.

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33 András Karácsony, 'A jog mint kulturális jelenség' [Law as a cultural phenomenon] (2002) 3 Jogelméleti Szemle 3, <http://jesz.ajk.elte.hu/karacsony11.html> accessed 1 December 2025.

34 Cees Maris, Frans Jacobs, *Law, Order and Freedom: A Historical Introduction to Legal Philosophy* (Jacques de Ville tr, Springer 2011, Dordrecht–Heidelberg–London–New York) 327–331, DOI: 10.1007/978-94-007-1457-1; Karácsony.

35 Elizabeth M. Zechenter, 'In the Name of Culture: Cultural Relativism and the Abuse of the Individual' (1997) 53 (3) Journal of Anthropological Research 319–347, DOI: https://doi.org/10.1086/jar.53.3.3630957

V Instead of closing: Examples

1 The use of legal culture in legal sociology

As we have seen, legal culture as a concept of legal scholarship arose explicitly in connection with the sociological (or social theoretical) analysis of law. Lawrence M. Friedman in his classic book *The Legal System. A Social Science Perspective*, published in 1975, explicitly analysed the legal system using the methods of the sociology of law. As Balázs Fekete wrote: 'Indeed, this book can definitely be regarded as a symbolic […] starting point of the contemporary inclusion of the legal culture concept into legal scholarship.'[36] The analysis of law as a social phenomenon seemed to become easier with its help. Thus, the concept of legal culture is often used in the field of legal sociology. In the following, I will only refer to a few examples very briefly that clearly illustrate the usefulness of legal culture as an interpretative framework in relation to specific phenomena of law in a society (without going into the debates and views related to the subject and methodology of the sociology of law).

It can be noted that Wibo van Rossum's work highlights the application of the soft approach as the most important feature of Dutch legal culture. The essence of this is the communicative style, which considers persuasion more important than coercion or punishment. Therefore, in the field of law, there is also a perception that views law as an invitation to initiate a multipolar dialogue between parties of roughly equal standing, including state offices and mediating organisations (eg, trade unions).[37] This gives rise to fundamental principles, such as the principle of proper and fair public administration or the principles that pervade private law, such as the principle of reasonableness and, in general, the pragmatic and non-legal (non-legalistic) features of Dutch legal culture.[38]

A real understanding of Dutch legal culture, however, presupposes a certain amount of knowledge of Dutch history. For example, we must be aware of the features of political history in order to correctly interpret previous trends, which in turn reveal a close connection with Dutch social history. An example is the division of Dutch society into pillars, which meant that Dutch society was divided into different social groups horizontally on a religious basis and vertically according to socioeconomic factors between 1900 and the 1960s. Each pillar had its own values and beliefs (attitudes), which determined private life and work, but also who voted for which political party. Despite this social division, relative unity could be maintained by a flexible and tolerant political and legal system (*gedogen*, tolerance, is also a fundamental principle of Dutch legal culture). This is one of the reasons for the above-

[36] Balázs Fekete, 'Inconsistencies in the use of legal culture in comparative legal studies' (2018) 25 (5) Maastricht Journal of European and Comparative Law 551–564, DOI: https://doi.org/10.1177/1023263X18796978

[37] Wibo van Rossum, 'Dutch Legal Culture' in Jeroen Chorus, Ewoud Hondius, Wim Voermans (eds), *Introduction to Dutch Law* (5th edn, Kluwer Law International BV 2016, The Netherlands, Ch. 2) 17.

[38] Van Rossum 18.

mentioned peculiarities and other characteristic features of the Dutch legal culture. Among these, the *polder* model can be highlighted, which refers to a mentality that seeks to ensure the achievement of regulatory goals through agreement, with a strong emphasis on the enforcement of mutual trust, or *beleid*, which means the application of specific policies in such a way that the viewpoints of all those affected also find an audience.[39]

Van Rossum also draws attention to the contradictions of the specific Dutch legal culture. According to him, it is difficult to draw an unequivocal conclusion concerning drug-related policy according to these principles, as the available data are contradictory (the results so far cannot be considered either definitely positive or definitely negative).[40] In light of this, the Dutch example does not support the position of those who argue in favour of drug liberalisation. Similarly, the evaluation of the settlement of legal situations related to euthanasia is not clear.[41] Moreover, the principles at the centre of Dutch legal culture can also fail – for example, when a firework factory exploded in the city of Enschede, with the overly tolerant and flexible (one could say forgiving) preventive approach of the authorities contributing to the accident. An example of the same is the fire that occurred on New Year's Eve 2001 in an overcrowded nightclub in Volendam, in which 14 young people lost their lives and more than two hundred were injured. There were no adequate emergency exits, and the place did not even have an operating license, but it was still able to continue its activities. It is no coincidence that there is debate around the aforementioned central guiding principle of the Dutch legal culture, the soft approach, and related principles such as administrative tolerance.[42] Although such cases may also occur in other legal systems, which in different legal cultures can be evaluated simply as the omissions of public administration bodies, Van Rossum's examples aim to draw attention to the excessive application of the core principles of Dutch legal culture, which can have serious adverse consequences.

The peculiarities of different legal cultures are most striking when they come into conflict with each other in some way. This can happen, for example, when Western people unexpectedly (for instance, as tourists) experience a legal procedure that is in stark contrast to the principles of Western law that they more or less know. The opposite of the legal principles rooted in different cultures is a trauma for them; they do not understand, perhaps they cannot understand the specific features of the given legal rules, and they are hit by culture shock.[43]

In this field, Western countries and their populations have faced a more significant issue in recent decades: international migration. As a result, people from diverse legal cultures have begun to appear in greater numbers within their respective legal systems. Moreover, in some

39 Van Rossum 19–23.
40 Van Rossum 23–26.
41 Van Rossum 26–28.
42 Van Rossum 29–31.
43 Concise definition of culture shock: 'Culture shock' Merriam-Webster.com Dictionary, Merriam-Webster, <https://www.merriam-webster.com/dictionary/culture%20shock> accessed 1 December 2025.

cases, legal regimes based on completely different legal cultures have emerged in practice alongside national legal systems. The reason for this may also stem from the specifics of the different legal culture itself: for example, Sharia law is based on the principle of personal scope, thus in principle it covers all Muslim persons, wherever they live. So, this different legal culture requires validation and practical implementation. For example, cases related to the wearing of the veil have been generating controversy in France for a long time.[44] But in practice, many other legal cases can occur that justify the importance of legal culture. In Sweden, for example, in one case, the first-instance criminal court considered the different cultural background of a Kurdish immigrant from Iraq when it only imposed a suspended sentence and a fine for assaulting, coercing and threatening his pregnant ex-girlfriend, as opposed to the judicial practice of imposing a prison sentence to be served in similar cases. Social debate developed in connection with the verdict, and the second-instance court finally imposed a two-month prison sentence. In the United Kingdom, a serious political and legal dialogue has started about whether certain elements of Sharia law should be incorporated into the legal system, and to what extent they should be considered. For example, what role can the emerging quasi-courts acting based on Sharia law play in the legal system of the United Kingdom?[45]

On this last question, a rather lively debate has been taking place. In practice, these 'Sharia councils' act as special quasi-courts in family law and some property law matters, but their decisions are not formally binding. One of the subjects of the debate is whether it would be necessary for the state's legal system to regulate their operation in some way. Although they cannot formally make legally binding decisions based on the legal system of the United Kingdom, Muslim communities still consider them binding in certain cases, which raises many questions. One of them is the problem of legal equality and compliance with human rights. According to some, certain human rights may be violated during the proceedings of these councils – for example, the rights of women in the case of divorce, who may not be guaranteed equal rights. The fact that the state could intervene through legislation and adopt some kind of guaranteed regulation regarding the operation of these councils can be justified by the need for the protection of human rights. However, viewed from the other side, this would mean recognising these bodies as special courts (by the way, a tangible solution in practice is to extend the legal regulation of arbitration and mediation to them).[46]

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[44] Raphael Cohen-Almagor, 'Indivisibilité, Sécurité, Laïcité: the French ban on the burqa and the niqab' (2022) 20 French Politics 3–24, DOI: https://doi.org/10.1057/s41253-021-00164-8

[45] Reza Banakar, 'The Politics of Legal Cultures' (2008) 123 (4) Retfaerd Argang 37–60, 31, DOI: 10.1007/978-3-319-09650-6_7

[46] Shona Lester, 'The State and the Operation of Sharia Councils in the United Kingdom. A Critical Response to Machteld Zee' (2015) 17 (1) Journal of Religion & Society 1–9; Maria Reiss, 'The Materialization of Legal Pluralism in Britain. Why Shari'a Council Decisions Should be Non-binding' (2009) 26 (3) Arizona Journal of International & Comparative Law 739–778.

All this highlights the fact that in practice, there may exist a legal system parallel to the state one among Muslim people living in a close and separate, culturally defined community in the United Kingdom that they accept as binding on themselves. On the one hand, this actually reflects the plurality of law from a sociological point of view, even within the framework of a developed state legal system. On the other hand, from the perspective of the state legal system, all of this poses a threat: a parallel law with significantly different characteristics may undermine the latter's validity, thereby calling into question its legitimacy and enforcement. This can have serious consequences, and the same is true if the state tries to incorporate this particular parallel law into the state's legal system through formal legislation or judicial application.

It is worth noting that the 'clash of legal cultures' also allows for a more general interpretation, which Cotterrell also raises. According to this, we can talk about different cultural interpretations of the law when different social groups, who may form different cultural communities, interpret the law (including state law) in different ways. It is not only lawyers who interpret the law, although in principle they are the ones who reveal the 'best reading' of the law through their professional knowledge. It may also happen that other groups in society attribute a different meaning to the given legislation or legal institution and evaluate it differently. This again draws attention to cultural differences and can lead to viewing the law as an object or tool of a cultural competition or struggle.[47]

These examples demonstrate the application of the concept of legal culture within the sociology of law or the sociological methodological approach to law. If the conceptual framework of legal culture is properly applied, it can lead to a better understanding of the analysed legal phenomena.

