

# Amicus *Curiae*

*The Journal of the Society for Advanced Legal Studies*



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## EDITOR'S INTRODUCTION

AMY KELLAM

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I am delighted to present the first issue of *Amicus Curiae* for 2026, and my first issue as Co-Editor. As always, the issue is framed by the journal's goal, as the official publication of the Institute of Advanced Legal Studies, of disseminating legal scholarship that connects academic theory with practice. This commitment is realized in the diverse contributions that follow, which collectively examine law's foundational structures—from corporate governance and intellectual property to its spatial, temporal, and cultural boundaries—before culminating in a Special Section on Deaf Legal Studies that exposes the sensory foundations of these structures.

In “Consumer Protection in Transition: A Study of China's Emerging Implementation Framework”, Ling Zhou examines the evolving landscape of consumer rights in the People's Republic of China, particularly in the context of the rapid transition from a planned economy to a consumer-centric market. This article highlights the significant reforms introduced by the 2024 Implementing Regulations for the

Consumer Protection Law, which aim to address the complexities of modern consumerism, especially in the wake of the explosive growth of e-commerce and digital transactions.

Zhou's analysis underscores the persistent challenges that consumers face, including deceptive marketing practices, inadequate enforcement of consumer rights, and the vulnerabilities of specific demographics such as elderly and minors. By examining the regulatory framework's strengths and weaknesses, the article advocates a more robust consumer protection approach that safeguards individual rights and promotes public trust in the marketplace.

This analysis of a regulatory framework adapting to new market realities finds a parallel in the examination of a profound regulatory absence in the following article, “Addressing the Legal Challenges of Unregulated Surrogacy in Ghana” by Justice Sir Dennis Adjei and Samuel Addo Otoo. This presents an analysis of the consequences of Ghana's lack of specific surrogacy regulation. Using the Ghanaian

context as its foundation, the study adopts a broad comparative lens to examine the international spectrum of regulatory approaches, from partial restriction to absolute prohibition. It thoughtfully explores the ethical underpinnings and practical outcomes of these diverse models, arguing persuasively that the absence of a domestic legal framework exposes all parties to significant risk.

Rather than advocating for the adoption of one foreign model, the article makes a distinct and valuable contribution by framing this comparative discussion as a catalyst for informed national debate. It compellingly concludes that the boundaries of any future Ghanaian surrogacy law should not be determined by external precedent alone, but must be deliberated and set by its own civil society, informed by the country's traditional cultural and moral values.

Where the previous article calls for law to be grounded in cultural context, the next probes a foundational legal category. In "Partnerships and Trusts as Legal Persons ... What About the Tax?", Chris Thorpe offers a precise technical analysis of UK tax doctrine, considering the complexities surrounding the legal personality of partnerships and their tax implications. Thorpe argues for a re-evaluation of the legal status of partnerships, advocating for their

recognition as *sui generis* entities that reflect the commercial realities of modern business practices. This exploration is particularly timely as it aligns with the ongoing discourse on the need for legal frameworks that adapt to the changing dynamics of partnership structures, especially in light of the increasing prevalence of Limited Liability Partnerships. By drawing parallels between partnerships and trusts, the article highlights the necessity for a coherent tax treatment that acknowledges the unique characteristics of these entities, ultimately aiming to bridge the gap between legal and tax statuses.

This technical inquiry into legal personality raises immediate practical questions of how such categories are applied. The following article confronts this directly, examining the barriers faced by parties when legal frameworks encounter diverse cultural understandings. In "Asian Parties and the Property (Relationships) Act 1976: Unique Challenges and Issues", Mai Chen and Alice Strang illuminate the challenges faced by Asian litigants within New Zealand's property law framework. As the demographic landscape shifts, the authors emphasize the importance of cultural competence in legal proceedings, particularly in the context of the Property (Relationships) Act. The article critically examines how cultural

practices, language barriers, and differing legal understandings complicate relationship property disputes, advocating for reforms that ensure equitable access to justice. This work not only addresses the unique experiences of Asian parties but also contributes to the broader conversation on the need for a legal system that is responsive to the diverse cultural fabric of contemporary New Zealand society.

Moving from the interpersonal sphere to the structural, the next critique targets the core economic doctrine governing the most powerful legal persons: the corporation. In “Is Shareholder Profit Maximization Efficient?”, Say H Goo delivers a timely economic and legal critique of the Anglo-American corporate model, arguing that shareholder primacy is a structural generator of social cost. It presents a robust critique of the doctrine of shareholder profit maximization, asserting that its claimed efficiency relies on conditions—such as perfect competition and full cost internalization—that are rarely met in practice.

The analysis reveals that when firms externalize social and environmental costs, the pursuit of shareholder value distorts allocative efficiency and undermines societal welfare. The existing patchwork of consumer, labour, and environmental laws is insufficient to address this systemic flaw, as it targets symptoms rather than the

governance structures at their root. To correct this, the article proposes a fundamental reconstitution of corporate boards to include representatives for core stakeholder constituencies—employees, consumers, communities, and the environment. This model of “stakeholder boards” is not only an ethical imperative but also an efficiency-enhancing mechanism that compels the internalization of externalities at the decision-making core of the firm.

This critique of internal corporate governance logically expands to a critique of law’s ultimate governance of space itself, examining the ontological “thresholds” that determine belonging and abandonment.

In “The Jurisprudence of the Threshold”, Michael Murphy advances the theory of Relational Legal Pluralism (RLP) by diagnosing a foundational crisis in contemporary jurisprudence: the “temporal cage”. This ontological bias prioritizes defining what law is over asking what law does, a fixation that blinds law to its complicity in structures of colonial power. To break open this cage, the article critically repurposes the triadic philosophy of Watsuji Tetsurō, by arguing that a pervasive, mobile logic of spatial governance—one that actively creates and maintains a threshold between a sovereign “inside” and an abandoned “outside”—constitutes a fundamental crisis in modern law.

To prove and interrogate this claim, the author analytically scales RLP by applying it to two distinct sites: first, to the localized, domestic catastrophe of the Grenfell Tower fire and, second, to the expansive geopolitical violence of the European Union's border regime. These are not simply parallel case studies but are presented as connected manifestations of the same colonial logic. Through this dialectic between the intimate and the geopolitical, the article demonstrates that RLP makes visible the shared operative principles linking seemingly disparate sites of juridical rupture. Thus, the case studies serve to prove the diagnostic power of this reconstructed philosophical grammar.

The power of this critique is its adaptability. It is not fixed to a single issue or ideology. Rather, it offers a diagnostic lens that can be applied across a spectrum of contexts. In each case, the same underlying grammar of exclusion becomes visible: the creation of an "abyssal line" where legal responsibility dissolves.

From the spatial logic of exclusion, this issue's "Visual Law" contribution "The Absolute", by Gavin Keeney and Amy Kellam, turns to law's governance of another fundamental dimension: time. The following essay applies a radical critique to the legislated temporality of intellectual property,

confronting the temporal cage identified earlier.

"The Absolute" operates at the intersection of philosophical manifesto, cultural critique, and legal theory. Working from Keeney's foundational conception of works-based agency, it argues that intellectual property law functions as a governor of creative time in that it generates a legislated, commodifiable temporality that actively pre-structures the creative process and our relationship to its outputs. This juridical framework systematically captures and subordinates the singular event of creation to the logic of the asset economy, thereby rendering impossible the emergence of what the text calls "the Absolute"—a transformative, structural principle immanent to works, capable of reconfiguring creation from within. Rather than proposing legal reform, the essay advocates for an individual, "elective" abandonment of authorial rights to create an "a-legal" space where this occluded potential might surface. We publish it here to provoke critical reflection on the temporal and ontological assumptions underpinning copyright regimes and to invite legal scholars to engage with this radical critique from the avant-garde. As the editor of this section and a co-author of this piece, I welcome the critical dialogue it will, I hope, inspire.

This issue also includes an obituary, by Marique Yseult, for Professor Patrick Birkinshaw, who passed away in November 2025. A longstanding contributor and esteemed scholar of public law, he is greatly missed. Fittingly, the book reviews section which follows is led by one of his final pieces of writing.

Professor Birkinshaw's review of Jonathan Sumption's *The Challenges of Democracy and the Rule of Law* is a characteristically sharp contribution, consistent with a career defined by engaged and principled scholarship.

Demonstrating his lifelong expertise in public and European law, Birkinshaw dissects Sumption's conservative defence of parliamentary sovereignty against international courts and social change. He offers a robust, progressive counter-argument, challenging Sumption's scepticism of the European Court of Human Rights and defending the role of juridical checks in safeguarding rights where political processes may fail. True to form, the review is both a substantive engagement with a key legal debate and a demonstration of his critical acumen. We publish it here in professional tribute and for the clarity it brings to a central tension in contemporary jurisprudence.

The book review section also includes a review by Mai Anh

Nguyen of *Language of Comparative Constitutional Law: Questioning Hegemonies*, edited by Erika Arban, Maartje De Visser and Jeong-In Yun, and a review by Jean-Pierre Cabestan of *Taiwan and the Cause of Democratisation in China: Inspiration and Support*, edited by Chen Jie.

The issue's cumulative critiques of law's economic, spatial, and temporal structures converge in a profound examination of its sensory and communicative foundations. The Special Section on Deaf Legal Studies exposes how law's hearing-centric bias underpins and connects these varied modes of exclusion.

As Guest Editor Rob Wilks' introduction outlines, the contributions to the special section range from the legal framing and practical operation of deaf people's rights, with a specific focus on the incorporation of international human rights norms, the implementation of sign language law, comparative legal mapping techniques, and access to protection within domestic legal systems.

Modern Western law is profoundly logocentric and hearing-centric. Many of its core rituals—the oath, the testimony, the adversarial hearing—its rules of evidence (hearsay, credibility), and its doctrines of intent and consent take the spoken word,

and hearing as the default channels of legal truth. The legal subject is presumed to hear and to speak. From this foundational bias flow institutional obstacles. The scholarship thus interrogates inadequate or unenforced legal protections for sign languages, the failures in inclusive framing, and documents how these structural deficits institute a regime of unequal access.

These same structural biases—the logocentrism and hearing-centrism of law—are reproduced in more mundane, yet corrosive, failures of administration. For many who are deaf, the promise of access—via assistive listening systems, hearing loops, captioning—is routinely broken. Yet, even when functioning, these measures often merely accommodate a deaf participant to a hearing procedure; they do not transform the underlying hearing-centric logic. This maintains a foundational inequality, where access is granted as a conditional concession rather than secured as a right of equitable participation. Not for lack of solutions, but for a failure of imagination and implementation.

My own experience in court and other institutional spaces—as a deaf person reliant on lip-reading, residual hearing, and assistive technology that often fails—is that procedural momentum exerts its own coercive

force. The procedural machinery does not pause: it advances through whispered consultations, turned-away remarks, and rapid exchanges—a physical grammar that severs visual access. This is the rhythm of the hearing room, leaving those of us reliant on nonfunctioning technology, lip-reading, or absent interpreters to grasp at its edges. When access fails, this coercive force presents a choice: either attempt to participate on profoundly unequal terms or forfeit engagement altogether. It is a commonplace, everyday coercion that emerges not from malice but from the gap between formal guarantee and practical institutional competence. As such, it constitutes a failure of procedural justice, one that demands a response from practitioners and scholars alike.

However, by tracing such failures to law’s medical and linguistic foundations, the section makes a broader point. Procedural justice cannot be severed from these deeper structures. For scholars and practitioners across different fields of law, it offers not only a specialist’s inquiry but a masterclass in uncovering hidden assumptions that structure our legal world. It asks, quite directly, whether law is prepared to see, hear, and accommodate different ways of being in the world—precisely the kind of foundational critique that reorients legal understanding.

If law's hearing-centrism institutes a regime of unequal access, a parallel critique must be levelled at the channels of legal scholarship itself. The contributions gathered here examine how law structures communication, participation, and recognition; these same questions arise, with direct urgency, within academic publishing. Recent work on accessibility in scholarly communication has shown that a significant proportion of academic outputs remain inaccessible to readers with perceptual or cognitive disabilities, and that audio- and video-based formats often reproduce barriers unless substantially remediated. Despite clear legal duties under the Equality Act 2010 and the Public Sector Bodies (Websites and Mobile Applications) Accessibility Regulations, practical commitment is lacklustre. Evidence suggests a near-total failure of implementation; one global study of major journals found that only 2.4% of scholarly PDFs met basic accessibility standards (Wang & Ors 2021: 8).

The problem deepens with the scholarly adoption of digital-native formats. The default video infrastructure of platforms such as YouTube exemplifies this issue: academic content published for public engagement typically relies on auto-generated captions, lacks verified transcripts, and omits audio description—failing basic accessibility standards. These

failures are a baked in feature of a hyper-capitalized, scale-driven model that prioritizes frictionless distribution and metricized engagement over communicative integrity, corroding its epistemological value. Here, the grasping for social metrics ruptures the act of communication, incentivizing discourse tailored for algorithmic promotion rather than critical, durable scholarship. Ultimately, this logic alters scholarship's public purpose, recasting dissemination from a collective intellectual project into a metric of private engagement.

In response, a growing emphasis on born accessible publishing holds that scholarly materials must be designed from the outset to be accessible, citable, and navigable (see, for example, [The University of London Press](#)). This is not simply a technical goal but speaks to the role of scholarship as a public good: born accessible practice completes the open access mission by ensuring the removal of the paywall is not the only barrier to entry. While universities experiment with multimedia, the core function of academic publishing remains the production of durable, accessible, and archivable knowledge. Ensuring research is available in formats that can be meaningfully accessed by all scholars is therefore a fundamental responsibility. Accordingly, this issue of the journal introduces improvements

to our PDFs' technical accessibility, a step toward born accessible publishing.

As this issue demonstrates, questions of linguistic rights and communicative justice do not end at the courtroom door; they also shape how academic communities imagine their audiences and structure their own practices of knowledge-making. It is in this spirit that the issue presents the following diverse articles, which, each in their own way, interrogate the structures that govern recognition, participation, and value in the legal world.

My thanks go to my fellow Co-Editors Pablo Cortes and Maria Moscati for their invaluable partnership. I also wish to express my gratitude to our Consulting Editor, Michael Palmer, whose mentorship made my editorship possible and whose legacy continues to inform our collective work as co-editors, as well as my own academic endeavours. I reserve a special thanks to Marie Selwood without whom none of the issues would be possible, and who deserves special mention for her work implementing the improved accessibility measures.

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# CONSUMER PROTECTION IN TRANSITION: A STUDY OF CHINA'S EMERGING IMPLEMENTATION FRAMEWORK

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## Abstract

This article explores consumer protection issues in today's China, focusing on the evolving regulatory framework for safeguarding consumer rights. It emphasizes the 2024 Implementing Regulations for the Consumer Protection Law and highlights China's changing consumer welfare framework in its transition from a planned economy to a consumer-centric market economy, with rising rights awareness and the growth of e-commerce. Despite the 2013 amendments to the law, various challenges have persisted, including false advertising affecting elderly people, online gaming risks for youth, and strategic claims by so-called "professional consumers". Other problems include price discrimination enabled by big data, excessive data collection, live-stream commerce, and uneven enforcement. The 2024 Implementing Regulations introduce clearer enforcement mechanisms, enhanced digital protections, stricter limits on professional consumers, and improved dispute resolution. The article evaluates these reforms in protecting consumers and regulating businesses, while reflecting on the continued importance of state control and the influence of socialist values.

**Keywords:** consumer protection; implementing regulations; professional consumers.

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## [A] INTRODUCTION

Consumer protection in the People's Republic of China (PRC/mainland China), as elsewhere, is necessary to safeguard individuals from unfair business practices, low-quality products, and misleading information. For several reasons, however, consumer protection has become especially important in the PRC over the past three decades, as mainland China has pursued policies of economic reform, moved from a planned to a more consumer-centric market, experienced rapid economic growth, and seen a significant rise in consumer awareness. The notion

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of consumer (*xiaofeizhe* 消费者) has had to be constructed almost from scratch, and several waves of reform have extended consumer welfare in various ways. In the mid-1980s, local regulations were introduced and served as precursors for the Law for the Protection of the Rights and Interests of Consumers (1993) (hereinafter, the Consumer Protection Law, or CPL) (*Zhonghua Renmin Gongheguo Xiaofeizhe Quanyi Baohu Fa* 2013).<sup>1</sup> This key development was accompanied by related legislation including an Advertising Law (1994) which sought to better regulate advertising content so as to protect consumers from misleading and false advertisements; a Product Quality Law (1993), requiring manufacturers to meet specific standards and holding them accountable for defects, and an Anti-Unfair Competition Law (1993) aimed at promoting fair competition, and addressing issues adversely impacting on the consumer such as deceptive practices including false advertising, trademark infringement, and monopolistic conduct.

The rapid economic growth that China has experienced over the past few decades, and the emergence of consumerism in what was once a socialist economy have necessitated the creation of an effective regulatory framework for protecting the consumer and providing avenues of redress and dispute resolution for aggrieved consumers. China's development has led to the creation of a vibrant middle class, with a strong interest in consumer goods and services, and prepared to assert their "rights and interests" as the CPL puts it. Shopping malls abound where there were once inefficient small local factories, or outdated housing blocks. As the consumer market in China has expanded, and the consumer has come to be recognized as a bearer of rights and interests, consumer welfare has come to be seen as a matter of public interest, and one that is sometimes undermined by business misconduct, often prioritizing profit over welfare, including false advertising, fake goods, corrupt sales dealings, shoddy production, and environmentally harmful packaging. These may bring harm to consumers, employees, and local communities. The Government aims to protect consumers against such harm, but does not always enjoy success. In particular, the PRC has experienced important scandals related to product safety, including the melamine-

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<sup>1</sup> *Zhonghua Renmin Gongheguo Xiaofeizhe Quanyi Baohu Fa* (中华人民共和国消费者权益保护法). amended in accordance with the "Decision on Amending the Law of the People's Republic of China on the Protection of Consumer Rights and Interests" adopted at the 5th Session of the Standing Committee of the Twelfth National People's Congress on 25 October 2013. In the People's Republic of China, in many areas of what is termed "social protection law", the areas of social life protected are characterized as "Rights and Interests" rather than just "Rights". The "Interests" refer to the "benefits" individuals or groups can be reasonably expected to enjoy. These include economic, social, cultural, and legal "assets" such as property, earnings, and well-being, thereby contributing to their livelihood and quality of life.

contaminated milk incident (Chung & Wong 2013), and the prevalence of counterfeit goods in the market (Lin 2011; Yang 2015). These scandals have sometimes put consumers' health and safety at risk, as well as creating intellectual property issues such as the unknowing purchase of fake or low-quality products, ranging from luxury items to everyday necessities like food and medicine. While China in the post-Mao reform era has made serious efforts to develop a robust legal framework for consumer protection, including provisions encouraging private enforcement and, as I have pointed out elsewhere, specialized mechanisms to resolve disputes between consumers and businesses which have operated with a fair degree of success (Zhou 2017; 2020; 2023), as in other areas of Chinese law, there remains a need for stronger enforcement and this need has been seen as increasingly more important as the Chinese authorities have progressively stressed the value of social stability, enhancing their appreciation of the value of consumer welfare, trust in the market, and safeguarding public health.

In due course, in 2013, the Consumer Protection Law was amended to introduce stricter regulations on long-standing issues such as product safety, false advertising and fake goods, and to address emerging challenges arising from e-commerce. The amendments were an important aspect of government-implemented policies to encourage domestic consumption and open up markets, while at the same time individuals had become more consumer conscious—better informed and more discerning in their purchasing choices, leading to significant transformations in the consumer landscape. Moreover, as marketing in China has become more complex and deceptive market practices have evolved, even well-informed individuals are not always fully aware of their rights in relation to the quality of the goods or services that they purchase. Facilitated by its rapid digital transformation, the PRC's e-commerce industry is now one of the largest in the world (Lin 2025). With the exponential increase in online shopping and the potential for fraud, defective goods, and misleading marketing, consumer protection measures are necessary to hold sellers accountable and maintain trust in the online marketplace. The emergence of the internet as a marketplace and online shopping has also encouraged the need for better regulation to safeguard consumers against such practices as false business data, fake user evaluations, misleading sales tactics, such as deceptive bundle sales, and engaging in big data-enabled price discrimination (Shang & Ors 2022). Nonetheless, the CPL as amended in 2013 did not foresee the full extent of China's ongoing rapid economic and social development in the years that followed, necessitating the latest significant development

in this line of legal reform, namely the 2024 Implementing Regulations on the 2013 Consumer Protection Law (hereinafter, the 2024 Implementing Regulations). Legal practitioners in China often look to such implementing regulations as providing important substantive legal rules that provide the “real law” more effectively than the main code of law itself, as the latter is sometimes too general and programmatic. The significance of the 2024 Implementing Regulations is further enhanced by the fact that the 1993 CPL was not accompanied by implementing provisions so that the new provisions are the first national-level implementation measures in more than three decades.

This article contains four sections, in addition to this Introduction and the Conclusion. The second section examines persisting problems in the mainland PRC’s system for consumer protection; the third section offers some explanations for the 10-year delay in introducing the 2024 Implementing Regulations; the fourth section considers important features of the 2024 Implementing Regulations; the fifth section considers the need for further reform; while the Conclusion points to the continuing influence of socialist ideology on the system of consumer protection.

## [B] CONTINUING AND EMERGING ISSUES

In response to various problems in consumer protection noted above, China’s 1993 Law on the Protection of Consumer Rights and Interests (the CPL) was revised in 2013. These revisions strengthened the law, as suggested above, in ways that were a significant improvement over the previous legal framework (Zhou 2020), but were not able to address fully the difficulties of consumer protection in China, leaving weaknesses.

### Implementation and enforcement

Perhaps the most important continuing flaw has been that the system had not resolved a major weakness of lack of coordination between relevant agencies, complicating particular problems of implementation and enforcement. Wei (2020) has noted the importance of recognizing the need for greater co-ordination and harmonization, especially in the Greater Bay area of southern China, where the post-colonial legal systems and traditions of Macau and Hong Kong continue to play a complicating role. But at the same time, within mainland China, there are also particular difficulties of coordination. Thus, the State Administration for Market Regulation (SAMR) and the China Consumer Association (CCA) play crucial roles in regulating the market, ensuring product quality, consumer rights protection, and addressing complaints in China. They

play pivotal roles in safeguarding consumers in China. The SAMR, a “super ministry” that serves essentially as a regulatory body, functioning to oversee market activities, ensure businesses comply with relevant laws, and resolving market-related disputes that may arise between consumers and businesses. This organization is crucial in maintaining market order and fairness, providing a structured framework within which businesses and consumers operate. On the other hand, the CCA may be characterized as a semi-official agency, standing outside the Chinese civil service in theory, but in practice tied very closely to the state as it is the state which pays the salaries of its officials. The CCA primarily functions to enhance consumer awareness, to champion consumer rights, and to act as a forum for resolving consumer disputes. It undertakes various initiatives to educate the public on their rights and responsibilities, aiming to empower consumers with the knowledge needed to make informed decisions and protect themselves against exploitation. The CCA’s advocacy extends to lobbying for consumer-friendly policies and practices, striving for a balanced relationship between businesses and consumers, and, as I have pointed out elsewhere, inclined to be supportive of consumers aggrieved by the misconduct of businesses. Because it is so closely associated with the Government in the eyes of consumers, aggrieved consumers are inclined to overestimate its authority and to have unrealistic expectations of what it can achieve (Zhou 2020).

However, both institutions, along with their local branches in particular, face challenges related to lack of effective synchronization in their activities. This can impact their enforcement work in various ways, sometimes leading to fragmented enforcement, inconsistent policy implementation, and inefficiencies in handling consumer complaints. The overlapping responsibilities of SAMR and CCA, particularly in consumer protection and market regulation, have led to duplicated efforts and inefficiencies. This overlap may result in differences of view regarding their respective jurisdictions and fragmented enforcement across regions, causing inconsistencies in regulation. Additionally, varying standards in different areas can create enforcement disparities, weakening overall market regulation. There are also issues with communication gaps, particularly between SAMR and CCA, which hinder decision-making and the flow of crucial information. Poor coordination can lead to delayed responses to consumer complaints, causing frustration and reducing trust in regulatory bodies (Li 2024). Inconsistent policy implementation is a significant issue, stemming from varied policy interpretation. Local branches of SAMR and local consumer councils under the CCA often interpret national policies differently. This leads to uneven enforcement

across regions, with some areas enforcing stricter regulations while others are more lenient. Such inconsistency can create difficulties for businesses and consumers. Local branches often face capacity gaps, such as resource constraints and disjointed enforcement of national campaigns. They may lack the resources and training of national headquarters, hindering effective enforcement. Additionally, poor coordination can disrupt national campaigns, limiting their effectiveness. Legal and bureaucratic barriers in China's regulatory system include jurisdictional conflicts between SAMR and local authorities, leading to coordination issues, and a complex bureaucracy that complicates decision-making and enforcement due to lengthy approval processes. Moreover, while the 2013 legislative reforms identified the responsibilities of governmental and quasi-governmental agencies in consumer protection, they did not offer mechanisms that would point to accountability for non-enforcement. Local regulators have often exhibited hesitation or delay in addressing issues with influential businesses, and there were limited repercussions for regulatory inaction. On the basis of my fieldwork experience, I would say that in order to enforce better China's market regulation and enhance consumer protection, there need to be stronger communication channels, better integration of data and technology, efficient resource allocation, and clear roles and responsibilities among the agencies. The new Implementing Regulations, as we shall see, do take some important steps in this direction.

Inadequate governmental support for consumer organizations has remained a significant weakness. Although the 2013 revised law recognized the importance of these organizations in safeguarding consumer rights, it did not provide them with sufficient legal authority or financial resources to pursue specific grievances, nor to advocate for consumers on a broader scale. Additionally, local protectionism has often shielded businesses from accountability, making it harder for these associations to advocate for consumer rights. Moreover, while revisions to the CPL in 2013 introduced increased penalties, local authorities often lacked the necessary resources, personnel, or training to implement the law effectively. As a result, at least in some areas, businesses were able to operate without facing substantial consequences for misconduct in infringing on consumer rights.

## Dispute resolution enhancement?

As I have pointed out elsewhere, the PRC has developed since the 1990s, with some success, avenues for dispute resolution, including mediation in particular, but also extending to arbitration and litigation (Zhou 2017; 2020; 2023; Lin 2025). Consumers in many jurisdictions around the world

encounter hurdles in seeking redress, especially for small claims, as the cost and time required to pursue legal action are often disproportionate to the value of the dispute. Nevertheless, the 2013 revisions in China did little to reform effectively procedural issues which are difficult for consumers to navigate. While the revisions allowed for class-action lawsuits in cases of perceived consumer rights violations, the potential for mass litigation remained largely untapped and underdeveloped. This was largely due to a lack of sufficient incentives and clear guidelines for initiating and handling such actions, especially in “typical” trouble cases involving widespread, low-value harms impacting on large groups of consumers. Mass litigation has been a sensitive issue in China for several decades (Fu 2021).

### Ineluctable growth of online shopping

The 2013 revisions, perhaps understandably, did not adequately foresee the rapid growth of e-commerce and digital transactions in China which have quickly reshaped the country’s retail landscape. As a result, the regulation of online shopping platforms—including more recently live stream shopping (*zhibo dai huo* 直播带货)—has emerged as a significant issue (Wang & Li 2024), particularly in addressing challenges such as fraudulent reviews, data privacy concerns, and online payment fraud. These revisions fell short in addressing these complexities, especially in transactions involving complex third-party platforms (Lin 2025). Additionally, the revisions did not fully account for the expansion of cross-border e-commerce. This sometimes left vulnerable PRC consumers involved in disputes with international sellers or platforms outside China’s regulatory reach.

### The rise in the need for more effective protection of personal data and privacy

A challenging aspect of the growth in online shopping has been the increased need for more robust data protection. The 2013 revisions, perhaps unsurprisingly, did not sufficiently address the escalating concerns regarding the collection, use, and safeguarding of consumers’ personal information, particularly with the advent of online transactions and digital marketing. Businesses have from time to time engaged in unauthorized use or sale of consumer data without facing clear legal repercussions, leaving consumers vulnerable to privacy breaches. A notable issue has been the use of overly broad consumer authorizations. Consumers have often been required to provide blanket consent for the

collection and use of their data when purchasing goods or services online. The 2013 revisions failed to establish clear limitations on how businesses could use such data, resulting in misuse and exploitation of personal information.

## Electronic and financial revolutions

The 2013 revisions did not adequately foresee the need to regulate effectively emerging forms of business such as online streaming, sharing economy platforms (like ridesharing or home-sharing), and peer-to-peer lending. Additionally, the 2013 revisions did not anticipate the need for enhanced consumer protections in financial products. The rapid expansion of consumer-targeted financial services—including online lending platforms, insurance products, and investment schemes—was not sufficiently addressed by the 2013 legislation. As a result, consumers have sometimes been misled by false promises or ambiguous terms, perhaps resulting in significant financial losses. Notably, these sectors experienced especially rapid growth following the 2013 law revisions, creating regulatory gaps that left consumers vulnerable to fraud, substandard service quality, and unclear liability in disputes involving third-party platforms.

## Protection of elderly people and young persons

In China, elderly and young consumers face distinctive vulnerabilities to consumer rights violations. Elderly consumers struggle with the digital divide, making them targets for scams, misleading health advertisements, and financial exploitation. They often lack awareness of legal protections and face physical and financial limitations. Minors are susceptible to predatory practices in online gaming, privacy violations, unsafe products, and influencer marketing due to their limited awareness of the issues. They are particularly vulnerable to influencer marketing and may encounter unsafe or substandard educational products and toys. Both groups face challenges within a consumer system that has historically given insufficiently robust safeguards for protecting them against their vulnerabilities.

## Prepaid consumption

Prepaid consumption in China is widely used, but its growth has created a range of problems, especially for buyers and particularly in the service industry (Zhou 2024). Businesses including gyms, beauty salons, and education centres often aggressively promote prepaid

membership packages that require significant upfront payments. When these businesses abruptly close or declare bankruptcy, consumers may be left with little to no recourse, losing their entire prepaid amounts. Regulatory oversight of prepaid funds has not been sufficient. Unlike jurisdictions that mandate safeguards on prepaid funds, China has lacked comprehensive regulations to ensure businesses manage these funds separately from operating capital. This regulatory gap has allowed businesses across various service sectors to use prepaid funds as operating capital without establishing financial safeguards. The problem is further exacerbated by information asymmetry. Consumers typically have little to no insight into a business's financial health or stability before committing to prepaid plans. Many, particularly elderly consumers, may not fully understand contract terms regarding refunds or the implications of business closures. When businesses face financial difficulties or deliberately engage in fraudulent schemes, consumers often have had minimal recourse to recover their prepaid amounts. Some businesses impose excessive penalties, create convoluted procedures, or flatly refuse legitimate refund requests, trapping consumers in a vulnerable position. The 2013 revision provided some clarification on the responsibilities of businesses, but many obligations were still vaguely defined. This allowed businesses to exploit loopholes, such as misrepresenting product quality or manipulating terms of service. Additionally, businesses frequently found ways to avoid providing refunds, replacements or compensation by exploiting lack of clarity in the law. In the case of online marketplaces, the 2013 revisions did not sufficiently clarify the responsibilities of platform operators in disputes between consumers and third-party sellers. This led to confusion over who was accountable when consumer rights were violated, with platforms often distancing themselves from responsibility.

## Consumer consciousness

More generally, the 2013 revisions did introduce innovations in the area of consumer education, especially on the need for promotion of broader public understanding of consumer rights. Many consumers remained unaware of their rights under the law, or how to seek redress when those rights were violated, limiting the law's effectiveness in protecting consumers. It can be argued that this has been a particular problem for disadvantaged consumers. The 2013 revisions did not provide special protections for the welfare of vulnerable consumer groups, such as elderly people, people with disabilities, or those with limited digital literacy. As a result, as noted above, these groups were often disproportionately

targeted by fraud or other deceptive practices, particularly in areas like healthcare products or financial services.

While the 2013 revision of China's Consumer Protection Law was a step forward, it did not fully address the evolving complexities of consumer protection, particularly in a rapidly evolving digital and economic landscape. The 2024 Implementing Regulations seek to close many of these gaps by introducing clearer guidelines for enforcement, enhanced protection for consumers in the digital economy, and improved mechanisms for resolving disputes and protecting personal data.

## [C] PATIENTLY WAITING

In the PRC when significant legislation is introduced, implementing rules often follow quickly. These regulations provide essential details and guidance that the primary legislation may lack. They are crucial for the practical application of more broadly drafted laws, such as the Consumer Protection Law, filling gaps left by the original legislation. These implementing rules offer operational guidelines for government agencies, businesses, and the judiciary to address legal issues, disputes, and rights protections. They usually seek to promote consistent law enforcement across regions and sectors by defining procedures, responsibilities, and standards for enforcement agencies and others. Such regulations are intended to transform general policies into actionable rules, ensuring that the intent of national legislation is realized at operational levels. Lawyers and judges use these rules to apply the legislation effectively. Additionally, after introducing primary legislation, a period of evaluation often follows and implementing rules are then promulgated. The 2024 Implementing Regulations for Consumer Protection aim to address emerging issues and evolving social, economic, or technological conditions that the primary law may not have fully anticipated, or to take into account other legislative developments relevant to consumer protection.

It took a full decade to introduce the Implementing Regulations for the 2013 Consumer Protection Law. Authorities needed time to adapt to China's economic growth and technological changes. E-commerce, digital payments, and social media are now part of consumer conduct. More effective regulations were necessary, and the Government had to monitor emerging trends. Consumer issues became more complex, involving industries such as online gaming and live streaming. The process of developing regulations requires coordination across industries and government agencies. Authorities also may well have delayed in order to align with broader policy innovations such as "dual circulation"

(*guoneiguoji shuang xunhuan* 国内国际双循环). By 2024, clearer needs for reform were apparent. Growing consumer awareness has also been a pressure for better protection, seeking to balance business interests and consumer rights more effectively.

Especially in response to the growth of e-commerce and the digital economy, and the expanding need for personal data security, following the 2013 revision of the CPL, mainland China has significantly reformed various areas of the law which impact on consumer protection and business conduct. Such developments have had to be taken into account in drafting implementing regulations. Thus, not too long after the 2013 revisions to the CPL, the Advertising Law was also updated (2015). Key aspects of the revised Advertising Law include efforts to prohibit false or misleading advertising: the law prohibits companies from making exaggerated or false claims about their products or services. This is seen as particularly important in sectors like health, food, and medicine, and is intended to help consumers to receive accurate and reliable information. In addition, celebrity endorsements must be truthful and transparent. Additional restrictions are placed on advertisements targeting children, with the aim of ensuring that advertising content is appropriate and safe. Also in 2015, the Food Safety Law was revised to enhance consumer protection in the food industry by instituting stricter oversight of food production and sales. Penalties for food safety violations were increased, including higher fines and possible business closures for serious infractions. Greater transparency in the food supply chain was required, with an obligation placed on suppliers to maintain comprehensive records and ensure transparency regarding their ingredient sources.

The 2020 Civil Code offers robust legal safeguards for consumer protection, including consumer rights in general, product quality, contract obligations, personal data protection, and liability for defective products. This effort to strengthen commitment to consumer safety and consumer trust in the market came after the introduction of the E-Commerce Law, effective from 1 January 2019, which represents an attempt to advance significantly consumer protection within the online shopping sector. The e-commerce legislation seeks to establish clear guidelines for dispute resolution, product quality assurance, and transparency in e-commerce transactions, in an effort to foster trust among consumers and retailers alike. Furthermore, the protection of consumer data has been a primary focus of recent legislative efforts. In response in the main to the challenges created by digital development, the Data Security Law (2021) and the Personal Information Protection Law (PIPL) (2021)

were enacted. These laws address increasing concerns over the misuse of personal information and are legislative attempts to enhance privacy and security in the rapidly evolving digital landscape. They do so by instituting strict regulations for data processing, storage, and sharing. They also define the rights of individuals to access, correct, and delete their personal information. Collectively, these three legislative measures do show commitment on the part of the authorities to safeguarding consumer interests and promoting a secure and dependable digital economy. Also noteworthy are the Measures on the Supervision and Administration of On-line Transactions (2021), introduced by the SAMR. This set of regulations further develops online consumer protection in various ways including transparency and traceability of products. Online platforms are required to ensure that sellers provide accurate information about the goods and services offered, including product descriptions, safety standards, and pricing. In addition, there is protection against misleading sales tactics—platforms are prohibited from manipulating prices or using false reviews to mislead consumers. Furthermore, online platforms are required to establish clear and efficient procedures for handling consumer complaints and disputes.