2 The use of legal culture in comparative legal studies

As H. Patrick Glenn wrote:

> In thinking about the laws of the world, in their diversity, we appear driven by an epistemological urge to think of different laws as representative of larger, explanatory categories of being. It is not clear why this is so but it is a widespread phenomenon. The laws of the world are thus seen or grouped (the list is probably not exhaustive) as systems, cultures, traditions, styles, mentalities, families, circles or spheres (Rechtskreise) or civilizations.[48]

[47] Roger Cotterrell, 'Law in Culture' in Roger Cotterrell (ed), *Law, Culture and Society: Legal Ideas in the Mirror of Social Theory* (Ashgate 2006, Aldershot) 97–108, DOI: https://doi.org/10.4324/9781351217989-7

[48] H. Patrick Glenn, 'Legal Cultures and Legal Traditions' in Mark Van Hoecke (ed), *Traditions Epistemology and Methodology of Comparative Law* (European Academy of Legal Theory Series, Hart Publishing 2004, London, 7–20) 7, DOI: https://doi.org/10.5040/9781472559586

Very generally, this activity is an essential part of comparative law.[49] It is not possible here to go into the history of comparative law in detail (or to discuss whether it is a method or an independent social scholarly field),[50] but the idea of legal culture has had an important place in major recent debates about the nature and aims of comparative law.

Balázs Fekete addressed this issue in his paper *Inconsistencies in the use of legal culture in comparative legal studies*.[51] First, he emphasised that the use of legal culture is not a contemporary conceptual innovation (as I have mentioned above myself). He points out that Friedman did not claim that it was his innovation either. Fekete establishes: 'In sum, the recent flourishing of legal culture in comparative legal studies has not been without antecedents; they can mostly be found in the turn of the 19–20th century German legal scholarship.'[52] As he further states: 'In the German legal scholarship of the turn of the 19–20th century, under the influence of both Hegelian and Neo-Kantian philosophical thinking, the application of the term "legal culture" as a key conceptual tool was coined by such important authors as Jozef Kohler or Gustav Radbruch.'[53] Second, he indicates in his study that the opposition between a functionalist and a cultural approach to comparative law is relative. It depends on the applied approach and methodological tools as to which 'trend' of comparative law prevails in the given research. It is most fruitful if these two main methodological trends of comparative law are applied in a complementary way, with a holistic approach.[54]

He highlights the three – the most typical – predominant understandings of legal culture in comparative law: 1. legal culture as the background of law (essentially: the influence of extra-legal factors on law as such or on a given legal institution or provision), 2. legal culture as interactions around law (in summary: how the results of legal sociology, legal anthropology and cultural studies can help to understand the interactions related to the normal functioning of the legal system), 3. legal culture as the sum of attitudes towards law (which is also rooted in Lawrence M. Friedman's conception of legal culture, as you may read earlier).[55] Thereafter, he presents three typical inconsistencies in the application of legal culture in comparative law ('certain typical scholarly mistreatments of legal culture'):[56] 1. confusion of different understandings in the same study (for example: mixing the previous three approaches and their associated methodological tools), 2. under-theorisation of legal culture (oversimplification, applying this term without any real scholarly reflection, failing

[49] George Mousourakis, *Comparative Law and Legal Traditions, Historical and Contemporary Perspectives* (Springer Nature Switzerland AG 2019, Cham, Switzerland) 1–18, DOI: https://doi.org/10.1007/978-3-030-28281-3

[50] See Balázs Fekete, *Paradigms in Modern European Comparative Law: A History* (European Academy of Legal Theory Series, Hart Publishing 2021, London) DOI: https://doi.org/10.5040/9781509946952

[51] Fekete, Inconsistencies in the use of legal culture in comparative legal studies 551–564.

[52] Fekete, Inconsistencies in the use of legal culture in comparative legal studies 553.

[53] Fekete, Inconsistencies in the use of legal culture in comparative legal studies 553.

[54] Fekete, Inconsistencies in the use of legal culture in comparative legal studies 554.

[55] Fekete, Inconsistencies in the use of legal culture in comparative legal studies 555–559.

[56] Fekete, Inconsistencies in the use of legal culture in comparative legal studies 559.

to provide a solid methodological framework), 3. over-theorisation of legal culture (creating such a complex working concept of legal culture that it clearly overtheorises it, requiring the use of too many and complex methodological tools belonging to various scholarly fields).[57]

Finally, he reaches three important methodological conclusions: 1. There are research subjects to which – because of their nature – the legal culture approach cannot be applied. 2. There are many other research methods applicable to comparative law; those based on legal culture can only be chosen in appropriate cases based on the research questions and the professional background of the researcher. 3. If the use of legal culture in a comparative study seems to be supported, the researcher should choose the most appropriate approach to it, bearing in mind the methodological implications. The theoretical distinction between legal culture as a background, as a set of interactions surrounding law, and as a set of attitudes related to law may facilitate the choice, as it represents three most common ways of applying legal culture, but other approaches may also be appropriate, as Nelken has indicated (and as I have also mentioned earlier).[58]

Overall, Fekete sees the methodological approach based on legal culture as a fruitful tool – as do I – but draws attention to the fact that '[…] a much more self-reflective methodological and critical application of "legal culture" seems to be needed in comparative legal studies […] to find the proper place for this term in the structure of the emerging post-functionalist comparative law.'[59]

On the basis of the above considerations, let us look at another experiment when attempting to apply the framework of legal culture to analyse a given question. The question was posed as to whether there was a Central European legal culture with specific characteristics. Of course, we must accept that we apply legal culture as an explanatory theory in this case.

The meaning of the notion of Eastern Europe and of Central Europe in history has been the subject of long debate,[60] so the question is not brand new, having been raised in comparative law when grouping legal systems.

Balázs Fekete starts with a cultural comparison of law when he tries to formulate his own answer.[61] He considers that the most important insight from a cultural perspective is that law

57 Fekete, Inconsistencies in the use of legal culture in comparative legal studies 559–563.

58 Fekete, Inconsistencies in the use of legal culture in comparative legal studies 564.

59 Fekete, Inconsistencies in the use of legal culture in comparative legal studies 564.

60 See Emil Niederhauser, *Kelet-Európa története* [*History of Eastern Europe*] (MTA 2001, Budapest); and Oskar Halecki, *Borderlands of Western Civilization: A History of East Central Europe* (2nd edn, Simon Publications 2000, Safety Harbor).

61 Balázs Fekete, 'Megjegyzések a közép-európai jogi kultúrákról' [Notes on Central European Legal Cultures] (2012) 3 (4) Jogi Iránytű 57–58 <https://jog.tk.hu/uploads/files/Jogi_Iranytu/Jogi_Iranytu_2012_4_Fekete_Balazs.pdf> accessed 1 December 2025; See also Balázs Fekete, 'The Concept of Legal Culture Revisited: An East-Central European Perspective' in Miodrag A. Jovanovic, Bojan Spaic (eds), *Jurisprudence and Political Philosophy in the 21st Century: Reassessing Legacies* (Peter Lang 2012, Frankfurt am Main, Berlin, Bern, Bruxelles, New York, Oxford, Wien, 56–68) DOI: https://doi.org/10.3726/978-3-653-01540-9

is not merely a closed system with internal contexts, but it is also a cultural phenomenon. Historical, social, anthropological, psychological and other aspects of law are also important in any comparison. He states that a comprehensive approach to legal culture is not possible due to the diverse and incompatible definitions of legal culture. However, this does not mean that certain aspects of these eastern or central European legal cultures cannot be examined within a single framework. He attempts to address this question using the theory of 'law and emotions', which may be part of the law and culture framework.[62] Overall, he concludes that legal cultures in Central Europe have specific features that are sporadic and difficult to explain, but using the perspective of emotions, they can be integrated into a coherent frame of reference. Based on this theory, these special features arise from the general social emotions that emerge as a result of the historical characteristics of a region.[63]

The author refers to the need for further evidence to confirm his claims. Nevertheless, his short essay, despite its questionable generalisation, still shows the validity of the statement cited above, which emphasises the scholarly usefulness of the legal framework based on legal culture.

In any case, during the preparation for the accession to the European Union, the former socialist (post-socialist) states applying for membership were often classified into one group during the study of legal cultures, although their differences were also emphasised. For example, an analysis undertaken in 2000 by a research group led by Erhard Blankenburg examined the legal culture of five countries: Slovenia, Estonia, Poland, Hungary and the Czech Republic. Meanwhile, they considered and called them 'Central European countries'.[64]

According to this analysis, legal historical traditions have had differing impacts on the legal culture of these countries. 'Looking at the new formation of the rule of law, it is apparent that Slovenia, Hungary and the Czech Republic share their legacy with Austrian traditions, Poland has in the past looked to French institutions as a model and in Estonia the influence of German and Scandinavian law has been paramount.'[65] At the same time, the study also finds that…

> […] the new elements of post-communism are common to all of them:
> • In reaction to the past political dependence of the judiciary, they establish self-governing judicial councils guaranteeing the independence of the judiciary more rigidly than in the West;
> • In reaction to the repression of the past, they introduced constitutional review, which is separate from regular judicial practice, while at the same time binding regular courts to the constitutional courts' interpretation of statute law;

[62] Fekete, Megjegyzések a közép-európai jogi kultúrákról [Notes on Central European Legal Cultures] 57.

[63] Fekete, Megjegyzések a közép-európai jogi kultúrákról [Notes on Central European Legal Cultures] 58.

[64] Erhard Blankenburg in cooperation with Nena Tromp, Airi Kana, Michiel Notten, Laszlo Maracz, Hank Geerts, *Legal Culture in Five Central European Countries* (2000) WRR Working Documents no. W111, The Hague <https://library.oapen.org/bitstream/handle/20.500.12657/34059/439723.pdf?sequence=1&isAllowed=y> accessed 1 December 2025.

[65] Blankenburg, 11.