Recent judicial interpretations by the Supreme People’s Court have greatly expanded the scope of punitive damages in China, now covering a wide range of consumer disputes. This expansion is crucial for cases involving fraudulent or deceptive business practices, offering better protection and recourse for consumers. Punitive damages serve as a deterrent, imposing penalties on companies that engage in misconduct beyond mere compensation. In terms of public interest litigation, amendments to the Civil Procedure Law in 2021 empowered organizations seen as functioning in the public interest to play a more active role in consumer protection: “agencies and relevant organizations specified by law may file lawsuits with the people’s court” (Article 58). These changes have enhanced the ability of organizations such as the CCA to bring suit in the People’s Courts, on behalf of consumers, arguing for their collective interests. Such litigation is seen as addressing consumer issues with widespread impact, targeting companies involved in fraudulent, harmful, or unsafe practices that negatively affect numerous consumers. This development, while also containing an element of social control because it limits the standing of individual consumers to bring such suits, is also seen as promoting good business practice. The courts have also been relevant in another way: namely, through the imposition of punitive damages. Recent judicial interpretations by the Supreme People’s Court—as we shall see below—have considerably impacted on the scope of punitive

damages and are particularly significant for cases involving fraudulent or deceptive business practices. Punitive damages are intended to serve to deter companies from misconduct by imposing penalties that exceed mere compensation, but also provide opportunities for consumers who bring suit to secure profits from their purchase of inferior products or services.

## [D] KEY ASPECTS OF THE 2024 IMPLEMENTING REGULATIONS FOR THE 2013 CONSUMER PROTECTION LAW OF THE PEOPLE'S REPUBLIC OF CHINA

The main features of the 2024 Implementing Regulations for the 2013 Consumer Protection Law of the People's Republic of China may be characterized in the following terms.

### Consumer rights

The 2024 Implementing Regulations seek to create a safer and more protective overall consumer environment, and a number of provisions are focused on consumer and business rights and obligations. A prominent aspect is the precise definition of consumer rights, including the right to safety, the right to be informed, and the freedom to make choices without coercion. Businesses must provide precise product information, honour quality commitments and after-sales services, and protect consumers' personal data. This mandate extends to e-commerce platforms and live-streaming services, aligning with the evolving digital marketplace. A particular concern is promoting safety and security (*renshen he caichan anquan* 人身和财产安全) within the market and improving the quality of goods and services offered by sellers, including those provided as gifts or rewards. These Implementing Regulations strengthen consumer protection provisions established in the 2013 CPL by thus clearly outlining consumer rights, especially concerning personal and property safety and business obligations to ensure product and service safety (Article 7). Consumers are entitled to protection against harm to their person or property when acquiring goods or services, and businesses are obligated to ensure that their offerings pose no danger. Consumers are also empowered to report concerns to relevant authorities about potentially defective products that may threaten personal or property safety. Businesses are made accountable for their products and services so that, for example, they are required to implement recalls and other corrective actions if their products or services are found to be defective;

they are also responsible in such contexts for notifying consumers and covering related costs. Furthermore, as the importance of both physical safety and property protection is stressed, so businesses must maintain safe facilities, and provide assistance to consumers if there is an emergency on the premises (Article 8). One of China's leading civil law specialists (Wang, Liming 2024), has characterized the advances made in very positive terms, as reflecting the view that consumer rights are basic rights of citizens and essential for people's livelihoods and happiness. His analysis examines how the new regulations respond to consumers' concerns, protect vulnerable groups like elderly people and minors, and address new challenges in the digital economy and e-commerce. Other writers offer a more cautious view, using language which predominantly frames consumer protection through institutional arrangements rather than empowering consumers directly with enforceable rights. Consumer rights are mentioned, but the emphasis is on how businesses should fulfil obligations and how the Government and consumer associations should monitor and enforce compliance. This approach to the Implementing Regulations reflects more closely China's regulatory philosophy where consumer protection is implemented more through administrative oversight and social governance than through individual rights enforcement. While there may be an emphasis on the "people-centred" approach encouraged by the Chinese President Xi Jinping, the focus is more on institutional responsibilities than on individual consumer empowerment (Li 2024). Some of these commentators write from the perspective of law enforcement officials rather than as consumer advocates, which also explains their concern with regulatory mechanisms rather than with empowering individual consumers with rights awareness (Wang, Ruijin 2024), moreover overall the perspectives adopted avoid an activist approach. Furthermore, not only business operators but also consumers are expected to act in accordance with the principle of good faith (*chengxin yuanze* 诚信原则) (Liu & Zhang 2024).

## Treatment of the socially disadvantaged

The 2024 Implementing Regulations for the Consumer Protection Law offer comprehensive protections for all consumers. They also provide targeted measures aimed at addressing the specific needs of vulnerable groups, particularly elderly people and minors. These provisions underscore a clear commitment to protecting those who face heightened risks in China's increasingly complex marketplace. Elderly consumers are explicitly safeguarded under Article 15, which states:

Proprietors must not use false or misleading publicity to fabricate or exaggerate the efficacy of goods or services, such as for treatment, health care, or wellness, to induce the elderly and other consumers to purchase goods or services that clearly do not meet their actual needs.

This rule seeks to address deceptive marketing practices, especially those targeting health-related products and services. By recognizing elderly people as a particularly vulnerable demographic, the regulation aims to protect them from exploitation and assist them in making their purchasing decisions better informed.

Article 16 introduces significant safeguards for minors, particularly in the context of online gaming. It stipulates:

Where business operators provide online gaming services, they shall comply with the state's provisions and standards on areas such as the time period, duration, function, and content of online gaming services, set up corresponding functions such as time management, authority management, and consumption management for minors, and strictly conduct user verification in stages such as registration and login, to protect minors' physical and psychological health in accordance with law.

This provision imposes provisions including time limits, parental controls, spending management, and stringent user verification. Together, these measures aim to protect minors' mental and physical wellbeing in an environment often fraught with risks. The regulations also prioritize the protection of minors' sensitive personal information under Article 23, which states:

Where business operators handle sensitive personal information such as consumers' biometrics, religious beliefs, specific identities, medical health, financial accounts, whereabouts and tracks, as well as the personal information of minors under the age of 14, they shall comply with the provisions of relevant laws and administrative regulations.

Thus, the provision emphasizes the importance of safeguarding minors' privacy, particularly for those under 14 years old, by requiring strict compliance with legal and regulatory standards.

## Business responsibilities

The responsibilities of businesses are further highlighted in other provisions in the Implementing Regulations. Businesses have a duty to conduct their communications transparently and honestly (Articles 9-13). They are required to provide truthful and comprehensive

information about their products and services, including precise pricing and labelling. This obligation aims to prevent false advertising and misleading practices that infringe upon consumers' rights and interests, ensuring that consumers are well informed and capable of making safer, more secure purchasing decisions than they otherwise might. Businesses are also encouraged to develop and offer internal dispute resolution systems. Thus, Article 44 directs businesses to create efficient and accessible complaint-handling systems. Establishing internal mechanisms like first-contact responsibility, pre-compensation, and online dispute resolution (ODR) are encouraged because it is thought they will assist in the effective management of disputes, offering early resolution options before disputes escalate to formal complaints or litigation, and thereby reducing pressure on external dispute channels. The 2024 Implementing Regulations also specify various penalties for businesses that violate consumer rights, including fines, confiscation of illegal gains and, in severe cases, the revocation of business licences. These measures are intended to function as a deterrent to non-compliant businesses and to help enhance legal accountability. The relevant provisions are to be found in Chapter 6 entitled "Legal Responsibility" (*Fülü Zeren*), Articles 48-52. In particular, Article 50 stipulates that businesses that violate the provisions of the regulation can face fines ranging from one to five times the amount of illegal gains. If no illegal gains are present, the fine can be up to 300,000 yuan. Moreover, these penalties can be accompanied by warnings and confiscation of illegal gains. In more severe cases, businesses may be ordered to suspend operations for rectification and even face the revocation of their business licence. At the same time, according to Article 51, if businesses self-correct their misconduct "where the illegal conduct is minor and corrected in a timely manner and no harmful consequences are caused" then any punishment may be mitigated, or not imposed, in accordance with the provisions of the Administrative Punishments Law of the PRC (as revised 2021). Civil liability is also stressed. Article 48 provides that businesses which provide defective goods or services in violation of the Consumer Protection Law and the 2024 Implementing Regulations, thereby infringing upon consumers' legitimate rights, will bear civil liability in law.

## Public participation and governmental responsibilities

Moreover, the 2024 Implementing Regulations aim to encourage consumers to be proactive and to develop their own consumer awareness. Article 26 grants consumers the right to file complaints and reports with

relevant government agencies if they believe their rights have been violated. The regulations also emphasize the importance of public participation in monitoring business practices and reporting violations, integrating social supervision into the governance system. The governmental agencies are directed to handle complaints made by aggrieved consumers promptly and fairly, thereby strengthening oversight of market practices and enhancing consumer safety. Additionally, the regulations seek to promote public education about consumer rights and responsibilities. Government authorities are tasked with raising awareness about the importance of safe and rational consumption, thus empowering consumers to protect their own safety and interests (Article 30).

At the same time, however, the persistence of a Chinese “socialist” emphasis on the importance of the state in providing a protective environment for the consumer is evident in the 2024 Implementing Regulations that assign significant roles to government bodies which are responsible for overseeing and enforcing consumer protection measures. These include handling complaints, supervising businesses, and ensuring the implementation of standards. This focus on the active role of the state is emphasized in general terms in especially Articles 3, 4 and 5, as well as in Article 25:

All levels of people’s government should strengthen guidance for efforts to protect consumer rights and interests, organizing, coordinating, and urging relevant administrative departments to implement their duties for the protection of consumer rights and interests, and increasing the level of legalization (*fazhi shuipinghua* 法治化水平) of efforts to protect consumer rights and interests.

Government departments are further tasked with educating the public about their consumer rights (Article 30). The state sees itself as actively overseeing consumer rights protection through market regulation, legal enforcement and the promotion of green consumption (*lüse xiaofei* 绿色消费) and pressing businesses to comply with consumer protection regulations. Trade and industrial associations, often acting under state guidance (State Council 2024), are also encouraged to promote self-regulation and for members’ businesses to operate in good faith (Article 3). Such bodies are thus expected to promote compliance with consumer protection standards. This is intended to create a self-regulating marketplace where businesses voluntarily uphold higher standards. This dual approach improves consumer safety and product quality by ensuring accountability from both government and industry peers.

Finally, government performance may also be subject to penalties where it falls short of expected standards:

Staff of relevant administrative departments who fail to fulfil their duties in protecting consumer rights as stipulated by these regulations, or who abuse their authority or shield businesses that infringe on consumers' legitimate rights, shall be subject to disciplinary action. If a crime is constituted, criminal liability shall be pursued (Article 52).

## Dispute processing

In addition to encouraging businesses to set up and offer to aggrieved consumers their own dispute management systems, in various ways the Implementing Regulations offer support for other robust and diverse dispute resolution processes (*duoyuan hua jie jue jizhi* 多元化解机制), that is, various avenues for resolving consumer disputes, including negotiation, mediation, arbitration, complaints, and litigation. Ideally, these are to be relied on sequentially, from informal bilateral negotiation and settlement (*hejie* 和解) through to litigation. Article 43 highlights the importance of local government enhancing and promoting these processes, intending thereby to assist consumers to settle their disputes with businesses. Moreover, as we have noted, businesses themselves are encouraged in Article 44 to adopt internal mechanisms to handle disputes promptly, including pre-compensation systems and ODR—the latter process is increasingly relied upon in dispute resolution all over mainland China, enabling disputes to be handled remotely, and most likely more efficiently, through digital platforms. Businesses may not, according to Article 17 of the Implementing Regulations, use standard form contractual terms to limit the avenues of redress available for aggrieved consumers.

In order to encourage use of mediation services and to protect the rights and interests of consumers, Article 45 empowers consumers to seek mediation services from consumer associations and other recognized bodies—these most probably include local mediation committees—who are required to resolve disputes efficiently, and their ability to deliver effective dispute resolution is seen as important for maintaining consumer trust. In addition, support is given for ensuring that complaint procedures are effective—Article 46 outlines the process for filing complaints with market supervision departments. These departments must address complaints within seven working days. If both parties agree to mediation, then it should be completed within 60 days. Article 47 emphasizes the role of testing institutions in resolving quality disputes. Consumers and businesses can mutually select testing facilities, or relevant authorities may designate one if there is no agreement between the parties in dispute.

## Consumer associations

In Chapter 4, Article 34-41, consumer associations—standing somewhere on the penumbra between the state and civil society—are granted an active role in protecting consumer rights, conducting evaluations, and filing lawsuits on behalf of consumers in cases of widespread rights violations. This expands the legal recourse available to consumers beyond individual efforts. The Implementing Regulations on consumer associations require the associations (and other legally recognized consumer organizations) to conduct their activities on the basis of the CPL. Their main duties involve promoting consumer rights, conducting activities like comparative testing (*bijiao shiyan* 比较试验) surveys and evaluations, and publicizing complaint information. The people's governments at all levels should support consumer associations by providing necessary funding and resources to help them perform their duties effectively. Government departments are required to consider feedback from consumer associations, investigate reported consumer rights violations, and provide updates on their actions. Consumer associations are also responsible for educating the public about consumer law and offering support to help consumers secure their rights (usually by means of dispute resolution facilities). They are also expected to share best practices and case studies to enhance consumer awareness. Consumer associations, further, have the authority to investigate consumer rights complaints, verify facts with businesses, and facilitate discussions to resolve issues. Most importantly, in cases of widespread consumer rights violations, organizations like the CCA and provincial consumer associations may initiate legal action in the People's Court, in the public interest (State Council 2024).

## Personal data

The 2024 Implementing Regulations also provide some key measures for safeguarding consumer personal information, focusing particularly on sensitive data such as biometrics and health information. Overall, the aim is to boost consumer privacy protection and ensure transparent business practices when managing personal and sensitive information. Article 23 requires businesses to protect consumer personal data consistent with legal standards. Importantly, businesses are restricted from collecting excessive personal data unrelated to their services or products. When dealing with sensitive personal information—including biometrics, religious beliefs, health records, and data of minors under 14—businesses must adhere to relevant laws and regulations. Article 24 considers issues of consent for marketing communications. Businesses are required to obtain clear consent from consumers before sending out

marketing messages or making promotional calls. If consumers opt in, businesses must provide an easy way to cease to subscribe. Following cancellation, the business must promptly cease further communications.

Looked at in a positive light, the 2024 Implementing Regulations for China's 2013 Consumer Protection Law are intended to offer a comprehensive legal framework for safeguarding consumer rights, underpinned by government oversight and public participation. They focus on harm prevention and business transparency and accountability, thereby attempting to enhance protection of the consumer in the rapidly changing marketplace. Key strengths include robust governmental oversight and accountability, integration of industry self-regulation, specific protections for vulnerable consumers, including those who are elderly and those less familiar with digital technologies, and important roles for consumer organizations. The Regulations also address digital platforms and emerging markets, emphasizing consumer protection in these areas. Additionally, they provide for diverse mechanisms for dispute resolution, with the intention of enhancing accessibility for aggrieved consumers seeking redress. They also seek to offer consumer protection standards that align better with international norms. We may also conclude that, while they are officially characterized as Implementing Regulations, they give the appearance more of being a consolidation of relevant norms, brought together with the needs and convenience of those involved in the enforcement of consumer law in mind, many of whom are not trained lawyers, and who would benefit from working with merged material.

## [E] PROFESSIONAL CONSUMERS

But there are also more restrictive provisions in the Implementing Regulations on the activities of the so-called professional consumers, who have made good use of civil liability in an area of consumer law and practice that has emerged over the past three decades or more. The concept of a "professional consumer", which we discussed above briefly, is not clearly defined in any current laws or regulations. As I have noted elsewhere, this role emerged from Chinese legislation intended to protect consumers (Zhou 2020). Individuals and informal groups have seized upon the legal provisions for punitive damages in the Consumer Protection Law as a way to make profits—although often mixed motives of personal gain and public interest are to be found, with the professional taking the view that while they seek profits, what they do is also in the public interest and in keeping with the spirit of the CPL. They focus on identifying products that might not comply with consumer laws and

regulations and intentionally purchase such items which they hope will lead to compensation much greater than the cost of the product—including by settlement outcomes secured by negotiations with the business party. While some officials and judges approve of such conduct on the ground that it enhances consumer standards, others question the motives of the professional consumers, arguing that their work often results in trifling claims, wastes administrative and judicial resources, increases costs for sellers who have to defend these claims, and produces outcomes that rarely lead to improvements in product and services standards.

This tension between the two views is reflected in Article 49 of the Implementing Regulations. The first paragraph has the effect of protecting the consumer from business misconduct, as well as businesses against frivolous complaints:

Where proprietors commit fraud in providing goods or services, consumers have the right to demand compensation from proprietors in accordance with the provisions of Paragraph 1 of Article 55 of the Law on the Protection of Consumer Rights and Interests. However, there are exceptions to the defects in the labels, instructions, promotional materials, etc. of the goods or services that do not affect the quality of the goods or services and do not mislead consumers.

The second paragraph more robustly protects businesses that are faced with false claims brought by professional consumers or others:

Where the business operator is defrauded of compensation or extorted by means such as entrainment, package dropping, counterfeiting, tampering with the production date of the goods, or fabricating facts, the provisions of the first paragraph of Article 55 of the Consumer Rights Protection Law do not apply, and it is handled in accordance with the PRC Public Security Administration Punishment Law and other relevant laws and regulations; where a crime is constituted, criminal responsibility is pursued in accordance with law.

So, we see that, while penalties are part of a broader framework aimed at enforcing consumer rights and ensuring businesses comply with the laws governing consumer protection, limits are placed on what is probably the most important form of consumer activism to have emerged in China over the past three decades or so, namely the professional consumer. The Implementing Regulations are, as we noted above, not the only recent normative development in dealing with the problem of the professional consumer. The 2024 Judicial Interpretation of the Supreme People's Court of Several Issues Concerning the Application of Law in the Trial of Cases Involving Disputes over Punitive Damages for Food and Medicinal Products, promulgated and in force in late August 2024 and subsequent to the Implementing Regulations, is a more detailed attempt at restricting

the range of claims that the professional consumer might bring. It seeks to limit the scope for individuals who knowingly purchase non-compliant food or medicinal products to claim punitive damages, and in some situations to impose punishment as well. The Judicial Interpretation aims to standardize court practices nationwide, addressing a key issue faced by professional litigants: inconsistent case outcomes across different jurisdictions. While some local courts are more lenient, others are notably strict. This Interpretation sets out a detailed and uniform standard for courts to follow, seeking to secure greater consistency in the outcomes of legal proceedings. The main restrictions now put in place by the Interpretation are intended to disqualify claims that are too small, or involve only minor technical issues, or where excessive punitive damages are sought, or where the consumer knowingly purchases a defective product or service, or where the purchaser tampers with the purchase in order to bring a malicious claim.

The rise of professional consumers in China can be traced to longstanding challenges with counterfeit goods and food safety. As we have seen, these individuals deliberately purchase products they suspect to be substandard or non-compliant with regulations and then use consumer protection law to seek compensation. Their actions highlight an intricate relationship between regulatory enforcement, consumer rights, and business accountability in China's marketplace. Professional consumers argue that they play a vital role in supplementing government oversight. By identifying counterfeit or substandard products that might otherwise go unnoticed, they help enforce regulations in a market where official monitoring resources are often stretched thin. Their vigilance creates pressure on businesses to uphold quality standards while empowering ordinary consumers to safeguard actively their rights. In a system where regulators cannot scrutinize every product or service, these proactive consumers address critical enforcement gaps. However, critics contend that professional consumers often blur the line between advocacy and exploitation. It is argued that too many such consumers focus on trivial issues, such as minor labelling errors that pose no real threat to consumers, rather than addressing substantive safety concerns. More troubling conduct includes predatory practices, such as bulk-buying products solely to file multiple compensation claims, which can strain judicial resources with frivolous cases. Businesses argue that such tactics foster an adversarial environment, detracting from collaborative efforts to improve quality and diverting attention from meaningful reforms.

At the heart of this debate lies a fundamental question: do professional consumers serve the public interest or prioritize personal profit? While

the professionals play an important role in protecting public welfare by exposing unsafe products, they are also often seen as exploiting legal mechanisms for financial gain without contributing to broader improvements in consumer safety. In response to these challenges, the recent legal reforms we have noted aim to support legitimate consumer advocacy while curbing abuse. The 2024 judicial interpretation on punitive damages for food and medicinal products preserves strong compensation rights for valid claims while introducing measures to limit exploitative practices. Notably, Articles 12 through 14 restrict compensation for consumers who knowingly purchase non-compliant products to “reasonable consumer needs” and establish criteria for identifying potentially abusive purchasing patterns. Despite the reforms, the distinction between legitimate advocacy and opportunistic conduct remains a point of contention in Chinese legal and societal discourse. The evolution of these regulatory efforts at limiting the conduct of professional consumers will likely continue, given market complexities and the often highly skilled complainants who are the professional consumers. The professional consumers both enforce and exploit consumer protection laws and operate at the edge of legitimacy. They are regarded as simultaneously “consumer heroes” and “opportunists”, to a significant extent depending on the viewer’s perspective.

## [F] AREAS FOR POSSIBLE FUTURE REFORM

At the same time, while the regulations offer a broad framework for consumer protection, they may not fully achieve their goals due to issues with enforcement, consumer agency, and adaptability to modern market challenges. First, it might be argued that, as implementing regulations, they do not provide the detail necessary to guide effective enforcement. Secondly, it also might be argued there is an over-reliance on state control and that this raises the possibility of failure to adjust to rapidly changing market conditions. It also may leave consumer protection vulnerable to local government budgetary constraints and policy priorities. The Implementing Regulations stress the importance of state authority leadership in consumer protection efforts, but do not in any specific detailed guidance to address the general issue of coordination between different sectors and departments in the administration—an issue identified above as one of the key factors in implementation difficulties.

Further, the Implementing Regulations could have provided for greater empowerment of the consumer. While the Regulations encourage consumer organizations, outline dispute resolution mechanisms, and acknowledge the rights of individuals to make complaints and

initiate litigation, they do not explicitly stress the capacity of individual consumers to enforce their rights directly, especially in the courts. The framework set forth by the regulations is comprehensive in terms of involving consumer councils and establishing industry standards for self-regulation. However, much of the enforcement relies predominantly on government agencies, which are tasked with overseeing compliance, and industry self-regulation, which often involves creating and adhering to voluntary codes of conduct. This arrangement leaves consumers largely dependent on these external entities for the protection and enforcement of their rights. As a result, individual consumers may find themselves in a position where they must rely on the effectiveness and responsiveness of these organizations rather than having the means to independently advocate for their own rights.

There are also unresolved issues of inconsistent enforcement and penalties that might have been addressed more effectively. The Implementing Regulations specify penalties for businesses that violate consumer rights, but they lack detailed guidance on how these penalties will be consistently applied across different cases. For example, while Article 50 outlines fines and possible business licence revocation for violations, it does not offer clear criteria for what constitutes a “severe case” (*qingjie yanzhong* 情节严重) or how fines should be calculated for various types of infractions. This lack of specificity can lead to arbitrary enforcement and uncertainty among businesses about the consequences of non-compliance. Without clear guidelines and criteria, both regulators and businesses face challenges in ensuring fair and uniform application of the laws designed to protect consumer rights.

While the 2024 Implementing Regulations provide for a variety of dispute resolution mechanisms for handling consumer grievances, the actual processes of dispute resolution in practice can be slow and cumbersome (Zhou 2020; 2023). These mechanisms include arbitration, mediation, and consumer tribunals, designed to offer a structured approach to resolving disputes. However, there remains much emphasis on mediation. While mediation may be said to facilitate access to justice in some respects by offering a less formal and potentially cost-effective means of resolution, it can also be overly didactic (rather than facilitative) and slow. Thus, the Regulations allow for mediation to take up to 60 days, excluding any time needed for additional procedures like product testing or identification. This lengthy process may discourage consumers from pursuing their claims, particularly in cases where swift resolution is necessary to address urgent issues or regain an aggrieved consumer’s

confidence. Perhaps, then, the system could benefit from reforms aimed at expediting these procedures to better serve consumer needs.

Despite the inclusion of obligations for online businesses and live-streaming platforms, the regulations arguably do not adequately address rapidly evolving issues such as cybersecurity risks or digital fraud, deviant activities which can significantly harm consumers and businesses alike. Provisions related to the protection of personal data focus mainly on traditional privacy concerns, such as data collection and sharing practices, and do not fully engage with the complexities of online consumerism in the digital economy. The regulations might have benefited from a more comprehensive approach that took fully into account emerging technologies and addressed issues like data encryption and authentication procedures, and offered consumer education on digital safety.

Another potential concern is the relative lack of focus on protecting vulnerable consumers. Although, as we have seen, the Implementing Regulations do provide some safeguards for special categories of disadvantaged person such as minors and elders, they fall short in addressing the specific needs of other vulnerable consumers. People with disabilities face unique obstacles in accessing information and services, which are not adequately considered in the current regulations. Likewise, individuals in rural areas encounter challenges such as limited access to resources and support systems, which can impede their ability to enforce consumer rights. The existing one-size-fits-all approach may overlook these distinctive challenges, leading to insufficient protection and support. A more tailored strategy might better meet the diverse needs of all vulnerable consumers. Improved consumer protection for vulnerable groups is an important aspect of effective enforcement of consumer rights.

Arguably, too, the provisions in the Implementing Regulations regarding compensation for fraud are too restrictive. Article 49 specifically limits compensation for fraudulent business practices to cases in which the quality of a product or service is directly impacted. This narrow scope could potentially allow businesses to escape liability for less obvious forms of deception, such as misleading marketing strategies, exaggerated advertising, or false claims about a product's benefits. Such deceptive practices might not affect the actual product or service, yet they still might mislead consumers and create an unfair market environment. Thus, we might conclude that there is a need for broader criteria to ensure comprehensive and effective consumer protection in the area of business fraud on the consumer.

While the Implementing Regulations, as we have seen, offer general provisions for business self-regulation, these provisions remain overly broad and somewhat vague. The intent behind these regulations is to encourage industries to regulate themselves voluntarily, promoting higher standards of conduct. However, this is easier said than done, as the regulations do not specify detailed mechanisms for ensuring compliance or monitoring businesses' adherence to these self-regulatory standards. This lack of clear guidance can lead to inconsistencies in the manner in which different industries implement these standards, potentially resulting in gaps in consumer protection. Without clear oversight or enforcement tools, this reliance on industry self-regulation may not be effective in protecting consumers, leaving them vulnerable to the whims of businesses that may prioritize profits over safety and fairness. Therefore, it is crucial to consider additional frameworks and monitoring systems to enhance the effectiveness of these self-regulatory practices.

These various issues suggest that, while the regulations offer a broad framework for consumer protection, consumer law in the PRC may well benefit from further reform. Consumers might still find themselves vulnerable, despite the reforming Implementing Regulations. One especially important concern lies in the enforcement of these regulations, which can be inconsistent or insufficient, leading to flaws in protection. Additionally, consumer agency is another critical area, as consumers may lack the necessary resources or knowledge to exercise fully their rights, and may be drawn into mediation processes that do not necessarily address fully genuine grievances. Further, the adaptability of these regulations to the challenges of rapid market and technological change is questionable, as they simply may not be able to keep pace with the swift advancements in technology and evolving market dynamics.

## [G] CONCLUSIONS

The 2024 Implementing Regulations attempt to offer a comprehensive approach that balances consumer protection with business obligations, underpinned by government oversight and public participation. The Regulations also seek to impose strict safety standards, improve business transparency, and establish effective processes for consumer protection and recourse. There is an appropriate focus on harm prevention and business accountability. The Regulations also do attempt to address continuously evolving challenges, such as digital commerce and data privacy, in their efforts to construct a framework suitable for China's evolving marketplace. As we have also seen, they do not yet address

fully a number of the difficulties facing the Chinese consumer and could benefit from further reform in several areas.

Whilst the PRC has explicitly committed itself to the development of a market economy since the early 1990s and seen consumer welfare as an important dimension of the economic reform process, it has characterized its economic reform policy goals as intended to develop a “socialist market economy”. China’s system of consumer protection, although constructed in the context of the country’s transition to a more market-driven economy, with the spread of market forces and rapid economic growth, nevertheless retains elements of its socialist framework in several ways. Perhaps most importantly, state oversight and intervention are critically important. In the 2024 Implementing Regulations and other areas of China’s consumer protection framework, the Government is expected to play a significant role in regulating industries, enforcing consumer rights, and ensuring market fairness. This state-centric control may be seen as a legacy of China’s former system of a state-planned economy, where the Government was involved in nearly all key economic processes, and also as reflecting the constitutionally entrenched position currently enjoyed by the Chinese Communist Party. The Chinese Government, through its comprehensive oversight, aims to balance market forces with consumer rights, encouraging businesses to operate fairly and transparently. This approach not only protects consumers from fraudulent practices and poor-quality products but is also seen as encouraging healthy competition among businesses and as ultimately leading to better services and products for everyone, thereby protecting consumers from the excesses of capitalist enterprises. An effective and robust consumer protection system, in particular by minimizing abuse against and safeguarding the interests of consumers, is seen as important not just for the consumer but also for social stability, social harmony, and regime legitimacy. China’s consumer protection system emphasizes the collective wellbeing of society. Such a system aims at protecting individuals so that they are not taken advantage of by businesses, thereby not only promoting trust and confidence in the marketplace but also in the system of control as a whole. In particular, agencies such as the SAMR and the CCA are very much guided by state leadership and may be characterized as reflecting a socialist concern of government-led control over consumer affairs and public welfare. In certain sectors of the economy, such as energy, telecommunications, and banking, state-owned enterprises continue to play a dominant role. While these companies are expected to follow market principles, their close government ties mean that consumer protection policies often reflect state guidance. This approach may be characterized as supporting long-

term social goals rather than just focusing on profit maximization. As I have pointed out elsewhere, consumer disputes in China are commonly resolved through mediation, administrative intervention, or collective actions by government-backed consumer associations (Zhou 2020, 2023). In their usage, these dispute resolution processes emphasize not only individual rights and interests, but also collective welfare and social harmony, and try to avoid an adversarial spirit. So while the PRC's economy is heavily influenced by market forces and private enterprises, its consumer protection system not only addresses resulting consumer issues but also retains important socialist elements. This is evident in government control, a focus on collective welfare, and the alignment of consumer rights with China's broader social and economic goals, creating a blended system of consumer protection.

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## ADDRESSING THE LEGAL CHALLENGES OF UNREGULATED SURROGACY IN GHANA

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### **Abstract**

This article examines the legal and ethical issues posed by unregulated surrogacy in Ghana. Surrogacy is an arrangement where a woman (the surrogate) carries and delivers a child for an intended parent or parents. The egg and sperm used may originate from the intended parent(s), or may be obtained by donation or purchase. The article highlights the potential legal and ethical complications arising from the absence of comprehensive legislation governing such arrangements. The core problem is the lack of legal frameworks to address parentage, rights, and responsibilities in scenarios involving donated gametes and surrogate motherhood. This deficiency leaves children, intended parents, and surrogates vulnerable to disputes, exploitation, and legal ambiguity.

The article explores the complexities of surrogacy, including instances where intended parents utilize donated eggs or sperm, or where same-sex couples seek parenthood. It emphasizes the risk of parental repudiation due to a lack of biological connection, a scenario with severe consequences for the child's wellbeing. By comparing surrogacy regulations in other jurisdictions, the study underscores the urgent need for Ghana to enact specific laws. Key findings reveal that Ghana's current legal framework only addresses birth certificate modifications through High Court orders, leaving broader surrogacy issues unaddressed. The article concludes that the absence of dedicated legislation creates a legal vacuum, necessitating the immediate development and implementation of comprehensive surrogacy laws to protect all parties involved.

**Keywords:** surrogacy regulation; assisted reproductive technology; Ghana; reproductive tourism; the Casablanca Declaration; commodification of children; Ghanaian law.

## [A] INTRODUCTION

Medically, surrogacy involves an arrangement where a fertility institution provides assisted reproductive technology (ART) to enable a woman to carry a pregnancy. In the more popular sense, surrogacy refers to an arrangement where a woman agrees to carry an embryo created through *in vitro* fertilization (IVF) and give birth to a child for intended parents, who may be infertile couples, single individuals, same-sex couples, or those with medical conditions preventing pregnancy.

## [B] DIFFERENT ATTITUDES TO SURROGACY

Internationally, surrogacy regulation presents a patchwork of approaches with some countries enacting comprehensive regulatory frameworks while others lack any specific legislation (Trimming & Beaumont 2013). This regulatory disparity enables “reproductive tourism”, where individuals seek surrogacy arrangements in jurisdictions with minimal regulation and lower cost (Trimming & Beaumont 2013: 439,441-442). States have advanced compelling arguments, grounded in religious beliefs and human rights principles, for the prohibition of all forms of surrogacy. Conversely, equally compelling arguments support surrogacy as enabling naturally infertile individuals to have children through scientific assistance, with proponents wholly rejecting religious objections.

These divergent views are reflected in a spectrum of national legislative approaches with varying degrees of permissibility. At one end, the Catholic Church, guided by its theological doctrines, prohibits all forms of surrogacy. Several states, including China, France, Germany, and Italy, have also enacted prohibitions. Notably, Italy has taken the additional step of criminalizing surrogacy by prescribing penalties for all parties involved. Other jurisdictions adopt partial prohibitions. Hong Kong has criminalized commercial surrogacy, but the laws on altruistic surrogacy are not clear. Canada allows surrogacy but with restrictions on commercial surrogacy. Australia, Brazil and the Netherlands allow altruistic surrogacy but explicitly prohibit commercial surrogacy. India allows altruistic surrogacy for Indian citizens but forbids commercial surrogacy for foreign intended parents.

Ghana is one of the countries where surrogacy remains largely unregulated. The sole regulatory intervention concerns parentage registration: a surrogate mother may apply to the High Court for an order directing the Birth and Death Registry to register the intended mother as the child’s mother at birth. If the application is not made timely, and

the surrogate is registered as the mother, then the intended mother must apply to the High Court within six months of birth for an order substituting her as mother (Births and Deaths Registration Act 2020 (Act 1027), section 22). Despite the absence of specific legislation regulating contracts between the parties, surrogacy has been practised in Ghana for over two decades, resulting in the birth of many children through the process. This article discusses the different types of surrogacies and the serious consequences likely to affect children born through these unregulated arrangements.

To understand the risks posed by Ghana's regulatory gap, it is necessary to examine the grounds upon which other states have formulated their surrogacy policies. Typically, a state's attitude towards surrogacy is informed by which types of surrogacy arrangements it finds acceptable, taking into consideration human rights compliance. First, some states perceive surrogacy as an unacceptable means of having children based on religious objections. Second, some countries prohibit their nationals, both within their territories and abroad, from participating in surrogacy, viewing it as inhumane because it treats human beings as commodities. This objection centres on the commodification inherent in financial transactions for surrogate births. Third, a well-established human rights objection is that surrogacy violates women's dignity by commercializing their reproductive capacity, effectively renting their wombs. Fourth, surrogacy has become a potential vehicle for organized crime and money laundering, with agents and medical facilities potentially extracting large sums of monies from desperate intended parents (Karavas 2019; GBC Ghana Online 2021; Eurojust 2024). Fifth, in unregulated jurisdictions such as Ghana, surrogate babies born with severe disabilities face particular risk (United Nations 2018: 9). If intended parents refuse to accept the child, the child becomes an unintended burden to the surrogate, increasing the likelihood of abandonment. Sixth, surrogacy arrangements can have significant psychological effects upon the women involved, particularly those who serve as surrogates (Lamba & Ors 2018; Velez & Ors 2025).

These diverse grounds for opposition manifest in varied regulatory approaches across jurisdictions. There are countries, including Ghana, where there has not been any discussion on surrogacy, and those involved in such transactions do so with impunity.

Meanwhile, some countries permit all types of surrogacies without implementing meaningful regulation, despite the serious consequences for surrogate mothers, children, intended parents and society. Ukraine

exemplifies this approach, having developed into a hub for international or cross-border surrogacy practised on an industrial scale, with significant adverse effects on surrogates, children and the country itself. Prior to the war with Russia, Ukraine attracted intended parents from around the world seeking surrogacy arrangements. The conflict has since stranded surrogate babies whose intended parents cannot travel to Ukraine to collect them (König 2023). This has forced the Ukrainian Government to provide temporary care for the newborns in makeshift facilities, including basements converted into air raid shelters. These newborns also face potential statelessness. Ukraine's lack of surrogacy regulation means children born to non-Ukrainian intended parents cannot automatically acquire Ukrainian citizenship, as birth within the country's territory does not confer citizenship by right (Al Jazeera 2022; BBC News 2022; *New York Times* 2022; Reuters 2022).

## [C] DIFFERENT TYPES OF SURROGACY

Surrogacy arrangements can be categorized into four main types: traditional surrogacy; gestational surrogacy; altruistic surrogacy; and commercial surrogacy.

In traditional surrogacy, the surrogate's own egg is used with sperm from a partner or donor, whether known or unknown, making her the biological mother of the child. The surrogate mother, who is the biological mother of the child, carries the pregnancy and has a genetic connection to the child. A man may agree to accept as his own a child born through traditional surrogacy using donor sperm. However, such voluntary acceptance lacks specific legal regulation. The man may decide to decline paternity whenever the relationship between the man and the surrogate mother becomes sour, as he did not provide the sperm and does not have any genetic relationship with the child. When the sperm comes from the intended father, paternity is not in doubt: DNA testing can confirm his biological relationship, establishing his legal responsibility.

Traditional surrogacy raises particular legal questions when it occurs within marriage. Ghana's Evidence Act 1975 establishes presumptions about paternity that become relevant in such scenarios. A serious legal complication arises when a married woman uses donor sperm without her husband's consent. Under Ghanaian law, the husband is presumed to be the father because the child was born during the marriage. Section 32 of the Evidence Act provides as follows:

- (1) A child born during the mother's marriage is presumed to be the child of the person who is the mother's husband at the time of birth.
- (2) A child of a woman who has been married, born within three hundred days after the end of the marriage, is presumed to be a child of that marriage.
- (3) This section applies both to monogamous and polygamous marriages.

This presumption creates significant legal implications for traditional surrogacy arrangements involving married women. A man may dispute the paternity of a child born during the subsistence of the marriage or 300 days at the end of a marriage. While the presumption is rebuttable—a man can present evidence, such as DNA testing, to establish that he is not the biological father—the burden of proof falls on him. Once a man proves he is not the biological father, any prior recognition of paternity ceases. Even if the sperm donor's identity is known to the woman, he may refuse to accept paternity, potentially leaving the child without a legally recognized father.

In Ghana, most official forms—whether completed by a child or on their behalf—require identification of both parents, traditionally designated as mother and father. For example, school enrolment forms require both maternal and paternal names. This requirement applies to numerous documents: school admissions (from preschool through tertiary education); medical forms; employment applications (including public service and military positions); passport applications; and even forms for holding political office. This raises difficult questions: whose name should such a child list as “father”? Does this align with Ghanaian moral and traditional values? These questions are left for readers to consider.

In gestational surrogacy, the surrogate carries an embryo created through IVF using the sperm and egg of the intended parents or from donors or a combination of both. Unlike traditional surrogacy, the surrogate is not the biological mother of the child and has no genetic connection to the child. The surrogate mother rents her womb or agrees to use her womb to carry the pregnancy to term.

Altruistic surrogacy involves a surrogate carrying a pregnancy for the intended parents without financial compensation beyond necessary expenses such as food, clothing, and medical care. The surrogate mother makes her womb available to carry the embryo or gamete for the intended parents. While some arrangements may be motivated by genuine altruism, others may involve coercive relationships where surrogates feel compelled

to carry pregnancies for employers or family members. In extreme cases, human-trafficking networks may exploit women as forced surrogates for commercial gain.

Commercial surrogacy involves financial compensation to the surrogate beyond reimbursement of expenses. The parties typically enter into an agreement that spells out the fee to be paid by the intended parents to the surrogate for carrying the pregnancy. These contractual agreements often outline the parties' roles and responsibilities, with breach potentially leading to litigation. In many such agreements the surrogate mother agrees to live in a particular area and attend a particular health clinic or fertility facility at regular intervals.

In jurisdictions that regulate surrogacy, legislation typically distinguishes between permissible and prohibited forms of surrogacy, with enforcement mechanisms for compliance.

## [D] DIFFERENT TYPES OF SURROGATE AGREEMENTS

Surrogacy arrangements typically involve three main types of agreements: independent surrogacy; agency-facilitated surrogacy; and clinic-facilitated surrogacy.

Independent surrogacy involves a direct agreement between the intended parents and the surrogate without third-party intermediaries. The contract specifies that the surrogate mother's role is limited to carrying the pregnancy and that she will have no parental rights or responsibilities after delivery. This approach is less expensive due to the absence of intermediary fees. However, the medical facility performing the embryo implantation typically does not have any contractual relationship with the surrogate mother. The risk involved in independent surrogacy is that the surrogate mother may develop a relationship with the intended parents and potentially form an emotional attachment to the child, complicating the intended separation after birth.

Agency-facilitated surrogacy is facilitated by an agency which matches the surrogate with intended parents. In most cases, the surrogate will not know the intended parents throughout the subsistence of the agreement. This approach is more expensive due to agency fees, but it offers the advantage of maintaining anonymity between the parties, reducing the likelihood of post-delivery contact or emotional complications.

Clinic-facilitated surrogacy is where a medical facility or fertility clinic agrees with the intended parents to represent them in a deal with a surrogate. Typically, both parties remain anonymous to each other, and the contractual relationship concludes upon the baby's delivery. While costly, clinic-facilitated surrogacy is often considered the most reliable option, as the medical facility assumes responsibility for monitoring the pregnancy and ensuring contractual compliance.

Across all three types of surrogacy arrangements, there are some common problems that can arise: when the surrogate has an abortion or miscarriage; where the surrogate child is born with profound disabilities and the intended parents refuse to accept them; and when intended parents predecease the birth. No laws regulate such situations in Ghana.

## [E] CLASSIFICATION OF SURROGACY BASED ON THE INTENDED PARENTS

Surrogacy can also be classified according to the intended parents. Based on this criterion, there are three main categories: surrogacy for heterosexual couples, same-sex couples, and single individuals.

Heterosexual surrogacy involves intended parents of opposite sexes, who may be married, cohabiting, or in no formal relationship but have agreed to parent the child.

Same-sex surrogacy involves intended parents of the same sex, whether in a relationship or not, who agree to become parents through surrogacy. For male same-sex couples, options include using sperm from one partner with a donor egg, or using donor gametes for both. Female same-sex couples may use an egg from one partner with donor sperm, or use donor gametes for both, particularly to avoid disputes over biological motherhood.

The third category of surrogacy is single-parent surrogacy, where an individual person, whether male or female, may provide their own gametes or use donor gametes to become a parent through surrogacy.

## [F] UNREGULATED SURROGACY, PARTICULARLY GHANA

As noted, national attitudes toward surrogacy vary significantly. In many developing countries, including Ghana, surrogacy is not regulated. As a result, fertility clinics and medical facilities are able to operate without regulatory constraints and prioritize income generation over the welfare

of surrogates, children, and intended parents. Many African countries—including Uganda, Nigeria, and Ghana—lack surrogacy legislation. This regulatory gap threatens the rights of surrogate children, whose best interests are often compromised in favour of commercial transactions. In addition, the absence of specific surrogacy legislation, coupled with a wider lack of regulation in the transplantation sector, creates a regulatory environment vulnerable to exploitation, including concerns about illicit trade in human biomaterials and organ trafficking (Banyubala 2014).

This regulatory vacuum creates fertile ground for stakeholders to operate without regard for children's best interests or the rights of surrogate mothers, who may be exploited by other industry players. In unregulated jurisdictions, single men may purchase gametes (either sperm, eggs or both) and engage commercial surrogates with fees negotiated directly or through medical facilities. Similarly, single women may purchase gametes and either serve as surrogates themselves (if medically feasible) or hire surrogates through commercial agreements.

Unregulated surrogacy poses numerous problems, including the engagement of economically vulnerable women as surrogates for single parents, couples, or same-sex couples.

The only aspect of surrogacy that is addressed in Ghana is the official registration of the surrogate child's mother. Section 22 of the Registration of Births and Deaths Registration Act 2020 (Act 1027) is the only law that permits surrogacy in the following language:

- (1) An intended parent may engage the services of a person to give the intended parent a child through surrogacy.
- (2) The intended parent may, within twelve weeks after introducing an embryo or gamete into the surrogate mother, apply to the High Court for a pre-birth parental order to allow
  - (a) either the intended parent or surrogate mother or
  - (b) both parents of a child, to be named as the parent of a child born through surrogacy or any other assisted reproductive birth if the birth occurs within twenty-eight weeks of the order of the High Court.
- (3) Where the High Court is convinced of the evidence of parentage and the existence of surrogacy, the High Court shall issue a pre-birth parental order naming the legal parent of the unborn child and a copy of the order shall be issued to
  - (a) the District Registrar of the district in which the child will be born;
  - (b) the intended parent;

- (c) the surrogate mother and
  - (d) the hospital where the child is born, if the birth occurs at a hospital facility.
- (4) A woman who gives birth to a child shall, in the absence of an order of the High Court naming another person as the mother, be registered as the mother of the child.
- (5) Subject to subsection (2), a woman who gives birth to a child shall
- (a) have the right to register the child and
  - (b) inform the Registration Officer in the District in which the child is born of
    - (i) the name of the child;
    - (ii) the name of the father of the child; and
    - (iii) any other information required for the purposes of the registration.
- (6) The Registration Officer shall, on receipt of the information required under paragraph (b) of subsection (5), proceed to register the birth of the child in accordance with the information provided.
- (7) The District Registrar and, where appropriate, the hospital where the child is born, shall
- (a) register or cause to be registered in the district office of the Registry, the birth arising from the surrogacy or other assisted reproductive birth in accordance with the pre-birth parental order, and
  - (b) enter or cause to be entered in the register of births, the name of the child provided by either the intended parent or surrogate mother, or both in accordance with subsection (2).
- (8) Where a child is already born, an intended parent or surrogate mother may apply to the High Court for a post-birth parental order or substitute parentage order.
- (9) Where the High Court approves an application made under subsection (8), the High Court shall issue a post-birth parental order or substitute parentage order naming the intended parent or surrogate mother as the legal parent of the child, and a copy of the order shall be immediately served on the District Registrar.
- (10) A post-birth parental order or substitute parentage order issued under subsection (9) shall, in substance, be in the form of an adoption proceeding and shall be lodged at the High Court at least twenty-eight days after the birth of the child but not later than six months after the birth of the child.
- (11) The District Registrar shall on receipt of a sealed substitute parentage order from the High Court, strike out or cause to be

struck out the original birth record, and open or caused to be opened a new birth record with the intended parent or surrogate mother named as the parent of the child in accordance with the order of the High Court.

- (12) The District Registrar shall keep the original birth record struck out under subsection (11) in a confidential place, and that birth record shall be made accessible to the child whose birth entry was made only when that child attains the age of twenty-one years.
- (13) A new birth record opened under this section shall supersede any other birthday record made earlier.

The Act, by necessary implication, allows all forms of surrogacy in Ghana. Section 22(1) of the Births and Deaths Registration Act 2020 (Act 1027) provides that any person who seeks to become an intended parent of a child may engage the services of a surrogate to carry the embryo for that person. The Act establishes no minimum age for intended parents or a surrogates. This omission suggests that, technically, even a minor could become an intended parent or surrogate, limited only by the common law principle that a child can only enter into a contract of necessity. Under common law, contracts entered between adults and minors are not automatically void but are voidable at the minor's option unless for necessities. Thus, a surrogacy agreement involving a minor as either intended parent or surrogate would be voidable. Nonetheless, by extension, a minor could theoretically contract to become a surrogate (*Edwards v Carter* 1893). If a minor serves as a surrogate, the contract remains voidable. However, once the child is born, the contract effectively terminates, and any subsequent legal action by the former minor cannot affect the child's status. This was affirmed by the House of Lords in *Edwards v Carter*.

Section 48's definitions further demonstrate the Act's openness. By defining "intended parent" broadly as "a person who desires to be a parent through surrogacy", the Act imposes no restrictions on who may assume these roles. Section 48 of the Act defines the following terminologies, "assisted reproductive birth" and "intended parent", as follows:

"Assisted reproductive birth" means the use of modern technological advancement, including fertility medication, artificial insemination and in-vitro fertilization, to cause reproduction and childbirth other than by orthodox means;

"intended parent" means a person who desires to be a parent through surrogacy or any other assisted reproductive birth arrangement.

These broad definitions technically permit anyone to become an intended parent or surrogate, creating potential for abuse and hardship for children who may not be adequately supported. This underscores the urgent need for specific legislation.

The Act also fails to establish minimum or maximum ages for intended parents, disregarding the best interests of the child to be born. This omission contravenes the fundamental children's rights principle that all decisions affecting children must prioritize the paramount or best interests of the child. A minor who serves as a surrogate may lack capacity to support a child, creating hardship for both. Similarly, an intended parent of advanced age may not be in the child's best interest, particularly considering that average life expectancy in Africa is 64 years (World Health Organization nd).

While the Act permits all categories of surrogacy arrangements, it fails to protect surrogates by omitting time limits for registering the child's birth with the Births and Deaths Registry. Without timely registration, the surrogate automatically becomes the legal mother, regardless of her intentions regarding parenthood.

This definition—"a person who desires to be a parent through surrogacy or any other assisted reproductive birth arrangement"—effectively permits any of the three forms of intended parents (heterosexual couples, same-sex couples, or single individuals) to pursue parenthood through surrogacy. Although Ghana has passed a bill criminalizing same-sex marriage, the legal status of same-sex surrogacy remains ambiguous. This lack of clarity has significant consequences. For example, without explicit legal provisions, same-sex couples seeking surrogacy face potential legal challenges regarding parental rights, child custody, and birth registration. In the absence of regulation, it is unclear if a child born through surrogacy to a same-sex couple would be legally recognized as their child, potentially leaving the child in legal limbo. Furthermore, if a dispute were to arise between the intended parents and the surrogate, there is no established legal framework to resolve the matter.

Unfortunately, detailed, publicly available reports of specific surrogacy cases in Ghana are limited due to the sensitive nature of the topic and the absence of formal legal structures. However, evidence suggests that informal surrogacy arrangements do occur, often within closed networks (Akangah & Ors 2025; Amarteifio & Ors 2025). This lack of transparency and regulation creates a situation ripe for exploitation, particularly of vulnerable women who may agree to be surrogates. Without legal oversight, there is no guarantee of fair compensation, medical care, or

psychological support for surrogates. Additionally, intended parents may face uncertainty regarding their legal rights and responsibilities. The absence of clear legal guidelines also raises concerns about potential child trafficking or exploitation, as there is no formal process to ensure the ethical and legal integrity of surrogacy arrangements. The lack of legal clarity also creates a space where religious and cultural norms may be used to judge and potentially criminalize those involved in same-sex surrogacy arrangements. This can lead to discrimination and stigmatization, further complicating the already sensitive issue (Amarteifio & Ors 2025).

With the present position of the law, any person who intends to become a parent and can meet the cost involved is at liberty to become a parent through surrogacy. Heterosexual couples—whether married or unmarried—may become parents through surrogacy. Same-sex couples may pursue parenthood using donor gametes (eggs or sperm) as needed. Single individuals may also pursue parenthood through surrogacy. A single man may provide his sperm and use a donor egg, while a single woman may provide her egg and use donor sperm. Alternatively, single individuals may use both donor eggs and sperm.

## [G] ETHICAL, SOCIETAL, AND LEGAL OBJECTIONS TO SURROGACY

The practice of surrogacy raises profound ethical, societal, and legal concerns, leading to its prohibition or strict regulation in various jurisdictions and condemnation by certain religious institutions.

### Religious prohibitions

The Catholic Church maintains a firm stance against surrogacy, articulated in various encyclicals and pronouncements. Key objections include: (1) surrogacy violates the “natural orientation” of the family (Pontifical Council for the Family 1987, “Donum Vitae”: section 87). (2) It exploits women, treating their bodies as instruments (“Dignitas Personae”: section 18). (3) It commodifies children, undermining their inherent dignity. “Amoris Laetitia” states: “Children are not commodities; they are persons who have the same dignity as every human being” (Francis 2016: paragraph 181). (4) It treats the human body as an object rather than a person. “Veritatis Splendor” (1993), section 80 states: “The human body is not a mere instrument or a ‘thing’ to be used, but a person, and therefore, should never be treated as an object” (Francis 2016: paragraph 181).

Pope Francis has described surrogacy as a grave threat to human dignity and a potential source of human trafficking. Overall, the Church's position emphasizes the sanctity of human life and the traditional concept of family, declaring: "Surrogacy is a form of exploitation, and it represents a grave threat to human dignity" (Francis 2019). Predominantly, Catholic states have incorporated these religious objections into their legal frameworks, resulting in prohibitions or stringent restrictions on surrogacy.

## Ethical objections

Germany and France base their prohibitions on ethical concerns, emphasizing the commodification of women and children and the potential exploitation of vulnerable women, particularly in cross-border arrangements. Their focus is on protecting human dignity and preventing the treatment of individuals as mere means to an end.

## Human rights focus

International declarations, such as the Casablanca Declaration 2023, emphasize the human rights implications of surrogacy. These declarations raise concerns about the potential for the exploitation and trafficking of women, the child's right to know their origins, and potential discriminatory practices. Overall, these human rights-based objections focus on protecting the most vulnerable individuals involved in the surrogacy process.

## Interrelation of objections

It is crucial to recognize the interconnectedness of these objections. Religious beliefs often inform ethical principles, and both contribute to legal frameworks. The shared thread running through these diverse perspectives is a concern for human dignity and the potential for exploitation inherent in surrogacy arrangements. By grouping the information in this way, the reasoning behind the legal and ethical objections becomes clearer.

## The Declaration of Casablanca

Civil society organizations help in the formulation of policies and can pressure states to undertake legal reform. They also lobby parliamentary bodies to introduce Bills for legislative consideration. In 2023, senior legal and medical experts, high-ranking psychologists, philosophers, and human rights practitioners, met in Casablanca, Morocco, alongside non-governmental organizations from 75 states. Their objective was to discuss

and issue a declaration calling for the abolition of all forms of surrogacy, which they deemed an affront to human dignity.

The resulting Declaration of Casablanca for the Universal Abolition of Surrogacy, issued on 3 March 2023, asserts that surrogacy in any form violates human rights and contributes to the commodification of women and children. Signed by 100 experts from diverse backgrounds from 75 nationalities, it condemns all forms of surrogacy, whether commercial or altruistic, as a violation of human dignity. It calls for international cooperation to pressure governments to prohibit surrogacy, protect human dignity and establish a global convention to prohibit surrogacy worldwide. The Declaration recommends that states and governments should prohibit surrogacy within their jurisdictions, deny legal validity to surrogacy contracts, and prosecute individuals who become parents through surrogacy, whether domestically or abroad (Casablanca Declaration 2023).

## International conference in Rome

A follow-up conference was held in Rome from 5 April to 6 April 2024, organized by supporters of the Casablanca Declaration. It demanded the abolition of surrogacy through international treaty agreement and emphasized ethical concerns and commodification (Rome Conference Report 2024).

## [H] THE ORGANIZATION OF SURROGACY REGULATION IN OTHER COUNTRIES AND ITS RELEVANCE TO GHANA.

This discussion examines the multifaceted issues surrounding surrogacy, drawing upon the legal frameworks of Italy, France, and Germany, and connects these to the urgent need for regulation in Ghana. The analysis is structured thematically to provide a clearer understanding of the key considerations for potential legislation. These countries or states were selected for specific discussions due to their extensive and often restrictive laws.

## Protecting the best interests and rights of the child

A central concern in surrogacy is ensuring the best interests of the child. Unregulated practices often fail to address the child's right to know their biological origins and can lead to abandonment in cases of disability or

parental rejection. The lack of age limits and medical requirements for intended parents can also jeopardize the child's long-term wellbeing.

Italy's Law 40/2004 was enacted with the view of protecting the best interests of surrogate children. While the text notes the Constitutional Court's concern about children born through surrogacy being denied knowledge of their biological parents (leading to a ban on surrogacy itself within Italy, though the initial aim of the law focused on regulating artificial reproduction technologies more broadly), the underlying principle is the child's welfare. The law also imposes age limits and medical conditions on intended parents.

Ghana must prioritize the rights and wellbeing of children born through surrogacy. Drawing inspiration from Italy's initial aim to protect children through regulations like age and medical requirements for intended parents is crucial. Even if Ghana does not adopt a complete ban, establishing legal mechanisms to ensure the child's right to identity (where possible and ethical) and safeguards against abandonment and neglect due to the intended parents' circumstances is paramount.

The Italian Law on Assisted Reproductive Technologies 40/2004 was enacted following a heated parliamentary debate to establish a comprehensive framework for reproductive medicine. Among its core provisions were regulations on the age and medical conditions of couples seeking treatment, alongside strict guidelines for fertility clinics. The law implemented a complete prohibition on surrogacy arrangements, a ban that remains firmly in place.

The Act also initially banned heterologous procreation altogether, preventing couples from receiving donations of eggs or sperm that were not their own. However, this specific ban was successfully challenged. In a landmark 2014 ruling (No 162), the Constitutional Court of Italy declared the prohibition on gamete donation unconstitutional, thereby overturning it. This decision was grounded in the rights of infertile couples to access available treatments to found a family. It is important to distinguish this from the separate and enduring ban on surrogacy, which is justified on the grounds of preventing the commodification of human beings and protecting the dignity of all parties involved, particularly the child (*Surrogacy and the Right to Know One's Biological Parents* 2017).

## The ethical and human rights imperative for regulation

Unregulated surrogacy raises significant ethical and human rights concerns. There is a risk of exploitation of surrogate mothers, who may be underpaid and suffer psychological distress without adequate support. Furthermore, the commodification of children, treating them as objects in a transaction, not only undermines their inherent dignity but fosters conditions that can be likened to modern slavery, enabling severe forms of exploitation such as human trafficking and organ harvesting.

France considers surrogacy contrary to its public policy and cultural values, prohibiting it outright through its foundational 1994 bioethics law, the *Loi relative au respect du corps humain* (Loi n° 94-653). The grounds for the prohibition include the exploitation of vulnerable women, the commodification of children, the violation of human dignity and the principle of equality, and the fact that it challenges traditional family structures and political rights. Additionally, Article 310-1 of the French Civil Code prohibits surrogate motherhood, and Article 311-19 nullifies any surrogacy agreements. The prohibition is grounded in preventing the exploitation of vulnerable women, the commodification of children, and the violation of human dignity and equality, and was upheld by the French Constitutional Court (*ARDHIS v France* 2015).

Germany's Embryo Protection Act 1990 prohibits both commercial and altruistic surrogacy, emphasizing the protection of human embryos and preventing the misuse of reproductive medicine. The German Civil Code further defines legal motherhood based on childbirth, inherently excluding surrogacy arrangements and reinforcing the legal ties to the birth mother. The German Penal Code also criminalizes human trafficking for reproductive purposes. The ethical and human rights problems associated with unregulated surrogacy, as highlighted in the Ghanaian context (exploitation of surrogate mothers, potential for trafficking), strongly underscore the need for legal intervention. By considering these models within its own framework, Ghana can develop comprehensive legislation that prioritizes human dignity, protects vulnerable individuals and prevents exploitation.

## Regulating ARTs and fertility clinics

The lack of regulation in the ART sector can lead to exorbitant costs and is potentially linked to money laundering and other illicit activities like human trafficking and the organ trade. Clear guidelines are

needed for fertility clinics to ensure ethical practices and prevent the exploitation of vulnerable individuals seeking ART services. Italy's Law 40/2004 established guidelines for medical facilities and fertility clinics providing ART services to ensure strict compliance. This demonstrates the importance of oversight and regulation of the service providers in the ART industry. Ghana, facing concerns about financial exploitation by fertility centres and their potential involvement in illegal activities, urgently needs to establish guidelines and regulatory bodies for ART clinics, learning from Italy's approach to ensure ethical practices.

## Addressing the rights and wellbeing of surrogate mothers

Unregulated commercial surrogacy can lead to the exploitation of surrogate mothers, including underpayment and a lack of support for the psychological and physical challenges they face during and after pregnancy. The psychological impact, including attachment to the child and postpartum emotional issues, needs to be addressed. France's prohibition of surrogacy is partly motivated by the desire to prevent the exploitation of vulnerable women who might be compelled to rent their wombs. Given the reported exploitation of surrogate mothers in Ghana, any potential legislation must prioritize their rights and wellbeing. This includes ensuring fair compensation, access to comprehensive healthcare (physical and psychological), informed consent, and legal protection throughout the surrogacy process. The strong stance of France against the exploitation of women offers a compelling argument for stringent regulations or even prohibition.

## Societal and ethical values

Surrogacy raises fundamental societal and ethical questions related to traditional family structures, religious beliefs about the creation of life, and the potential erosion of human dignity and equality. Some argue that it challenges natural birth and could lead to the marginalization of children born through ART. France's opposition to surrogacy is partly rooted in its values concerning traditional family structures and political rights. Many countries oppose surrogacy based on human rights, economic, religious, ethical, and traditional values. Concerns include the child's right to know their biological mother, the prevention of exploitation, and the avoidance of commodification. Religious viewpoints in some countries consider human creation outside natural procreation as an affront to divine authority and a potential source of inequality.

Ghana needs to consider its own cultural, religious, and traditional values when formulating surrogacy legislation. The potential impact on family structures and societal norms should be carefully evaluated. The arguments raised by countries opposing surrogacy based on ethical and religious grounds warrant serious consideration in the Ghanaian context.

In Germany, the Embryo Protection Act (*Gesetz Zum Schutz von Embryonen*) was enacted on 13 December 1990 and entered into force on 1 January 1991. The purpose of the Act is defined in section 1 as, *inter alia*, protecting human embryos and preventing the misuse of reproductive medicine. Section 2 prohibited commercial surrogacy agreements, section 3 prohibited altruistic surrogacy agreements, section 6 regulated egg donation by prohibiting it in most cases, and section 8 prescribed penalties for violations of the Act.

The German Civil Code and the German Penal Code also provide some restrictions on surrogacy. Section 1591 of the German Civil Code defines a legal mother as a person who gives birth to a child. Section 1592 regulates parental rights and responsibilities to hold parents accountable to the children they give birth to. Section 217 of the German Penal Code prohibits human trafficking for reproductive purposes, while section 218(a) regulates abortion and reproductive medicine.

The experiences of Italy, France, and Germany, alongside the identified problems within Ghana's unregulated surrogacy landscape, provide a strong impetus for legislative action. Ghana can learn from the prohibitory stance of France, driven by human rights and ethical concerns, and the regulatory approaches of Italy and Germany, which emphasize child welfare and the ethical use of ART. By carefully considering these international models within its own cultural and ethical framework, Ghana can develop comprehensive legislation that protects vulnerable individuals, safeguards the rights and wellbeing of children, and establishes a responsible and ethical approach to ARTs. The urgency to address exploitation, potential trafficking, and the lack of clarity regarding parental rights necessitates swift and decisive action.

## [I] PROBLEMS WITH UNREGULATED SURROGACY

As discussed above, surrogacy is not regulated or only partially regulated in several countries. In some cases, however, surrogacy agreements are partially regulated by contract or family laws. Nonetheless, in such instances the rights and responsibilities of parents under surrogacy

remain unaddressed and there is a failure to address the best interests of surrogate babies.

In Ghana, surrogacy is not regulated, and the laws on contract are not enough to regulate the interests of children who may be used as surrogate mothers and the children to be born. Commercial surrogacy, which is in ascendancy, may exploit surrogate mothers whose wombs are rented by the intended parents to carry their embryos for them. Surrogate mothers can be underpaid after delivery, and the baby nonetheless taken away; they can face unaddressed psychological problems post-delivery, which they may continue to live with throughout their lives. Two 2025 studies of stakeholders in Ghana documented these exact concerns, reporting financial exploitation and significant post-delivery psychological distress among surrogates (Akangah & Ors 2025; Amarteifio & Ors 2025). Surrogacy can, therefore, resemble a modern form of human slavery.

Furthermore, there are no age limits for intended parents, and persons of pensionable ages may get involved without the means to maintain the child until the child becomes an adult and can manage their own affairs. The medical conditions of intended parents are also unregulated, risking scenarios where they become incapacitated shortly after the child's birth. There is, therefore, an urgent need for age and medical restrictions to promote and protect the wellbeing of children born out of surrogacy.

Finally, unregulated surrogacy can be a source of money laundering. Without oversight, fertility centres can not only charge exorbitant fees but also enable traffickers, who pay vast sums to produce children for the illicit trade.

## [J] ADOPTION AND SURROGACY

In Ghana, adoption is regulated to prevent child abuse, while surrogacy lacks protection. Adoption is a legal process for a child to be declared adoptable by the Central Adoption Authority, as a person in need of care and protection, and under a care order, and only after other options of care for the child have been exhausted (Children's (Amendment) Act 2016, section 79).

Ghana's two main types of adoption are in-country and inter-country adoption, with stringent rules for the latter to prevent trafficking. Notably, a person in a same-sex relationship or a single person who is not a Ghanaian is prohibited from pursuing inter-country adoption. Inter-country adoption is only considered if the child cannot be placed with a foster or adoptive family in Ghana, and where inter-country adoption is

deemed in the child's best interest (Children's (Amendment) Act 2016, sections 86I, 86J, 86K).

Age restrictions are essential to the adoption process, ensuring prospective parents are capable of promoting the child's welfare. For in-country adoption, the applicant or, in the case of a joint application, one of the applicants, must be between 25 and 55 years old and at least 20 years older than the child. For inter-country adoption the applicant must be between 25 and 50 years old and at least 21 years older than the child. For adoption by a relative the relative must be between 21 and 65 years old (Children's (Amendment) Act 2016, section 80).

Exclusive jurisdiction over adoption orders rests with the High Court in the area where the child resides on the date of the application. This centralized authority was established by the Children's (Amendment) Act 2016, which came into force on 23 November 2016. It revoked the jurisdiction previously held by Family Tribunals and Circuit Courts—a change implemented to curb abuses of the process (Children's (Amendment) Act 2016, section 85).

Ghana's inter-country adoption laws are shaped by its accession to the Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption. Ghana acceded to the Convention on 16 September 2017 and it entered into force on 1 January 2017. The Convention framework introduced critical safeguards, including strict eligibility criteria for adopters and adoptability assessments for children; restrictions on adoption by single parents and the non-adoptability of children who had previously been adopted. It also reinforced the exclusive jurisdiction of the High Court and empowered it to revoke adoption orders obtained by fraud or misrepresentation, and enabled the establishment of the Central Adoption Authority.

The High Court can only grant an adoption application after it is satisfied that the applicant and the child meet the basic eligibility requirements for adoption, as determined by the Central Adoption Authority, based on reports from the Department of Social Welfare, that is, the Child Study Report and the prospective parent's Home Study Report (Children's (Amendment) Act 2016, sections 86D, 86E).

After an adoption order has been made by the High Court, the Central Adoption Authority ensures strict post-adoption compliance to protect the child's best interests. Requirements include the deposit of a certified copy of the adoption order and a new birth certificate with the Authority; monitoring the adoption every six months for the first two years and then

annually for the next three years; provision of appropriate measures to promote counselling and post-adoption services; and ensuring the child is not taken out of the jurisdiction without at least 30 days' written notice to the Department of Social Welfare (Children's (Amendment) Act 2016, section 86H).

The adoption order severs all legal ties with the biological parents and guardians. Full parental responsibility is transferred to the adopter(s), with joint parental control exercised in the case of a couple (Children's (Amendment) Act 2016, section 82).

## [K] SURROGACY AND FOSTER CARE

Foster care in Ghana is a temporary system designed to provide support for a child until that child is united with the biological parents or until a permanent living arrangement is secured. Throughout the process, the biological parents remain the parents of the child, while the foster parent provides daily care and support for the child under the supervision of the Department of Social Welfare. Sections 63–78 of the Children's (Amendment) Act 2016 (Act 937) regulate foster care in Ghana. An agency may be accredited by the Department of Social Welfare to provide foster-care services, and the accreditation may be revoked by the Department of Social Welfare where the conditions for the grant are breached.

To become a foster parent, a person must be of high moral character and proven integrity, and be at least 21 years old. They must apply to the Department of Social Welfare. An exception exists for relatives: a relative who is 18 years old may serve as the child's foster parent (Children's (Amendment) Act 2016, sections 63, 64).

The Act establishes a Foster-Care Placement Committee consisting of the Regional Director of Social Welfare (as chairperson), one queen mother nominated by the Regional House of Chiefs, a trained counsellor or psychologist with at least three years' experience, a social worker, and a person from a CSO with an interest in the welfare of children nominated by CSOs. The Committee is tasked with, *inter alia*, recommending the suitability of an eligible foster parent to a foster child, determining a child's eligibility for foster care, terminating foster-care placements, and addressing related matters (Children's (Amendment) Act 2016: section 67).

## [L] CONCLUSION

In conclusion, this article argues that the current absence of comprehensive legal and policy frameworks for surrogacy in Ghana poses significant risks to surrogate mothers, surrogate children, and intended parents, as evidenced by the limited provisions in the Births and Deaths Registration Act. Apart from section 22 of the Births and Deaths Registration Act 2020 (Act 1027) on the registration of assisted reproductive rights, there is no law on surrogacy despite its profound effect on the country, the surrogate babies, surrogate mothers, and intended parents. There is an urgent need to regulate surrogacy in Ghana to address the eligibility of persons to become intended parents, persons competent to enter into surrogate contracts, the types of surrogates which are permissible, and to eliminate human rights violations in surrogates and prevent the commodification of human beings and protect human dignity. The analysis reveals that this regulatory vacuum fosters potential exploitation, endangers children's rights and welfare (particularly concerning parentage, health, and abandonment), and could transform Ghana into a hub for unethical practices like human trafficking and organ harvesting, mirroring the negative experiences of unregulated surrogacy in countries like Ukraine. To mitigate these dangers and align with international human rights standards and ethical considerations, Ghana must urgently enact specific legislation that outlines the eligibility criteria for all parties involved, defines permissible types of surrogacy, ensures the protection and wellbeing of surrogate mothers and children, and establishes robust oversight mechanisms for fertility clinics and agencies involved in surrogacy arrangements, drawing lessons from regulated adoption and foster care systems within Ghana and the prohibitory stances of nations prioritizing human dignity.

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(Germany)

Strafgesetzbuch [German Penal Code] (Germany)

### Ghana

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## PARTNERSHIPS AND TRUSTS AS LEGAL PERSONS ... WHAT ABOUT THE TAX?

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### Abstract

An English partnership, for tax purposes, is transparent, meaning that the partners are subject to tax on the income and capital profits; however, in many respects a partnership is an express trust—which is not transparent for tax purposes. There has already been some consideration from a legal perspective as to the personality of a partnership and for the potential tax status of a limited liability partnership, but how does this tie into the tax treatment of trusts if the two structures are so similar? The Law Commission and Scottish Law Commission joint report of 2003 recommended that partnerships be treated as a “*sui generis*”—a unique legal person in law—to reflect commercial reality and encourage continuity, but not to become a body corporate. It also suggested that limited partnerships might have the option to avoid legal personalities. A trust is arguably a *sui generis* legal person as well as an “opaque” entity for tax purposes, so if the Law Commissions’ recommendation could ever be carried out to bring trusts and partnerships into line from a legal and commercial perspective, could the tax treatment not be brought into line too?

**Keywords:** partnership; trusts; *sui generis*; personality; beneficial ownership.

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### [A] INTRODUCTION

In September 2000, the Law Commission and Scottish Law Commission issued a joint consultation on partnership law covering aspects such as partnership property, fiduciary duty, insolvency and legal personality. In November 2003, a final report outlined the Commissions’ final recommendations and included a draft Bill formulating and bringing to life those recommendations.

One of the recommendations (within part 5) was that English partnerships should be *sui generis* entities with their own separate legal personality, as Scottish partnerships currently are—but not be bodies corporate like limited companies or limited liability partnership

(LLPs). This was on the basis that the perception and commercial reality of partnerships is that they are essentially firms holding their own property in the partnership's own name, operating as an identifiable entity rather than as a collection of individuals. In its response to the initial consultation to the report, the Construction Industry Council summarized its position:

Partnerships often operate as though they were an entity. ... Not only will [independent legal personality] bring the law into line with practice, it will make a legal reality of the relationship assumed by clients (Law Commission & Scottish Law Commission 2003: paragraph 5.6).

Another issue is that:

There is a gulf between the commercial perception of, and the legal characterisation of, partnerships (ibid paragraph 5.8).

This alludes to the fact that partnerships are deemed to cease when a partner leaves/dies and a new partnership is formed when a new partner joins—their clients want to deal with one firm and one name. By making an English partnership akin to a Scottish partnership (so that it is indeed a “firm” with its own legal personality) this would align the law with commercial expectations and the modern reality of business and partnerships.

Critically, however, the report did not address the position of tax and partnerships; indeed, within paragraphs 3.50-3.53 it explained the current position but also confirmed that partnerships' transparent status for tax purposes will remain. The disconnect between legal status and tax status should be addressed.

The report did address limited partnerships and suggested that those partnerships created under the Limited Partnership Act 1907 with one managing partner with unlimited liability should be given the option of whether or not to adopt a legal personality; those without a legal personality would be “special” limited partnerships.

Where do trusts fit into this discussion? A partnership is a trust in many respects—from a tax perspective it is a bare trust and, under section 20(2) Partnership Act 1890, holds land in trust for the partners as beneficial owners. Express trusts have a *sui generis* legal personality and have their own identity and their own tax regime, tax returns, rates and allowances. Their trustees have the ability to split their roles between individual and custodian—under the latter they can hold property separate from their own personal property. The trust is a separate entity but not a body corporate. Why cannot partnerships therefore be the same? I support the

report's finding in this legal regard but would argue the Law Commissions could have gone further with respect to the tax.

I have previously suggested that LLPs should have the option to be transparent or opaque for tax purposes (Thorpe 2024) and perhaps it is worth considering whether ordinary partnerships can do the same. The Commissions' report did not address the possibility of changing the transparent tax status of all partnerships, but the matter may be worth revisiting more than 22 years after the report's publication, especially as the onset of LLPs and their place in the business world has changed the entire discussion.

This article will therefore revisit the 2003 Commissions' report and consider some of its findings, including those tax matters "not dealt with" (2003: paragraph 3.49).