- In reaction to the lack of remedies against public administrations in the all-encompassing communist states, they developed a dual system of formal action before administrative courts on the one hand, and informal complaints with an ombudsman institution on the other.[66]

The analysis assesses the consequences of the European Union's expectations regarding the establishment of the rule of law in these countries in the 1990s:

> The emerging Central European model combines a double ambition of ideals which are often seen as opposites: on the one hand, a rather legalistic rechtsstaat in which public administration is strictly bound to statute law and compliance is bound to judicial review; and, on the other, informal mechanisms to enhance the responsiveness of public services.[67]

Overall, the authors considered it necessary, above all, to conduct a more in-depth analysis of legal institutions. As they wrote about their evaluation: 'It tries to form comparative indicators for institutions of legal culture: legal education, the legal profession, civil and criminal justice and the institutions of administrative and constitutional review.'[68]

VI Assessment

It is clear from the above that legal culture is a fluid concept which does not have a generally accepted definition, although there are more or less similar interpretations. It can be used in a much broader sense than is acceptable in precise research work. Of course, this concept can cover trends that cannot be grasped precisely in relation to one or more legal systems: it can be used as a 'decorative element' to support a theory, or it may be considered to have a meaning so self-explanatory that it does not even require a separate explanation, and it can also be considered as a framework (collective concept) covering all legal phenomena in society.

However, from a scholarly point of view, as I mentioned earlier, and as other authors have pointed out, it is advisable for researchers to define the meaning of legal culture according to the subject, objectives and hypotheses of the given research. Furthermore, scholars should also take into account the applicable methods. If they plan and act with sufficient care, they can achieve useful results. They can develop an explanatory conceptual framework in this way, with the help of which it is possible to move beyond a legislation-centric explanation of legal phenomena. The social phenomena that function as law, with their specific characteristics, can become better understood in this way.

66 Blankenburg, 11.
67 Blankenburg, 11.
68 Blankenburg, 12.

I will summarise in a few additional points what lessons can be learned from the issues discussed so far:

1. Legal culture often seems to be an approach – a conceptual framework in legal research to which different research methodologies can be connected (eg anthropological, statistical and any method of the sociology of law). Such a scholarly application of legal culture can help to understand the complicated social phenomenon of law. One could also say that legal culture as a framework can be filled with a number of elements that can be examined in order to get a more complete picture of the legal system of a given society or of a legal phenomenon across multiple societies. This, of course, requires an adequate methodology. The more such elements are considered, the more complete the understanding will be. Such elements may include, for example, the system of legal sources, judicial practice, legal education, the legal professions, the legal knowledge and understanding of the law of the population, and so on. In my opinion, therefore, over-definition is not a real problem if the research and the study that reflects it are sufficiently accurate. After all, a more detailed definition of legal culture allows for a deeper understanding.

2. Furthermore, legal culture can also provide a foundation for empirical research. The elements mentioned in the previous point can be investigated using descriptive sociological notions (eg attitudes, legal consciousness, etc.) with the help of indicators that can be measured by empirical methods.

3. This approach and conceptual framework can be used in comparative jurisprudence, but also in legal sociology or legal history research. It is a conceptual framework that can be applied flexibly across different fields of jurisprudence, provided it is managed with the necessary precision. It can help us gain a deeper understanding of people's patterns of behaviour regarding law, as well as how they think about the law, and what attitudes characterise them in relation to it.

4. The concept of legal culture must always be carefully defined. It depends on the subject and method of the research. It also, of course, determines the outcome of it. It is therefore an essential part of a well-founded research plan.

5. This is closely related to the previous point, but it is worth separate emphasis that it seems advisable to define the research subject as precisely as possible (this is always recommended, in any case).

6. For my part, if there are sufficient resources and time, I see no obstacle to a large-scale project based on the concept of legal culture that sketches a large, comprehensive, but at the same time sufficiently detailed picture of either a legal system or the legal systems of the world. It could be akin to Manuel Castells' renowned monumental work on societies at the end of the 20th century, which is based on the concept of networks.[69]

[69] Manuel Castells, *The Information Age. Economy, Society and Culture* (Vol 1-3, 2nd edn with a new preface, Wiley-Blackwell 2010, Oxford).

7. It is also worth noting the following. The different legal cultures of the world have a significant impact on each other, and the goals of comparative law itself, or the comparison of legal cultures, also include a strong emphasis on acquiring experience for legislation and legal reform. But the comparison of different legal cultures can also be used as a constructive tool in the application of law, in the creation of legal concepts, as an aid to the interpretation of legislation or, as is the case in Europe, for harmonisation and unification. In practice, the comparison of legal cultures can differ from traditional legal comparison in that the sociology of law may use this concept to operate in a broader field (eg by studying legal practice, legal education, legal knowledge and awareness, value relations, etc.) and make extensive use of empirical methods to investigate how legal institutions function in society.[70]

8. Last but not least: legal sociology and jurisprudence only model reality, but the concept of legal culture can provide important help in this; the advantages of its application are more numerous than its disadvantages.

VII Conclusion

In my view, the above shows that this concept is special in that it can serve as both a theoretical framework and an approach to help formulate comprehensive evaluative explanations (eg of a legal system as a whole, of legal systems' similarities and differences around the world, of a legal institution, or of legal transplantation), as well as a basic concept that can be the starting point for empirical studies.

The evaluation of the literature reviewed here highlights the importance of clear, careful and precise conceptual definitions, which will provide the basis for the conclusion: when applied correctly, the concept of legal culture is an effective tool for analysing law. It is a valuable resource for legal studies, the sociology of law, comparative law and legal history. Furthermore, legal culture can also provide a foundation for empirical research. In the meantime, as Nelken suggests, there are three main issues to be aware of: the kind of facts that are thought to make up legal culture, the chosen approach within which the concept is deployed, and the normative aspects of the enquiry. Discussing the concept itself seems to promote its application in concrete research, even if this is only tentative in many case studies.

To sum up, the concept of legal culture is undefined and vague. Indeed, giving a brief and concise definition is not possible in jurisprudence. Nevertheless, we can argue convincingly, based on an overview of the basic theories related to legal culture, that an approach based on legal culture is associated with more advantages than disadvantages in legal studies. Its ambiguity is precisely its advantage, as each scholar can adapt it to their own research with careful work, using it as a conceptual framework or basis. At the same time, we must be aware of the difficulties that can lead to fundamental philosophical questions.

[70] de Cruz 10–18.

The main benefit of the conceptual framework of legal culture in socio-legal studies is that it can be used to deconstruct the complex social phenomenon of law into elements that can be effectively investigated, either theoretically or empirically, through appropriate conceptualisation and operationalisation. As has been presented, with its help, the historical determination of law can also be revealed. In brief, the notion of legal culture is an effective tool for analysing law.

These conclusions and the assessment in Section IV are strongly supported by the findings of the majority of the literature that has been reviewed, as my article has shown.

Sára Lőrinczy*

How Courts React, or Would React, When Faced with a Procedural Contract in Hungary?

Abstract

This article examines the legal nature and admissibility of procedural contracts under Hungarian civil procedure law, with particular attention to how courts respond when parties seek to regulate procedural aspects of litigation by agreement. While common law jurisdictions accept certain forms of procedural contracting, civil law systems remain resistant, emphasising judicial control and mandatory rules. The paper reviews the limited scope for party autonomy in Hungary under the Code of Civil Procedure, focusing on pre-dispute and post-dispute agreements, jurisdiction clauses, evidentiary pacts, cost-sharing arrangements, and class action agreements. It also considers comparative developments in EU and German case law, and the human rights constraints derived from Article 6 ECHR. The analysis concludes that, although Hungarian law acknowledges narrow exceptions – such as choice of court agreements, mediation settlements, or class action contracts – procedural autonomy remains tightly constrained. The study argues that this strict model is rooted in constitutional guarantees of due process and efficiency, but also notes recent legislative initiatives (eg the proposed simplified civil procedure) that cautiously extend the role of party agreements. Overall, the article highlights the tension between judicial control and contractual freedom, and maps the limited corridors where procedural contracting may gain legal relevance in Hungary.

Keywords: procedural contract, party autonomy, civil procedure, comparative civil procedure, due process, jurisdictional agreements

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I Introduction

This paper explores the legal nature and admissibility of procedural contracts under Hungarian civil procedure law, with particular attention to how courts may – or should – react when confronted with such agreements. Procedural contracts refer to agreements between parties that aim to regulate certain procedural aspects of litigation, either before a dispute arises or after proceedings have commenced. These agreements may address matters such as jurisdiction, evidentiary rules, the format of hearings, procedural costs, or the mutual suspension or termination of litigation. In essence, they represent an attempt to introduce elements of party autonomy into a field that is otherwise governed strictly by public law.[1]

The concept is broadly accepted in common law jurisdictions but not in Hungary or other civil law systems. An empirical study[2] of commercial contracts in common law systems shows that while parties often use autonomy through forum-selection clauses, arbitration agreements,[3] and fee-shifting provisions, they rarely alter core court procedures such as pleadings, discovery, or evidentiary rules. The article concludes that concerns about 'contracting for procedure' may be overstated, since such clauses are seldom invoked in practice, and calls for further explanation of why parties do not fully exercise their procedural autonomy.

Below, we will assess whether the same applies to civil law systems, where the concept of procedural contracts is generally less widely accepted. Comparatively, we can declare that while Hungarian civil procedure remains predominantly court-controlled, EU and comparative case law increasingly refines the outer limits of party autonomy. Two lines are particularly relevant for this paper's thesis: (i) jurisdiction agreements under Brussels Ia (incl. *Inkreal*[4] and *SIL*[5]), and (ii) the non-waivability (or only strictly waivable character) of fair-trial guarantees (*Poitrimol*,[6] *Sejdovic*[7]). These strands help calibrate when procedural contracts may be tolerated (eg forum selection, cost-sharing in settlements) and when they collide with public-law safeguards (eg interim measures, core evidentiary assessment).

Hungarian civil procedure, however, offers only narrow room for such contractualisation. Governed by the Civil Procedure Code (Act No. CXXX of 2016, hereinafter: 'CPC'), the procedural framework is classified as public law and falls largely outside the realm of party

1 Jaime Dodge, 'The Limits of Procedural Private Ordering' (2013) 97 (4) Virginia Law Review 723–804.

2 W. Mark C. Weidemaier, 'Customized Procedure in Theory and Reality' (2015) 72 (4) Washington & Lee Law Review 1865–1930.