## [B] THE DIFFERENCE BETWEEN LEGAL PERSONALITY AND BODY CORPORATE

It may be a fine line, but a legal personality and body corporate are different things; a body corporate, by definition, has a legal personality but an entity can have a legal personality without being a body corporate.

According to Smith (1928: 283), what defines legal personality is the bestowal of rights and imposition of duties on that entity such that legal relations can be entered into and with respect to interaction with other people:

the ship, the corporation and the natural person all require the same thing to make them legal persons, namely, to be a party to legal relations. None of them requires anything more (Smith 1928: 292)

...

it (legal personality) is to regulate also the conduct of human beings toward the subject or toward each other. It suits the purposes of society to make a ship a legal person, not because the ship's conduct will be any different, of course, but because its personality is an effective instrument to control in certain particulars the conduct of its owner or of other human beings. The broad purpose of legal personality, whether of a ship, an idol, a molecule, or a man, and upon whomever or whatever conferred, is to facilitate the regulation, by organized society, of human conduct and intercourse (ibid 296).

Smith points out that it is too simplistic to say that limited companies have legal personality while partnerships do not—he points out that partnerships have been held to have legal personality (*West & Co v*

*The Valley Bank* 1856: 169; *Second National Bank of Oswego v Burt* 1883: 233).

From a legal perspective, being a body corporate means having one's identity and status conferred by legislation; whereas legal *personality* looks at the more human aspects and their interactions. The Commissions' report refers to the "often-antiquated" corporation rules, but unlike the Companies Act 1985, it references the common law; LLPs hold corporate personality with separate legal personality by virtue of section 1(2) Limited Liability Partnerships Act 2000. Legal personality is referred to in the report as being possessed by a "*sui generis*" entity which does not automatically mean it is a body corporate; indeed, the report recommends against that being the case. As with the rights and duties which constitute legal personality, the report highlights sources of those *sui generis* rights and duties as being a part of the partnership contract (ie the rules of partnership and, if there is one, the express partnership agreement which embodies the partners' intentions). The report also included a draft Partnership Bill, which the Commissions submitted as a proposed piece of legislation to define partnerships and as a partial rewrite of the 1890 Partnership Act, to embody their recommendations.

If a partnership can be *sui generis* by virtue of commercial realities, partnership law, a partnership agreement or by a new statute, could it not be said that a trust should also have a *sui generis* legal personality?

## [C] TRUSTS AND THEIR RELATIONSHIP WITH PARTNERSHIPS

Partnerships are essentially trusts—land is held by partners on trust for themselves, and for tax purposes they are bare trusts with a transparent tax treatment. Even LLPs, which are bodies corporate, are bare trusts for tax purposes, so it would seem reasonable to examine the two entities and consider whether the status of trusts might further support the idea that a partnership could adopt a legal personality. The government says trusts do not have a legal personality (Department for Business Innovation and Skills 2011). However, given some of the points made above with respect to partnerships, I would suggest it is arguable that trusts already do have such a personality. A trustee, whilst an individual, wears two hats—one for their own assets with absolute ownership, and another as custodian for trust assets. That trustee will enter contracts, hold property and interact with other people as a custodian without affecting the status of their own personal assets; such individuals are even subject to their own

income tax, capital gains tax (CGT) and inheritance tax (IHT) rules. Smith refers to trustees' multiple capacities when considering partnerships:

As an individual in his own right, A can transfer property to himself as trustee or do business with himself as a member of a firm to which he belongs or, in a triple capacity, as an executor he can transfer property to himself as a trustee. What shall we call such distinctions as these, if not distinctions of legal personality? (1928: 289-290)

Aside from this argument that a trust is *sui generis*, another argument proposed by Ben McFarlane and Robert Stevens (McFarlane 2008: 23-27; McFarlane & Stevens 2010a: 1-2) that a beneficiary's right is not a right to a thing (a proprietary right) or against a person (ie the trustee—a personal right), but is a *sui generis* “right to/against a right” or a “persistent” right not attaching to any thing or person, but stems from other rights. Zaccaria (2019: 466) gives a review of this suggestion by McFarlane and Stevens (2010b: 38) when considering beneficiary rights:

The advantage for equity, in recognising the concept of a right to a right, is that “it permits B to enjoy the benefit of a right without holding that right directly, whilst also recognising that B has more than a mere personal right against A, the holder of the right.” (472).

So, if a partnership is essentially a trust, and an express trust is arguably a *sui generis* legal person, then this would in turn seemingly lend further support to the Commissions' recommendation. But what about the tax element? The analogy between partnerships and trusts starts to fall apart when one looks at tax. An express trust has its own tax regime, even its own self-assessment tax returns, even subject to value-added tax as a separate taxable person, lending more support to the argument that trusts are *sui generis* entities; but a partnership is transparent—essentially only a bare trust as far as tax is concerned. There is thus a notable gap between the legal status and the tax status of a partnership. With an express trust, the trustees are subject to income tax, CGT (and IHT in most cases), and the subsequent income tax consequences for the beneficiaries will depend on whether the trust is discretionary or an interest-in-possession (IIP). The discretionary trust beneficiary receives the income as a payment distinct from the form in which the trustees received it (eg rental income, dividends etc); the beneficiary receives that payment with a refundable 45% tax credit which can be offset against their own personal tax liability. The IIP trust beneficiary (known as the “life tenant”) will receive the income in the same form as it was received by the trustee, but the latter will have already paid basic rate income tax, for which the life tenant gets credit when the same income is reported on their personal income tax return. CGT is dealt with solely by the trustees,

though it is subject to half the annual exemption of an individual and at a rate of 24%; indeed, trustees have their own CGT reliefs, such as provisions within the Business Asset Disposal Relief and Principal Private Residence relief legislation (sections 169J and 225 Taxation of Chargeable Gains Act (TCGA) 1992 respectively).

Whatever their form, express trusts have their own regime which one would expect from an entity with a legal personality, namely that the entity itself is taxed in the first instance and the same income is not subject to tax again when received by the beneficiaries. Partnerships are transparent for tax purposes, irrespective of whether they have a legal personality (like Scottish partnerships) or are bodies corporate, namely, LLPs, so the end result is the same as with trusts in that the profits are taxed only once, except that the partnership is never taxed in the first place—only the partners are taxed in full.

The Commissions' report did not address the tax element, recommending that the transparent treatment remains and that its importance in the decision as to legal status is not conclusive:

It appears that separate legal personality in many jurisdictions is only one factor which tax authorities will take into account in deciding whether a partnership is transparent for tax purposes and that it is rarely determinative of that issue (2003: 19.7).

The fact that LLPs remain transparent for tax despite their body corporate status would seem to support the Commissions' view. In the report, the reasons given for retaining the transparent status—citing (the then) Inland Revenue—were based upon three characteristics of partnerships:

- (1) the partners carry on the business of the partnership with a view to profit;
- (2) every partner is liable jointly or “jointly and severally” with the other partners for all the debts and obligations of the partnership; and
- (3) the partners own the business, each having at least an indirect share in the net assets of the partnership.

It is clearly in the commercial interests of UK partnerships to preserve the existing tax treatment (2003: 4.28).

However, this justification for transparent treatment would seem to contradict the arguments the Commissions made for partnerships having a legal personality, that is, the commercial reality that their clients engage with the partnership as an entity and that the partnership continues despite partners' coming and going and that English partnerships should be able to hold property in their own name. Whilst characteristics 1 and

3 which the Inland Revenue cited above accurately reflect the current tax rules, they would seem an odd justification for not changing them. The recommendations made in the report are on the basis that an English partnership should be a legal person precisely because commercial interests would best be served if the partnership could have flexibility and a degree of continuity—being the “face” which its clients see and deal with, the entity which they assume owns its own property and continues irrespective of what happens to its partners.

Surely if partnerships are to have a legal personality (whether it be English, Scottish, or an LLP with its corporate personality), should they not also have their own tax regime—or at the very least, an option to adopt one?

## [D] TRANSPARENT TAX TREATMENT

As the Inland Revenue stated, the current transparent tax treatment is such that the partners conduct the business. The partnership is the coming together of two or more partners to carry on a common business with a view to making a profit (to paraphrase section 1(1) Partnership Act 1890); the same applies to LLPs. By this transparent treatment, partners/LLP members are subject to income tax (and national insurance) as well as CGT on their revenue and capital profits respectively, and their losses are their own—the partnership itself is not subject to any tax (though the partnership discloses revenue profits and proceeds of capital disposals on its own tax return under its own HMRC unique tax reference (UTR) number). The partnership tax return gives partners their share of the profits which are then disclosed again on their personal self-assessment returns through which the tax is paid. By placing the tax burden on the partners entirely, the partnership is analogous to the bare trust but has nothing in common with the tax personality of an express trust whereby the trustees are the taxable persons with respect to trust income and capital.

So, if partnerships are arguably capable of being *sui generis* for legal purposes and have their own area of common and statutory law, and if express trusts are arguably *sui generis* and trusts have their own opaque tax regime, why cannot partnerships also be *sui generis* and opaque with their own tax regime as well?

## [E] ELECTION WITHIN PARTNERSHIPS?

Within part XIX of their report, the Commissions addressed the proposed concept of a “special limited partnership”, which would be a type of limited partnership but which does not have a legal personality. The report highlighted how venture capitalists have used limited partnerships as a standard structure for their investments and will choose between Scottish or English limited partnerships depending on whether they want a partnership with or without legal personality respectively, based on the particular product. Respondents to the consultation had highlighted the competitive advantage which the UK has over other jurisdictions and the degree of competition within the European Union in particular. The Netherlands and Guernsey have both allowed partnerships to choose whether or not to adopt legal personality as this status will often determine whether other jurisdictions would regard the partnership as being transparent for tax purposes or not. Australia and Belgium were cited (Law Commission & Scottish Law Commission 2003: paragraph 19.7) as examples of countries that will regard a partnership as a corporation for tax purposes if that partnership has legal personality in its own country. The United States (US) too has moved to an “entity” (ie opaque) recognition of partnerships through the Revised Uniform Partnership Act 1994, allowing general and limited liability partnerships to continue after a partner leaves/is disassociated. Clearly, the ability to choose whether to adopt legal personality was seen as reinforcing British competitiveness and the idea of an election mechanism was planted.

In my November 2024 article, I put forward the suggestion that LLPs should be able to elect whether or not to be treated as corporations for tax purposes; LLPs are bodies corporate in law already, but transparent for tax purposes like any other partnership. My suggestion was that LLPs should be able to elect to be opaque for tax purposes, akin to limited companies, with the LLP paying corporation tax and members being able to make drawings and undertake employment contracts. This is along the lines of elections available to Limited Liability Companies (LLCs) in the US (a hybrid statutory entity comparative to the UK LLP) which are treated as transparent entities for federal tax purposes by default, unless they opt to be treated as a corporation with IRS Form 8832. Single-entity LLCs are “disregarded entities”, so the profits are recorded on the owner’s federal tax return—akin to a sole trader. With two or more members, an LLC is treated as a transparent entity filing partnership tax returns unless it elects to be treated as a corporation. Furthermore, corporations (and LLCs can be treated as a corporations rather than as partnerships) have the option to elect to move away from their opaque tax status and become a transparent

“S corporation” (via IRS Form 2553). These S corporations, whilst retaining full corporate liability protection, are transparent for tax purposes so the shareholders enter the income onto their own personal tax returns.

However, this option to become opaque need not be confined to LLPs as there is also the precedent from the US for UK general partnerships to also be opaque for tax purposes. Within the US, general, limited and limited liability partnerships can also elect to be treated as opaque entities rather than retain their default transparent status—they can be taxed as a “C corporation” which subjects the partnership’s profits to corporation tax and the shareholders again to income tax on dividends—as in the UK. Elections made via Form 8832 are binding on the business for the next five years to prevent annual switching, for example, to minimize the tax burden (only if the election is made under a mistake of fact or the business changes more than 50% of its ownership can a further election be held within the five years).

The UK tax rules could take a leaf out of the US book; if it is possible for an entity to elect how it is treated for tax purposes, irrespective of its legal status, it could resolve the tax-legal personality anomaly we have in the UK with respect to partnerships. The Commissions’ report missed a prime opportunity to address the disparity in both the legal *and* tax differences; whilst the Commissions’ touched upon the possibility of limited partnerships choosing whether or not to adopt a legal personality, the same sentiment could have been taken further on the matter of tax and general partnerships.

## [F] OPAQUE PARTNERSHIPS?

If general partnerships in the UK were given the same option to afford themselves legal personality for tax in the same way as US LLCs/corporations are able to, the partners would have to worry about something which often leads to questions to accountants: should I incorporate to pay lower tax? A general partnership or LLP (like a sole trader) pays income tax (and national insurance) on its profits irrespective of what it actually withdraw from the business. A partnership profit share might be above £100,000, taking the partner/member into the 60% marginal income tax bracket with the gradual loss of their personal allowance, but they might only withdraw half that amount (maybe because of the business’s cash needs).

From my days in practice, I found many a sole trader and partner/member would look for solutions to this problem—one obvious (though

not necessarily simple) option was to incorporate into a limited company, subjecting business profits to corporation tax but only exposing themselves to income tax insofar as profits were actually withdrawn from the company (as salary and/or dividend). However, the process of incorporation leads to further tax (and non-tax) complications. CGT is one issue where business assets are transferred from the sole trader/partnership, although incorporation or holdover reliefs (under sections 162 and 165 TCGA 1992 respectively) are potentially available to defer any tax charge. Stamp duty land tax is probably even more prominent an issue if land/buildings are incorporated, as deemed market value consideration will be imposed for the transaction. That tax needs to be paid within 14 days of completion of the transfer, too, so it can be a significant strain on a business's cash flow. Furthermore, if a sole trader or general partnership transfers the business into a limited company, there can be significant cost increases with respect to compliance fees and administration: Companies House submissions, pro-forma accounts, as well as corporation tax returns, plus payroll and/or dividend reporting when the profits are withdrawn.

Instead of having to go to the extremes of incorporation with the upfront tax and ongoing compliance costs, it would be much easier and cheaper for sole traders/partners to retain their existing business model but simply elect for opaque tax treatment.

## [G] OPAQUE PARTNERSHIPS AND TRUSTS

If the US rules concerning transparent/opaque elections were to be adopted in the UK, with general partnerships being *sui generis* legal personalities and the option available to extend that to the tax regime, what would this do to the suggested analogy between general partnerships and trusts? The simple answer is that it would merely reinforce the analogy, giving partnerships the same *sui generis* legal personality which trusts now have; giving partnerships the option to become opaque for tax purposes would move them from being bare trusts to express trusts with two layers of taxation—trusts and beneficiaries akin to partnerships and partners.

## [H] CONCLUSION

The Commissions' report of 2003 raised an interesting point concerning the legal identity of an English partnership being a *sui generis* personality, short of being a body corporate. Whilst nothing ever came of the report and the Commissions' draft Bill was never enacted, they were right about the

fact that the reality of partnerships in the modern commercial world, their separate identity to their clients, their longevity and continuity despite partners' coming and going, means that they are *de facto sui generis* personalities already. But for tax purposes (aside from having their own tax returns and UTR numbers) they are not separate personalities at all, they are entirely transparent with the beneficiaries—rather than the legal owners—being subject to tax.

Partnerships are bare trusts with respect to UK tax but are, or could be, so much more similar to express trusts with respect to tax. Despite the government's view, express trusts are, I would suggest, *sui generis* entities with their own identities—the trustees are acting in a completely different capacity from themselves, as custodians, subject to completely different sets of tax rules, rates, reliefs and allowances, in the same way that a corporation would be. So, why could a partnership also not be treated as a corporation for tax purposes? Previously, I had suggested that LLPs—already bodies corporate in law—should have the option to elect to be opaque for tax purposes too. However, this same logic can arguably be extended to all partnerships if the logic of the recommendations in the Commissions' report were to be followed. If partnerships can be separate personalities in law, then it would also seem logical for them to be so for tax, in the same way as express trusts are. However, instead of imposing an opaque tax regime on a potentially unwilling partnership, allowing the partners to elect in the same way as US partnerships would give a great deal of flexibility and likely make partnerships an even more popular business vehicle than they already are.

The Commissions' report expressly avoided this tax issue (except with respect to foreign jurisdictions) and confirmed the Inland Revenue's preference for the *status quo*. However, this consultation would have been a good opportunity to address the separate personality and whether partnerships should be *sui generis* for tax as well as legal purposes. The fact that the report's recommendations were not pursued was disappointing, as addressing the legal personality status could have been a prelude to addressing the tax personality status. Now, 22 years on from the publication of the Commissions' final recommendations, maybe the time has come to actually address this elephant in the room with a view to resolving this issue; the business world has changed a lot in the intervening time.

### About the author

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# ASIAN PARTIES AND THE PROPERTY (RELATIONSHIPS) ACT 1976: UNIQUE CHALLENGES AND ISSUES

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## Abstract

This article analyses the unique challenges and issues Asian parties experience under the Property (Relationships) Act 1976 (PRA) in New Zealand. Drawing on demographic data, case law, and interviews with expert and experienced practitioners in property relationship issues, the article highlights how cultural practices, language barriers, and differing understandings of legal norms complicate relationship property disputes in court. Issues include the treatment of family transfers—whether a transfer is a gift or a loan, interpretation and translation of evidence, discovery and disclosure, limited documentation and lack of expert cultural and language evidence. The analysis emphasizes the need for cultural competence within the Family Court, when cultural issues may be relevant to adjudicative issues, and recommends changes to ensure equal access to justice as the PRA enters its 50th year.

**Keywords:** Property (Relationships) Act; Asian parties; filial piety; cultural competence; family transfers; loans; gifts; language barriers; access to justice; superdiversity; contracting-out and compromise agreements; interpretation and translation; intergenerational support.

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## [A] PURPOSE OF THIS ARTICLE

New Zealand's demography has fundamentally changed since the enactment of the Matrimonial Property Act 1976 which has now become the Property (Relationships) Act 1976 (PRA).<sup>1</sup> Per section 1C, the PRA is mainly about how property of married/civil union/*de facto*

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<sup>1</sup> The Matrimonial Property Act 1976 was renamed the Property (Relationships) Act 1976 on 1 February 2002. This change was part of the reforms introduced by the Property (Relationships) Amendment Act 2001, which also extended the Act's application to *de facto* relationships and civil unions.

couples is to be divided up when they separate or one dies. Section 1M explains that its purpose is to reform the law relating to the property of couples, to recognize the equal contribution of both spouses to the marriage partnership, of civil union partners to the civil union, and of *de facto* partners to the *de facto* relationship partnership, and to provide for a just division of the relationship property between the spouses or partners when their relationship ends by separation or death, and in certain other circumstances, while taking account of the interests of any children of the marriage or children of the civil union or children of the *de facto* relationship. The principles of the PRA under section 1N espouse the importance that men and women have equal status, that all forms of contributions to the partnership are treated as equal, that a just division of relationship property has regard to the economic advantages and disadvantages arising from the enterprise of the partnership, and that questions arising under the PRA should be resolved as inexpensively, simply, and speedily as is consistent with justice.

In 1971, Asians made up about 1% of New Zealand's total population. By the 2023 Census, that proportion had grown dramatically to 17.25%, reflecting significant migration and demographic change over the past five decades. The Asian population increased over 30-fold in absolute numbers, while the total population less than doubled.<sup>2</sup>

In this article, "Asian parties" refers to litigants of East, South, and Southeast Asian heritage. The term is used for analytical clarity based on the available case and interview data and is not intended to ascribe any general characteristics to a group of individuals.

The Asian community has become one of the fastest growing and biggest ethnic groups in New Zealand. The growing superdiversity of New Zealand society, defined as people not born in this country (Chen 2015) and those identifying with more than one ethnicity are some of the changes the New Zealand Law Commission (NZLC) says is contributing to "major shifts in how relationships form, change and end. The result is that relationships,

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<sup>2</sup> In 1971 the New Zealand-born population stood at 2,561,280 and remained at about 86 % of the total population (Official Census Data from the New Zealand Official Yearbook of 1976). The total population in 1971 was 2,862,631. The broad ethnic origins of the population from 1971 show that there were 12,818 who identified as Chinese and 7,807 who identified as Indian. Chinese made up 0.38% of the population in 1971. Indians made up 0.26% of the population. In the 2023 census, the population of Asians (Southeast Asian, Chinese, Indian, other Asian) had grown to 861,576 of a total population of 4,993,923 (StatsNZ "2023").

families and households are increasingly diverse and complex” (Te Aka Matua o te Ture | Law Commission 2019: page 9).<sup>3</sup>

It is therefore timely on the 50th anniversary of the PRA to reflect on these demography changes and to analyse:

- ◇ Whether the growing numbers of Asian parties in dispute under the PRA raises unique issues which may be relevant to adjudicative issues in cases; and
- ◇ Whether any changes need to be made to ensure access to justice for Asian parties and to ensure that justice is done in cases where diverse cultures and languages are relevant to adjudicative facts and issues under the PRA.

With the Supreme Court’s caution that one size does not fit all, superdiverse parties, (who are predominantly Asian per StatsNZ nd) encounter and generate more and novel issues in PRA proceedings, as detailed below. They usually couple or marry in their home country and subsequently shift to New Zealand, or one partner shifts first and buys a home and then the other one is invited to marry and shift to New Zealand or comes to New Zealand to join the other spouse. The cultural and language framework within which separate and relationship property is acquired is often very different from that underlying the PRA’s “equal contributions, no fault” provisions, complicating resolution of disputes.

What follows is an analysis of a number of unique issues raised by Asian parties in PRA disputes, taking account of cases where litigants are identified as being of East, South, or Southeast Asian background. This article only deals with issues unique to Asian parties and thus general discussion of the *forum conveniens* issue, for example, will not be

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<sup>3</sup> The NZLC Study Paper on *Relationships and Families in Contemporary New Zealand—He hononga tangata, he hononga whānau I Aotearoa o nāianei* (2017b) found that in the Growing Up in New Zealand Study, by age 4 approximately 40% of Pacific children, 32% of Asian children and 26% of Māori children were living in extended family households, compared to 8% of European children. The October 2021 research report, *Relationship Property Division in New Zealand: The Experiences of Separated People* by Megan Gollop and others, informed a review of the Property (Relationships) Act 1976; see Te Aka Matua o te Ture | Law Commission, *Review of the Property (Relationships) Act 1976* (2019: paragraph 36). Home ownership varies significantly by ethnicity. In 2013, the rate of home ownership was higher for the European and Asian ethnic groups (56.8% and 34.8% respectively), compared to Māori and Pacific peoples (28.2% and 18.5% respectively). Family transfers may be more common in different cultures. In non-western cultures, particularly in Asian and Pacific cultures, the concept of reciprocity can involve the sharing of financial resources across generations. Family transfers may become increasingly common as it becomes harder for first home buyers to enter the property market ...” (at paragraph 52). Also see Chan and Riddle (2025) in the related area of trusts and the issues they raise when the PRA was created with traditional families in mind, typically “Mum and Dad, with two or three kids”. The added complexities that come with stepchildren, step-parents, or multiple marriages form a gap in the law which is compounded when Asian parties are involved.

covered. Unfortunately, statistics are not kept of the ethnicity of parties in Family Court (or any) court proceedings. The Ministry of Justice Library explained in personal communication that:

On Family application forms there is a box for applicants to list their ethnicities, but it is not always filled in, and even when it is, it's not always added to CMS by the registrars. That means when we are looking at the data, it's just not in a strong enough state that we would want to generate reports with it.<sup>4</sup>

The cases analysed below demonstrate how cultural practices and traditions can influence the court's interpretation of evidence and the classification of property. Of course, the starting-point of case analysis on cultural considerations is always *Donglin Deng v Lu Zheng* where the Supreme Court, in 2022, made important comments about "Cultural considerations" (paragraphs 75 to 84). Balance is needed between understanding when culture is relevant and avoiding stereotyping, especially as culture also evolves and changes over time (Liao 2022: 7-8).

The cases below demonstrate how cultural context affects the interpretation of financial arrangements within families, especially whether parental or inter-family transfers should be treated as loans or gifts. While the statutory framework of the PRA directs courts to assess the parties' intentions, those intentions are often inseparable from and informed by cultural norms, practices and expectations that influence how families conceive of support, obligation and repayment.

The cases show that, in many Chinese families, substantial advances are made without formal documentation, reflecting traditions of intergenerational care and collective responsibility. Money may be provided for housing, business ventures, or living costs, with repayment expected in ways that extend beyond legal instrument, such as later-life care for parents as they age or gradual repayment based on opportunity. New Zealand Courts at different levels have recognized that applying Anglo-centric legal assumptions in isolation from the culture and language context which informs the meaning families attach to money, obligation, and reciprocity leads to the risk of unjust decisions in cases concerning Asian parties. By contrast, in Indian families, financial support from parents is often closely tied to traditions of generosity, particularly toward sons and their families. The birth of male heirs and the maintenance of family honour can heighten expectations of transfers of large sums which may well be intended as outright gifts.

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<sup>4</sup> See Mai Chen, "Asian Parties in the Courts" [2025] NZLJ 366; Mai Chen & Yvonne Mortimer-Wang, "The Data Gap" [2025] NZLJ 369.

However, where formal documentation exists (such as loan agreements or conditions of repayment) judges have prioritized the written evidence over assumptions of cultural generosity.

The analysis also reviews the sparse number of relevant published research which may fall within section 129 of the Evidence Act 2006. Finally, the analysis in this article is based on interviews with expert and experienced practitioners in PRA issues, some of whom are superdiverse and some Pākehā. Their comments are attributed unless they were made anonymously. Note that the region in which a lawyer practises impacted the number of Asian parties encountered in practice. For example, Anita Chan KC, who resides in Dunedin, came across fewer Asian parties than the lawyers who practised in Auckland or the Bay of Plenty area, but is instructed to act on cross-border disputes with Asian parties living outside New Zealand. This article concludes with recommendations of changes that should be considered as we face forward into the next 50 years of the PRA to ensure that the Act continues to do justice to all New Zealanders.

## [B] METHODOLOGY

This article draws on desk research, the authors' own experience as practising barristers, and interviews with lawyers who have deep expertise and experience in advising litigants of Asian ethnicity in New Zealand on PRA issues. The interviews were designed and conducted to provide original, empirically grounded insights into the experiences of Asian litigants in PRA disputes. Such insights are almost entirely absent from existing publications and cannot be obtained from publicly available data alone. Thus, the interviews played a key role in the research presented in this article.

The interviewees were selected from a pool drawn from a call for participation posted on the authors' LinkedIn pages and emailed to the Waitakere and North Shore Family Law Bar, as well as through the authors' professional networks (on file with the authors). Selection of interviewees targeted those individuals with direct experience relevant to the research topic and based on their depth of expertise and experience in civil and family law involving litigants of Asian heritage in New Zealand.

Those selected answered a number of questions via a remote or in person interview with both or one of the authors, via emails and by Zoom/ phone, including:

- ◇ What are unique issues that you have experienced or observed acting for or dealing with Asian parties?
- ◇ What differences do you notice in dealing with Asian parties in comparison with non-Asian parties?
- ◇ Are there differences in dealing with Asian parties when one spouse is not Asian?
- ◇ Are there any trends identified in acting for Asian parties entering into contracting-out agreements?
- ◇ Are there language issues, or communication issues?
- ◇ Are there issues experienced with the use of translators/interpreters?
- ◇ Are there any assumptions or presumptions held by Asian parties themselves about relationship property?
- ◇ What do Asian parties understand the laws on relationship property to be in New Zealand?
- ◇ What has your experience of cultural competency been in the Family Court and of lawyers/counsel?
- ◇ What is your experience in using expert evidence on culture or/and language in PRA cases in the Family Court or senior courts?

The interviews were recorded with the interviewees' verbal consent to facilitate easier writing up.

As the research presented in this article was conducted entirely by private researchers (ie outside of a university or government agency), interviewing legal experts with full knowledge and consent, and is in a non-health/social sciences area, ethics approval is not required.<sup>5</sup>

We nevertheless recognize the value of best practice and have implemented the following safeguards to ensure the research meets high ethical standards.

- 1 Interviews were designed to allow participants to contribute anonymously.
- 2 Prior to their interviews, we disclosed to every interviewee the research purpose, gave them the option to contribute anonymously or choose which aspect of their interview was attributed anonymously, and informed them that they could withdraw at any time, with the ability to edit the article as they saw fit.
- 3 We obtained express permission for any attributable quotes (written consent was given to the authors by the interviewee).

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<sup>5</sup> Email from the Aotearoa Research Ethics Committee, 2025, on file with the authors.

- 4 All interviewees have been given the opportunity to review the article and provide feedback.
- 5 No interviewees received any payment or reimbursement for participation.
- 6 The data collected will be securely stored in such a way that only those mentioned below will be able to gain access to it. Data obtained as a result of the research will be retained for at least five years in secure storage. Any personal information held on the participants such as transcriptions of their interviews may be destroyed at the completion of the research even though the data derived from the research may be kept for much longer.

## [C] NOT UNDERSTANDING NEW ZEALAND'S COURT SYSTEM

Asian parties may have come from countries with a very different concept of the rule of law which affects their understanding of New Zealand law, the independence of the judiciary and the role of lawyers. They may struggle with *viva voce* evidence. In a defended hearing, both parties provide their account, and the judge must often make determinations on credibility to make findings of fact. They may perceive that a finding can only be made based on tangible evidence (ie supporting evidence), not on affidavit/oral evidence alone, and may be surprised when the judge prefers the wife's account over the husband's, for example. The process of weighing credibility—essentially “he said, she said”—can feel alien and even unfair to clients from more hierarchical or patriarchal backgrounds, where male testimony is traditionally given more weight. This cultural dissonance can lead to distrust of the system. Clients may not be able to reconcile how a judge could reach a binding conclusion on a deeply personal and significant matter based purely on competing narratives (Interview with Mark Sandelin, Barrister, 2025).

Academic Ruiping Ye (2019: 168) wrote that:

[in mainland China] Judges are more active in conducting the case. The Chinese legal system is inquisitorial, as opposed to adversarial. Judges have the power and obligation to collect evidence where necessary, although there are also rules for the parties' burden of proof.

Another issue is that Asian deponents may not be prepared to travel to New Zealand, nor to be cross-examined by audio-visual link (AVL), resulting in their affidavits not being admissible. In *Zhou v Yu* (2015) for example, the applicant relied on detailed affidavits, emails from his father,

remittance forms, and a schedule of 40 advances totalling substantial sums to show funds provided by his family were loans rather than gifts. The applicant sought to have these family members testify to support his claim. However, a key deponent, the applicant's aunt, was unwilling to travel to New Zealand to give evidence and refused cross-examination via AVL. The court refused to admit her affidavit, limiting the applicant's ability to substantiate his position through direct testimony from his family (*Zhou v Yu* 2015: paragraph 40).

Courts have also observed that some witnesses from China lack understanding of their duty as a witness, coming to New Zealand "solely for the purpose of giving evidence to support a family member" (Chen 2015: paragraph 6). They may confuse the role of a witness with that of an advocate and may not understand that hearsay evidence is generally inadmissible (*Hemu Trade Company Ltd v Le* 2018: paragraph 6).

## [D] ASIAN PARTIES MAY HAVE LESS UNDERSTANDING OF THE PRA

A survey done by Otago University into *Relationship Property Division in New Zealand: The Experiences of Separated People* showed 84% of people born in New Zealand know that after three years as a couple, all property becomes relationship property and is split 50:50 in a breakup. For those not born in New Zealand, that understanding was only 67% (Gollop & Ors 2021).

Respondents were less likely to have considered making a contracting out agreement if they were unaware of the general rule of equal sharing under the PRA (15%), were Asian (17%), were born outside New Zealand (18%), were already married (21%) or rented rather than owned their own home (21%). Phase one of the survey conducted 220 interviews with Asian respondents.

As media have reported (Hatton 2018):

Three-quarters of New Zealanders understood that this law applied to married and un-married couples, but only half of migrants knew this.

Property lawyer and Chinese national Penny Liu said at least once a week she heard from someone with a similar story.

"The client came to me in a panic, basically worried that she won't get her money back at all. She's headed toward retirement age and is worried she won't have any resources left."

Ms Liu was describing a recent client who sent money over from China to her daughter and her son-in-law so they could buy a house.

The daughter's relationship ended in June and her husband was now entitled to half of the house.

"My client sold her family home and then transferred \$400,000 cash over – which was everything she's got. She was living in China and there was no one there to give her advice – nor did she think it was necessary to get any advice because it's her daughter who she trusts.

"The original intention was to help them out, to get them into a nice home, but the problem is because there was no correspondence no proof that her intention was to give it as a loan that would need to be paid back. It's very stressful for her knowing that the money has essentially evaporated."

Ms Liu has run seminars for the migrant community on the topic for the past two years. "There's still quite a gap in the migrant community as to the understanding of what applies to their situation and that's why you get a lot of disputes and a lot of litigation."

She said language barriers stopped a lot of migrants from seeking legal advice. "Unfortunately, you can't just get help from a translator because you need someone who speaks the 'legal language' ..., as well as 'the language,' and we don't have a lot of people who do. The legal profession hasn't grown to be able to cater for the needs of the migrants. This group is pretty much out there in the dark."

Barrister Mark Sandelin confirmed that migrant Asian parties often have less understanding of the PRA than New Zealand-born Asian parties and further observed that New Zealand-born Asians generally understand and trust the local legal system, whereas immigrants frequently approach it with suspicion (Interview with Mark Sandelin, 2025). They operate according to the law back in their home country where, for example, the conduct of the parties is relevant to how much the parties get, as in Mainland Chinese law, in contrast to the no-fault system in New Zealand (subject to the provisions set out at 18A of the PRA).<sup>6</sup> So, Asian parties seek to tell the court about perceived wrongdoing by the other partner, not understanding that it is irrelevant under New Zealand law.

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<sup>6</sup> *Zhou v Lassnig* (2024) paragraph 99: the Property (Relationships) Act is generally not concerned with moral judgements about the partners' conduct, and there is a high threshold to be reached before misconduct is relevant to the division of relationship property. (The CA decision was upheld in the Supreme Court *Lassnig v Zhou* [2025] NZSC 116). Section 18A requires the misconduct to be "gross and palpable" and to have significantly affected the extent or value of the relationship property. Misconduct under section 18A is a negative fact detracting from other positive contributions to the relationship rather than warranting any form of penalty.

## [E] LANGUAGE, INTERPRETATION AND TRANSLATION ISSUES

Language barriers impact many superdiverse Asian parties and even if they are proficient in English, it remains a second language (ESOL) if they immigrated to New Zealand as adults. Some Asian parties may not speak English (at all or proficiently) requiring interpretation and translation of documents. Their interactions with counsel who do not speak their language is invariably limited and the risk is counsel misunderstanding their instructions or/and Asian clients not understanding what they have been advised. Many interviewees spoke about the need for double the amount of time to explain issues to Asian clients. Interpretation usually requires more court time for hearings (*Hinds v Song* 2023: paragraph 24).

Professor Leo Liao (2022: 11) writes that:

Poor-quality interpretation may distort the meaning of what the witnesses say in the courtroom. Even if in good quality, it may still lose the “flavour” of the original statements. The credibility may only be correctly assessed in connection with the demeanour. The demeanour of Chinese witnesses, however, is hard to perceive for Western judges. The process of examination and cross-examination could be helpful, but the practice in China is different and most Chinese people are not familiar with these. They may look shy, unconfident and seem to avoid answering questions and eye contact in answering questions. Some Western judges may think that such demeanours suggest the witness is telling a lie. This may not be fair, if the witness is highly influenced by traditional Chinese culture that eye contact with a person in a superior position would be seen as disrespectful, threatening, or insulting.

It is important to note that these language barriers impact every stage of PRA proceedings. For example, the process of filing deposed evidence is more challenging—such as when ensuring that the client’s statements in their home language are accurately translated into English and translation issues with affidavits with deponents not understanding what they are signing in an English language affidavit sometimes drafted by a friend or other family member from conversations had in their first non-English language. Barrister Ben Snedden recounted the time when the court and counsel were reduced to using dialogue probe when the interpreter failed to arrive (Interview with Ben Snedden, 2025).

In *Zhou v Yu* (2016: paragraphs 518-519), both counsel had to have the assistance of “second counsel” because of language difficulties, resulting in costs being granted at a 2B scale. Four parties were involved in the matter, and while the separated couple were the applicant and respondent

respectively, both parties' parents were represented, involved, and recorded in the judgment as well. All parties underwent significant cross-examination, and evidence of loans was in dispute. Documents provided by the applicant's father, including statements regarding loans and asset arrangements, were translated into English. For example, a "Statement" purportedly from the applicant outlined that his assets would be held in trust by his father, Shui Zhou, in the event of unforeseen circumstances (*Zhou v Yu* 2016: paragraph 79). Another document, labelled a "Loan Statement", detailed transfers totalling \$45,000 from his parents to the applicant for property purchase and living expenses (*Zhou v Yu* 2016: paragraph 83). This was presented as evidence of the loans.

The applicant argued that translation issues explained why documents were issued retrospectively, and when questions were put to him around the authenticity of the loan documents, he responded "*Well, my English is not, you know, not native*" (*Zhou v Yu* 2016: paragraphs 129-130). Further disputes arose because evidence in their English versions (translated documents) were not agreed as being accurate translations, with the respondent's counsel in counterpart Chinese proceedings deposing that mistakes had been made in the translation (*Zhou v Yu* 2016: paragraph 289). Under cross-examination by AVL, the witness (a qualified lawyer practising in China since 1997) deposed (*Zhou v Yu* 2016: paragraph 289):

According to the Chinese version, Zhou Guo said in the document all his assets be handled by his father, Zhou Shui. But when your distinguished lawyer read the English version on page 14, it means that all the assets under Zhou Guo's name will be the assets of his father. So this is different.

This Family Court decision was over 100 pages long due to having to address these translation difficulties.

## [F] THE IMPORTANCE OF NUANCE AND ITS IMPACT ON ACCESS TO JUSTICE

In a hearing, cross-examination may become more complicated as questions asked in English by counsel or by the judge may contain technical terms or cultural nuances that are difficult for the interpreter (who may themselves be ESOL) to convey with precision in real time. Coupled with the stress and high pressure of proceedings, this challenge becomes even greater. Interpretations of what counsel or the judge asks and what the deponent says in reply may therefore lose nuance or risk inaccuracy. Dala Oh, the Director of Nolen Walters (who speaks Chinese as well as several other Asian languages/dialects), explained in

interview (2025) that even minor misinterpretations can have significant consequences in litigation, emphasizing the need for greater consistency and attention in this area. She has observed a growing practice among senior counsel who are not proficient in Chinese of partnering with Chinese-speaking lawyers or Chinese-speaking instructing solicitors. This enables any issues requiring clarification to be raised at the earliest opportunity in court and addressed collaboratively with the interpreter (Interview with Dala Oh, 2025).

Barrister Ben Snedden said in interview (2025) that by working with instructing solicitors who are proficient in, for example, Mandarin, Cantonese, or Punjabi as well as in English, clients may feel more comfortable deposing in their first language and this approach may lead to less risk of inaccuracy.

Interviewees commented on the need for more experienced Asian counsel practising in the relationship property specialty. Asian parties may deliberately choose to engage practitioners that can speak their language even if they do not practise relationship property law. Other Asian parties opt to use Pākehā lawyers because they are concerned about judicial bias and discrimination against Asian counsel. This, in turn, can lead to communication issues between counsel and clients. Even with Asian clients that, at first blush, appear to speak proficient English, Kings Counsel Vivienne Crawshaw said “There’s a lot that’s lost” (2025), leading to an increasing desire to err on the side of caution by using a professional translator even in the initial meetings.

Barrister Augustine Choi encouraged greater use of young, bilingual and culturally aware practitioners by specialist teams and experienced practitioners in the field. However, he considered that ultimately the need is for practitioners who can *bridge* cultural divides and not merely practise from the other side of the canyon. Some of these young practitioners will themselves require more help with their English language skills and cultural training to develop their judgement when dealing with colleagues and judges in this field (Interview with Augustine Choi, 2025).

The use of interpreters in court is high, even if parties have a good command of English, due to the stressful nature of legal proceedings and the fact that English is not their first language. Some counsel prefer to hire their own interpreters due to their experience of the inconsistent quality of court-provided interpreters who may not be proficient enough in English or with the particular nuances of the Asian parties’ precise form of Mandarin (for example, a Singaporean interpreter of a deponent from rural mainland China) to convey meaning and nuance accurately

(Interview with Kenneth Sun, Founding Partner at Capstone Law, 2025). This is critical when credibility is so often in issue in PRA proceedings with Asian parties due to the lack of documentary evidence. The inconsistent quality of interpreters provided by the court was identified as a significant issue by almost all interviewees.

PRA proceedings involve specialized legal concepts (economic disparity, division of functions within a relationship, repugnancy to justice) that can be difficult to grasp even for a Pākehā layperson speaking English as a first language. Cultural understandings of property concepts often differ significantly, making it challenging for Asian clients to fully grasp legal principles like fairness, reasonableness, and equal sharing, which are fundamental in Western legal systems (Interview with Jo Hosking, Barrister, 2025).

Some legal concepts, like a legal “trust” do not translate directly into Mandarin, thus underscoring the need for competent interpreters in the Family Court who are properly trained in relationship property concepts and can ensure thorough explanations to clients (Interview with Genevieve Haszard, Barrister, 2025). This would not only assist the court but potentially lead to greater access to justice and to more just outcomes.

## [G] DISCOVERY AND DISCLOSURE

Discovery is often a foreign concept for some Asian parties and thus fulfilling court obligations under discovery is harder to achieve. Many interviewees said that Asian parties are reluctant to disclose assets, with the process of disclosure being described as both “pulling teeth” and “given through gritted teeth”.<sup>7</sup> Asian parties in relationship property proceedings often hesitate to provide full disclosure due to cultural values around privacy and saving face. Family disputes are considered to be held within the family and no one else’s business (Liao 2022: 12). Financial matters and family issues are considered highly personal, and revealing details can feel like exposing vulnerabilities or inviting shame (Interview with Christina Lee, Barrister, 2025). Additionally, language barriers and unfamiliarity with the legal process can create distrust or fear that information might be misunderstood or used unfairly against the party. This reluctance is sometimes compounded by concerns over family reputation and the desire to protect relatives from scrutiny, especially when extended family members are involved.

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<sup>7</sup> Interviewees did not want this comment attributed.

## [H] LIMITED DOCUMENTATION REQUIRING MORE SLEUTHING

On lack of formal documentation, Ruiping Ye (2019: 157) writes:

Exceptions to the norm of written contracts could exist. This is particularly so when parties are family or friends. As written contracts are perceived as evidence for transactions and requiring evidence for agreements with one's family or friends would appear to be distrusting, many harmony-loving Chinese will find it difficult to ask for a written contract with family, friends or close acquaintances. In cases of close relationship, it is honour that binds the parties, rather than the written contract. Nevertheless, each party would believe that a binding contract exists between them if terms of the agreement have been discussed, and words of confirmation have been spoken unequivocally. Where the subject matter is important enough or the amount involved is substantial, people are likely to ask for or try to obtain something in writing even between close relations.

Interviewees said that there is often more sleuthing required to determine the facts, made more complicated by Chinese Government restrictions which result in money being transferred out of China through agents, and assets sometimes also being put in the name of third parties (Interview with Lynda Kearns KC, Barrister, 2025). Finding evidence of money and assets that are hidden can be time consuming and costly, especially if there is undeclared cash involved. But Lynda Kearns KC says that the effort can be worth it if justice is achieved for a disadvantaged party. In one case she was involved with, the discovery process had been significantly delayed, by years. At the hearing, the Presiding Judgment reflected that the discovery process was instrumental in shaping the eventual outcome (Addendum from Lynda Kearns KC following the interview).

## [I] FRAUDULENT DOCUMENTATION

Interviewees' perception is that there is a higher incidence of lying and fraudulent documentation in proceedings under the PRA involving Asian parties, and this often arises in the context of the loan versus gift cases. Ben Snedden (2025) identified the practice of manufacturing documents after the fact, which clients do not perceive as dishonest but rather as a shortcut. He explained that this behaviour, stemming from a cultural misunderstanding of New Zealand's legal system, can unravel a case even if a loan would have been found otherwise.

As the judge stated in *Zheng v Qiu* (2007: paragraph 7):

all the witnesses ... had an interest in the outcome of the proceedings. I gained the distinct impression that these witnesses were intent in

presenting to the Court their version of what happened in a way that would best suit their individual purposes. This does not mean that I think that they were deliberately telling lies with the aim of misleading the Court. Rather, however, they *did not appear to appreciate the difference between giving truthful evidence and advocating their own respective causes* (emphasis added).

In a further example, *Zhao v Zhang* (2022) concerned parties in dispute over multiple properties and a business. At a hearing to determine an interlocutory application for further discovery, the court commented on the importance of credible and accurate disclosure. In support of her position, Ms Zhang provided a Chinese bank statement that was found to have been illegitimate. The court specifically noted the impact of misleading evidence, observing that Ms Zhang “did not help herself, or the Court” (*Zhao v Zhang* 2022: paragraph 30) by submitting a Chinese bank statement that was not legitimate.

## [J] EVIDENCE ACT ISSUES AND EXPERT EVIDENCE ON CULTURE

Academic Professor Leo Liao (2022: 10) asks whether well-known and established cultural practices/assumptions or expectations can be taken into account by courts as custom. Section 128 of the Evidence Act 2006 concerns uncontroverted fact which may be easier for counsel of Asian parties to use as the Asian population in New Zealand grows and more is known about their culture. Section 129 of the Evidence Act refers to admission of reliable published documents. Otherwise, expert evidence will need to be deposed to support the submission that the Asian party acted in a certain way due to their culture and ethnicity. An Asian deponent may of course adduce evidence explaining that their own actions are affected by culture. Opposing counsel would then have to depose expert evidence to show that there is no such cultural custom/expectation.

For example, in the *AB* case (*AB v BG* 2025: paragraph 31), the court found that:

[a]lthough the plaintiff suggested that “in China, ‘cousin’ would be a title customarily used for a friend of the opposite sex who has a very close relationship not being married”, this was not the evidence of Dr Zhixiong (Leo) Liao, given as an independent expert called on behalf of the plaintiff on Chinese law, culture and business practice. Dr Liao’s evidence was quite simply “cousin is cousin. Cousin is not partner”.

Expert evidence on culture is often not deposed when it should be, if the lawyer does not realize it needs to be, or the party cannot afford to. At times, further comprehensive evidence may be required, but the cost associated with this may not be consistent with the principle of simple, efficient, cost-effective resolution of relationship property disputes (Interview with Genevieve Haszard, Barrister, 2025).

Vivienne Crawshaw KC discussed a relationship property case where disputes over parental contributions and undocumented loans arose and stressed the potential need for expert evidence to clarify these complex financial issues. She commented that such evidence can help the court assess contributions accurately, particularly in situations where documentation is lacking (Interview with Vivienne Crawshaw KC, 2025).

One interviewee suggested that judges may be reluctant to take cultural facts on judicial notice due to lack of familiarity with the culture of distant countries in Asia. Even experienced judicial officers may struggle to recognize indirect contributions (such as leaving one's home country and family for an arranged marriage) as a financial disadvantage that warrants adjustment (Interview with Genevieve Haszard, Barrister, 2025).

## [K] LIMITED REPORTING OF FAMILY COURT JUDGMENTS

A further difficulty in this area is the lack of visibility of Family Court decisions. Most are anonymized and rarely reported, meaning that, while the issues discussed in this article are common and regularly encountered by interviewees, there is sparse publicly accessible information on them. As a result, practitioners and researchers have limited guidance on how cultural factors are weighed by the court in determining adjudicative facts and legal issues.

This is compounded by the fact that PRA cases do not get filed because of lack of funds to pay court and lawyer fees and because of settlement. The only statistics we have are that 2024 applications were filed under the PRA in 2024 (New Zealand Ministry of Justice nd). This includes applications under the Property (Relationships) Act 1976 which relates to agreements about the status, ownership and division of relationship property and assets at any time during a marriage, civil union or *de facto* relationship, or about the division of property and shared assets when the relationship ends or the other partner dies. Since 2016 PRA proceedings have regularly represented 3% of all applications filed in the Family Court.

For, example, in 2024, 26% of all substantive Family Court applications filed were in the category of guardianship cases (16,247 applications).

The result is a body of law that may not be well understood and is under-researched. Without more reported decisions it is difficult to assess consistency in judicial reasoning or to trace how courts engage with cultural arguments. In a superdiverse society, the risk is that misconceptions about cultural practices become entrenched, even as these disputes form part of the everyday work of the Family Court.

## [L] GIFTS OR LOANS?

“I don’t think I’ve ever had a mainland Chinese client that doesn’t have that as one of the issues. The gift and loan issue is always there” (Interview with Pauleen Clark, Partner at Connell and Connell, 2025). Under the PRA there is a presumption that contributions without loan documentation are gifts. Morton LJ summarized the equitable presumption of advancement in *Warren v Gurney* (1944: page 473) as follows:

It is well established that when a parent buys a property and has it conveyed into the name of his child, there arises a presumption that the parent intended to make a gift or advancement to the child of that property. Of course, that is a presumption which can be rebutted by evidence that that was not the father’s intention.

In determining whether there is evidence to rebut the presumption, the PRA is understandably underpinned by an Anglo-Saxon understanding of marriage, de facto relationships and civil unions. This can lead to situations where parties are owed nothing under New Zealand law despite having a significant interest from a Confucian perspective, for example (Interview with Ben Snedden, Barrister, 2025).

The gift/loan issue for Asian parties arises from the deep involvement of parents and other members of the family in money or asset transfers to the husband or wife or partners, sometimes of very large amounts/significant value. Ben Snedden notes that in his experience, many “loan versus gift” cases involve substantial sums, often over a million dollars, typically relating to funding a family home. However, the money may be used for multiple purposes, such as business ventures or rental properties, which complicates the legal classification.

From a PRA perspective, the law tends to focus narrowly on the family home, whereas, culturally, contributions are seen in a broader, collective sense. This demonstrates a tension between New Zealand’s legal system, which prioritizes individual entitlements, and collectivist

cultural practices, where financial contributions are interwoven with family obligations and shared interests. Pākehā individuals might not understand the cultural practice of Asian families providing financial support. From an Asian party's perspective, family money is often understood to be a loan to the individual, not a gift to both parties, even without any relevant loan documents.

This issue is complicated by the restrictions placed by the Chinese Government on transferring money and assets out of China, for example (Interview with Lynda Kearns KC, Barrister, 2025). This results in money being transferred out of China in no more than \$50,000 increments, the use of other people to make the payment, and complications arising from “hiding” money from the Chinese Government. Individuals will also sometimes procure other people to own offshore assets, including in New Zealand (Interview with Lady Deborah Chambers KC, 2025).

## [M] CULTURAL EXPECTATIONS

The transfers happen due to different cultural concepts of family and what family members do for each other, parental relationships with (adult) children and the expectation that, in return for the transfer, children will look after their parents in their old age, in the children's home. Traditional Asian cultures often involve elderly parents living with their children—contrasting with Pākehā practices like rest homes—which can create further family expectations and legal complexities (Interview with Jo Hosking, Barrister, 2025). In some Asian families, the idea that they will utilize retirement homes or outsource the care of aging parents is unheard of (Interview with Jo Hosking, Barrister, 2025). Although the parties may be adults, they remain “children” within the family dynamic, and typically, the entire family becomes involved in the transfer and ownership process.

Because PRA proceedings involve disputes arising after the breakdown of a family relationship, it is often challenging, at this time, to explain to parties that gifts are not generally reclaimable under New Zealand law, even when the cultural expectation is that a contribution to a family home was ostensibly made on a condition that the home was intended to be for a husband's parents (Interview with Deepal Kumar, Senior Associate at GML Lawyers, 2025).

Conflict of interest issues requiring parents to be separately represented from their adult child may be difficult to explain and to be understood by Asian parties (Interview with Renee Rudd, employed Barrister, 2025).

The need to restore parents or family members who contributed financially on the basis of cultural expectations converges with the need for “big face” in Asian clients. This cultural imperative of restoring family honour can intensify the dispute beyond what may be economically rational, making settlement more difficult. For example, a dispute may not settle and instead may go to court even though court action is much more expensive than the amount in dispute.

In summary, many of the cases where the assessments were not kept confidential found that the transfers were loans,<sup>8</sup> but there are also cases where the court concluded the transfers were gifts. It is difficult to tell on the face of the judgments whether this is due to the unique facts of the case or the need for expert evidence on culture. For example, Chinese families do have obligations to care for their children even into adulthood (gift) but there are reciprocal obligations on the adult child to care for the parents in old age such that a 50:50% sharing of the house means that obligation cannot be carried and thus the expectation is that the money transferred would be repaid (loan).

## Resulting trusts in Chinese family property disputes

For example, in *Zhou v Ling Yu* (2015) the Family Court concluded that funds advanced to a couple during a marriage by both parties’ families, on numerous occasions and often used for property purchases and living expenses, were gifts rather than loans. The court examined cultural practices, noting the common expectation in Chinese families that parents provide financial support to children, sometimes with the understanding of reciprocal care in old age. Despite that obligation of reciprocal care, the court found the transfer was a gift.

In contrast, most other cases analysed below found such transfers were loans or the basis of a resulting trust.

Interviewee Kenneth Sun was involved in the recent 2025 High Court case of *Wang v Wang* (2025) where the plaintiffs (Wang and Xu) were the parents of the defendant, Xin Wang, and contributed the entirety of their retirement savings to purchase a property, which Xin, their adult son, held. The plaintiffs argued that pursuant to the Chinese concept of “filial piety” (the moral obligation of adult children to care for their elderly parents), the plaintiffs would not have gifted their retirement savings with no strings attached. The issue was whether a formal agreement existed regarding ownership, whether a resulting trust arose in favour of the

<sup>8</sup> In *Wei v Wang* (2020), the case centred on large money transfers from Ms Wang’s parents, including a \$989,000 gift, which the Court assessed but ultimately protected from full disclosure.

parents, and how financial obligations such as loan repayments and rental income should be managed.

The presumption of advancement assumes that transfers from parents to children may reflect a gift motivated by parental support, and Xin's defence argued that the property and associated financial benefits were gifts, reflecting his parents' love for him. The court considered New Zealand and comparative jurisprudence, including the Canadian case of *Pecore v Pecore* (2007) and the New Zealand High Court case of *Woolf v Kaye* (2018), to assess whether the presumption of advancement applies to adult children.

The High Court ultimately held that it did not have to conclude on whether the presumption of advancement applies to independent adult children. This is because any presumption was rebutted by the parents' clear intention to retain beneficial ownership (*Woolf v Kaye* 2018: paragraph 254). Evidence showed that the parents contributed significant funds and expected the property to remain theirs because they trusted that Xin would be a "filial son"; they had not intended to gift it outright. The court acknowledged that, while Xin had relied on his parents financially, this reliance did not establish a legal right to the property or its income. Accordingly, Xin was required to transfer the property, repay the loans he had personally secured against it, and account for rental income received after a specified date.

In the High Court case of *Zhang v Li* (2017), Simon France J considered whether the \$335,500 transferred by Ms Li's parents toward the purchase of the couple's family home were funds held on trust for the parents. The couple married in 2007, purchased a \$427,500 property in 2008, and separated in 2012.

The court considered evidence from both parties, the parents, and an expert in Chinese cultural practices. The court decided that the parents had never intended that the funds would be treated as a gift. Instead, the transfer reflected a culturally informed obligation to assist their daughter in establishing a home, consistent with traditional Chinese norms of familial support and intergenerational care (*Zhang v Li* 2017: paragraph 7). The funds were thus an interest-free loan.

The key reasons why the court came to this conclusion included the limited personal connection between the parents and the husband and the size of the transfer relative to the parents' retirement savings (the transfer being such a large percentage of the money). Prior smaller contributions for tuition and living expenses were distinguished from the

large advance, showing that routine support did not necessarily equate to gifting a substantial asset (*Zhang v Li* 2017: paragraph 9). This case also noted issues affecting the credibility of certain evidence, including a backdated promissory note purported to be drafted in 2008 (at the time of the house purchase) but in fact prepared by Ms Li in 2012 (*Zhang v Li* 2017: paragraph 13).

The family home was ordered to be sold, with repayment of the parents' advance from the proceeds.

In *Narayan v Narayan* (2009: paragraph 47), Wylie J stated that:

The presumption of advancement can be rebutted by evidence showing that there was no intention to benefit the alleged donee by way of gift. A contemporaneous act or declaration by the alleged donor will suffice. Acts or declarations by the donor subsequent to the purchase or transfer, unless so connected with it as to be reasonably contemporaneous, are not admissible in favour of the donor to rebut the presumption.

He determined that a \$100,000 transfer from a husband's parents to their son and daughter-in-law was a gift rather than a loan. Judge Wylie cited *Xiang v Liu* (2016) where the Family Court found no evidence sufficient to displace the presumption. It was found that the unusually high interest rate and secretive handling of the funds suggested the document was more about preserving "security" in case the marriage failed than a genuine loan. Despite a formal document recording the transfer as a loan to be paid back with high interest, the court found the funds were intended as a gift, reflecting traditional Indian family values where parents often support their children, especially sons with families of their own. Judge Adams (*Narayan v Narayan* 2009: paragraph 60) stated that:

Within the context of an Indian family espousing very traditional views, the position of the only male children in the family, particularly when he has produced a male child himself, is bound to excite joy and generosity, where generosity is possible.

That Family Court decision was successfully appealed in 2009 (*Narayan v Narayan* 2010). While the Family Court had made some assumptions around parental generosity, the High Court focused on the parents' intent at the time of the transfer. An "irrevocable document" signed at the time of the transfer specified that \$25,000 was a gift but \$100,000 was a loan with conditions, including interest and shared title. The High Court held that the document reflected the parents' true intention and was legally valid. As a result, the sum was treated as a relationship debt, jointly owed by the parties.

## Loans, intention, and cultural context in family property disputes

In *Wu v Tan* (2023), the High Court upheld the Family Court's finding that the advances were loans rather than gifts, rejecting claims to the contrary. The High Court emphasized that intention is central in distinguishing between a gift and a loan, particularly in situations where cultural norms might shape behaviour in ways that are unfamiliar in a purely Anglo-Saxon legal context. While the advances might have appeared generous, the understanding and intention among the family members was that they were to be repaid, reflecting customary practices in Chinese families where financial support is often provided but not necessarily intended as a gift.

In *Su v Shui* (2020), Mr Shui received advances totalling \$520,000 from his mother, Ms Wei had intended to fund the purchase of a motel and other properties. These funds represented the life savings of Ms Wei and her husband and were in part borrowed from relatives. Disputes arose because there was little formal documentation. A "gift certificate" had been signed by Mr Shui on behalf of his mother but without her knowledge.

The court focused on the parties' intentions. Judge Broughton emphasized that, while the presumption of advancement typically treats parental transfers as gifts, this presumption could be rebutted by evidence to the contrary. Both Mr Shui and Ms Wei provided affidavits and oral evidence confirming that the transfers were intended to be treated as loans, not gifts. The court accepted that informal financial arrangements are common in Chinese families, where loans between relatives are rarely documented. Written instruments produced after the fact were not necessarily reflective of the parties' true intentions, often serving only to facilitate financing.

The court acknowledged that understanding Chinese familial practices could assist in interpreting intentions, and Judge Broughton concluded that the transfers from Mr Shui's parents were loans and not gifts on the direct evidence of the parties (*Xiuyung Su v Guo Shui* 2023: paragraph 102(a)).

In *Speller v Chong* (2003), the issue was whether significant sums of money advanced by the husband's family for the purchase of a house were a gift or loans after the separation of the husband (Mr Chong) and his New Zealand wife (Ms Speller). Mr Chong argued that, in Chinese culture, such financial advances are typically understood as loans rather than gifts.

The Family Court accepted that the transaction could not be assessed solely through the lens of New Zealand legal assumptions and held that inter-family loans needed to be viewed in the cultural context in which they occurred (*Speller v Chong* 2003: paragraphs 6-8). The court analysed evidence including testimony from family members, the way the funds were advanced, and the expectations communicated within the husband's family. It concluded that the advances were made with an expectation of repayment, and there was an obligation on the husband to repay the sums advanced, consistent with Chinese familial norms (*Speller v Chong* 2003: paragraphs 9-10).

Antonia Fisher KC emphasizes the importance of expert evidence in the Family Court, particularly where Chinese parents have advanced funds to their children. Often they are loans but are considered as gifts where there is no written documentation. In her experience, the Family Court tends to place significant weight on the written record, and expert cultural evidence is often essential to rebut this.

## Filial piety, patriarchy, and cultural context in Chinese family transfers

Professor Leo Liao (2022) has written on the most challenging transactions between Chinese parties—disputes between Chinese family members brought in western courts about whether the transfer (usually from Chinese parents to their adult children) was a gift, a loan or an equity investment. As Professor Liao (2022: 1-2) states:

Where disputes arise from such transfers, commonly there is little contemporaneous documentary evidence available and testimonies [regarding the intention of the transfers] are significantly divergent ... Where some documents are available, they may not meet “the requirements of the Evidence Act 2006 or the relevant High Court Rules” for admissibility of evidence. ... Chinese culture's influence on Chinese familial transactions has been seriously considered by common law courts in Hong Kong and Singapore, where Chinese is the majority of its population, and in New Zealand, where Chinese is a minority. A New Zealand judge comments, “it could be inappropriate to evaluate such transactions ... without appreciation of the cultural context in which they occur”. For Western judges and lawyers, a proper understanding and assessing evidence on the Chinese cultural context may be a key to decoding the puzzle.

Professor Liao (2022: 6, footnotes excluded) explains why Chinese parents transfer to their adult children and the impact of patriarchy in Chinese society:

The hierarchy is also a system of reciprocity, in that the superior has the duty to provide members in inferior positions with benefits and protection in exchange for their obedience, respect, and support. Within a family, parents are expected to be a model, and a protector, of the children, and children must respect and support their parents. Honouring one's parents is required in many cultures, but the Confucian tradition is more stringent in this regard. The tradition of *xiaodao* (filial piety) is regarded as an important merit of a person in Chinese communities. Chinese adult children, worldwide, think adhering to the principles of filial piety and looking after their elderly/sick parents is not only *tianjingdiyi* (a natural responsibility), but would set up a good example for their own children, enhance their reputation in the community, and build up credits for reciprocity of intergenerational bonds. The high-power distance in Chinese culture is also reflected by greater gender inequality, with male dominance, in contrast to Western culture. This tradition could be illustrated by the *zongci* (temples of extended families) and *zupu* (genealogy books showing the family trees), both hinged on lineage positions of only male members of the (extended) family. Traditional parents may give their sons significantly favorable treatments over their daughters in wealth distributions.

## Intergenerational transfers and the need for reform

The NZLC Issues Paper, *Dividing Relationship Property—Time For Change? Te mātatoha rawa tokorau—Kua eke te wā?* (2017a: paragraphs 11.77-11.79, and 11.82) stated:

We have learned through our research and preliminary consultation that transfers of property between family members may be increasingly common. This is partly attributable to the fact that New Zealand may be becoming more culturally diverse and intergenerational wealth transfers may be more prominent among different cultures. It may also reflect the increasing financial assistance partners require in order to buy their first home.

While intergenerational transfers of wealth themselves do not appear to create significant legal problems, disputes can arise when it is unclear whether the transfer was intended as a gift or a loan. The distinction is important when determining property interests at the end of a relationship. If, for example, the parents of one partner gift property to that partner to help him or her purchase a first home, the gift would constitute relationship property if that home is used as the family home. If, on the other hand, the transfer is a loan to help purchase a home, the loan is likely to be a relationship debt which is then deducted from the partners' relationship property.

Some legal rules attempt to simplify the process of determining whether a transfer is a gift or loan. The law presumes that when parents transfer property to their children they intend to do so as a gift. This rule is sometimes called the "presumption of advancement".

Consequently, if a partner argues that the advance was a loan, he or she must prove that the advance was indeed intended as a loan. ...

As we think it probable that family gifting and lending will increase in New Zealand, it is appropriate to consider whether any reform to the PRA is needed to respond to these types of transactions. In particular, we are interested in views on whether the PRA should provide that the presumption of advancement does not apply. Removing the presumption could better reflect current (and potentially future) practices in New Zealand, particularly among some sections of society. On the other hand, it could make situations where the nature of an advance is unclear more contestable. That would potentially stimulate disputes between partners and wider family members. It could also be contrary to the principle that questions arising under the PRA should be resolved as inexpensively, simply, and speedily as is consistent with justice.

In the final report on the *Review of the Property (Relationships) Act 1976—Te Arotake i te Property (Relationships) Act 1976* (2019), the NZLC recommended, *inter alia* (paragraph 3.69):

Changing how the family home is classified. Currently the family home is always treated as relationship property and usually divided equally, regardless of when or how it was acquired. Under our recommendations, if the family home was owned by one partner before the relationship began or was received as a third-party gift or inheritance, only the increase in the value of the home during the relationship should be shared.

This recommendation has not been implemented as the government response says it is a significant departure from current law,<sup>9</sup> and the current Government has said it is not part of the government's work programme (Edmunds 2025). But the need for review and reform is likely to increase with the growing superdiversity of New Zealanders to whom the PRA applies.

Applying presumptions developed in western culture to Chinese family transfers may be problematic since what may appear to be gifts come with unspoken cultural obligations such that they are more akin to a loan. That said, (usually) women who are the subject of arranged marriages

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<sup>9</sup> Government Response to the Law Commission report *Review of the Property (Relationships) Act 1976 Te Arotake i te Property (Relationships) Act 1976* (2019), presented to the House of Representatives: the Government said it intended to consider the report's remaining recommendations after the completion of the Law Commission's review of succession law. After the Report into the NZLC's review of succession law was presented to Parliament on 15 December 2021, the New Zealand Government stated: "Reform of these areas of law will be a significant undertaking. The Commission has provided us with two comprehensive and detailed reviews. Nonetheless, the Government will need to take the time to work through the policy detail of implementing many of the Law Commission's comprehensive recommendations on both relationship property and succession law" (New Zealand Government 2021: 6).

or mail-order bride types of relationships (discussed further below) benefit from such presumptions (Interview with Deepal Kumar, Senior Associate, GML Lawyers, 2025). The courts are increasingly recognizing non-enterprise contributions under section 13 of the PRA, resulting in fairness in the treatment of parental contributions even if not structured as loans (Interview with Vivienne Crawshaw KC, Barrister 2025).

## [N] PATRIARCHAL CULTURES AND GENDER EQUALITY PRINCIPLES UNDER THE PRA

What is perceived as fair to Asian parties may be affected by the patriarchal nature of the culture in their country of birth. Although “equal sharing” is part of the law in mainland China, for example, that legal approach may be applied differently in the cultural context of a patriarchal society (Chen-Wishart 2013). Barrister Jo Hosking said in interview (2025) that there is the need to acknowledge and address unconscious biases, particularly concerning gender and cultural norms when dealing with clients from South Asian, Indian and Sri Lankan cultures.

### Dishonesty, obstruction and tragedy in *ZY v ML*

For example, in *ZY v ML* (2013), Mr Li and Ms Yang (“ML” and “ZY” respectively in the anonymized Family Court case), who had been married in China and later moved to New Zealand in the early 2000s, became embroiled in a protracted and highly contentious relationship property dispute following their separation in 2005. After their separation, Mr Li sold the family home but retained nearly all of the proceeds from the sale, despite Ms Yang’s legal entitlement under the PRA to a share of those assets. In a move that both the Family Court and High Court found deliberate and dishonest, Mr Li used the sale proceeds to purchase another property in his first wife’s name, all the while claiming that no sale proceeds existed because he had repaid family loans. This evidence was rejected by the Family Court and later confirmed by the High Court, both of which found that the transaction had been orchestrated to defeat Ms Yang’s claim.

Ms Yang initiated proceedings under the PRA in 2007 seeking relief, but the Family Court noted the disadvantages she faced due to neither party having legal counsel nor presenting formal legal submissions at that time (*ZY v ML* 2013: paragraph 33). Throughout the litigation, Mr Li was found to be an extremely difficult party, frequently failing to comply with court directions and engaging in obstructive conduct, making proceedings

prolonged and complex despite the straightforward nature of the dispute (their main asset being the family home).

The High Court later upheld the Family Court's findings in Ms Yang's favour, emphasizing that the resolution of the property division should have been simple had there been honest disclosure and cooperation (*Lu v Huang* 2016: paragraph 226).<sup>10</sup> Instead, the dishonesty displayed by Mr Li caused significant delay and unnecessarily consumed judicial resources. The High Court strongly condemned this conduct, warning that such dishonesty undermines the fundamental principles and effectiveness of the PRA (*Lu v Huang* 2016: paragraph 226).

The ongoing dispute and Mr Li's anger with Ms Yang obtaining her lawful half share of the relationship property led to an "obsessive fixation" culminating in Mr Li murdering Ms Yang in July 2019 (*Li v R* 2023: paragraph 7). At sentencing, the judge observed that Mr Li's fixation on the perceived wrongs he suffered in relation to the property dispute was a key motivation behind this extreme and tragic act (*Li v R* 2023: paragraph 7).

## Arranged marriages

Some clients come from societies where arranged marriages and patriarchal structures shape the understanding of marital relationships, sometimes viewing marriage through a more transactional or commercial lens than as a love match. Arranged marriages may also set the stage for greater vulnerability and unequal bargaining power if the bride or groom leaves their family and travels to New Zealand for the marriage, especially if the other partner already resides in New Zealand and has purchased what becomes the family home. The bride may be by "mail order" or in answer to an advertisement, which may also introduce an exploitation element. This includes not being able to afford legal representation, when the other party can.

One anonymous interviewee discussed a matter involving a woman who entered a traditional arranged marriage in India. The husband lived in New Zealand and the couple completed a traditional *roka* ceremony (a pre-wedding Indian ritual that serves as a formal engagement signifying the official commitment between the couple and the joining of their families), followed by a legal marriage. Before or shortly after the marriage, the couple purchased a home in New Zealand, registered in the husband's

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<sup>10</sup> By sections 11B to 11D Family Courts Act 1980 and section 35A of the Property (Relationships) Act 1976, all details that might lead to the identification of the parties to these proceedings were also suppressed. This High Court judgment has been anonymized. The names used for the parties and all witnesses are fictitious.

name. The bride's family contributed some funds, documented via a promissory note in Punjabi. After relocating to New Zealand, the woman experienced extreme family violence. Efforts to resolve matters within cultural frameworks proved unsuccessful, ultimately forcing her to leave the home with only a suitcase and some jewellery. She sought support from sexual harm services and obtained a temporary protection order.

Despite the husband making no financial contribution and the marriage having ended, the court initially provided her with nothing. The interviewee, representing the wife on a *pro bono* basis, highlighted the judiciary's limited understanding of cultural and indirect contributions, specifically, the significance of leaving her family and work in India to join her husband in New Zealand, where she had no support. The interviewee was of the view that procedural delays, the need for translation, and the insistence on extensive evidence, including cultural expert testimony, further complicated matters.

This interviewee stressed that the Family Court needs to better account for indirect contributions, cultural context, and the lived realities of women in abusive relationships. Recognizing these factors is essential to achieving equitable outcomes in family law, particularly for vulnerable migrant parties. The interviewee also proposed the creation of a specialized Asian Family Court list overseen by judges trained in understanding cultural dynamics. The interviewee believed this would ensure a better fit-for-purpose conflict resolution system within the Family Court, allowing individuals to self-select into this specialized list based on their cultural background.

Jade Cookson, Principal, Turner Hopkins (2025), said that Asian families are motivated to protect family assets for their children. Thus, disputes are settled by the mother frequently placing assets in trust for children's benefit and foregoing her own rights and interests, which the husband will agree to as opposed to her getting half of the assets in trust.

In an interview with Lady Deborah Chambers KC (2025), she said it is not uncommon for a man from China to have a long-term mistress while maintaining a primary marriage and family, with the mistress sometimes brought to New Zealand, provided with housing, and occasionally having children with him. As China does not recognize *de facto* relationships, the man may assume the mistress has no legal claim to his property. However, under New Zealand law, a qualifying *de facto* relationship can entitle a partner to an equal share of relationship property, leading to shock and resistance from the other party when these claims are made. This disconnect between cultural norms and local legal principles underscores

the need for early legal advice and culturally informed explanations of relationship property laws for migrant communities.

It is also relevant to refer to *Guan v Chen* (2005: paragraph 51), where Venning J set aside a relationship property agreement because at the time the wife entered the agreement she did not do so with a free mind and that to enforce the agreement would cause a serious injustice due to “the serious disproportionate imbalance between the amount received by the plaintiff under the agreement with what the plaintiff would otherwise have achieved under the Act”. The husband was present at the lawyer’s office while the wife was executing the agreement:

and even went to the extent of interrupting the meeting between the defendant and his solicitor to require an amendment to the clause in issue ... even after the separation the plaintiff remained in contact with the defendant. He continued to exert authority over the defendant and as a result to place her under pressure. ... The defendant remained in a fragile emotional state as was confirmed by Dr Fung. Dr Fung saw the defendant again in July 2004 for anorexia and sleep disturbances related to stress. The plaintiff’s continued interference with the defendant’s life must have affected the defendant (*Guan v Chen* 2005: paragraph 48).

Venning J found that: “While not physically abusive to the defendant, the plaintiff dominated the defendant mentally in their home” (*Guan v Chen* 2005: paragraph 18).

## [O] A MORE DIVERSE RANGE OF ASSETS DISPUTED

In disputes involving Asian families, the range of assets disputed for division under the PRA can be diverse, including “red packet” wedding gift funds (*Wen v Li* 2023), valuable jewellery and gold in the form of bullion/gold bars. Despite the variety and geographic spread of these assets, the legal test remains whether each asset qualifies as separate property or relationship property on the available evidence.

In *Braswell v Anderson* (2013), an Indian couple were disputing the ownership of gold and jewellery stored in a Kerala bank locker. In South Indian culture, gold is more than a financial asset, and embodies family wealth, marital security, social status as well as cultural heritage. The matter was ultimately resolved through mediation, culminating in a consent order in March 2013 for the release of the gold and jewellery.