3 Richard Schmidt, *A nemzetközi fórumválasztás szabadsága és korlátai [The Freedom and Limits of International Choice of Forum]* (PhD Thesis, Pázmány Péter Catholic University 2024, Budapest).

4 Case C-566/22 *Inkreal s.r.o. v Dúha reality s.r.o.*, EU:C:2024:102.

5 Case C-537/23 *SIL v Agora*, EU:C:2025:120.

6 *Poitrimol v France* App no 14032/88, ECHR (23 November 1993).

7 *Sejdovic v Italy* [GC] App no 56581/00, ECHR (1 March 2006).

autonomy.[8] Procedural law in Hungary is fundamentally court-controlled, with the CPC defining a rigid structure that limits the procedural discretion of litigants. As a result, while procedural contracts may formally be valid, they are often unenforceable in practice. Notwithstanding, there is one special type of procedure, which ultimately requires the parties' prior procedural contract: the class action lawsuits (see below II.3).

Nonetheless, this limitation does not negate all elements of party autonomy. Given that parties bear the primary burden of managing and presenting their cases, they are both entitled and obligated to take an active role in litigation. Moreover, some authors[9] argue that elevating party autonomy as a guiding principle in civil procedure, arguing that many procedural agreements (from choice-of-forum to evidentiary pacts) can make litigation more efficient and bridge the gap to arbitration. This opens a space – albeit narrow[10] – for certain types of procedural agreements, which can be grouped into two main categories:

1. Pre-dispute procedural contracts:[11] These are concluded before a dispute has formally arisen. While the CPC does not explicitly regulate such agreements, they are not uncommon in legal practice. Examples include jurisdiction or forum selection clauses, and more substantively, limitations of liability or waivers of certain claims – provisions that influence the scope and nature of any potential future litigation.

2. Post-dispute procedural contracts: These are concluded after a dispute has arisen, either before initiating litigation or during the course of ongoing proceedings. The CPC allows limited flexibility in this regard, permitting party agreements on issues such as procedural costs, evidentiary matters, and mutual requests for termination or suspension of proceedings. However, while such agreements may be formally valid, their enforceability by courts remains uncertain or inconsistent.

In addition to this temporal classification, procedural contracts may also be categorised according to their procedural function, encompassing pre-litigation negotiations; jurisdiction clauses; agreements on procedural specifics (such as *interim* measures, hearing formats, evidentiary rules or costs allocation); and class action waivers or class action agreements.

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8 Despite of the fact that the parties are entitled to act freely regarding their rights and reliefs sought in the proceedings, this right is limited to their right to initiate a proceedings and define its scope. See more: István Varga, Tamás Éless (eds), *Szakértői javaslat az új polgári perrendtartás kodifikációjához [Expert Proposal for the Codification of the New Code of Civil Procedure]* (HVG-ORAC 2016, Budapest) 33.

9 Gerhard Wagner, *Prozessverträge: Privatautonomie im Verfahrensrecht [Procedural Contracts: Private Autonomy in Procedural Law]* (Mohr Siebeck 1998, Tübingen).

10 According to Gerhard Wagner, the validity of procedural contracts should be judged by general contract fairness *(Vertragsgerechtigkeit)* and that public interest imposes only limited boundaries – leaving a broad scope for party agreements.

11 The term was first used to describe pre-dispute contracts that set procedural rules for any future litigation. See more: Kevin E. Davis, Helen Hershkoff, 'Contracting for Procedure' (2011) 53 (2) William & Mary Law Review 507; and 2017 Harvard Law Review follow-up blog: 'Contracting for Procedure, Redux' (Harvard Law Review Blog, 10 November 2017) <https://harvardlawreview.org/blog/2017/11/contracting-for-procedure-redux/#:~:text=Six%20years%20ago%2C%20we%20published,making> accessed 1 December 2025.

They may also be assessed from a subjective perspective, that is, based on the identity of the parties involved – for instance, consumer versus business actors, or employer versus employee disputes – each of which may trigger distinct public interest considerations or regulatory limitations.[12]

The central aim of this paper is to assess the permissibility of procedural contracts under Hungarian civil procedure law. Where such contracts are found inadmissible or unenforceable, the paper will explore the constitutional and human rights implications. Where they are permitted, the discussion will examine their scope, potential legal consequences of non-compliance, and the extent to which Hungarian judicial practice has evolved in its treatment of procedural autonomy.

II Admissibility of specific types of procedural contracts

1 Pre-dispute agreements

a) Pre-lawsuit negotiations

The enforceability of pre-litigation obligations agreed upon by the parties remains a contested issue in Hungarian procedural law. While dispute resolution clauses – often aiming to mandate negotiation or mediation – are regularly included in commercial contracts, their procedural weight before court proceedings is minimal. The following section outlines the current regulatory framework and judicial interpretation concerning such clauses and examines the formal limits of party autonomy under the Hungarian Code of Civil Procedure.

Although it is very common that parties to an agreement include a so-called ‘amicable settlement of disputes clause’ into their agreements, it is rather a lex imperfecta, because it cannot be enforced. The reasons why a court shall dismiss (reject without trial) a statement of claims has a closed number list, which does not include such provision, also cannot be amended by the parties [Section 176(1) of CPC]. See however point III.1 below for non-compliance with a procedural contract. In addition, there are some cases where the law requires a preliminary procedure in order to consider the statement of claims admissible (eg in press-correction claims), however, such requirement is based on law not on the parties’

12 Scope clarification: This paper does not assess agreements of a primarily substantive legal nature, such as choice of law clauses or liability waivers, even though these may have direct procedural effects. While such clauses influence the scope of the lawsuit and, by extension, the court’s procedural conduct, they pertain to the legal rights and obligations established under substantive law. These agreements affect the court’s scope of decision-making rather than the procedural rights and duties of the parties themselves. As such, although the enforceability of the right in question is determined by substantive law and by the parties’ underlying agreement, a full analysis of such clauses lies beyond the scope of this paper and will be addressed in future research.

agreement. These rather strict rules are actually welcomed by some authors. Owen Fiss[13] critiques the trend toward private settlement as a form of procedural contracting. He warns that excessive reliance on settlement and ADR may undermine the public role of courts by removing disputes from judicial scrutiny and its safeguards. Though not focused on custom procedural rules, the essay raised early concerns that party-driven resolutions risk sacrificing justice, transparency, and precedent for efficiency and autonomy – a theme later echoed in debates on contractualised procedure.

Notwithstanding, if the parties reach an agreement in the mediation procedure, either of the parties may request the court vested with competence and jurisdiction to be summoned to settlement negotiations before court proceedings are instituted for the purpose of approval of a negotiated settlement.[14] If the parties to the agreement jointly apply to be summoned to settlement negotiations, it may be conducted by any court of competence [Section 167(1) of the CPC]. Before court proceedings are instituted, the party may apply with the court vested with competence and jurisdiction to be summoned for the purpose of reaching a negotiated settlement even if the parties did not reach an agreement in a mediation procedure beforehand [Section 168(1) of the CPC]. If no agreement is reached for settlement by the prescribed deadline, the court shall inform the parties about the possibility of mediation. If all the parties declare their intention to resort to mediation, at their joint request the procedure shall be stayed, the proceedings stayed may be resumed only if the party who requested continuation in due time enclosed with the application the agreement between the parties reached during the mediation procedure. Otherwise, the court shall refuse the application for continuation and the proceedings shall remain in stay without interruption[15] [Section 168(4)–(5) of the CPC].

Under the old Civil Procedure Code, there was a specific requirement for business entities to negotiate prior to initiating a lawsuit; however, courts even interpreted that obligation narrowly. Section 121/A of the former Hungarian Civil Procedure Code (Act III of 1952) imposed a mandatory obligation on legal person business entities to attempt out-of-court resolution of their disputes before submitting a statement of claim. This requirement applied only if both parties qualified as legal persons with business organization status. The obligation could be waived if the parties jointly prepared a protocol documenting their disagreement, which had to be attached to the claim. Reintroduced into the procedural

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13 Owen Fiss, 'Against Settlement' (1984) 93 Yale Law Journal 1073–1090.

14 Contrary to the Anglo-Saxon tendencies, the Hungarian regulation in this regard prefers party autonomy, ie the court's discretion on obliging parties to attend mediation is strictly limited to advising. See more István Varga, 'Perrendi szabályozási igények azonosítása jogösszehasonlító kitekintéssel' *[Identifying Procedural Regulatory Needs with a Comparative Outlook]* in István Varga (ed), *Codificatio Processualis Civilis – Studia in Honorem Németh János II* (ELTE Eötvös Kiadó 2013, Budapest) 509.

15 According to some authors, it should be revised whether mediation is actually ground for suspension or stay of the proceedings, given that the latter does not require pre-judicative actions. See more István Varga and Kristóf Szécsényi-Nagy, 'A perrend egyéb általános szabályai' [Other general rules of procedure] in János Németh and István Varga (eds), *Egy új perrendtartás alapjai [Foundations of a New Code of Civil Procedure]* (HVG-ORAC 2014, Budapest) 312.

system by the 2010 legislative reform, this rule reflected a revived effort to prioritise pre-litigation resolution between commercial entities. If no agreement was reached, the plaintiff was required to attach written records of prior communications and evidence of the attempted settlement to the statement of claim; otherwise, the court could dismiss the filing without issuing a summons. However, case law (BDT 2017.3708) clarified that such dismissal is not permissible solely on the basis that the claimant failed to communicate their legal position, provided the pre-litigation notice identified the claim amount and contractual basis. Furthermore, where a claimant knowingly initiated proceedings despite facts that clearly excluded the claim's validity without further proof, they could not claim litigation costs from a defendant who declined to settle out of court (BDT 2015.3371). Courts could impose cost liability on a defendant who unjustifiably failed to participate in the settlement process or refused to cooperate in preparing the protocol, even if that party prevailed in the litigation. Nevertheless, this pre-litigation obligation was inapplicable in cases subject to shorter statutory filing deadlines, special procedures, or high-priority litigation, thereby marking the boundaries of party autonomy in procedural planning under the earlier procedural regime.