In *Mullur v Nibhanupudi* (2015), Ms Nibhanupudi (wife) sought to have certain items treated as relationship property for division following the

separation but she pleaded that jewellery was separate property. In testing this position, the court examined the origin and nature of the jewellery, focusing on whether it had been acquired during the marriage using joint funds or had been gifted or purchased from Ms Nibhanupudi's separate resources.

The core dispute involved \$30,000 worth of gold jewellery that Mr Mullur claimed his wife acquired while working in Saudi Arabia and was therefore relationship property. Although her salary was fully disposable, she deposed that she sent all her earnings directly to Mr Mullur's bank account in India. Mr Mullur contended he only received \$5,000, suggesting that the remaining funds were used by Ms Nibhanupudi to buy gold jewellery as an investment. Investing in gold jewellery is described as an "Indian practice" because, culturally and historically, gold has served as a reliable form of wealth preservation in India. Ultimately, the Family Court favoured Ms Nibhanupudi's testimony and held that all jewellery in Ms Nibhanupudi's possession constituted her separate property.

In *Naidu v Naidu* (2009), a case involving interviewee Lynda Kearns KC, the Family Court was determining the value and ownership of various assets, including jewellery, amid a four-year separation between Indian parties. The proceedings revealed conflicting valuations, late evidence, and questions over the provenance of certain pieces. The wife provided multiple jewellery valuations, some based only on verbal descriptions and others prepared without photographs or professional certification. The total quantum disputed was modest (\$3,391.00 for six key pieces) but Judge De Jong noted that: "The jewellery issue is bitterly contested. Not only is jewellery important to the parties but it is an important feature of their Indian culture" (*Naidu v Naidu* 2005: paragraph 60).

The "assets" being contested may include money deposited to meet the requirements for an investor category visa to help obtain residency and citizenship for one or both spouses or may also be complicated by the need to comply with the Overseas Investment Act 2005 (Interview with Ben Snedden, 2025).

The practice of dowry, while illegal in India, is another issue that is still arising and is arguably captured under the provisions of the PRA (Interview with Deepal Kumar, Senior Associate GML Lawyers, 2025).

## [P] CONTRACTING-OUT AND COMPROMISE AGREEMENTS

Under section 21 of the PRA, a contracting-out agreement allows parties to enter into an agreement to “contract out” of provisions of the PRA. Essentially, these agreements function like pre-nuptial agreements, enabling spouses or partners to define in advance how their assets and liabilities will be divided if the relationship ends. To be valid, the agreement must be in writing, signed by both parties, supported by full disclosure of assets, and each party must receive independent legal advice. The Family Court retains the power to set aside agreements for fraud, duress, undue influence, or unfairness, ensuring that such arrangements remain informed and equitable. The threshold is serious injustice under section 21J (*Nguy v Lee & Chang* 2009: paragraph 40).

A common theme amongst interviewees was that Asian parties did not often enter into these agreements. Barrister Mark Sandelin noted that he had only encountered one case in his career which involved Asian parties entering into a contracting-out agreement (Interview with Mark Sandelin, 2025).

Deepal Kumar notes that, in her experience, contracting-out agreements are generally frowned on in Indian culture, particularly among older generations. Suggesting such an agreement is entered into can be perceived as a lack of trust or an expectation of marital failure, which can in fact stop a marriage from going ahead if raised (Interview with Deepal Kumar, 2025).

Kumar highlights the challenges faced when property that was initially separate becomes subject to division upon relationship breakdown. Women, despite initially rejecting formal agreements, often seek equal division after separation, particularly when children are involved. Cultural expectations of gender roles further complicate these disputes, with men sometimes perceiving women’s claims as inappropriate or contrary to their traditional responsibilities.

Overall, Kumar considered that, while contracting-out agreements could be used to clarify and better protect property rights held by either party ahead of marriage, cultural norms, stigma, and gender expectations often prevent their use, leaving women, in particular, in potentially vulnerable positions upon separation.

## Contracting-out agreements and Korean parties

Contracting-out agreements are also largely foreign to Korean legal practice. Family law expert Christina Lee, reflecting on 21 years of experience, noted that such agreements are extremely uncommon in Korea (Interview with Christina Lee, 2025). Lee further commented that Koreans typically do not enter into these agreements with other Koreans. The limited exceptions occur when a Korean citizen is married to a non-Korean spouse or partner, reflecting the differing expectations around property rights and legal protections across cultures. In these cross-cultural contexts, contracting-out agreements can provide clarity and security that aligns with the foreign spouse's legal and cultural expectations.

Jade Cookson, Principal at Turner Hopkins, said in interview (2025) that Chinese parties who considered entering into a contracting-out agreement may not sign as it is culturally perceived to show a lack of trust prior to a marriage or *de facto* relationship and demonstrate a "lack of honour".

The interviewees' experiences are corroborated by the relatively few cases on contracting out concerning Asian parties. *Harrison v Harrison* (1996) involved a husband (a New Zealander) and wife (a citizen of the Philippines) who, at the time of their marriage, were 53 and 26 years of age respectively. Mr Harrison had a previous failed marriage and, having experienced the provisions of the PRA, was unwilling to enter a further marriage without a signed contracting-out agreement (*Harrison v Harrison* 1996: paragraph 2). The wife was provided with independent legal advice and the husband's property prior to the marriage was ringfenced as his separate property. The parties became involved in a joint venture in the Philippines, with a property being purchased in the wife's name with the intention of establishing a home where the parties could live for part of the year, and the property was at issue in the Family Court. The wife testified that, at the time she signed the agreement, she did not understand it nor had she read it, and while this position was not accepted by the hearing judge (in the District Court) the High Court judge set the agreement aside and referred the matter back to the District Court to determine the disparity between what Mrs Harrison would receive under the agreement and under the PRA (*Harrison v Harrison* 1996: 8).

## Contracting-out agreements and Filipino parties

Interviewee Pauleen Clark (2025) confirmed that, in advising her Filipino clients, contracting-out agreements are usually sought by Pākehā partners, who are often older and with prior wealth or children, who want to protect their separate property.

Ms Clark highlights a recurring dynamic: the foreign-born partner, often much younger and with limited assets, may be vulnerable if the relationship ends. While there is often genuine emotional connection, the agreements typically enforce a strict “what’s yours is yours, what’s mine is mine” approach. She sometimes incorporates review clauses to provide the foreign-born spouse with potential security in the future, though life interests or guaranteed provision can be difficult to secure.

*Harrison v Harrison* (2005) was cited in the 2009 High Court case of *Nguy v Lee & Chan* (2009). The appellant sought to set aside a contracting-out agreement entered into with his former wife, Ms Lee, shortly before their marriage, by which the family home, which he had previously transferred to her, should be her separate property (*Nguy v Lee & Chan* 2009: paragraph 1). Ms Lee was the first respondent in the matter, but because Mr Nguy sought to set aside a post-separation disposition of the home by Ms Lee to her mother (Mrs Chan), Mrs Chan became involved as the second respondent (*Nguy v Lee & Chan* 2009: paragraph 2). On appeal, Mr Nguy argued that the contracting-out agreement he entered into was void for many reasons, including that the agreement had the effect of causing serious injustice under section 21J of the PRA. He further argued that the subsequent disposition to Mrs Chan should also be set aside (*Nguy v Lee & Chan* 2009: paragraph 2(b)-(c)). It was not disputed that Mr Nguy transferred sole ownership of the family home in consideration of Ms Lee’s agreement to marry him, or that this property subsequently became Ms Lee’s separate property under the terms of the contracting out agreement entered into (*Nguy v Lee & Chan* 2009: paragraph 58).

The appeal was dismissed. Mr Nguy may have been infatuated with Ms Lee and, whilst in hindsight the transfer may have been foolish, it was a decision made of his own free will and because he wanted to marry Ms Lee and therefore felt was fair and reasonable even when faced with an ultimatum to sign by Ms Lee (*Nguy v Lee & Chan* 2009: paragraphs 53 and 65). The court cited *Harrison*, noting in that case that it was also confirmed that the pressure to which Mr Nguy was subjected to in signing the agreement was broadly of the kind which the legislature regarded as acceptable (*Nguy v Lee & Chan* 2009: paragraph 66). Because the High Court confirmed that the family home was Ms Lee’s separate property

prior to separation (as per the terms of the contracting-out agreement), the transfer of the property to her mother was also made in good faith and legitimate.

## Trusts, children, and compromise agreements

Interviewee Jade Cookson observes (2025) that, in her experience in dealing with contracting-out agreements involving Asian parties, women may often receive stronger protection of property when children are involved. She has found there is a common practice of placing assets in trusts for children, reflecting an expectation that women will prioritize their children's financial security over personal gain. Even in cases where men appear willing to transfer significant assets to their wives, the underlying motivation often relates to safeguarding the children's inheritance rather than purely marital equality (Interview with Deborah Chambers, 2025; and Interview with Jade Cookson, 2025).

Asian parties may more readily enter into compromise agreements. In a case that Lynda Kearns KC was involved in, the judgment concluded that the purported contracting-out agreement was a compromise agreement, entered into, usually after a relationship ends, with the purpose being to record and formalize the division of property at the conclusion of a relationship. Compromise agreements have a lower threshold for being voided for serious injustice, and there is also less tolerance for pressure with a compromise agreement (Addendum from Lynda Kearns KC following interview). The judgment set aside the compromise agreement.

## [Q] KOREAN PARTIES

Interviewee Barrister Christina Lee (born in Korea) stressed the significant cultural difference between Korea and New Zealand regarding property in relationships, particularly concerning the notion of gift versus loan. In Korean culture, parents often provide money for a child to buy a house, but this is not considered a gift in the way New Zealand law might interpret it.<sup>11</sup> Instead, it is seen as family money, and even if the child buys the house in their own name and it becomes the family home, it is understood to remain tied to the parents. The child does not view it as their personal property, and the parents expect it to remain within the family.

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<sup>11</sup> The funds are now provided to sons and daughters. Previously, in Korean culture it was an expectation that the man would provide a house, but now there are second generation Korean sons in New Zealand that do not have the means to do so, so the parents provide daughters with funds to purchase the property in New Zealand as "our house".

This conflicts with the PRA assumption that property purchased during a relationship is potentially relationship property, subject to a 50:50 division, whereas in the Korean context, the house is viewed as separate family property.

In Korean, the term “*our home*” often refers to the family home owned by the parents, not the marital property of the couple. This is a major source of misunderstanding in New Zealand legal proceedings. When a Korean spouse says “*our home*”, it can be misinterpreted as meaning the house is jointly owned within the marriage. In reality, the term reflects collective family ownership, with the property still fundamentally belonging to the parents.

Additionally, there are different cultural expectations for marriage and *de facto* relationships. In Korea, there is a formal expectation that the husband will provide accommodation, often with financial support from his parents. *De facto* relationships in Korean culture, by contrast, are more casual and do not carry the same obligations. This contrasts sharply with New Zealand law, where *de facto* relationships are treated similarly to marriages in property division, further illustrating the potential clash between cultural norms and legal presumptions.

Ultimately, these differences, especially around the meaning of “*our house*”, make property disputes involving Korean parties in New Zealand challenging, with Ms Lee commenting “*the evidence doesn’t stack up*”, as the presumption of gift or shared ownership does not align with Korean cultural expectations or intentions (Interview with Christina Lee, Barrister).

## [R] ANONYMOUS INTERVIEWEE COMMENTS

Anonymous comments were made about perceptions of the litigiousness of mainland Chinese and Indian parties, in particular. There may be a lot of suspicion of lawyers due to the role lawyers play and their status back in their home countries, which makes it more difficult for lawyers to ensure they are good officers of the court. Lawyers may give their Asian clients a false sense of good chances of success due to the client’s high expectations and demands and the lawyer not wanting to lose the client or be the subject of a complaint to the New Zealand Law Society (NZLS). This then results in that party being less willing to settle as they think they have a stronger case.

Interviews also elicited anonymous comments about:

- ◇ lawyers and judges who did not have “mental red flag” to enable them to see the relevance of culture to a PRA dispute;
- ◇ lawyers proficient in Mandarin who represent Asian parties on PRA matters when they do not have expertise or experience in family law;
- ◇ lawyers representing Asian parties who are experienced in PRA matters but are not able to speak Mandarin and do not see nor understand the cultural issues;
- ◇ a perception is that there is a higher incidence of fraud and forgery involving Asian parties under the PRA including the creation of documents or backdating, while some explain that their clients are not wanting to mislead, but instead to ensure there is evidence of what the true situation is.

## [S] CONCLUSION AND RECOMMENDATIONS FOR THE FUTURE

The growing numbers of Asian Parties in dispute under the PRA are raising some unique issues and challenges, which may be relevant to adjudicative issues. Assessing the relevance of those issues may be assisted by implementing the follow recommendations.

- 1 Improving the quality of interpreters and translators in the Family Court by requiring credentialing or qualifications for interpreters. At present the fees are set by the Witnesses and Interpreters Fees, Allowances, and Expenses Regulations 2023 which provide that the prescribed hourly fee payable to an interpreter in any class may not be less than \$35 or more than \$200. While there is no requirement for interpreters to hold specific qualifications, courts must ensure that interpreters are competent for the task at hand. For example, in criminal trials, interpreters are expected to meet an adequate standard of competency so that the defence is not impaired and there is no miscarriage of justice. Judges are responsible for monitoring the adequacy of interpretation throughout proceedings as the Supreme Court found in *Abdula v R* (2011). This is harder to achieve when the judge does not speak the foreign language being interpreted or translated, which is often the case. There is also a need to ensure better matching of the interpreter with the dialect and accent of the particular deponent to ensure accurate interpretation. Interpreters in PRA proceedings should be given rudimentary training on basic relationship property concepts such as economic disparity, *de facto* relationships, and on the concepts of trusts and gifts versus loans.

- 2 Judges should consider using their powers to appoint experts to assist them with cultural issues. While the Family Court generally follows District Court rules on expert evidence, significant differences exist between the PRA and Care of Children Act 2004 (COCA) regimes, with the latter providing for expert reports on culture. Section 16 of the Family Courts Act 1980 incorporates the District Court Act 2016, meaning that District Court Rules, including rule 9.27 on court-appointed experts, apply to Family Court proceedings unless specifically overridden. Expert witnesses are also bound by the Code of Conduct in schedule 4 of the High Court Rules 2016. In COCA proceedings, section 133 of COCA provides detailed guidance on the use of experts and cultural reports which address a child’s cultural and religious background and are routinely employed to inform judicial decision-making. By contrast, the PRA contains no explicit equivalent provision, and the court cannot order specialist reports “as of right” for property disputes, relying instead on general District Court powers. Section 38 of the PRA does explicitly empower the court to appoint the registrar or another suitable person to inquire into matters of fact and report back to the court, with parties able to tender evidence on any such report. This provision could be interpreted to allow the appointment of experts, including those with cultural expertise, to assist in property dispute cases. Given this statutory authority, it is recommended that judges in PRA-related Family Court proceedings actively consider using their powers under section 38 to appoint experts where cultural factors may be relevant, ensuring that these considerations are appropriately addressed in decisions regarding property division.<sup>12</sup>
- 3 Current consideration of law reform of the PRA based on the NZLC recommendations needs to take account of how the demography of New Zealanders has changed and consider whether the cultural assumptions underlying the policies implemented in law remain apposite to ensure the law continues to be capable of doing justice to all New Zealanders.
- 4 Updating the Otago University research on the understanding of the PRA, particularly through its “Relationship Property Division” project which included a 2018 survey and 2020 survey, as highlighted in

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<sup>12</sup> In the Reserved Interlocutory Decision of His Honour Judge P Callinicos [As to Cultural Report] in *Ratana v Ratana FC Whanganui* (2009) it was noted at paragraph 32: “In summary, therefore, the only basis upon which a party might seek that the Court commission a cultural report on matters under the Property (Relationships) Act, could derive from s 38.” And at paragraph 33: “Section 38 creates an unfettered discretion to a Court to obtain reports to assist the Court in determining factual matters. It is not a subsidy or supplement to the parties’ own obligations to reasonably prepare his or her own case. Plainly, that is what is sought from this Court.”

reports by the Michael and Suzanne Borrin Foundation (Binnin & Ors 2018; Gollop & Ors 2021). It has been five years since the latest survey was completed and the 2023 census shows increasing superdiversity and more Asians in New Zealand.

- 5 Ensuring that information is provided on the Family Court website that is suitable for all New Zealanders including those who are superdiverse and CALD (culturally and linguistically diverse). Key Asian organizations could be consulted on whether any changes need to be made to the Family Court website to determine whether it is fit for purpose. This could include more information on alternative dispute resolution and mediation to ensure that only cases requiring judicial determination end up in the Family Court.
- 6 Consideration needs to be given to how Family Court cases can be reported without compromising the privacy of families but still giving helpful guidance about the development of PRA law, the relevance of culture to the determination of adjudicative facts and issues and emerging trends.
- 7 The complexities analysed above highlight the critical importance of cultural competency among legal professionals, who must understand these cultural nuances to provide accurate, effective, respectful advice that bridges cultural expectations and New Zealand's legal framework. CQ (cultural capability) training is needed to ensure appropriate advice is provided by lawyers to their Asian clients, including on dispute resolution outside the courts, to ensure access to justice and justice being done at the least cost for clients. In the interview with Dala Oh, Director, Nolen Walters, she was encouraged by what she felt was a growing commitment across the legal profession, judiciary, and community to improve cultural awareness. While acknowledging that much work remains to be done, she emphasized that this progress marks a significant step forward, in advancing equity in relationship property cases.
- 8 Ongoing cultural capability education provided by Te Kura Kaiwhakawā, the Institute of Judicial Studies, which has responsibility for the education programme for all judges, to ensure that Family Court judges are alive to the unique ways in which culture may be relevant to issues under the PRA.
- 9 Ethnicity data needs to be collected by sufficiently reliable means to allow research and analysis to determine if there are issues with Asian parties accessing justice in the courts and, if so, how to effect a cure.

- 10 Legal writing on topical issues concerning Asian parties and the PRA should be encouraged so insights and reflections on this topic continues to grow.
- 11 Ethnicity data needs to be collected by sufficiently reliable means to allow research and analysis to determine if there are issues with Asian parties accessing justice in the courts and, if so, how to effect a cure.

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# IS SHAREHOLDER PROFIT MAXIMIZATION EFFICIENT? IMPROVING THE SOCIETAL EFFICIENCY OF CORPORATIONS: FROM SHAREHOLDER SUPREMACY THEORY TO STAKEHOLDERISM

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## Abstract

This article fundamentally challenges the dominant corporate social responsibility (CSR) paradigm by arguing that structural governance reform (stakeholder boards) is necessary because voluntary CSR, disclosure requirements, and external regulation cannot adequately internalize externalities when boards are legally bound to prioritize shareholder interests. It fundamentally reframes CSR from a voluntary ethical choice or matter of “enlightened” management discretion to a structural governance problem. It challenges the dominant assumption that shareholder profit maximization maximizes societal efficiency. It demonstrates formally that when externalities can be externalized, shareholder profit (M) diverges from societal efficiency (E), sometimes dramatically. Current corporate law compounds this problem by legally obligating directors to pursue the misleading profit figure rather than genuine social value. The proposed solution offered is that stakeholder board representation offers a more direct and potentially more efficient mechanism for internalizing costs than relying on external regulation alone. Voluntary environment, social and governance reporting, stakeholder consultation, and investor pressure all fail because they leave intact the fundamental board structure that creates incentives to externalize. Stakeholder representation addresses the root cause.

**Keywords:** stakeholder board; shareholder profit maximization; societal efficiency; corporate social responsibility; stakeholderism.

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## [A] INTRODUCTION

This article addresses a fundamental question in corporate governance: does shareholder profit maximization maximize societal efficiency, and, if not, what governance reforms can better align corporate decision-making with social welfare? The conventional wisdom, articulated most famously by Milton Friedman (1970), holds that corporations best serve society by maximizing shareholder profits within legal constraints. This

“shareholder supremacy theory” rests on two critical assumptions: (i) markets are competitive, and (ii) all externalities are adequately regulated. When these conditions hold, profit maximization should drive efficient resource allocation and maximize social welfare. However, in practice, these conditions rarely exist. Markets often fail to internalize the full costs of corporate operations—pollution, health impacts, unemployment—creating a divergence between reported profits and genuine social value. As demonstrated below, when companies externalize costs, shareholder profit maximization not only fails to maximize societal efficiency but actively undermines it.

This article makes three core arguments. First, it demonstrates formally (section [C]) that when externalities can be externalized, the conventional equation linking profit maximization to social welfare breaks down. Secondly, it examines non-economic arguments against shareholder primacy (section [D]) and assesses alternatives including Oliver Hart and Luigi Zingales’s “shareholder welfare” maximization. Thirdly, it proposes (section [E]) and defends (section [F]) stakeholder board representation as a more direct and efficient mechanism for internalizing costs than relying on external regulation alone. The analysis proceeds as follows: Section [B] explains the economic case for shareholder supremacy theory. Section [C] demonstrates mathematically why this theory fails when costs are externalized. Section [D] reviews additional arguments against profit maximization. Section [E] proposes stakeholder boards as a governance solution. Thereafter, section [F] analyses whether such boards would enhance efficiency, drawing on evidence from German codetermination.

## [B] THE ECONOMIC CASE FOR SHAREHOLDER SUPREMACY THEORY

The idea of profit maximization has moved to the central stage since the 1960s as Hansmann and Kraakman observed (2001: 444). They claimed that the dominance of a shareholder-centred ideology of corporate law among the business, government, and legal elites in key commercial jurisdictions was exerting pressures for governance practices around the world to converge to the shareholder-centred idea of profit maximization (Hansmann & Kraakman 2001: 439). Under the shareholder-centred model:

Ultimate control over the corporation should rest with the shareholder class; the managers of the corporation should be charged with the obligation to manage the corporation in the interests of its shareholders; other corporate constituencies, such as creditors, employees, suppliers, and customers, should have their interests

protected by contractual and regulatory means rather than through participation in corporate governance; noncontrolling shareholders should receive strong protection from exploitation at the hands of controlling shareholders; and the market value of the publicly traded corporation's shares is the principal measure of its shareholders' interests (Hansmann & Kraakman 2001: 441).

The problem with this claim is that, in practice, there are no adequate contractual and regulatory means to protect other stakeholders in society.

Henry Hansmann and Reinier Kraakman (2001: 441) admit that: "This is not to say that there is agreement that corporations should be run in the interests of shareholders alone—much less that the law should sanction that result." They point out that "all thoughtful people believe that corporate enterprise should be organized and operated to serve the interests of society as a whole, and that the interests of shareholders deserve no greater weight in this social calculus than do the interests of any other members of society". In the same vein, Armour & Ors say that:

the appropriate goal of corporate law is to advance the aggregate welfare of all who are affected by a firm's activities, including the firm's shareholders, employees, suppliers, and customers, as well as third parties such as local communities and beneficiaries of the natural environment. This is what economists would characterize as the pursuit of overall social efficiency (Armour & Ors 2009: 28).

Thus, there is an agreement even amongst the shareholder-centric academics that corporations should be run for the benefit of society. However, they claim that "as a consequence of logic and experience, there is convergence on a consensus that the best means to this end (that is, the pursuit of aggregate social welfare) is to make corporate managers strongly accountable to shareholder interests and, at least in direct terms, only to those interests", "[moreover] the most efficacious legal mechanisms for protecting the interests of nonshareholder constituencies—or at least all constituencies other than creditors—lie outside of corporate law" (Hansmann & Kraakman 2001: 442).

In his famous quote, Milton Friedman said that corporations' social responsibility is to increase profits: "There is one and only one social responsibility of business—to use its resources and engage in activities designed to increase its profits *so long as it stays within the rules of the game, which is to say, engages in open and free competition without deception or fraud*" (Friedman 1962: 173; Friedman 1970: 33).

Thus, according to the shareholder supremacy theory, a company's responsibility is to maximize profit for the shareholders as this is the best way to maximize efficiency for society. This is because, according

to the free market theory, resources are allocated efficiently in a free market, and free markets exist when, amongst other things, there is no cost of exchange. However, there are always unavoidable costs. Under shareholder supremacy theory, shareholders, as residual claimants, have the incentive to keep the costs as low as possible. But these costs must be internalized if we are accurately to characterize the efficiency of the company's operation. When costs are all internalized, in a competitive market, the free market would weed out inefficient companies that do not have the ability to keep the costs down (ie companies that misallocate resources) and achieve societal efficiency. The relationship between shareholder supremacy theory (or shareholder profit maximization) and societal efficiency can be summed up in the following equation:

## The basic framework

Societal efficiency can be expressed as:

$$\text{Societal Efficiency (E)} = [\text{Revenue} - \text{All Costs}] + \text{Producer Surplus} + \text{Consumer Surplus} + \text{Benefits (B)}$$

Where "All Costs" includes: materials, processes, pollution costs, medical costs, unemployment costs, regulatory compliance costs (RC), etc.

Crucially, shareholder profit (M) reflects only the costs borne by the company, not costs externalized to society:

$$\text{Shareholder Profit (M)} = \text{Revenue} - \text{Company's Costs}$$

When the company internalizes all costs, M and E align (adjusted for surpluses and benefits).

Thus, if another company that is not efficient in its operation, uses the same material and process but is wasteful in its production, then the cost would be higher and the profit would be lower and, in a competitive market, would be priced out of the market. The market selects the more efficient company over the less efficient, and that is good for allocative efficiency and social welfare.

But how does profit maximization increase social welfare? Michael Jensen explains that:

A company that takes inputs out of the economy and puts its output of goods and services back into the economy increases aggregate welfare if the prices at which it sells the goods more than cover the costs it incurs in purchasing the inputs (including, of course, the cost of the capital the firm is using) ... it is precisely because profit is the amount by which revenues exceed costs—by which the value of output exceeds the value of inputs—that profit maximization (*provided there*

*are no externalities*) leads to an efficient social outcome (Jensen 2001: 12, emphasis added).

He concludes:

Therefore, *as long as there are no negative externalities* in the input factor markets (an example would be a case where the supplier of an input was imposing negative externalities on others by polluting water or air), the opportunity cost to society of those inputs is no higher than the total cost to the firm of acquiring them ... Likewise, as long as there are no externalities in the output markets, the value to society of the goods and services produced by the firm is at least as great as the price the firm receives for the sale of those goods and services ... [A]s in the case of producer surplus on inputs, the benefit to society is higher to the extent that consumer surplus exists (that is, to the extent that some consumers are able to purchase the output at prices lower than the value to them). In sum, when a company acquires an additional unit of any input(s) to produce an additional unit of any output, it increases social welfare by at least the amount of its profit—the difference between the value of the output and the cost of the input(s) required in producing it. And thus the signals to the management are clear: Continue to expand purchases of inputs and sell the resulting outputs as long as an additional dollar of inputs generates sales of at least a dollar (Jensen 2001: 12-13, emphasis added).

Merritt Fox points out that there is a “rough consensus”:

Among most (though not all) academic commentators that the proper goal for good corporate governance is that the firm should be operated to maximize its residuals—the difference between what the firm pays at contractually pre-determined prices for its inputs and what it receives for its outputs—over the life of the firm, discounted to present value (2014: 458-459).

He further argues that “doing so maximises the social wealth generated by the real operations of the corporation, *assuming that firms operate in competitive markets and that the potential externalities resulting from their activities, such as environmental damage, are properly regulated*” (Fox 2014: 458-459, emphasis added).

This resonates well with Friedman’s famous quote and Jensen’s explanation above.

Under these circumstances, the value of what the firm takes from society is, at the margin, properly measured by what it pays out at market-determined prices for contractually obtained resources, and the value of what it contributes to society, at the margin, is what it receives at market-determined prices for its output. The difference, the residual, is the firm’s value added and its contribution to society (Fox 2014: 458-459).

The residual, in other words, is the maximized shareholder value. Fox further points out that:

For investor-owned firms, shareholders are the recipients of these residuals. Thus, *according to the U.S. consensus*, such firms need to operate in a fashion that maximises share value. This need in turn suggests that the directors of the corporation should primarily represent the shareholders (Fox 2014: 458-459, emphasis added).

Thus, as Jensen emphasizes time and again, profit maximization leads to maximization of social welfare provided that there are no negative externalities.<sup>1</sup> Shareholder profit maximization provides shareholders with the incentive to use or monitor the use of company resources in an efficient way as they are the last claimants, so the argument goes. In economic theory, this is good for allocative efficiency. However, a rash of corporate collapses in the United States (US) since Enron (Hill 2005: 367) and global financial crisis also raised concerns about the merits of shareholder primacy and market discipline. Increasingly, there are many voices raised against profit maximization.

## [C] WHY SHAREHOLDER SUPREMACY THEORY FAILS: A FORMAL ANALYSIS

As Fox observes, the contemporary views on profit maximization versus societal interest are a “hard-fought transnational debate” (Fox 2014: 458). Unfortunately, Friedman has often been misquoted, as most people seem to have focused on the first part of the quote ignoring the second part (see above in italics), which sets the condition that qualifies his view: in other words, Friedman did not suggest that companies can focus solely on profit maximization without complying with the law and by externalizing its cost. Law and rules are enacted to force companies to internalize costs. Companies can maximize profits only if all costs are internalized by complying with the rules of the game. Thus, there are two pre-conditions for shareholder supremacy theory to be optimal, as Fox, Friedman, Jensen, Christopher Stone, Geoffrey Hodgson, and many others have very accurately observed: (i) there has to be a free competition for the goods or services that the firm is providing; and (ii) all potential externalities of the activity of the firm are properly regulated (i.e. internalized).

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<sup>1</sup> “If firms do not take externalities into account, society’s resources may end up being inefficiently allocated. Firms which are free to disregard social costs will be able to set lower prices. This will mean demand will be higher than it otherwise would be, which in turn will lead to the supplying of larger quantities. The ultimate result will be over-production from the perspective of society” (Cheffins 1997: 24).

In many real-world scenarios, the two preconditions do not always exist: (i) the market is either not competitive so dominating firms are able to externalize externalities, or the competition drives firms to externalize externalities in order to cut costs, as Hart and Zingales observe; competition can drive firms to choose dirty operation and cause damage (Hart & Zingales 2017a: 17-18; Stiglitz 2019); and (ii) externalities are not properly regulated (ie regulation is incomplete or not enforced) (Goo 2017). Therefore, in these circumstances, the shareholder profit maximization approach falsely magnifies the benefit firms make to society (Parkinson 1993: 311) and encourages firms to externalize externalities and cause harm to society at the same time as they benefit society; the contribution the company makes to society is not accurately reflected as my equation in scenarios 2 and 3 below show.<sup>2</sup>

As Fox, Friedman, Jensen, and others acknowledge, profit maximization maximizes social welfare only if all costs are internalized. This section demonstrates formally what happens when this condition fails. As mentioned earlier, when the company internalizes all costs, M and E align (adjusted for surpluses and benefits). But when costs are externalized, they diverge.

### Three scenarios

Table 1 illustrates three scenarios assuming revenue of 600.

Scenario	Company costs	Externalized costs	Shareholder profit (M)	Societal efficiency (E)*
1 Full internalization	Materials (100) + process (100) + employment (100) + pollution (50) + medical (50) + RC	0	200 – RC	200 – RC
2 Partial externalization	Materials (100) + process (100) + employment (100) + RC	Pollution (50) + medical (50)	300 – RC	200 – RC
3 Race to bottom	Materials (50) + process (50) + employment (100) + RC	Pollution (150) + medical (150)	400 – RC	100 – RC

\* Excluding producer surplus, consumer surplus, and other benefits (B) for simplicity, which remain constant across scenarios.

*Table 1: Divergence between profit and societal efficiency*

<sup>2</sup> For simplicity, only a few costs are mentioned in this equation. In reality, of course, the list of costs is much longer and would include cost of capital, etc. Profit here, as Jensen (2001) explains, refers to the difference between the revenue and the costs: ie when the value of output exceeds the value of input. Social efficiency would also include economic profit (or economic surplus), which is the sum total of producer surplus and consumer surplus. Producer surplus is the difference between the price consumers are willing to pay and the cost of production. Consumer surplus is the difference between the price consumers are willing to pay and the price at which the producer is willing to sell the product. Shareholders will enjoy the producer surplus, whereas consumers will enjoy the consumer surplus. Happiness/benefits refer to other intangible or unquantifiable benefits that may be enjoyed by all stakeholders, including shareholders.

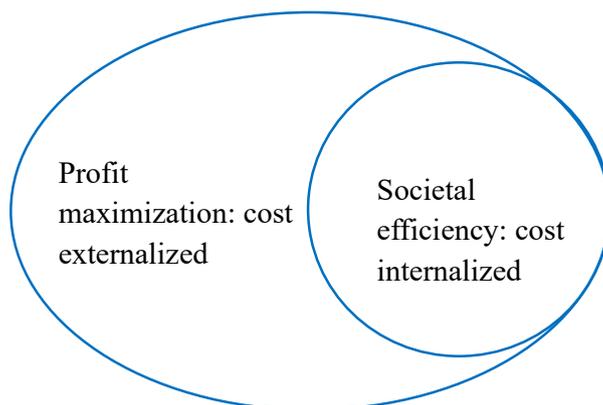


Figure 1: Analysis

## Analysis

**Scenario 1 (full internalization):** Company A uses standard materials and processes, bearing all costs including pollution control (50) and worker health (50). Profit =  $200 - RC$ . This represents genuine value creation.

**Scenario 2 (partial externalization):** the company still uses standard materials/processes but externalizes pollution and medical costs. Shareholder profit appears higher ( $300 - RC$ ), but societal efficiency remains unchanged ( $200 - RC$ ) because society bears the 100 in externalized costs. The profit figure misleadingly overstates the company's social contribution by 50%.

**Scenario 3 (race to bottom):** Company B uses cheaper, inferior materials (50) and processes (50), cutting internal costs by 100 but increasing externalized pollution (150) and medical costs (150) by 200. Shareholder profit peaks at  $400 - RC$ , but societal efficiency falls to just  $100 - RC$ . Profit maximization has destroyed half the social value while appearing to double it.

The above analysis can be represented by a simple diagram (Figure 1).

## The core problem

In competitive markets, Scenario 3 companies will outcompete Scenario 1 companies because they appear more profitable. Free market mechanisms select for apparent efficiency (high M) rather than actual efficiency (high E). As Hart and Zingales (2017a) observe, competition can drive firms toward dirty operations.

Current corporate law compounds this problem by requiring directors to maximize shareholder value (interpreted as M, not E), creating legal

obligations to externalize costs wherever possible within regulatory constraints. The result, as my equations demonstrate, is systematic misallocation of resources and destruction of social value masked by impressive profit figures.

This analysis reveals why Friedman's argument—despite its elegance—fails in practice. Companies cannot maximize profits “within the rules of the game” if the rules are incomplete, enforcement is weak, and the board's legal duty points toward externalization.

Armour tries to justify shareholder profit maximization theory by saying that creditors, workers, and consumers will only deal with companies if it is in their interest to do so, and shareholders have pecuniary interest to maximize their interest to entice them to transact with the company.<sup>3</sup> However, he adds that, “Whether, in fact, the pursuit of shareholder value is generally an effective means of advancing overall social welfare is an *empirical question on which reasonable minds can differ*” (Armour & Ors 2009: 29, emphasis added).

It is true that, in theory, creditors, workers, and customers will consent to deal with a corporation only if they expect themselves to be better off as a result. However, in reality, as explained by Stone, many creditors, workers and consumers who deal with a corporation either do not have a choice or do not have the pertinent information that can help them ascertain whether they are better off as a result of the deal. Many consumers do not know they will be \$2 worse off for every dollar that shareholders gain. For example, they do not necessarily know that the materials or methods of production used could be harmful to them or the environment in the long run. Workers and customers may not know if in the long run they will be worse off indirectly as the state may have to spend money to clean up the environment or provide medical care and therefore have less money for worker and customer welfare in other ways, or have to raise more money in taxation, and so on. Armour & Ors

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<sup>3</sup> Armour & Ors (2009: 28-29): “it is sometimes said that the appropriate role of corporate law is simply to assure that the corporation serves the best interests of its shareholders or, more specifically, to maximize financial returns to shareholders or, more specifically still, to maximize the current market price of corporate shares ... such claims can be understood as saying, more modestly, that focusing principally on the maximization of shareholder returns is, in general, the best means by which corporate law can serve the broader goal of advancing overall social welfare. In general, creditors, workers, and customers will consent to deal with a corporation only if they expect themselves to be better off as a result. Consequently, the corporation—and, in particular, its shareholders, as the firm's residual claimants and risk-bearers—have a direct pecuniary interest in making sure that corporate transactions are beneficial, not just to the shareholders, but to all parties who deal with the firm. We believe that this second view is—and surely ought to be—the appropriate interpretation of statements by legal scholars and economists asserting that shareholder value is the proper object of corporate law.”

(2009) acknowledge that whether profit maximization in fact advances overall social welfare remains debatable. I argue that profit maximization cannot in fact advance overall social welfare when companies are able to externalize part of the cost and harm stakeholders' interests, as the extracts above from Friedman and Fox seem to imply and my equation above demonstrates.