In sum, while parties may express their intention to resolve disputes amicably, Hungarian procedural law grants little effect to such clauses unless grounded in statutory provisions. The courts maintain a strict interpretation of admissibility criteria and consistently reject efforts to elevate contractual pre-litigation steps to procedural preconditions. Even statutory obligations, such as those previously imposed on business entities, have been interpreted narrowly, confirming the dominance of procedural formalism over privately agreed dispute resolution mechanisms.

b) Choice of court clauses

The autonomy of parties to designate the forum for resolving their disputes is a key aspect of modern private international law. Hungarian law recognises this principle within clearly defined boundaries, particularly in the context of commercial relationships. The following section outlines the regulatory framework governing choice of court agreements under Hungarian and EU law, highlighting both the domestic limitations and evolving European jurisprudence that increasingly supports party autonomy.

The general rule is that parties may agree on the court of jurisdiction for their disputes, provided Hungarian jurisdiction is not excluded. Under Section 99(1)–(2) of Act No. XXVIII of 2017 on Private International Law (PIL), a choice of court agreement designates a court (domestic or foreign) to resolve property law disputes. Such agreements are invalid if they (a) assign jurisdiction to a foreign court in matters under the exclusive jurisdiction of Hungarian courts, or (b) assign Hungarian jurisdiction where Hungary has none.

Hungarian courts retain exclusive jurisdiction in cases involving real estate, company registration, and law enforcement. Choice of court is allowed only in commercial matters; it is prohibited in administrative and family law cases.

Beyond choosing a country's courts, parties may also select a specific regional court within Hungary in property-related disputes – unless restricted by law.[16] The designated court gains exclusive jurisdiction, unless otherwise provided or agreed. If validly concluded,[17] the selected court has exclusive authority over the case: all other courts must reject the statement of claim, or if exclusive jurisdiction becomes apparent later, the proceedings must be terminated. However, courts conferred with exclusive jurisdiction by statute (eg certain courts in Budapest) cannot be overridden by party agreement (Section 27 of the CPC). Similarly, no clause may limit a consumer's right to sue a business in their local court.

Choice of court agreements may be concluded before or after a dispute arises but apply solely in commercial contexts. Jurisdiction may be established even without being expressly provided by law, if it is not excluded and the defendant does not challenge it. If the defendant participates in the proceedings – such as by submitting a substantive defence – without explicitly objecting to the court's jurisdiction, jurisdiction is deemed to be established based on the parties' implicit agreement. It is also noteworthy that, under previous practice, parties were permitted to include a jurisdiction clause in their agreements only if a 'foreign element' was present in their legal relationship.[18] However, this approach appears to be shifting. In a recent decision, the Court of Justice of the European Union (CJEU) held that,[19] under the Brussels Ia Regulation, it is lawful for two parties domiciled in the same Member State to designate the courts of another Member State as having jurisdiction over their dispute.[20] This development reflects a move toward prioritizing party autonomy over a strict, formalistic interpretation of jurisdictional rules.[21]

In summary, while Hungarian law imposes specific constraints on the validity and scope of jurisdiction clauses – especially regarding exclusive jurisdiction and consumer protection – there is a discernible trend, both in domestic practice and EU case law, toward expanding the parties' ability to shape the procedural framework of their legal relationships. This shift underscores a broader movement toward balancing procedural safeguards with the principle of freedom of contract in cross-border and commercial litigation.

16 Not every jurisdiction freely enforces choice-of-court clauses — there are limits grounded in fairness and protectionism. In the German Federal Supreme Court's decision (III ZR 42/19, 17 October 2019), the Court awarded damages for breach of a choice-of-court agreement: the defendant, though sued in the U.S. in violation of the agreed jurisdiction (Bonn, Germany), was entitled to recover the costs incurred, since the contract expressly provided for German law and jurisdiction, and the parties had an interest in legal certainty and avoiding forum shopping.

17 A statement of claim cannot be dismissed without summons solely on the basis of an invalid choice of court agreement (BDT 2019.3983).

18 BDT 2007. 1544.

19 Case C-566/22 *Inkreal s.r.o. v Dúha reality s.r.o.*, EU:C:2024:102 (8 February 2024).

20 Balázs Völcsey, 'Handling Jurisdictional Problems in Civil Procedure – Based on Hungarian and EU Legislation' (2025) (1) ELTE Law Journal 135–157.

21 Adél Köblös, *A joghatósági megállapodás [Jurisdiction Agreements]* (PhD Thesis, Szeged University, 2008).

2 Agreements related to specific procedural issues

As previously noted, procedural contracts have no binding effect on the court under Hungarian civil procedure law. Although such agreements may be formally valid – in the sense that no legal provision expressly prohibits their conclusion – they generally lack legal enforceability. This means that neither party can compel the court to adhere to the terms of the procedural contract, nor can one party legally enforce its application against the other. In practice, the court is not obligated to consider or follow such agreements, and their breach does not result in procedural sanctions. Nevertheless, voluntary compliance remains possible: parties may, by mutual consent, choose to refrain from exercising certain procedural rights, such as by agreeing not to request interim measures, or by waiving appellate rights. These arrangements, however, depend entirely on mutual good faith and cooperation, not on judicial enforcement.

The parties' ability to shape or design the procedure remains extremely limited.[22] Where such influence is permitted, it is typically exercised through individual procedural motions submitted during the litigation, rather than through pre-dispute or pre-trial contractual arrangements. For example, parties may agree during proceedings on the scheduling of hearings or jointly request the suspension or termination of the case – but these are evaluated by the court on a case-by-case basis and do not derive binding authority from prior agreement. Consequently, while party autonomy is not entirely absent, it plays only a marginal role in procedural design, and procedural contracts remain largely symbolic in effect.

a) Interim measures

The applied interim measures cannot be established by the parties' prior agreement. Although courts only order interim measures upon request, thus the parties may agree on not requesting such measures, if any party 'breaches' such agreement, it is not enforceable, it would not retain the court from granting the request if grounded.

Generally, the court shall order provisional measures conditional upon the provision of security if the applicant's adversary proves presumptively that he may be disadvantaged by the measure requested such that would serve basis, if successful, to demand compensation for damages or restitution from the applicant. The court shall order the provision of security if so requested by the applicant's adversary, along with presumptive proof of the disadvantage proportionate to the security requested; or it is offered by the applicant and accepted by the applicant's adversary [Section 106(1)-(2) of the CPC]. In the latter case – which can be deemed as a procedural agreement – the security shall be provided in

[22] Imre Szabó, 'Perhatékonyság és a percselekmények időszerűségének elve' [Efficiency of Litigation and the Timeliness of Procedural Acts] in István Varga (ed), *Codificatio Processuralis Civilis – Studia in Honorem Németh János II.* (ELTE Eötvös Kiadó 2013, Budapest) 365.

the amount offered by the applicant and accepted by his adversary. Although, accepting the security shall not constitute accession to the arguments presented in support of the introduction of provisional measures.

While parties may promise not to request interim relief, such arrangements cannot strip the court of its statutory power to grant provisional protection if the legal test is met. Under Brussels I(a), the Van Uden line construes 'provisional, including protective measures' narrowly and ties cross-border relief to a real link with the territorial jurisdiction; purely definitive orders fall outside the regime. This EU understanding supports a domestic reading that prevents contractual waivers from disabling interim protection where fairness or effectiveness so require.[23]

b) Document-based procedure vs in-person hearings

The parties cannot effectively agree on having an only document-based procedure. Although, it is in the court's discretion to decide whether the case can be decided solely based on the documents, the plaintiff and the defendant may request the court to close the case initiation process without a case initiation hearing in the statement of claim and the statement of defence, respectively. However, this does not require the agreement of the parties, but their individual motion. If the court is of the opinion that the parties defined the framework of the dispute by their statements made in the statement of claim and the written defence statement, it shall inform the parties that it intends to close the case initiation process without further case initiation documented in writing and case initiation hearing, and shall at the same time: *a)* deliver to the plaintiff the written defence statement, *b)* warn the parties concerning the consequences of closing the case initiation process, and *c)* inform the parties that it will hold a case initiation hearing if so requested by either of the parties in writing within fifteen days (Section 197 of CPC).

The parties may agree on the final judgement only contain summary statement of reasons. The summary statement of reasons shall contain only: *a)* the facts established by the court; *b)* the requests and/or statements made by the parties relating to the subject matter of the action, including a brief description of the underlying reasons; *c)* the laws on which the judgment is based; and *d)* reference to the statutory provisions on summary statements of reasons. In addition, if all the parties waive their rights to appeal [see point II.2 *f)* below], the judgement contains only summary statement of reasons without further consent of the parties. In such cases, it may be established, in the light of the circumstances of the case or the statements of the parties, that a full and detailed statement of reasons is not necessary and that it is sufficient to contain only certain elements which are sufficient to

[23] Case C-391/95 *Van Uden Maritime BV v Kommanditgesellschaft in Firma Deco-Line*, EU:C:1998:543, paras 37–49; see also Case C-125/79 *Denilauler v SNC Couchet Frères*, EU:C:1980:130; and Case C-616/10 *Solvay v Honeywell*, EU:C:2012:445.

ensure that the substantive res judicata effect and the admissibility of a new action based on new facts are properly assessed. It is important to note that the other structural elements of the judgment (introductory part, operative part, remedy part, final part) remain unchanged in such cases; the simplification - as the name of the legal instrument reflects – only concerns the statement of reasons (Section 347 of the CPC).