## [D] OTHER ARGUMENTS AGAINST PROFIT MAXIMIZATION

There are several other non-economic arguments against profit maximization.

First, it has been argued that the objective of a business is not to maximize shareholder return, but “to use its resources as efficiently as possible in supplying goods and services to its customers and to *compensate equitably those who supply these resources*” (Anthony 1960: 128, emphasis added). In other words, the objective is to earn a “satisfactory return on capital employed”—a “satisfactory” return being “equitable compensation paid for the use of capital”.

In real-world scenarios, businesspeople do not engage in profit maximization in many complicated problems such as pricing, choice of product line, marketing strategy, the direction of research efforts, what size plant to build, capital budgeting and so on (Anthony 1960: 128-132). This is primarily because “it is too difficult, and it would be immoral” (ibid 132). Shareholder profit maximization requires businesspeople to disregard other stakeholder interests as much as possible without ethical considerations, but that is not the case in the real world (ibid 132-133).<sup>4</sup>

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<sup>4</sup> “The ethical problem is that profit maximisation requires that the business manager think only of the best interest of the shareholders, whereas any responsible manager knows that he must actually consider the interest of all parties who have a stake in the business, of which the shareholders are only one. Profit maximisation requires the businessman to use every trick he can think of to keep wages and fringe benefits down, to extract the last possible dollar from the consumer, to sell as low quality merchandise as he can legally hoodwink the customer into buying, to use income solely for the benefits of the stockholder, to disclaim any responsibilities to the community, to finagle the lowest possible price from his vendors regardless of its effect on them, and so on. ... [The profit maximizers] deny the existence of a businessman’s conscience, and they exclude ethical considerations as being irrelevant to the subject. A businessman is a human being, and it is completely unrealistic to assume that he should act in an ethical vacuum. As a human being, he is deeply concerned with how his actions jibe with his own conscience, the respect of his family, and the opinions of his associates. Moral standards change, and whereas 50 or 100 years ago the profit maximising manager would perhaps have been tolerated in some circles of some communities, today society clearly expects the businessman to act responsibly. He cannot do this and at the same time seek to maximise the share of income going to just one of the several parties that have a stake in the business” (Anthony 1960: 133).

Perhaps it is precisely because many business people did not in fact act as profit maximizers that we encountered far fewer problems in the 1950s. What they in fact sought was “satisfactory return”, which is not the same as profit maximization. However, from the 1970s, investors began to put pressure on managers to maximize profits. “Labor unions, boards of directors, investors, bankers, and the government all exert pressure to ensure that the group each represents receives an equitable share of the revenue” (Anthony 1960: 133), but this is not always possible, especially when managers are under pressure to maximize profits. “Satisfactory return” does not mean that managers are not acting in the interest of the company to be efficient. “They will vigorously seek out opportunities to improve profits when they can do so ethically, and competition will force them to seek ways to improve efficiency even if no increase in profits results” (ibid 133). Anthony concludes that shareholder profit maximization is a misrepresentation of what happens in reality and is not one that any society should take pride in (ibid 133).<sup>5</sup>

Second, research shows that being socially responsible can be good for increasing firm value,<sup>6</sup> and in such a case, stakeholder approach collapses into a shareholder maximization model. According to George Serafeim: “Very little evidence exists to suggest that sustainability can be an impediment to corporate profitability. In contrast, evidence is emerging that under certain conditions ‘sustainability pays’” (2014: 12). However, it is important not to make a broad generalization that doing good for

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<sup>5</sup> “The consequences of the profit maximisers” misinterpretation are not only that their concepts are not useful to businessmen, but also that they happen to be conveying a false impression of what our economy really is like. Consider this statement, which is part of Samuelson’s summary of the essence of our economic system: ‘A rich man’s dog may receive the milk that a poor child needs to avoid rickets. Why? Because supply and demand are working badly? No. Because they are doing what they are designed to do—putting goods in the hands of those who can pay the most, who have the money votes.’ This is a shocking statement. If it were true, no one should be proud of the American system; such a system would certainly not be welcomed in other countries. If it were true, we should prefer communism. The plain fact is that this statement is not true. Our system does not condone, or encourage, fattening dogs by starving children. Our system is one of which we may be proud. It can be described accurately if the assumption of profit maximisation is discarded for the idea of satisfactory return. Such a change will lead to more accurate reporting and to the development of more useful rules and concepts, concepts which focus on the businessman’s responsibility to all the parties at interest, concepts which we can be proud of, and which will lead to improvements in our system of which we can be even more proud” (Anthony 1960: 133).

<sup>6</sup> “Corporate decisions that advance the interests of other stakeholders beyond what is required by the corporation’s existing contracts may, of course, enhance share value at the same time. For example, a firm’s discounted-to-present-value aggregate future residuals, and hence its share value, might increase if, despite a cost in terms of current earnings, the firm develops a reputation among current and potential workers as a good employer or among consumers as a ‘green’ company that works to reduce global warming” (Fox 2014: 460).

stakeholders will consistently benefit shareholders as well, as it often reduces share value, and thus, one has to make a choice.<sup>7</sup>

Third, Adolf Berle and Gardiner Means—whose observation of the phenomenon of separation of ownership and control in modern corporations that led to Jensen and Meckling’s agency theory which misconceived shareholders as the principals of the management—did not advocate shareholder profit maximization as the ultimate goal of corporations. They advise that:

It is conceivable—indeed it seems almost essential if the corporate system is to survive—that the “control” of the great corporations should develop into a purely neutral technocracy, balancing a variety of claims by various groups in the community and assigning to each a portion of the income stream on the basis of public policy rather than private cupidity (Berle & Means 1932: 312-313).

Einer Elhauge recognizes that profit maximization is too narrow a goal for managers when shareholders have social concerns (Elhauge 2005, cited in Hart & Zingales 2017a: 6). Lynn Stout (2012, cited in *ibid* 6), like Elhauge, also affirmed that, given that shareholders are prosocial, managers should pursue a broader agenda than profit maximization. Stout argued that the view that the fiduciary duty of managers and directors was to maximize shareholder wealth was not consistent with US corporate law. Another clear statement supporting stakeholder interests comes from Sir Adrian Cadbury, whose Cadbury Report lent impetus to the debate on corporate governance in the United Kingdom (UK):

Corporate governance is concerned with holding the *balance between economic and social goals and between individual and communal goals*. The governance framework is there to encourage the efficient use of resources and equally to require accountability for the stewardship of those resources. The aim is to align as nearly as possible the *interests of individuals, corporations and society* (Cadbury 2000: ‘Foreword’, emphasis added).

Fourth, Hart and Zingales argue that firm should maximize shareholder welfare, not just shareholder value, and underline the flaw in the idea of shareholder profit maximization. They claim that “the time has come for companies, economists, and society to abandon [Friedman’s argument]” (2017b: 5).

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<sup>7</sup> “The self-evidently overly broad generalization that, at least in the long run, doing good for other stakeholders consistently benefits shareholders as well. The happy incantation of this generalization by some authorities evades the fact that often an act that benefits other stakeholders reduces share value” (Fox 2014: 460).

The literature is divided on Friedman's thesis. One group believes that Friedman-type arguments hold only in a Arrow–Debreu complete market economy where each firm is a perfect competitor (Hart & Zingales 2017a), which of course does not always exist in real-world scenarios. The second group claims that in a world of incomplete contracts, stakeholders are all vulnerable to opportunistic behaviour and, thus, to encourage them to make relationship-specific investments, it may be important for managers to deviate from short-run profit or value maximization, and that under some conditions it may be efficient for the company to be set up as a worker, producer, or consumer co-operative or as a non-profit (ibid 5-6). The third area of literature—and it is vast—is primarily concerned with the empirical implications of a company's pursuit of a broader objective than merely shareholder value, raising the question of whether putting some weight on social issues actually increases profit in the long run (ibid 6). There is also a small theoretical literature on corporate objectives when shareholders care about public goods and externalities, although most of it is concerned with corporate gift-giving rather than the mitigation of externalities (ibid).

Hart and Zingales add to the debate by looking at how a consumer who owns shares in a company will choose between a clean and dirty decision. They make the following observations and conclude that companies should endeavour to maximize shareholder welfare and not market value.

- (1) consumer–shareholder will vote for a clean decision over dirty decision if and only if the profit from a clean decision (e.g. \$10) is larger than the profit from a dirty decision (e.g. \$12) minus the damage (e.g. \$4), and if the significance he or she attaches to damage is large enough;
- (2) If the profit for a clean decision (e.g. \$10) is larger than the profit for a dirty decision (e.g. \$9), he or she will vote for the clean decision over dirty decision;
- (3) If the profit for a clean decision (e.g. \$10) is smaller than the profit for dirty decision (e.g. \$12) minus the damage (e.g. \$1), he or she will vote for the dirty decision over clean decision;
- (4) If the profit for a dirty decision (e.g. \$12) is larger than the profit for a clean decision (e.g. \$10) but the latter (\$10) is larger than the former (e.g. \$12) minus damage (e.g. \$4), the consumer's preference will be the same as in situation 1 above;
- (5) If the profit for a clean decision (e.g. \$10) is the same as the profit for a dirty decision (e.g. \$12) minus damage (e.g. \$2), the consumer's preference will be the same as in situation 3 (Hart & Zingales 2017a: 7-10).

Hart and Zingales investigate how consumers–shareholders (not non-shareholders–stakeholders) would choose between clean and dirty decisions, and reveal that prosocial shareholders will vote for clean decision in situation 1. This shows that Friedman’s belief was mistaken in situation 1: prosocial shareholders will vote for a clean decision even if the associated profit is less than the dirty decision because the profit and externalities cannot be separated. However, one interesting point from Hart and Zingales’s analysis is that even prosocial shareholders cannot be relied on to make socially responsible decisions in situations 3 and 5. And managers who are required to act for the shareholders’ interests will likewise do so. In such situations, it would be necessary for stakeholders to sit on the board to protect their interests.

Hart and Zingales also affirm that in the case of perfect competition, dirty choices by other companies will likely reduce marginal costs and force prices down, reducing the firm’s profit. If company A is in duopolistic competition with company B, which has chosen a dirty technology, shareholders of company A confront a dilemma. If they choose clean technology, they will lose market share to company B if the latter’s marginal cost is lower. The consequence is a considerable amount of environmental damage by company B. If they choose the dirty technology (which they would prefer not to), they may produce possibly smaller damage themselves and still make money (Hart & Zingales 2017a: 18-19).

In view of this analysis, what is the fiduciary duty of managers or directors? Hart and Zingales say that the academic literature is confused (Hart & Zingales 2017a: 19). They argue that the duty is to maximize shareholder *welfare*, not just shareholder value (ibid).<sup>8</sup> Unfortunately, as they point out, managers of pension funds are required by law to maximize value rather than welfare, unless there is a vote at shareholder meeting to tell them otherwise (ibid 21-22). They also observe that a consequentialist shareholder would vote to transform the company into a clean one as “she feels guilty about the pollution produced if she does not act to curb it”, unless the pollution is “moderately inefficient” (ibid 26). However, if a shareholder is categorically imperative, they will make all inefficient takeovers impossible and eliminate any problem of free riding, collective action, and even adverse selection or moral hazard (ibid 26-27).

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<sup>8</sup> One problem is for the managers or directors to find out what shareholders want (their welfare). Hart & Zingales think that this can, however, be resolved by using digital polls that are cheap and fast (2017a: 20). Another option is to have specialized socially responsible mutual funds (not the normal mutual fund which trade regularly for profit only). On the strategy for social investing, they advocate that “invest and engage” would be more successful than “diverting” from dirty companies (ibid).

More recently, Colin Mayer and colleagues (2020), writing on the 50th anniversary of Friedman's article in *New York Times Magazine*, argue that, after 50 years, it is time for a new paradigm. They say corporations should be clear about their purpose as an expression of the responsibility they and their directors have in society, not as a matter of choice but as a matter of duty, and suggest that all corporations with over \$1 billion of revenues should be formed as public-benefit corporations as Senator Elizabeth Warren proposed (Mayer & Ors 2020).

Fifth, we cannot rely on market or profit maximization to look after stakeholders, not only because of shareholders' self-interest and market failure but also because markets cannot address the social justice consideration in a society. It is well known that corporations possess enormous powers (decision-making power in terms of what to produce, in what quantities, and at what price, etc; power over consumers in the market; making delegated decisions instrumental to production, eg on technology, organization of the workforce, plant location, and executive prerogatives) and can exercise their powers to the detriment of stakeholders (Parkinson 1993: 3-21; Stiglitz 2019: chapter 3). Individual and collective interests and values ought not to be sacrificed in a company's pursuit of profit—for example, employees' rights in case of dismissal and to a minimum wage—and because of the defect inherent in the market, a company can externalize costs to society (Parkinson 1993: 41-42). As Stone also emphasizes:

Even at its ideal best, the market is not a remedy for all the problems a society may have with its commercial actors, but plays a general allocative role, encouraging capital, labour, and other factors of production to flow to those industries and firms that can put them to the most beneficial social use ... few [economists] if any are satisfied that the market of itself can allocate resources adequately to fill social needs (Stone 1975: 88).

This is because those who have faith in the market or profit maximization as an assurance to achieve socially desirable goals are implicitly making certain assumptions each of which is often questionable (Stone 1975: 89): (i) that the consumers know *the fact* that they are being "injured". It often takes a long while for consumers and the public to know that certain products cause harm, for example, cigarettes or coal dust in a coal mine and the like, or what the products contain and their likely effect in the long term. (ii) That consumers know *where* to apply pressure, that is, who is the real culprit. Consumers identify products by brand name, not usually by the producing company. Thus, when dissatisfied with one product, they might inadvertently switch to another brand produced by the same company. (iii) That consumers are in a *position* to

apply pressure. The complaining party may not have any legal (contract or tort) relation with the company to be able to apply pressure. Or the company is a monopoly or oligopoly. And (iv) that consumer pressure will be *translated* into warranted changes in the institution's behaviour. When dissatisfied consumers turn to another brand, the management may not know why the company has lost sales, or even if they know, they may not be willing or able to remedy the problem in the most desirable way. "All large organizations seek to seal off or 'buffer' their technical core from disruptive environmental influences (like the market—or the law) [Thompson 1967: 20-23]. So far as possible their tendency is to fight rather than to switch" (Stone 1975: 89). Thus, you cannot leave it to the management to decide whether to remedy and how to do it. A stakeholder board will help or force them to change.

Sixth, looking after stakeholder interests or not maximizing profit is not bad for efficiency. Law and economic scholars often cite efficiency as the justification for supporting shareholder profit maximization. Japanese companies, often seen as the "odd man out", and, more recently, Chinese state-owned enterprises provide interesting examples of how looking after stakeholder interests is not bad for societal efficiency. Since 2002, Japan's emergence, albeit slow after its decade-long economic malaise (Katz 2003; Ito & Ors 2005), has prompted intriguing questions as to whether recovery was achieved by revamping its laws and economic institution along more American lines, as Daniel Kelemen and Eric Sibbett (2002: 269) argue, or if the recovery provides evidence of "the robustness of its broader, stakeholder-oriented system of governance", as David Collison and Yoshinao Kozuma contend (2002, cited in Nottage & Ors 2008: 21). "Does Japan's experience ... reflect the triumph of US-style shareholder-oriented governance, or the endurance of Japan's stakeholder-based model of capitalism?" (Nottage & Wolff 2005: 133; Nottage & Ors 2008: 21)

It is well known that Japanese companies are not primarily interested in profits and dividends, and yet:

large Japanese companies, though they may be privileged, are also intrinsically efficient. They could hardly make goods of such high quality and deliver them on time if they were not. No one, Westerner or Japanese, need be in any doubt that the Japanese system works (Clark 1979: 225).

Very little had changed after the lost decades.<sup>9</sup>

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<sup>9</sup> One reason for the *status quo* was "political, using that word in the widest sense. The company and Japanese industry as a whole confer their benefits on enough people for there to be considerable support for the status quo" (Clark 1979: 225)."

Although there has been a marked shift in Japan since 2002 from “employee sovereignty” towards “shareholder sovereignty” and development of a market for corporate control (Dore 2005a: 443; Jacoby 2005), and other phenomenon such as real threats of takeovers and much greater managerial concern with share price and faster growth of directors’ compensation compared to that of other workers (Dore 2007), there has been little revision of bureaucratic internal promotion systems for top managers (Jacoby 2005; Dore 2007). Thus, Haley maintains that the corporate sector in Japan continues to display a broader stakeholder approach to corporate governance which fits with Japan’s ongoing communitarian approach to law and society (Dore 2005b), and Dore concurs with Haley that Japan still retains key infrastructure for stakeholder-based firms (Dore 2007). Jacoby also argues that Japanese companies are still very much organization-oriented, focusing on long-term employees and broader stakeholders in their corporate governance, with a high-powered centralized human relations department (Jacoby 2005: 11-12). Even the rational self-interest theorists, such as Mark Ramseyer, who argue that the Japanese are not communitarian but are driven by straightforward market forces, not idiosyncratic and persistent institutional arrangements, agree that little has changed (Ramseyer & Nakazato 1999; Miwa & Ramseyer 2006).

On the other hand, there was the contrasting view that Japan was departing from stakeholder capitalism and moving towards an embrace of shareholder primacy (Nottage & Ors 2008: 26).<sup>10</sup> In fact, formal Japanese corporate law is closer to the Anglo-American model than the German model, as it presupposes the shareholder-oriented model and that employees are not given any say in the board.<sup>11</sup> However, lifelong employment explicitly marks the difference between the Japanese and

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<sup>10</sup> For example, Emmott, the editor of *The Economist* in 2005, claimed in rather colourful terms that cross-shareholdings, lifetime employment are no longer the rule, and executives now behave more like American (chief executive officers (CEOs) with pay linked to performance (Emmott 2005, quoted in Nottage & Ors 2008: 27): “Cross-shareholdings have largely been unwound. Lifetime employment, even in big firms, is now the exception not the rule thanks to changes in labour laws that have allowed workers to be employed on short-term contracts. Such employees make up 40 per cent or more of the total at manufacturers such as Toyota. Many – though not all – corporate boards have been streamlined, with more independent directors and fewer placemen [sic] ... Executive remain primarily bureaucratic but there are now many more exceptions, sounding and behaving more like American CEOs and with senior management pay geared to performance. And foreign executives are no longer unacceptable.”

<sup>11</sup> Araki 2005: 26; cited in Nottage & Ors 2008:56): “[Japanese corporate law] presupposes that a corporation is [the] shareholder’s property and the role of management is to maximize the interests of shareholders. Unlike [the] German co-determination law which opens the supervisory board to employee representatives, Japanese law does not give employees or their representatives any status as a constituent of the corporation ... Thus, ostensibly Japanese law resembles more the Anglo-Saxon market oriented model.”

US systems, which brings the Japanese firms closer to Germany's stakeholder-oriented model in substance.<sup>12</sup>

During the peak of the Japanese economy, lifelong employment and the broader model of stakeholder capitalism were trumpeted as the secret of the Japanese success, providing a worthy alternative to the liberal market economy, whilst, during the recent downturn, they were regarded as a drag on labour mobility and economic efficiency (Boyer & Yamada 2000: 3; Ahmadjian & Robinson 2001: 624; Nottage & Ors 2008: 57).

There has been debate as to whether lifelong employment has ceased to exist in Japan. However, the empirical evidence seems to indicate that lifelong employment persists but is under strain (Nottage & Ors 2008: 74). Despite Bill Emmott's assertion (2005), and despite a number of changes since 2002,<sup>13</sup> the Japanese stakeholder-oriented model remains largely intact albeit with considerable realignment of stakeholders (Nottage & Ors 2008: 28, 38).<sup>14</sup>

Thus, the Japanese experience does not show that looking after stakeholders can be bad for societal efficiency. The lost decade were more likely a result of the Plaza Accord, international finance and Japanese monetary policy at the time, not corporate governance structure or stakeholderism in Japan (Ito 2015).

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<sup>12</sup> Konzelmann (2005: 593-594; cited in Nottage & Ors 2008: 57): "Traditionally, Japanese firms have been 'organisation oriented' while American firms have been more 'market oriented'. This is reflected in the dominant features of corporate governance and work organization, where despite movement towards the American model, the Japanese system of stakeholder-oriented corporate governance and its view of labour as a productive resource continues to stand in sharp contrast to the American shareholder-based system and view that labour is a factor of production with a cost to be determined". Lifelong employment, along with seniority-based wages and enterprise unions are the "three sacred treasures" that represent "stakeholder governance" (Jacoby 2005b), even though it is neither mandated under Japanese corporate law nor part of any explicit contractual promise but a mere "unwritten guarantee" (Dore 2000: 107), "social norm" (Jackson 2007: 282), or a "moral imperative" (Ahmadjian & Robinson 2001: 624).

<sup>13</sup> For a detailed analysis of the changes, see Nottage & Ors (2008: 30-37).

<sup>14</sup> "Japan is experiencing significant but not overwhelming change in its system of corporate governance", claim Nottage & Ors (2008: 38). "Shareholders have become more central compared with creditors and employees (with more change underway than acknowledged by Haley). However, shifts are more ambivalent in some areas of industrial organization (especially in relation with key suppliers). Influences on firms from regulators or the broader community (such as NGOs) are also changing but remain more peripheral" (ibid 29). It has been suggested that: "[S]uch changes are best understood as evidence of an intensification of an existing mode of regulation—flexicurity—rather than a harbinger of more dramatic institutional shift. The system is undergoing stress, clearly, but its key features remain in place ... Lifelong employment ... is not 'withering away'; rather, it is reinventing itself in response to the intensification of the flexicurity mode of regulation. As the empirical evidence illustrates, the 'tree' of lifelong employment may have many of its branches swaying in the wind (some may have even snapped off), but this tree remains rooted in the same political compromise between labour and management settled over five decades ago" (ibid 79).

Finally, the theory of organization (the O-theory) suggests that looking after stakeholders can be equally efficient. According to the theory of the firm (the F-theory), firms are “to maximize profit—the difference between value of product and cost of production” (Simon 1952-1953: 40-48). In the F-theory, the entrepreneur is explicitly treated as a rational individual, and the other participants—employees, customers, suppliers—are passive “conditions” to which the entrepreneur adjusts in finding the solution that is optimal to them (ibid). In contrast, the O-theory treats participants in a more symmetrical fashion, as participants are offered an inducement for their participation in the organization, through which they make a contribution to the organization (ibid). The participant’s contributions are regarded as “factors” and the inducements as “products” (ibid). Thus, the organization transforms its members’ contribution into inducements which it, in turn, distributes to these members (ibid). Both theories are ultimately concerned with the optimal distribution of satisfactions—the F-theory is about optimal distribution for the entrepreneurs and the O-theory for all participants. The latter shows that once an optimal state is reached in the demand-and-supply curve, any combination of surplus to each participant is optimal, except that each participant will experience a different degree of satisfaction. As Simon explains:

Suppose that we have a solution in which each participant is receiving more than the minimum satisfaction required to retain him in the system—each has a satisfaction greater than zero. We suppose further that the satisfaction of all participants cannot be simultaneously increased—e.g., if the quantity of production is held constant, wages cannot be increased without increasing prices or reducing net profits. Then we could still maintain the system if we reduced wages to a point where the satisfaction of the employee was just above zero, and increased the satisfaction of the entrepreneur, or increased the customer’s satisfaction by reducing prices ... We may select, for example, that particular one or the other optimal solution for which the satisfactions of the entrepreneur and the customer are each equal to zero, and the satisfaction of the employee therefore attains the maximum value that is consistent with viability. The employee, in this case, captures the entire “surplus” of satisfactions. Alternatively, we may select the solution in which the entrepreneur captures this “surplus”, and the satisfactions of customer and employee are held at zero (Simon 1952-1953: 40-48).

Why should the entrepreneur capture all the satisfaction? The F-theory is optimal but does not increase the welfare of other participants. It rather selects out of all viable solutions the one that maximizes the satisfaction of the entrepreneur and assumes that they alone will seek to capture the “surplus” of satisfactions and the other participants will be persuaded to remain in the system by marginal inducements that just equal the

marginal opportunity costs of their respective contributions (Simon 1952-1953: 40-48). This bargaining allows customer and employee to retain part of the “surplus” (consumers’ surplus and labour’s surplus), but when the elasticity of the demand for product or the supply of labour becomes infinite (as in perfect competition in the market for the product and the labour market), these respective surpluses disappear, in which case, the F-theory requires that the inducement offered to customer and employee be just equal to the opportunity costs of their contributions (ibid). That is the reason why other stakeholders do not receive a fair share for their contributions under the current Anglo-American capitalism, which prefers the F-theory. Simon asks, “are we to restrict ourselves to the solution that is optimal to the entrepreneur (as in F-theory), or to consider the wider classes of optimal, or even viable, solutions (as in O-theory)?” (ibid). I believe the answer to the former is “no” and the latter is “yes”. Whilst not saying which theory to choose, Simon observes that: “Institutional economists, and theorists of organization who have perhaps been in closer contact than traditional economic theorists with the empirical phenomena, have been by no means satisfied that the F-theory coincides with the observed facts of organisational behaviour” (ibid). Stakeholder boards would not only help the demand-and-supply curve to yield a better/more optimal/efficient equilibrium by internalizing all costs of production (evidenced in my equations above) but also help all participants negotiate for a more optimal solution for them in line with the O-theory and create greater wealth for society.<sup>15</sup> Stakeholder board is a platform where stakeholders interests are distributed in line with O-theory. Thus, in theory, it is plausible that stakeholder boards would be as efficient as—if not more than—shareholder boards.

## [E] STAKEHOLDER BOARD TO INTERNALIZE EXTERNALITIES

Thus, the analysis above demonstrates that relying on consumer, worker, and environmental laws and regulations to regulate a company is insufficient to force companies to internalize their costs of operation. I have argued elsewhere that one possibility is to appoint stakeholder directors to represent stakeholder interests (shareholders, workers, consumers, community/society and the environment respectively) on the board of directors (Goo & Klinger 2014; Goo 2017). This would allow stakeholder interests to be considered in the company’s decision-making process and internalize all its costs of operation directly.

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<sup>15</sup> See Simon (1952-1953) chapter 5, C2 and C3 on how stakeholders might increase efficiency.

The idea of stakeholder directors on the board was proposed by Ralph Nader, Green and Seligman in the 1970s (Nader & Ors 1976: 125) but not adopted in the US. It is familiar to civil law countries, such as China, Japan and Germany as they have worker representation on the supervisory board with different degree of voting rights. Stakeholder boards would just be an extension of this.

## [F] WOULD STAKEHOLDER BOARDS BE MORE EFFICIENT?

Hitherto, we have been relying on law and regulation as mechanisms to internalize these costs. In the last decade, we have also been requiring companies to make environment, social and governance (ESG) reporting to internalize costs. However, as with many such reports or disclosures, they tend to degenerate into a box-ticking exercise. We need some internal governance mechanism of checks and balances. Having stakeholder directors on the board as an internal check and balance is one way to encourage internalization of the costs (Goo & Klingler 2014; Goo 2017).

But the stakeholder board remains a concept on paper—there is no empirical evidence to show whether it would be efficient. The nearest one can get is the German codetermination board which is a more limited form of stakeholder board. Free market economists see little value in state intervention into a functioning market and are therefore sceptical about the efficiency effects of German codetermination boards (FitzRoy & Kraft 2005: 235). Property rights theorists also dislike intervention by government into the decision rights of firms (FitzRoy & Kraft 2005: 235). Armen Alchian and Harold Demsetz (1972) argue that a private firm is allocationally efficient when all control and property rights reside in one agent, the firm owner (ie the shareholders): the owner pays a competitive wage, monitors worker shirking and, as the residual claimant, has incentives for efficiency (Fauver & Fuerst 2006: 679). This underlies the theory of shareholder profit maximization as mentioned above. Codetermination disturbs this as property rights are now split between two agents each pursuing a different agenda (ibid). However, whilst in the Alchian and Demsetz's neoclassical analysis employees have no firm-specific skills, it is now generally agreed that employees do develop firm-specific skills which are nontransferable, so employees do make human capital investments, and as long-term employment contracts either do not exist or lack specificity, and returns on their human capital investments (ie wages) commensurate with their investment may never materialize, employees may be reluctant to make human capital investment that is

vital for the success of a firm (*ibid*), and if invested would have incentive to see the company successful. Eirik Furubotn and Steven Wiggins (1984: 176-192) suggest that codetermination can promote human capital investment and increase firm value (Fauver & Fuerst 2006: 679).

Michael Jensen and William Meckling asked in the late 1970s:

if codetermination is beneficial to both stockholders and labour, why do we need laws which force firms to engage in it? Surely, they would do so voluntarily. The fact that stockholders must be forced by laws to accept codetermination is the best evidence we have that they are adversely affected by it (1979: 469-506).

However, as Steven Ramirez points out:

While markets certainly are powerful tools for allocating resources, they do not seem to imbue corporate governance standards with any degree of precision sufficient to positively influence law and regulation. This is the essential lesson from the race to the bottom debate. (2007: 356)

According to Oliver Williamson's transaction-cost theory (Williamson 1975), competitive forces drive the firm to its lowest-cost organizational form, so it follows that, as codetermination laws are imposed, natural and efficient governance is not achieved (Fauver & Fuerst 2006: 679). However, it is also pointed out that these criticisms do not take into account the coordination problems (*ibid*). As in the standard prisoner's dilemma, the first-best outcome cannot be obtained without coordination (*ibid*). By the same token, if a single firm implements codetermination on its own without the compulsion of law, even if it creates firm value, the compensation differential between management and worker is likely to fall, and worker job security is likely to rise, resulting in the firm losing its best management talent and attracting the least productive workers (*ibid*). Thus, adverse selection induces a negative externality if codetermination is unilaterally introduced, and coordination through legislation is therefore necessary to realize the benefit of codetermination (*ibid*).

But what does the empirical evidence tell us? As noted by FitzRoy and Kraft, surprisingly, board level codetermination has received little attention from economists, and there is not much econometric evidence on codetermination (FitzRoy & Kraft 2005: 234). Until recently, studies of the German system tended to examine the effect of the 1976 legislation (Codetermination Act 1976) or focus on non-economic measures of performance such as a firm's capacity to make decisions and implement change or the ability of employees to influence corporate policy (Fauver & Fuerst 2006: 675, citing Gerum & Wagner 1998). Felix FitzRoy and Kornelius Kraft suggest that: "Most theoretical models agree that

there is likely to be an optimal degree of codetermination in terms of efficiency, and ‘too much’ participation or employee representation will be counterproductive” (2005: 238). Some studies on codetermination in Germany have focused on financial performance or firm value (Gurdon & Rai 1990; Gorton & Schmid 2000; Fauver & Fuerst 2006; Kraft & Ugarkovic 2006; Vitols 2008), productivity and profits (Gurdon & Rai 1990; Renaud 2007), or abnormal returns (Petry 2015), but the results are not consistent due to different methodological frameworks and the panel data used (Conchon 2011; Lopatta & Ors 2018: 2). Other studies have criticized earlier research for using only cross-sectional data (eg FitzRoy & Kraft 2005: 234, commenting on FitzRoy & Kraft 1993 and Gorton & Schmid 2000), a mix of firms with different characteristics (eg sample size), sample sizes that are too small, or unsuitable statistical analysis procedures, none of which allow for controlling for possible unobserved or omitted firm-specific effects (FitzRoy & Kraft 1993; Gorton & Schmid 2004; Conchon 2011; Lopatta & Ors 2018: 5, citing Bermig & Frick 2010). As noted by John Addison and Clauss Schnabel (2011: 354-374), however, there is a wealth of empirical literature on the effects of codetermination at enterprise level. The literature focuses on the analysis of changes in productivity, shareholder value and profitability, and the impact on the firm’s innovation and employment level. Older studies on the impact of codetermination on productivity (eg Svejnar 1982; Gurdon & Rai 1990; FitzRoy & Kraft 1993; FitzRoy & Kraft 2005; Renaud 2007; Wagner 2009; Boneberg 2010) and profitability (eg Gurdon & Rai 1990; FitzRoy & Kraft 1993; Wagner 2009; Boneberg 2010) tended to be more negative, whereas the recent studies are more positive. Its impact on stock prices is more uniformly negative (Benelli & Ors 1987; Baums & Frick 1996; Schmid & Seger 1998; Vitols 2006; Frick & Bermig 2009). So the results are not conclusive (Sadowski & Ors 2000; Kraft 2006: 710), and it is difficult to know who is right because of the different methods and data used (Boneberg 2010: 8), though some believe that the more recent investigations are more reliable because of their improved methodology (Vitols 2005: 26).

On the other hand, there is also no evidence that profit maximization is more efficient than serving stakeholders’ interests. Board level employee representation (BLER) has existed in Europe for quite some time.<sup>16</sup> There

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<sup>16</sup> Fourteen countries have representation at board level in both private and publicly owned companies: Austria, Croatia, Czech Republic, Denmark, Finland, France, Germany, Hungary, Luxembourg, Netherlands, Norway, Slovakia, Slovenia and Sweden; five countries have representation at board level in only publicly owned companies: Greece, Ireland, Poland (also privatized companies), Portugal and Spain; 12 countries have no compulsory board level representation (other than voluntary): Belgium, Bulgaria, Cyprus, Estonia, Iceland, Italy, Latvia, Liechtenstein, Lithuania, Malta, Romania and UK. There is also the SE in all European Union (EU) countries.

is a depth of knowledge and experience on how such a system works (ECGI 2017: 3). In a recent conference on BLER, Franklin Allen argues (ibid) that corporations should serve stakeholders, noting that there are, however, cross-cultural differences as far as the answer to this question is concerned, having considered a number of papers that argue against stakeholder governance on grounds of being biased against innovation (Hellwig 2000: 95-134) and of posing problems with correct incentives to managers (Tirole 2001: 1-35; 2006), as well as papers that claim that BLER supports corporate governance on grounds of facilitating the implementation of stakeholders' concerns (Blair 1995) and of providing the benefit of internal mutual monitoring (Allen & Gale 2000).

There is a debate as to whether the German system is efficient,<sup>17</sup> and an argument that more flexibility should be given to firms to experiment with different governance or BLER regimes (ECGI 2017: 4). At the same time, there is a growing number of German companies reincorporating as *Societas Europaea*<sup>18</sup> to avoid and mitigate BLER and to opt for a one-tier board system (ibid).

Allen argues that, if the firm is confronted with cost uncertainty, stakeholder governance can benefit shareholders, whereas, if it is confronted with demand uncertainty, stakeholder governance can hurt shareholder profit (Allen & Ors nd: 3-4). Maug (ECGI 2017: 7; Maug 2017, citing Fauver & Fuerst 2006: 674) and Franklin Allen and Douglas Gale (2002) argue that in incomplete, imperfect markets, a stakeholder corporate governance system stressing cooperation between management and employees (ie codetermination) may allocate resources more efficiently than a shareholder system, although the empirical studies examining the impact of codetermination on stock returns, market-to-book ratios, and performance ratios do not furnish conclusive evidence regarding the impact of BLER on corporate performance (ECGI 2017: 7).<sup>19</sup> This is because of the shortcomings associated with the data, the fact that none of those measures fully capture the impact of BLER on firm value and, more generally, the presence of multiple dimensions of corporate governance that interact in ways that are difficult to capture (ibid). Maug notes that companies never opt to use BLER voluntarily, but do not seem to try to avoid it either and concludes that the empirical literature is

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<sup>17</sup> And only German employees are represented on the board. The European Court of Justice has recently ruled in *Konrad Erzberger v TUI AG* (2017) that such a rule is not incompatible with EU law on non-discrimination on grounds of nationality and free movement of persons.

<sup>18</sup> A public limited liability company formed under EU law that operates across member states with a single legal identity.

<sup>19</sup> See also ECGI (2017) chapter 5, fns 277, 281, 282, 324.

inconclusive and that firm behaviour seems to suggest that there are no first-order gains from having employee representation or avoiding employee representation (ibid). There are, however, other empirical studies that suggest that codetermination can enhance productivity and even firm performance.

Although there is no conclusive empirical evidence of the efficiency of German boards, the results being mixed because of their limitations, the balance of evidence suggests that German boards are efficient from the perspective of productivity and firm performance, but not in terms of short-term shareholder value or share price. More robust studies could be carried out to illuminate this. However, the fact that the German economy is the third largest in the world, after the US and China, speaks louder than words for its overall societal efficiency, especially as it is a small country compared to the US and China in terms of its geographical size and population. How can Germany be producing high-quality, world-class vehicles and other industrial outputs if its companies are not efficient?

## Can stakeholder boards restore efficiency? A formal analysis

If stakeholder representation forces companies to internalize costs at board level, can it restore the link between profit maximization and societal efficiency? The answer depends on whether the cost of stakeholder governance (SBC) is less than the harm prevented (see Table 2).

### Key findings

- ◇ Stakeholder boards are more efficient than shareholder boards if  $SBC < AH$ : Where SBC is the cost of stakeholder board governance (director costs, longer meetings, coordination) and AH is additional harm from externalities. For large-volume producers, AH scales with production while SBC remains relatively fixed, making stakeholder boards increasingly efficient at scale.
- ◇ Even partial internalization improves efficiency: if stakeholder boards only partially prevent externalization, they still improve societal efficiency provided  $SBC < (\text{externalities prevented})$ .
- ◇ The cost threshold is likely favourable: director costs are not additional (same number of directors, different representation). The main costs are coordination and potentially longer deliberations. These are dwarfed by externalized harms in sectors like chemicals, mining, and manufacturing.