For comparison, the German system is worth mentioning: § 128(2) of the German ZPO provides that, with both parties' consent, courts may decide without oral hearing in a purely written procedure. German doctrine, however, stresses that this remains within judicial case management and cannot dilute Article 6 ECHR safeguards; consent must be informed and unequivocal. This mirrors the CPC's approach that party motions may guide, but do not bind, the court.[24]

c) Evidence

As a rule, allocation of the burden of proof follows substantive law and, in Hungarian proceedings, is not contractually alterable in a manner that binds the court. For comparative context, German case law recognises party agreements affecting proof (incl. burden-shifting) within dispositive law, but subjects any standard-form clause to strict § 307/§ 309(12) BGB control; [25] clauses that materially worsen a party's proof position in AGB are typically invalid.[26] The court's free evaluation of evidence remains non-contractual. Notwithstanding, if the parties agree on individual facts during the proceedings, such facts do not have to be proven further. Although, any agreement on this topic would be unenforceable by the parties. The same applies to the assessment of evidence: it is the court's exclusive right to decide, and it includes assessing the evidence.

The same applies to evidence rules: if the parties agree on not using witness evidence, the court would not force them to, however, if any party breaches the agreement, the other party cannot enforce it; the court will use the witness evidence nevertheless. Appointing a private expert is generally allowed in civil procedure of Hungary, however, it is usually requested by one of the parties (the one on who the burden of proof lays regarding the fact that is intended to be proven by an expert), and thus the agreement on engaging the same private expert is theoretically possible, although never happened in practice. Moreover, it would also be unenforceable, if one of the parties breached the agreement.

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24 *Zivilprozessordnung* (ZPO) § 128(2) (and commentary).

25 BGH, Beschluss vom 6 Februar 2014 – VII ZR 160/12, *NJW-RR* 2014, 456: The Court held that after acceptance *(Abnahme)* the burden of proof for defects lies with the client, and any contractual or judicial presumption extending the contractor's burden beyond that point is invalid under §§ 307, 309 Nr. 12 BGB.

26 BGH, Urteil vom 10 Januar 2019 – III ZR 109/17, *NJW-RR* 2019, 428: A pre-formulated investor's declaration of having fully read and acknowledged the risks in a prospectus was held void under § 309 Nr. 12(b) BGB, since even without a full burden-of-proof reversal it worsens the investor's evidentiary position, and such knowledge acknowledgments in AGB cannot be given evidentiary effect.

Regarding the forensic expert evidence, the parties' agreement may be relevant. Generally, an expert shall be engaged if specific expertise is considered necessary to define the framework of the dispute or for establishing, ascertaining facts considered material for the case. The parties may bring motion for private expert evidencing, or on proposal, the court shall appoint an expert if neither of the parties adducing evidence proposed to enter a private expert or an expert appointed for other proceedings, each private expert's report contains cause for concern, or it is necessary to receive information so as to address any concern that may exist with respect to the opinion of the expert appointed for other proceedings, or to receive answers for questions proposed to be asked [Section 307(1) of the CPC]. In case the court appoints the expert, the expert proposed by the parties jointly shall be appointed. In the absence of an agreement, the court shall decide as to the person of the expert [Section 308(1) of the CPC].

d) Procedural costs

The court decides about the procedural costs ex officio [ie procedural fees, evidence costs (expert's fees etc.)], however, the legal fees must be expressively requested by the parties. In case of a settlement, the parties may agree on covering their own procedural costs, or establish a different ratio, however, in case of a judgement, the court establishes the amount and the bearing of procedural costs based on the law, and it is not bound by the parties' agreement.

In the case of a court-approved settlement, the party agreed upon by the parties shall pay the opposing party's court costs. In the absence of an agreement, the court costs of the successful party to the settlement shall be covered by the unsuccessful party to the settlement. Where each party succeeds on some and fails on other heads according to the settlement the party shall cover the costs of the opposing party in proportion of his losing. If the ratio of winning and losing cannot be determined, neither of the parties shall be required to cover the court costs (Section 84 of the CPC).

If the proceedings are terminated the court costs of the defendant shall be covered by the plaintiff, unless otherwise agreed by the parties. Where proceedings are terminated due to withdrawal, if withdrawal took place for the defendant satisfied the defendant shall cover the claim after the opening of proceedings, the court costs of the plaintiff. Where proceedings are terminated due to withdrawal of the parties' joint application, the party agreed upon by the parties shall pay the opposing party's court costs. In the absence of an agreement, the plaintiff shall cover the court costs of the defendant. If, however, the application was submitted for the defendant acknowledged the right asserted by the action after the opening of proceedings, or satisfied the claim enforced by the action, the defendant shall cover the costs of the plaintiff (Section 85 of the CPC).

EU law adds a proportionality/adequacy overlay where specific regimes apply (eg IP enforcement). In United Video[27] and Koch Media,[28] the CJEU held that flat-rate scales are acceptable only if they allow recovery of a significant and appropriate part of reasonable costs, with case-by-case control. Comparatively, German law explicitly permits contractual allocation of costs in settlements (§ 98 ZPO), a widely used gateway for party-made cost rules – subject, of course, to court approval of the settlement text.

e) Termination and stay of proceedings based on the parties' mutual request, other requests

The parties' autonomy to shape the procedure is very limited, although, based on mutual requests (that can be deemed as procedural contracts concluded during the proceedings) they can establish the process of the lawsuit.

ea) Termination and consolidation

At any time during the proceedings the court may terminate the proceedings upon request, even before the statement of claim is delivered, if requested by the parties jointly ([Section 214(1)b) of the CPC]. This right is given until the proceedings is closed, however, if the parties intend to terminate the proceedings after the first instance decision is made, they need to file an appeal before doing so.[29] Also, the plaintiff may withdraw the action without the defendant's consent before the defendant's written defence statement is presented, thereafter only upon the defendant's consent, except if withdrawal took place for the defendant satisfied the claim after the opening of proceedings [Section 214(2)–(3) of the CPC].

Where the parties present a claim jointly, the court shall move to consolidate the actions if the conditions are satisfied [Section 117(4) of the CPC]. Once consolidated, the court is bound to such decision.

eb) Stay and suspension

Proceedings shall be stayed if the parties notify their agreement to that effect, from the date of delivery of said notification to the court [Section 121(1)a) of the CPC]. The proceedings may be stayed between the same parties not more than three times before the final conclusion of the proceedings. Parties usually use this opportunity to start negotiations and try to reach a settlement. At the request of either of the parties the proceedings shall be continued. During the period in which proceedings are stayed all time limits shall be discontinued, and

27 Case C-57/15 *United Video Properties Inc v Telenet NV*, EU:C:2016:611, paras 24–36.

28 Case C-559/20 *Koch Media GmbH v FU*, EU:C:2022:313, paras 40–54.

29 BDT 2021.4296.

shall recommence when the stay is terminated. All court orders introduced during the period of stay, pertinent to the merits of the case, and all procedural acts made by the parties during the period of stay shall be of no effect, except for the court orders and procedural acts relating to the stay and continuation of proceedings, and/or to the declaration of termination of the proceedings [Section 122(1)–(2) of the CPC].

If the court orders the parties to submit to compulsory mediation [ie not the same as mentioned above in point II.1 *a)*, which is voluntary], it shall simultaneously suspend the proceedings. If the judicial proceedings was suspended on account of the opening of compulsory mediation, it shall be continued if either of the parties verify that the mediation process has been concluded, either of the parties verify of having participated in the first mediation hearing, however, the mediation process had not been opened, or two months have passed since the time of delivery of the decision ordering the parties to submit to compulsory mediation, during which time the parties failed to submit either of the above-mentioned presentments. If the mediation proceedings in progress is not expected to be concluded within two months from the time of delivery of the court decision ordering the parties to submit to compulsory mediation, and the parties jointly notify the court thereof eight days before the deadline at the latest, the judicial proceedings may not be continued insofar as the mediation procedure is concluded. Enclosed with the aforementioned notification the parties are to provide proof that the mediation process is ongoing (Section 124 of the CPC).

ec) Other requests

The CPC allows for limited instances of party autonomy during proceedings, particularly in matters of scheduling and procedural flexibility. Under Section 229(1) CPC, the court is required to postpone a scheduled hearing if both parties jointly request such postponement at least three days before the hearing, and provide a justified reason. If the request is made after this deadline, the court may grant it only in cases of particular importance, such as unforeseeable personal or procedural impediments. This provision reflects a narrowly defined opportunity for parties to influence the scheduling of hearings but remains subject to judicial discretion once the prescribed timeframe has lapsed.

Similarly, Section 148(3) CPC provides another rare example of consensual procedural modification: the parties may jointly waive the application of the judicial holiday, which suspends procedural deadlines between 15 July and 20 August each year. This allows the litigation to proceed uninterrupted during this traditionally inactive period, provided both parties agree. In practice, however, such waivers are uncommon, as most litigants prefer to preserve this statutory break unless time-sensitive commercial interests dictate otherwise.

Another provision allowing limited party-driven procedural adjustment is found in Section 127(2) CPC, which applies when the court has rendered an interlocutory judgment – a preliminary decision, typically establishing the existence of a legal basis for the claim, while deferring a ruling on the amount or quantity of the claim. If both parties submit a joint request, the court may suspend the continuation of the proceedings relating to the quantum of the claim pending the outcome of a review application (ie appeal) against the interlocutory judgment. This rule enables the parties to avoid unnecessary procedural steps until the fundamental question of liability is conclusively determined.

Despite the formal availability of these mechanisms, the actual exercise of party autonomy during litigation remains highly constrained. Mutual agreements of this kind are relatively rare in practice, primarily because they require cooperation between parties who are, by nature, in adversarial positions. Even though parties are expected to act in good faith throughout the proceedings, practical experience shows that such cooperation is seldom achieved once litigation has commenced. In adversarial proceedings, mutual trust is typically eroded, and strategic considerations often outweigh procedural pragmatism. As a result, although the CPC does allow for certain collaborative procedural decisions, these exceptions have limited real-world impact and do not amount to a general recognition of procedural contracts or party-driven case management within the Hungarian system.

f) Remedies

Any waiver of appeal must meet fair-trial standards: under the ECtHR, waiver of rights under Article 6 ECHR is valid only if unequivocal, voluntary and attended by minimum safeguards.[30] This frames CPC § 358–359 practice: ex post waivers following pronouncement are effective; general, blanket, ex ante waivers risk invalidity.

The person entitled to appeal shall have the right to waive his right to do so following publication of the decision or after delivery in the absence of publication. The waiver of the right to appeal may not be withdrawn. Waiver shall be considered valid only if notified by all entitled parties. If all entitled parties decided to waive their right to appeal following publication of the decision, the decision shall become final on the day of notification, or on the day following the date of receipt of the last notification by the court [Section 358(4) of the CPC].

Once a decision has become final, it may no longer be appealed. A decision that is subject to appeal shall become final from the day after the expiry of the time limit for appeal, if neither of the eligible parties have submitted an appeal, or if the court rejected by final decision all appeals which had been submitted [Section 359(3) of the CPC]. If the appeal is withdrawn, a decision shall become final on the day when the notice of withdrawal of the appeal is delivered to the court, if the time limit for appeal has already expired with respect to all other parties having the right to appeal. On the other hand, if the time limit for appeal has not yet expired vis-à-vis the other parties having the right to appeal, the decision shall become final on the day following the expiry of the time limit for appeal [Section 358 (6) of the CPC].

30 *Poitrimol v France* §§31–34; *Sejdovic v Italy* §§86–96.

g) Class action agreements

The new CPC introduced[31] the class action option in specific subject matter cases. It is a progressive novelty in Hungarian civil procedure law toward contractualization, however, it does not mean that the parties have the power to shape the proceedings, in the contrary, there are strict rules provided by the law regarding the class action lawsuits and class action agreements as well.[32] Notwithstanding, this is a classic form of contractualization, since such actions may not be brought without a class action contract at all.

At least ten plaintiffs shall be entitled to enforce one or several rights of the same cause for all plaintiffs (hereinafter referred to as 'representative right') in the form of class action if the facts underlying the representative right are the same as to substance with respect to all plaintiffs (hereinafter referred to as 'representative facts'), and the court approved the class action. A class action may only be brought in the following cases: *a)* for the purpose of enforcement of claims arising in connection with consumer contracts; *b)* in labour disputes; or *c)* for the enforcement of claims or damages stemming from health impairment resulting directly from unforeseeable environmental pollution caused by human activities or arising in consequence of negligence (Section 583 of the CPC).

Class action may only be brought in the above-mentioned cases, and it shall be based on a so-called class action agreement. Before the class action is instituted, the beneficiaries wishing to enforce their claim in this manner shall first enter into a class action agreement made out in writing. The class action agreement shall specify: *a)* the plaintiffs involved in the class action; *b)* delegation of the designated plaintiff; *c)* delegation of the deputy of the designated plaintiff; d) the legal counsel hired for the class action; *e)* the provisions relating to the expenses incurred by the conclusion of the class action agreement and by preparations for the class action, and for advancement, bearing and sharing court costs of the class action; *f)* the obligations of the parties in relation to making available the case files; *g)* the rules on the designated plaintiff's responsibilities, in particular the mode and the means of guarantees for damages resulting from inefficient conduct of the actions; *h)* the rules for allowing further parties to join the class action agreement after the class action has been initiated, and whether the parties to the agreement are permitted to withdraw from the contract individually; *i)* absolute ban on settlement or express authorization for negotiating a settlement, with the proviso that if an authorization is given for negotiating a settlement the minimum sum and other terms to be included in the settlement agreement must be specified; the parties may further stipulate that their consent must be obtained for a potential

31 Until 2018, under the old CPC, class actions were unknown to the Hungarian civil procedure. More claimants were entitled to initiate a lawsuit jointly under specific conditions, without being considered as a class. See more in Sándor Udvardy, 'Az amerikai class action elméleti háttere és jogi konstrukciója' [The theoretical background and legal structure of US class action lawsuits] in István Varga (ed), *Codificatio Processuralis Civilis – Studia in Honorem Németh János II.* (ELTE Eötvös Kiadó 2013, Budapest) 455.

32 Varga, 'Perrendi szabályozási igények...' 500.

settlement agreement upon receipt of a copy of the draft agreement; *j)* a clause that the prior consent of the parties is required for specific statements and pleadings, and procedural acts taken by the designated plaintiff; *k)* the rules and the method the designated plaintiff is liable to report to the parties about progress, and how the parties are given access to information and how they can monitor progress in the action; *l)* an indication that the plaintiffs will be entitled to a share from the sum of money awarded in the class action to the plaintiffs, or from the sum, other assets or rights granted under the approved settlement in the proportion of their original claim; *m)* information about the substantive force of the judgment given in the class action, indicating specifically the rights and the factual base covered; n) the cases and conditions of termination of the class action agreement (Section 586 of the CPC).

If the class action agreement does not contain the requirements set out above or if the agreement is contrary in content to any mandatory clause, the court shall reject the statement of claim. Consequently, the parties' contract is a necessary but insufficient precondition, which, aside from the mere fact of creating a class, does not shape the proceedings further.

3 The context of procedural contracts

Generally speaking, procedural contracts are deemed ineffective regardless of the form or context in which they are concluded. This applies whether the procedural arrangement is embedded in the parties' main (substantive) contract, incorporated into the general terms and conditions (GTCs), or established as a separate procedural agreement. Hungarian procedural law does not recognise such agreements as legally binding or enforceable. As a result, courts are neither required nor expected to follow the terms of a procedural contract, and a party cannot rely on such an agreement to compel either the opposing party or the court to act in accordance with its terms.

However, there are special statutory provisions applicable in specific personal or subject-matter contexts, particularly in relation to consumer contracts and employment relationships, which limit or regulate the use of choice of court clauses. In consumer disputes, for instance, any jurisdiction clause that deprives the consumer of the right to litigate in their place of residence is invalid. Similarly, in employment law, the employee's forum rights are protected against any contractual clause that would subject their claims to a foreign or distant court without sufficient justification. These exceptions reflect an underlying policy to protect the weaker party in structurally imbalanced relationships.

Outside of these protected settings, procedural contracts – whether between private individuals, companies, or mixed parties – are evaluated uniformly. As discussed in point II above, Hungarian courts maintain a strictly formalist approach, and party autonomy in procedural matters remains narrowly confined. Even in purely commercial contexts, procedural contracts other than choice of court clauses (which are themselves subject to limitations) are not afforded binding force.

a) Consumer to business claims

In Hungarian law, consumer protection usually means contractual limitations, which also applies to procedural contracts. Such rules are not only significant because they protect consumers in case they have a lawsuit against businesses, but also limits procedural contracts in a way that they cannot opt out from ordinary court jurisdictions, since arbitration in claims arising from consumer contracts is prohibited [Section 1(3) of the Act no. LX of 2017 on Arbitration].

The CPC only allows class actions in consumer and employment claims (see point II.3 above).

Choice of court clauses are limited in claims arising from consumer contracts. In actions brought by a business party against a consumer for the enforcement of a claim arising from a contractual relationship, the court within in whose jurisdiction the defendant's domestic residence is located shall have exclusive jurisdiction, unless otherwise provided for by an act, a binding legislation of the European Union or an international convention. If the defendant has no permanent residence in Hungary, said exclusive jurisdiction shall be determined according to the defendant's habitual residence in Hungary; if the defendant's habitual residence is not known, or if located abroad, the last known domestic residence shall apply. If the last domestic residence cannot be ascertained, jurisdiction shall be determined according to the general rules. In the case of joinder of defendants, the action may be brought against all defendants before the court of jurisdiction for either of the defendants who is a consumer [Section 26(1) of the CPC]. Moreover, no choice of court agreement is allowed if it precludes the consumer's right for the enforcement of a claim arising from a contractual relationship with a business party before a court within whose jurisdiction his own domestic residence, or his habitual residence in Hungary in the absence thereof, is located [Section 27(5) of the CPC]. Furthermore, in the absence of exclusive jurisdiction the plaintiff shall have the option to bring action for the enforcement of a consumer's claim arising from a contractual relationship with a business party before the court of jurisdiction for the place where the plaintiff's domestic residence, or his habitual residence in Hungary in the absence thereof, is located instead of the court of ordinary jurisdiction for the defendant [Section 28(1)d) of the CPC].

b) Labor disputes

The protection of employees against employers is similarly regulated as in consumer claims mentioned above (eg not subject to arbitration, specific rules apply).

There are also special choice of court rules applying to labour disputes:[33] the party may enforce his pecuniary claims by way of the order for payment procedure, except if the

[33] EBH 2019.M.9., EBH 2019.M.2.

action pertains to the sanctions applied as a consequence of any breach on the employer's part of the obligations stemming from the conclusion, amendment or termination of the employment relationship, or to sanctions applied on the grounds of disciplinary infraction [Section 508(6) of the CPC]. The employee as plaintiff shall be entitled to bring action before the court hearing labour disputes of jurisdiction by reference to his home address, or failing this, his habitual residence in Hungary, instead of the court of ordinary jurisdiction for the defendant [Section 513(2) of the CPC]. The employee as plaintiff shall also be entitled to bring action before the court hearing labour disputes in whose area of jurisdiction he or she is or has been working for any extended period of time, instead of the court of ordinary jurisdiction for the defendant [Section 513(3) of the CPC]. The employer as plaintiff shall bring action before the court of jurisdiction by reference to the employee's domestic home address, or domestic habitual residence if no home address is available, except in the case of joinder of defendants, if the employer lays claim to all defendants for damages or restitution, the action may be brought against all defendants before the court of jurisdiction for either of the defendants [Section 513(4)–(5) of the CPC].

The plaintiff may withdraw his action without the consent of the defendant at any time during the proceedings, although generally it is only possible until the defendant submits its defence statement (Section 518 of the CPC) [See point II.2 *ea)* above].

The court tries to settle the dispute with the parties at every stage of the proceedings, the parties are more intensively encouraged to come to a settlement than in general subject matter claims – however, such negotiations relate to the substantial legal issues, not to the procedure.

III Assessment of the enforceability, impact and the future of procedural contracts

1 Remedies for non-compliance with the procedural contract

With the exception of choice of court clauses – which are expressly recognised by law and may confer exclusive jurisdiction on the designated court – other types of procedural contracts remain ineffective and unenforceable under Hungarian civil procedure law (see point I.1 above). While parties are free to agree on certain procedural aspects, such agreements have no binding force on the court and cannot be enforced by either party. As a result, any contractual arrangement concerning, for example, evidentiary rules, hearing formats, or waiver of remedies will not be upheld by the court unless grounded in statutory provisions.

An important exception to this general ineffectiveness arises in the context of mediation. Pursuant to Section 86(3) of the CPC, if the parties reach a settlement agreement through mediation, and one of the parties later initiates court proceedings despite this agreement, the plaintiff shall be required to bear the defendant's court costs. However, if the lawsuit is brought solely due to the other party's failure to comply with the mediated agreement, the general rules on cost allocation apply, meaning that the initiating party may still recover costs if they prevail.

A similar rule applies under Section 86(6) CPC in the context of consumer disputes resolved by arbitration boards. If one party brings the case before the court after a statutory settlement agreement has been reached by the arbitration board via resolution, that party must bear the costs of the opposing party – except in proceedings that seek an enforcement clause due to the other party's non-compliance with the settlement. These limited exceptions reflect the legislator's intent to uphold the finality of mutually accepted resolutions and to discourage unnecessary litigation after successful alternative dispute resolution.

To a comparative note, the German Federal Court[34] accepted that breach of a forum-selection clause by suing in a non-agreed forum may entail damages (eg reasonable defence costs) under contract-law principles. This illustrates how certain procedural bargains can have substantive consequences – even if they do not bind the court's conduct.

2 Constitutional law and human rights

In Hungarian law, the principles of due process and the right to a fair trial are guaranteed by Article XXVIII of the Fundamental Law of Hungary, and are further elaborated and safeguarded within each procedural code – namely, the CPC, the Criminal Procedure Code, and the Administrative Litigation Code. These principles include, among others, the right to an impartial tribunal, the right to be heard, and the right to a judgment within a reasonable time. The enforcement of these guarantees is not left to the discretion of the litigants; rather, it is the exclusive responsibility of the courts to ensure that proceedings adhere to these constitutional standards. Parties to a dispute have no procedural autonomy to deviate from or waive these principles, even by mutual agreement.

However, the CPC provides that it does not mean to enforce these principles, but Article 25 of the Fundamental Law, which merely provides that in Hungary, courts of justice are entitled to decide in civil (and administrative and criminal) claims, thus applying a rather formalistic approach.

The principle of disposition (Hungarian: *rendelkezési elv*) refers to the party's right to initiate legal proceedings and, once initiated, to determine the personal and substantive scope, as well as to some extent the course, of the proceedings. The Constitutional Court of Hungary *(Alkotmánybíróság)* has addressed the definition of this principle in several decisions, including: 8/1990. (IV. 23.) AB decision, 9/1992. (I. 30.) AB decision, 1/1994. (I. 7.) AB decision. According to these rulings, the party's procedural right of disposition is an aspect of the constitutional right to self-determination – it represents its procedural

[34] BGH, Urteil vom 17 Oktober 2019 – III ZR 42/19.

dimension and is connected to individual autonomy. A party with an interest in the legal dispute has a constitutional right to bring their case before a court. This right to access the courts also includes the freedom not to exercise that right.[35] However, as discussed above, this does not cover the right to tailor the proceedings, but only to have their case handled by a court of justice within the legal framework provided.

As previously discussed, the new CPC elevated efficiency and procedural economy to the level of fundamental procedural principles, reinforcing the constitutional expectation of a trial being completed within a reasonable duration. This structural emphasis on judicial control and procedural effectiveness explains why procedural contracts are virtually non-existent in Hungarian law. Courts are vested with broad powers to manage the conduct of proceedings, including the ability to override or disregard any private procedural arrangement that would compromise fairness, efficiency, or legal certainty.

Moreover, the subject-matter-specific limitations on party autonomy – such as those governing consumer or employment disputes – are not incidental but derive directly from the constitutional obligation to protect vulnerable parties. This is reflected in special legal safeguards that prevent parties from circumventing protective procedural provisions through contractual means. In such settings, public interest and the structural imbalance between the parties justify additional restrictions on party autonomy, including limitations on jurisdiction clauses and enforceability of procedural agreements. Together, these doctrinal foundations reinforce a procedural system where state authority and judicial oversight prevail over contractual freedom in the shaping of litigation.

3 Shifting attitudes towards procedural contracts

Since the re-codification of Hungarian civil procedure in 2018, the new CPC has introduced a clear shift in the procedural structure, placing greater emphasis on the parties' responsibility to present their case. Under the new framework, the burden of asserting facts, presenting legal arguments, and submitting evidence rests primarily with the parties. Courts are now strictly bound by the claims, facts, and evidence submitted by the litigants, and may not go beyond what has been brought before them. This marks a deliberate move toward strengthening the principle of party presentation *(állítási és bizonyítási kötelezettség)*, aligning with the broader objective of enhancing procedural discipline and predictability.

However, despite this increased responsibility on the parties, the scope of procedural autonomy remains narrowly defined, much like under the previous CPC. While parties are expected to manage the substantive content of their case, they have little influence over the procedural structure of the litigation. Procedural rules continue to be mandatory and court-controlled, with limited opportunities for party agreements to alter deadlines, procedural steps, or other aspects of case management. Thus, while the new CPC reinforces the parties'

35 Varga, Éless, *Szakértői javaslat…* 33.

central role in presenting their case, it maintains the traditionally restrictive stance toward private procedural autonomy. One of the central objectives of the new CPC is to enhance the effectiveness and timeliness of judicial proceedings. This is achieved through strict procedural deadlines prescribed either by law or set individually by the court, alongside the application of sanctioning mechanisms.

Under the CPC, the general rule is that parties must present all claims, factual allegations, legal arguments, and supporting evidence at the earliest possible stage of the proceedings. Any deviation from this duty – whether through delay, procedural gamesmanship, or strategic withholding of information – is subject to the above-mentioned sanctions. This reflects a clear shift from the more party-driven adversarial approach toward a strongly inquisitorial model, where the court plays an active and supervisory role in maintaining procedural discipline.

This trend toward tight procedural control was further reinforced in March 2020, during the first wave of the COVID-19 pandemic, when the Hungarian government introduced temporary procedural rules aimed at ensuring continuity of judicial proceedings while facilitating social distancing. These emergency measures had the practical effect of further limiting party autonomy: in-person hearings and public access to proceedings were largely replaced by document-based adjudication, and court hearings could not be conducted in person, even if both parties jointly requested it. While the emergency rules theoretically allowed for remote hearings via telecommunication tools, the lack of technical infrastructure in most Hungarian courts meant that such hearings remained rare and largely unimplemented. As a result, many cases were either decided solely on the basis of written submissions or experienced significant delays, pending the relaxation of pandemic-related restrictions.

The combined effect of these developments has been a further centralization of procedural control in the hands of the judiciary, a narrowing of party influence over the conduct of proceedings, and a reaffirmation of procedural efficiency and judicial management as core pillars of the modern Hungarian civil process.

IV Conclusion

This paper demonstrates that while Hungarian civil procedure law nominally allows for procedural contracts, their practical enforceability remains highly limited. Rooted in a public-law framework and governed by the CPC, Hungarian litigation is primarily court-controlled, offering only narrow windows for party autonomy. Choice of court clauses represent the only truly enforceable procedural agreements, and even these are subject to significant restrictions – particularly in consumer and employment disputes. Other forms of procedural contracts, including agreements on evidentiary rules, hearing formats, or cost allocation, may be valid in form but lack binding effect and judicial enforceability.

Despite the CPC's shift toward emphasizing party responsibility for case presentation, courts retain control over procedural structure, deadlines, and enforcement mechanisms. Limited exceptions – such as mediation settlements or class action agreements – are tightly regulated by statute and serve more to supplement than to displace judicial authority. Constitutional guarantees of due process and judicial oversight further constrain procedural flexibility, especially to protect structurally weaker parties. In sum, while Hungarian civil procedure reflects a modest evolution toward procedural responsibility, it remains fundamentally resistant to contractualization, prioritizing judicial control, legal certainty, and procedural fairness over party-driven litigation design.

EU case law widens party autonomy at the jurisdictional gateway, yet keeps robust public-law guardrails around interim protection, fair-trial rights and cost proportionality. For Hungary, these developments do not overturn the CPC's court-centred model, but they map the safe corridors where procedural contracting is legally meaningful (forum selection; cost-sharing in settlements; carefully drafted, non-AGB proof agreements) and where it is structurally limited (core evidence assessment; interim measures; blanket appeal waivers).

What is foreseen is that, although the prevailing judicial attitude and legal framework are not likely to shift dramatically in the near future – given their deep roots in the logic of the civil law tradition – the Hungarian legislator has taken a cautious step toward expanding procedural autonomy. In a recent legislative package submitted by the government,[36] an amendment to the Civil Procedure Code proposes the introduction of a new type of lawsuit: the simplified civil procedure *(egyszerűsített polgári per).* This form of litigation would be available only upon the parties' prior written agreement and aims to streamline contentious procedures in specific cases. Notably, it excludes disputes involving personal status, employment governed by Section 508(1) CPC, and consumer relationships. The simplified procedure entails several significant departures from the general rules: it requires mandatory legal representation, eliminates the bifurcation between preparatory and substantive phases, prohibits procedural acts such as counterclaims, joinders, or in-person hearings, and restricts evidentiary means to written and expert evidence only. Moreover, the court must proceed expeditiously, with statutory deadlines as short as eight days for certain procedural actions. Although this new model preserves the court's overarching control and limits its applicability to clearly defined legal relationships, it reflects a novel legislative willingness to acknowledge and operationalise party agreement as a procedural trigger. Should it be enacted and implemented effectively, the *egyszerűsített polgári per* may pave the way for a gradual reevaluation of the rigid dichotomy between public-law procedure and private autonomy within Hungarian civil litigation.

[36] Bill no. T/11917., submitted on 13 May 2025.

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