Governance structure	Company bears	Society bears	Profit (M)	Societal efficiency (E)*	Condition
Shareholder board (Scenario 2)	Materials (100) + process (100) + employment (100) + RC	Pollution (50) + Medical (50) + Additional Harm (AH)	300 – RC	200 – AH – RC	Baseline
Stakeholder board (Scenario 4)	Materials (100) + Process (100) + employment (100) + Pollution (50) + Medical (50) + RC + SBC	0	200 – SBC – RC	200 – SBC – RC	SBC < AH for improvement
Shareholder board (Scenario 3)	Materials (50) + process (50) + employment (100) + RC	Pollution (150) + medical (150) + AH (200)	400 – RC	100 – RC	Worst case
Stakeholder Board (Scenario 4 versus 3)	Materials (100) + Process (100) + employment (100) + pollution (50) + medical (50) + RC + SBC	0	200 – SBC – RC	200 – SBC – RC	SBC < 200 for improvement over Scenario 3

\*Excluding producer surplus, consumer surplus, and benefits (B), assumed constant.

Table 2: Comparing governance structures

Type of values and companies	For whose interests?	Who decides?	Goal of firm?	Efficient?
Enlightened shareholder approach (UK)	For shareholders' interest	Managers	Profits maximization	Least efficient
<b>China</b>	<b>Shareholders' &amp; workers</b>	<b>Managers &amp; workers</b>	<b>Profits maximization and others</b>	<b>Moderately efficient</b>
Enlightened value maximization (Jensen 2001) (eg benefit corporations)	For firm value (all stakeholders)	Managers	Long-term value of firm Dollar=dollar	Moderately efficient
Stakeholder Board (Goo 2017)	For firm value (all stakeholders)	stakeholders	Maximize value for constituencies, and maximize firm value (using Jensen's test)	Most efficient

*Table 3: Boards with varying degrees of stakeholder participation*

As Table 3 shows, the current approach adopted in the UK which leaves it to the managers to make decisions, and requires them to act for the interests of shareholders, would still bring us back to Scenario 2. Jensen (2001) has pointed out the problem of the stakeholder theory and argues that companies should be run to maximize long-term firm value, which presumably includes value to all stakeholders, not short-term profit. This is an improvement from the current position, but he still leaves it to the managers to make the decision, which again would bring us back to scenario 2 to a certain extent. My proposed stakeholder board which leaves the decision to be taken by stakeholder directors would solve this problem, (ie takes us back to scenario 1).

Jensen has, since 2001, recognized the importance of stakeholder interests:

[does stakeholder theory] have no legitimate corporate uses? And can corporate managers succeed by simply holding up value maximization as the goal and ignoring their stakeholders? The answer to both is an emphatic no. In order to maximize value, corporate managers must not only satisfy, but enlist the support of, all corporate stakeholders—customers, employees, managers, suppliers, local communities (Jensen 2001: 16, emphasis added).

He continues:

Indeed, it is a basic principle of enlightened value maximization that we cannot maximize the long-term market value of an organization if we ignore or mistreat any important constituency. We cannot create value without good relations with customers, employees, financial backers, suppliers, regulators, and communities (ibid).

## [G] IMPLICATIONS FOR CORPORATE SOCIAL RESPONSIBILITY THEORY AND PRACTICE

The analysis above fundamentally reframes debates about CSR. Rather than a voluntary ethical choice or a matter of “enlightened” management, CSR emerges as a structural governance problem requiring institutional reform.

### Why voluntary CSR fails

Three mechanisms currently rely on voluntary CSR.

- (i) ESG disclosure and reporting: companies report environmental and social impacts, hoping transparency will drive behaviour change. But disclosure without governance reform merely documents externalization without preventing it. Directors remain legally bound to maximize shareholder value.
- (ii) “Enlightened shareholder value”: the UK Companies Act 2006, section 172, requires directors to “have regard to” stakeholder interests while pursuing shareholder benefit. This approach fails because (a) “have regard to” creates no enforceable duty, and (b) it still subordinates stakeholder interests to shareholder profit.
- (iii) Investor pressure: ESG investors and responsible pension funds supposedly discipline management. But as Hart and Zingales demonstrate, even prosocial shareholders may rationally choose “dirty” operations in scenarios 3 and 5 when profit differentials are large enough (2017a; 2017b).

### Why external regulation is insufficient

Environmental law, employment law, and consumer protection provide a regulatory floor, but three factors limit their effectiveness.

- (i) Regulatory incompleteness: laws inevitably lag behind corporate innovation in externalization. By the time products such as asbestos, tobacco, or microplastics are regulated, the damage has already been done.
- (ii) Enforcement gaps: regulatory agencies face resource constraints, capture risks, and jurisdictional limits (especially for multinational corporations).
- (iii) Incentive misalignment: even with perfect regulation, boards structured to maximize shareholder profit will seek legal ways to minimize costs, lobbying against stronger regulation rather than internalizing costs voluntarily.

## Stakeholder boards as structural CSR

Stakeholder board representation addresses these failures in the following ways.

- (i) Internalizing costs at the decision point: rather than detecting and punishing externalization after the fact, stakeholder directors prevent it during strategic planning.
- (ii) Creating countervailing power: worker, consumer, and community representatives can block decisions that externalize costs, even if legally permissible and profit-maximizing.
- (iii) Reducing information asymmetries: stakeholder directors bring local knowledge about impacts that external regulators cannot easily obtain.
- (iv) Aligning incentives: unlike shareholders (who capture gains but externalize losses), stakeholder directors internalize both the benefits and costs of corporate decisions.

## A new CSR paradigm

This analysis suggests CSR discourse should shift from “Should companies be responsible?” to “What structures ensure responsibility?”; from “Does sustainability pay?” to “How do we make companies bear full costs?”; from “voluntary commitments” to “mandatory governance reform” and from “stakeholder consultation” to “stakeholder representation”.

The business case for CSR remains relevant, but only within a governance structure that prevents externalization. Without stakeholder boards (or equivalent mechanisms), even well-intentioned CSR programmes will be subordinated to profit maximization when trade-offs arise.

## International and development implications

As noted in the conclusion, US and UK resistance to stakeholder governance may reflect their ability to externalize costs to developing countries through global supply chains. This has profound implications as detailed below.

- (i) Supply chain responsibility: if home-country boards must include stakeholder representatives, they cannot ignore externalities in overseas operations.
- (ii) Development policy: developing countries hosting multinational subsidiaries may wish to mandate stakeholder boards domestically, even if home countries resist.

- (iii) Trade and investment law: bilateral investment treaties and trade agreements should preserve policy space for host states to require stakeholder representation.
- (iv) Climate justice: the analysis explains why voluntary climate commitments fail and why Conference of the Parties (COP) negotiations should address corporate governance structures, not just emissions targets.

## [H] CONCLUSION

This article has challenged the dominant assumption that shareholder profit maximization maximizes societal efficiency. While this equation holds in theory when markets are competitive and all externalities are internalized, these conditions rarely exist in practice. When companies can externalize costs—as they routinely do—profit maximization not only fails to maximize social welfare but actively undermines it.

The central achievement of the article is that it has (hopefully) demonstrated formally that when externalities can be externalized, shareholder profit (M) diverges from societal efficiency (E), sometimes dramatically. A company that appears to generate 400 in profit may actually destroy social value, creating only 100 in genuine welfare once externalized costs are included. Current corporate law compounds this problem by legally obligating directors to pursue the misleading profit figure rather than genuine social value. The proposed solution offered is that stakeholder board representation offers a more direct and potentially more efficient mechanism for internalizing costs than relying on external regulation alone. By bringing worker, consumer, community, and environmental representatives into board-level decision-making, this reform would conceivably:

- (i) force cost internalization at the strategic planning stage, not after the fact through litigation or penalties;
- (ii) create countervailing power against externalization even when legally permissible;
- (iii) reduce information asymmetries between companies and affected stakeholders; and
- (iv) align board-level incentives with genuine social value creation.

Drawing on evidence from German codetermination, I have shown that stakeholder boards can enhance societal efficiency provided the governance costs (SBC) are less than the externalized harms prevented (AH). For large-scale producers in sectors with significant externalities—

chemicals, mining, manufacturing, agriculture—this threshold is easily met because governance costs remain relatively fixed while externalized harms scale with production volume.

This analysis fundamentally reframes CSR. Rather than a voluntary ethical choice or matter of “enlightened” management discretion, CSR emerges as a structural governance problem. Voluntary ESG reporting, stakeholder consultation, and investor pressure all fail because they leave intact the fundamental board structure that creates incentives to externalize. Mandatory stakeholder representation addresses the root cause.

Given operational complexities and the experimental nature of this reform, I propose a phased approach in the strategy for implementation, thus:

- (i) mandatory for large multinationals: corporations above \$1 billion revenue with history of externalities or human rights concerns should be required to adopt stakeholder boards;
- (ii) voluntary for others: smaller companies or those in low-externality sectors could adopt voluntarily, creating competitive advantage in ESG-conscious markets;
- (iii) sectoral variation: energy, extractive industries, chemicals, and manufacturing face the strongest case for mandatory stakeholder boards; professional services less so; and
- (iv) international coordination: home countries of multinationals should mandate stakeholder boards to prevent externalization through global supply chains.

The persistence of shareholder primacy in the US and UK despite its inefficiency may reflect ability to export externalities to poorer nations. That is to say that there are international political economy dimensions to this issue: domestic stakeholders in these countries benefit from profit maximization while foreign workers and communities bear the costs. This suggests international pressure and developing country reforms may be necessary to drive change.

It has to be admitted that critical questions remain about optimal stakeholder board composition, voting arrangements, and mechanisms for resolving deadlock. Pilot programmes and comparative research on German, Chinese, and Japanese models can inform institutional design. The key insight, however, is clear: when markets fail to internalize costs, voluntary CSR and external regulation are insufficient. Structural

governance reform is necessary to align corporate decision-making with social welfare.

Fifty years after Friedman's famous article, as Mayer and colleagues (2020) observe, the time has come for a new paradigm. That paradigm must recognize what the equations in this article demonstrate: shareholder profit maximization is efficient for society only when companies bear the full costs of their operations. Since neither markets nor regulation can ensure this, governance structures must change. Stakeholder boards offer a promising path forward.

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# THE JURISPRUDENCE OF THE THRESHOLD: RELATIONAL LEGAL PLURALISM AND THE POLITICS OF THE WOUND

MICHAEL MURPHY\*

## Abstract

This article advances Relational Legal Pluralism (RLP), arguing that the foundational crisis in contemporary jurisprudence stems from a temporal-ontological bias, the “temporal cage”, which prioritizes what law is over the urgent ethical demand of what law does. This fixation renders conventional law conceptually mute and actively complicit in a mobile mode of governance: the Jurisprudence of Foreclosure, that operates by producing spatial abandonment and legitimized harm. This failure is sustained by Relational Hegemony, a power that structurally enforces institutional deafness and shatters “knowledge parity” by retreating into “closed epistemic resources”.

RLP offers a spatial-ethical inversion, grounding law’s genesis not in sovereign decree, but in the accusative demand: the juris-generative “wound” that emerges from relational harm. Drawing on Watsuji Tetsurō’s conceptual triad, *fūdō*, *aidagara*, and *kū* (emptiness as reflexive negation), RLP translates this ethical demand into a methodology, “Law in the Accusative,” designed to diagnose injustice and articulate a symmetrical counter-praxis: Relational Repair.

Relational Repair is a contested political project that insists on cultivating institutional “receptivity” and procedural rigour (Reason Test), while the philosophy of *kū* functions as the critical safeguard, perpetually opening the framework to the decolonial politics of refusal. Positioned as a “jurisprudence of the threshold”, RLP does not seek to resolve law’s fractures, but to transform jurisprudence into a global method for the creative, ongoing practice of mending our wounded relations.

**Keywords:** Relational Legal Pluralism (RLP); jurisprudence of foreclosure; relational hegemony; abyssal thinking; temporal cage; Relational Repair.

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## [A] INTRODUCTION: THE JURISPRUDENCE OF THE THRESHOLD

From the ruins of the Grenfell Tower fire (London 2017) to the lethal hopes of the central Mediterranean, contemporary governance increasingly expresses itself through absence, what Moncrieff (2025) terms “rule by silence”. This article interrogates a more unsettling possibility: what if fragmentation and abandonment are not failures of the legal order, but deliberate techniques of governance? What if the wound is not an exception to the law, but its intended consequence and its very juris-generative space?<sup>1</sup>

This crisis is rooted in a mobile mode of colonial governance—this article will argue—that connects the geopolitical outside to the domestic inside. Conventional jurisprudence is ill-equipped for this crisis because its traditions, built on abstract individualism and procedural universalism, are self-defeating. The sites where legal order fractures are not anomalies; they are a spatial modality of rule. This is a system where the freedom of the “inside” was actively constituted by the unfreedom of the “outside” (Césaire 2000; Gopal 2019; Lederman 2022). Following Andrew Halpin’s (2006) challenge, we can diagnose the problem as an “intellectual pyramid in the air”, perilously detached from this co-constitutive reality.

The central thesis of this article is that this jurisprudential impasse stems from a deep, philosophical error in Western modernity’s self-understanding. The error is a “temporal cage” that prioritizes time over space, forcing jurisprudence to begin with ontology, *defining what law is*, before it can ask the urgent ethical question of *what law does*. The “temporal cage” refers to the inherited philosophical architecture that prioritizes temporality over spatial ethical co-presence, thereby foreclosing responsiveness to the wound. This fixation on the temporal and the ontological makes the mainstream legal tradition blind to its own complicity in the colonial matrix of power. Even the field of legal pluralism has been captured, domesticated into a “jurisprudence of management” (Barzilai 2008: 389). This managerialism is the operational front of relational hegemony, a mode of power that controls the conditions

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<sup>1</sup> The “wound” is the core juris-generative concept of this article. It is defined as the embodied, lived experience of relational harm that precedes and indicts a legal response. It is a spatial-ethical concept that serves as the methodological locus for diagnosing the failure of law, locating its origin not in sovereign decree but in the accusative demand of the harmed. The wound is a rupture in the *aidagara* (relational fabric) that manifests as a material injustice (a toxic *fūdō*) and carries accusative knowledge: an articulation of injustice that the dominant system must suppress to maintain the jurisprudence of foreclosure. Its significance lies in its power to transform the passive victim into an enactive political agent and to initiate the process of relational repair.

of encounter by imposing a false choice between its brutal, zero-sum colonial logic and its deceptively benign, managerial “positive-sum” pole. This sustained jurisprudence of foreclosure is the central failure: its reliance on recognition is not a path to healing but a demand that the wound detach itself from the place of its infliction to justify its existence in the placeless grammar of its creator (Ahmed 2012).

The aim of this article is to offer relational legal pluralism (RLP), a framework that argues for a foundational shift from the temporal cage to a spatial–ethical focus on *what happens between subjects*. This reorientation stands in direct opposition to the dominant “politics of recognition”. RLP asserts that this systemic failure is twofold: procedurally, it is a failure of reason. The demand that the wounded translate their suffering into the state’s sterile grammar violates “relational opacity”; by retreating into its own “closed epistemic resources”, the state shatters “knowledge parity” (Krentos 2026). This institutional deafness is the deliberate refusal to hear that makes an intelligible legal relationship impossible. Politically, it is a source of hegemonic capture, where the language of the wound can be “hijacked” by authoritarian forces.

A genuine alternative requires a deeper, affective groundwork. Any meaningful repair must begin at a pre-political level, by cultivating the affective capacities of “receptivity” and “attunement”—the very conditions that institutional deafness is designed to destroy. RLP is the framework that integrates these insights. Drawing on a critical appropriation of Watsuji Tetsurō’s conceptual triad, *fūdō* (juridical atmosphere), *aidagara* (relational betweenness), and *kū* (emptiness as reflexive negation), it develops a jurisprudence where ethics precedes ontology. The primary juridical fact is not a rule, but the health of the *aidagara* and the wound that ruptures it. RLP moves towards its normative horizon: “relational repair”, a contested political practice aimed at mending the socio-spatial fabric.<sup>2</sup>

This article thus proceeds in six parts, moving from a critique of law’s spatial blindness (section [B]) to the development of RLP’s theoretical (section [C]) and methodological (section [D]) Law in the Accusative foundations, before applying the framework to concrete cases (section [E]) and concluding (section [F]) by positioning RLP as a “jurisprudence

<sup>2</sup> The core object of RLP’s spatial-relational ontology is the “relational fabric”: an indivisible, dynamic matrix of human existence where the self is constituted in the *aidagara* (relational betweenness), a condition that is always inseparable from the material and affective space of its situation, the *fūdō* (juridical atmosphere). The health of this fabric is the primary juridical fact. Its rupture constitutes the wound, a literal tear in the fabric, and the normative horizon of relational repair is therefore the contested political practice of mending this tear by transforming the very conditions of co-presence.

of the threshold”: a guide for navigating the choice between immanent repair and decolonial refusal.

## [B] LAW’S OWN CRISIS

Conventional jurisprudence finds itself at a profound impasse, armed with theories that, in Andrew Halpin’s (2006) prescient diagnosis, constitute an “intellectual pyramid in the air”. This article argues that this detachment is not a neutral epistemic stance but the core technique of a coherent political project: a jurisprudence of foreclosure. Its function is to systematically erase legal plurality by maintaining the spatial and temporal boundaries of a colonial–modern order. Its primary weapon is the demand that those who inhabit injustice translate their suffering into a dominant legal grammar that is, by design, deaf to their claims. This act of forced translation is not merely unethical; it is, as the work of Jason Krentos (2026) reveals, a form of procedural violence. It compels the wounded subject to surrender their “relational opacity” while the state retreats into its own “closed epistemic resources”, thereby shattering the “knowledge parity” required for any legitimate encounter between strangers. This institutional deafness is therefore not a moral lapse but the logical outcome of a legal centralism that, as Jorge Fabra-Zamora (2022) notes, must categorize all non-state normativity as “deviant, defective, or pathological”. It is, in Sara Araújo’s (2025) sharp formulation, a “Eurocentric instrument that limits political imagination”.

Having established the necessity for a jurisprudence of the wound, this section deconstructs the architecture of this jurisprudence of foreclosure. It will first diagnose how the seemingly benign jurisprudence of management, the dominant mode of legal pluralism, functions as the operational front for a deeper relational hegemony. It will then excavate the two mutually reinforcing colonial logics that power this system: the spatial logic of “abyssal thinking” and the historical logic of the temporal cage. By exposing these foundational flaws, this section will establish the intellectual necessity for the radical, spatial–ethical reorientation that RLP proposes.

### The mechanics of relational hegemony: from psychoanalysis to authoritarian populism

Relational hegemony is the capacity to limit the horizon of political imagination by presenting a false choice between its brutal zero-sum pole and its managerial win–win pole. While indebted to Antonio Gramsci’s foundational insight that hegemony is a relational process (1971), the concept of relational hegemony developed here is distinct (see also

Emirbayer 1997; Emirbayer & Mische 1998; Azmanova 2018, 2020).<sup>3</sup> It departs from a primarily class-based analysis to foreground its spatial and psychoanalytic dimensions, focusing on how power operates by structuring the very conditions of encounter and managing the affective consequences of a foundational, spatial wound.

Relational hegemony functions, in the tradition of Gramsci (1971), by making a particular worldview seem like universal “common sense”. It is not a static ideology but a dynamic “war of position” that, as Laclau and Mouffe (1985) argue, articulates disparate social elements into a coherent discourse around a powerful “nodal point”.<sup>4</sup> This process creates a toxic societal and natural environment (*fūdō*), a pervasive juridical atmosphere that structures the very conditions of encounter by presenting a false choice. On one hand, it fosters the overt, zero-sum logic required for authoritarian populism. On the other, it champions a seemingly benevolent, liberal positive-sum ideology which pathologizes deep-seated conflict as a mere “cognitive error”, a psychological barrier to an otherwise self-regulating system.<sup>5</sup> Relational hegemony thus thrives by ensuring the only imaginable alternative to its brutal zero-sum manifestations is its own deceptive, managerial win-win narrative.

From a psychoanalytic perspective, this entire hegemonic order functions as a vast discursive apparatus for repressing what it cannot contain. The scream from the wound, the raw experience of spatial abandonment produced by this system’s foundational violence, is what psychoanalytic geography, following Jacques Lacan (1998 [1973]), would term the “return of the Real”: the eruption of the systemic contradictions that the dominant order must disavow to maintain its coherence (de Vries & Kapoor 2025). This resonates with Ashis Nandy’s (1983) diagnosis of colonialism as a form of “relational trauma”, creating an “intimate enemy” within the consciousness of both colonizer and colonized. The wound, in

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<sup>3</sup> I am indebted to Dr Raghavi Viswanath, postdoctoral researcher of the SOAS School of Law, for introducing me to this stimulating and productive term.

<sup>4</sup> While this article is indebted to Laclau and Mouffe’s theory of hegemonic articulation (1985), it also offers a critical corrective. Mouffe’s agonistic model, while a vital critique of deliberative democracy, has been criticized for its own “institutional deficit” (Schaap 2009), remaining trapped in an abstract, ontological excavation (Barnett 2017). A more profound critique is that her agonism, by focusing on passions within existing frameworks, risks confining the political subject within the very hegemonic discourse it claims to challenge. RLP addresses this impasse directly. By making a foundational “spatial turn”, it grounds the political not in an abstract ontological antagonism, but in the material, lived experience of the spatial wound. Its methodology of “relational repair” is offered as the concrete, institutional practice that can move beyond critique and translate the passions of the wound into a transformative politics.

<sup>5</sup> For a good example of this “if we could only nudge them in the right way” approach to the political, see Fearon & Ors (2021).

this sense, is not just a historical event but an ongoing psychological reality that the hegemonic order must constantly manage and suppress.

The primary technique for managing this eruption is the hijacked grievance, a key technology of what Stuart Hall (1985) identified as “authoritarian populism”. It operates by activating the zero-sum pole of the hegemonic discourse, co-opting a real or perceived national wound into a narrative that legitimizes state violence against a designated “Other”. This is visible in the “fantasy of conservation” in the Colombian Pacific (de Vries & Kapoor 2025); in the manufactured crisis at the European Union (EU)–Belarusian border, where the state’s narrative of being “instrumentalized” serves to justify its own “lawlessness law” (Ganty & Kochenov 2024); and in the Bhima Koregaon case in India, where the language of a national wound is co-opted by a hegemonic state to enact, rather than repair, harm (Shah 2024). In each case, the state positions itself as the victim, channelling the affective energy of the wound away from the structural violence it perpetuates and toward a demonized, external enemy.

## The jurisprudence of management as a hegemonic technology

This is the operational front of the relational hegemony defined above, where the state’s procedural rules become deliberately opaque. The institutionalized form of legal pluralism, whose initial critical promise as a counterpoint to state-centric positivism has been not merely frustrated but actively repurposed, serves as the primary instrument for this project.<sup>6</sup> Its dominant institutional form, built on the mechanism of state “recognition”, has become the very technology for the hegemonic project it once promised to challenge.<sup>7</sup> This has resulted in what Gad Barzilai

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<sup>6</sup> The critique that follows uses the dominant, institutionalized form of legal pluralism, with its reliance on state-based “recognition”, as a primary symptom of the deeper jurisprudential pathology this article seeks to diagnose: a profound spatial blindness that perpetuates colonial logics. The aim is not to dismiss legal pluralism, but to recall it to its original critical promise through the alternative framework of RLP.

<sup>7</sup> It is important to distinguish the RLP advanced here from Ralf Michaels’s (2017) framework of the same name. While Michaels’s framework represents a significant advance, its focus remains on the formal interaction between pre-existing legal systems. As such, it remains captured within the broader “politics of recognition” critiqued here as a hegemonic technology. The RLP developed in this article begins not with observing the relations between orders, but with the pre-ontological, juris-generative wound itself; it is not a tool for managing pluralism, but a methodology for politicizing the harm that the managerial system produces and renders invisible.

(2008: 389) correctly identifies as legal pluralism's transformation into a mere discourse of management, re-inscribed within the logic of the state.<sup>8</sup>

This is not a degeneration but a successful political manoeuvre. A jurisprudence of management is, by design, tasked with maintaining the stability of the existing system; its purpose is to process, categorize, and neutralize claims that might disrupt the institutional grammar. Such a framework is structurally incapable of asking the dangerous, jurisprudential questions that emanate from the wound. It is a methodology that actively forecloses the possibility of a transformative politics by reducing the horizon of justice to that which is procedurally manageable. Its lack of ambition is the core feature of its hegemonic function. This is enabled by what Margaret Davies (2017) terms “methodological statism”: a conceptual inability to imagine law outside the immense gravitational pull of the state, which inevitably recentres its sovereign power to confer legitimacy. Because of this, mainstream jurisprudence remains, as William Twining (2009: 21) concedes, “largely confined to state law viewed from what is essentially a Western perspective”, becoming a closed loop where, as Joseph Raz (2004: 331) revealingly admits, “what we study when we study the nature of law is the nature of our own self-understanding”.<sup>9</sup>

The primary tool for this managerial domestication of difference is the politics of recognition. Its metaphors of “dialogue” and “accommodation” obscure the profound power asymmetries that structure the encounter, requiring the perilous translation of other normative orders into the dominant legal grammar, a process that continues the classificatory practices of the colonial archive.<sup>10</sup> This “hegemony of words in the normative field” (Bojanić & Ors 2019: 14) creates a “theoretical cage”, blinding jurisprudence to other registers of harm because, as Luca Siliquini-Cinelli (2020: 3) argues, even the most sophisticated juridical logics “cannot act as a gateway to legal plurality's facticity”. Instead of

<sup>8</sup> César Bazán's (2024) decolonial perspective argues that the modern “rule of law” is itself a colonial technology that functions by invalidating non-state legal knowledge, countered by the decolonial project from the Global South of constitutionalizing legal pluralism.

<sup>9</sup> RLP's critique of legal formalism is indebted to the deconstructive impulse of critical legal studies and its successors (Kennedy 1987; Koskenniemi 2005). While drawing from this rich genealogy, including contemporary dialogues in TWAIL (Third World approaches to international law) and feminist jurisprudence (eg Anghie 2005; Tzouvala 2020), RLP's unique contribution is grounding these diverse critiques in a coherent spatial-ethical framework and proposing a constructive methodology of “relational repair.”

<sup>10</sup> While thinkers like Fraser (2003) and Young (2006; 2011) rightly defend claims for recognition as essential for achieving “participatory parity”, RLP argues that the dominant, institutionalized practice of recognition is both procedurally incapable of creating a peer-to-peer encounter and politically vulnerable to being “hijacked”. More fundamentally, RLP shifts the jurisprudential starting point: the primary juridical fact is not a claim for status (recognition) or resources (redistribution), but the pre-political wound in the relational fabric (*aidagara*).

challenging the underlying structures of injustice, this model defaults to what Iris Marion Young (2011) terms the “liability model”, a reductive focus on isolating perpetrators for a discrete past wrong that is fundamentally inadequate for addressing institutionalized subordination. Consequently, any recognition offered without a prior commitment to establishing “participatory parity” becomes, as Barzilai (2008: 416) warns, a “political tactic to disempower”. In its most pathological form, this dynamic is weaponized, where the entire discourse of a national grievance is “hijacked by authoritarian/fascist forces” to justify the violent silencing of minorities under the guise of repair (Shah 2024: 553). These managerial technologies are not placeless; they are the administrative tools for policing a deeply divided colonial space.<sup>11</sup>

## Abyssal thinking as the operating logic of hegemonic law

The managerial practices of recognition mask a deeper and more foundational violence. They are the primary technology for policing what Boaventura de Sousa Santos (2014) terms the “abyssal line”, an invisible demarcation that divides social reality into two irreconcilable realms. On one side lies the metropolitan zone of humanity, regulated by the logics of law and emancipation. On the other lies the colonial zone of appropriation and violence, inhabited by beings designated as sub-human. The core function of abyssal thinking is not merely to devalue the colonial zone, but to render its inhabitants and their knowledge systems non-existent to the metropolitan gaze, perpetuating what Santos (2004) calls a “sociology of absences”. This line is not just a geographical boundary; it is a psychic one, creating what Nandy (1983) identifies as the “intimate enemy”; an

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<sup>11</sup> This article argues that the logic of colonialism is not confined to an “outside” space but has always involved a simultaneous project of internal colonization within the metropole. The EU serves as a primary case study. While founded on a narrative of post-war peace, the EU’s legal DNA was imprinted with a colonial logic from its inception. Forensic archival analysis of the 1957 Treaty of Rome by Eklund (2023) reveals how its drafters deliberately constructed a legal architecture to police a divided colonial space. This was achieved through specific managerial technologies: the “association” regime for overseas territories legitimized their economic exploitation while abandoning them politically; the distinction between the “peoples of Europe” and colonial “inhabitants” was a conscious legal manoeuvre to strip the latter of political agency and the right to self-determination; and the creation of two classes of “workers” ensured that freedom of movement was a European privilege, not a universal right. This historical evidence demonstrates that the EU’s current border regime is not a recent aberration but a “reiteration of a legal framework already ingrained in the Treaty of Rome” (Eklund 2023). This analysis proceeds from a nuanced decolonial approach that, while decentring the West, avoids creating a simplistic binary between a monolithic colonizer and a homogenized “Other”. It recognizes the complex interdependencies and internal diversity on both sides of the line, aligning with scholarship that explores the co-construction of race and empire within the metropole (Groot 2000) and the colonial inspirations for Western democratic theory itself (Lederman 2022).

internalized colonial consciousness that deforms the self-understanding of both colonizer and colonized.

Procedurally, this abyssal line is the institutionalization of a total failure of knowledge parity, where the metropolitan side operates on the unquestioned assumption of its own legal universality.<sup>12</sup> Seen in this light, the politics of recognition is revealed as a colonial technology. The demand that the wound justify its existence in the juridical grammar of its creator is a pernicious demand that the colonial side of the line present itself in the language of the metropole, an act of translation that reinforces the false universality of that grammar. This is the central insight of the decolonial critique, which argues that the end of formal colonial administration did not mean the end of colonialism. Rather, power persists through what Aníbal Quijano (2007) terms the “coloniality of power”: a model of global power founded on the invention of “race” as a criterion for a “systematic racial division of labor” that endures to this day.

The decolonial critique, therefore, offers a necessary response, calling for the enunciation of injustices from these “other spaces” to “delink” from the Eurocentric grammar of modernity (Dussel 1985; Mignolo 2011). This project of building a “*paradigma otro*” (other paradigm) from the borderlands (Anzaldúa 1987) finds concrete expression in contemporary movements building legal orders “without and against the state” (Constantinou & Ors 2025). The Kurdish movement’s “Democratic Confederalism”, for example, is a living non-state legal order that views the nation-state itself as a primary vehicle of colonization (Dirik in Constantinou & Ors 2025). Similarly, the “Salween Peace Park” of the Karen people is a tangible act of “decolonial worldmaking” (Loong in Constantinou & Ors 2025).

While RLP is profoundly inspired by these living examples of border-thinking, its commitment to a politics of relation requires a critical engagement with the limitations of any project that risks creating a rigid binary between a monolithic “West” and a homogenized “Other” (Groot 2000; Pappas 2017).<sup>13</sup> As Alpa Shah’s work (2024) demonstrates, colonial dynamics are often reproduced within the colonized space, creating a fractured landscape of “internal colonialism”.<sup>14</sup> The logic of the abyssal line

<sup>12</sup> Krentos (2026). Colonial governance is, by its nature, a system that cannot treat its subjects as epistemic strangers with whom it shares knowledge parity. Its authority rests on a foundational epistemic hierarchy incompatible with the rule of law.

<sup>13</sup> While Santos’s concept of abyssal thinking provides an indispensable diagnostic tool, his framework’s reliance on a binarized opposition can risk creating a new totality, a form of closure that RLP’s own epistemic principle of *kū* (emptiness) must resist.

<sup>14</sup> Shah (2024) notes that “the distinction between the colonized and colonizer is not Black and White ... The colonized are themselves divided and include those who subordinated their own people (upper castes colonizing Dalits)”.

is a mobile political technology, actively redeployed by postcolonial states against their own marginalized populations (Regassa in Constantinou & Ors 2025). A jurisprudence of the wound must therefore be an intersectional jurisprudence. The “wounded subject” is not a singular category; the experience of harm is always inflected by interlocking systems of domination, including internal, patriarchal forms that a male-centric decolonial politics might overlook (Kuokkanen in Constantinou & Ors 2025). Furthermore, the act of “decolonial refusal” itself is not a pure or romantic category. The case of Paraisópolis in Brazil, where the refusal of an antagonistic state leads to an embrace of neoliberal logic, is a critical check on any such romanticism, demonstrating that the alternative to the colonial state can be a horizontal shift into another global hegemonic system (Amaral & Ors 2025). This forces RLP to remain critically vigilant, diagnosing not only the pathologies of the state but also the potential for hegemonic capture in the very alternatives that emerge in its wake.

## The temporal cage as the historical justification for hegemony

The spatial violence of the abyssal line requires a temporal justification. This is the function of the “temporal cage”: the inherited philosophical architecture of Western jurisprudence that provides the foundational logic for relational foreclosure. Conventional legal theory, following a long tradition from Martin Heidegger to Hans Lindahl, presupposes the conceptual priority of temporality over space.<sup>15</sup> This temporal bias is not an abstract preference but a direct barrier to ethical responsiveness. As Dipesh Chakrabarty (2000) argues, the “historicism” of modernity advanced a unilinear conception of time in which European modernity was the vanguard, perpetually placing non-Western peoples “behind”. This “first in Europe, then everywhere else” frame performs what Johannes Fabian (1983) described as the “denial of coevalness”, an act of temporal distancing that justifies colonial domination by placing its subjects in a different, lesser time.

This is a hegemonic act of repression. The temporal cage functions to relegate the violence of the abyssal line to a “political unconscious”

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<sup>15</sup> Hans Lindahl’s (2013; 2018; 2024) important theory of a-legality, for instance, remains fundamentally captured by the temporal-ontological project: it begins with the emergence of a legal collective (“We\*”) and theorizes disruption as an abstract a-legal act. What remains critically underdeveloped is the spatial and ethical register of the rupture itself. RLP takes Lindahl’s powerful concept of the “fault line” seriously but reframes it through the spatial-ethical grammar of *fūdō* and *aidagara*, reconceiving it not as a temporal event that destabilizes an ontology, but as a spatial wound that demands an ethical response.

(Jameson 1981), a past that is officially over. The “scream from the wound”, therefore, is not just a legal claim but a temporal rupture. It is what psychoanalytic geography would term the “return of the Real” (de Vries & Kapoor 2025): the violent eruption of the repressed colonial present into the sterile, linear timeline of the state. This temporal power operates by violently managing what Natasha Wheatley (2017) terms “temporal pluralism”. The state’s law, functioning in a singular “present tense”, must confront other legal orders, such as antecedent indigenous rights, that exist on different temporal axes. This triggers a “rights vitalism”, a perverse legal debate over whether these historical rights are still “living” or have been “extinguished”, forcing marginalized groups into an impossible performance where their legal orders must be both ancient and continuous, effectively “frozen” in time to be legally legible.<sup>16</sup> The goal is to produce a subject who has “unlearned how to relate”, lacking the “receptivity” required to encounter the Other in a shared present (Sachsenmaier 2024: 10, 20). This affective deficit is the psychological condition required for hegemony to function.

This temporal logic thus traps jurisprudence in a primarily ontological project: its first task becomes defining the temporal emergence of the legal order before any substantive ethical questions can be asked. Even sophisticated relational theories like that of George Letsas (2024) remain captured by this sequence, assuming a “distinctively legal domain” before addressing pre-legal social harm.<sup>17</sup> For such theories, ethics necessarily remains a secondary concern, a problem addressed only after the hegemonic foreclosure of time is complete. In direct contrast, decolonial projects of “stateless liberation” like the Kurdish movement’s Democratic Confederalism or the “decolonial worldmaking” of the Salween Peace Park are radical temporal projects. They are attempts to construct new legal orders that insist on living now, in a different present, outside the temporal cage of the nation-state (Constantinou & Ors 2025). They represent a refusal to wait for recognition from a legal order that has already denied their coevalness, choosing instead to enact a sovereign present on their own terms.

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<sup>16</sup> Wheatley’s (2017) analysis of how settler-colonial courts adjudicate the “vitality” of Indigenous rights is a key example of this temporal power in action.

<sup>17</sup> Letsas’s (2024) framework necessarily reasserts the primacy of juridical ordering, locating structural harm not within the diffuse, pre-legal social relations from which it often emerges, but within a domain already bounded and defined by law.

## [C] RE-FINDING LAW IN SPACE AND RELATION

The preceding analysis deconstructed the architecture of a jurisprudence of foreclosure, revealing it not as a mere theoretical error, but as the primary instrument of a deeper relational hegemony. We have shown this hegemony to be a coherent political project, functioning by controlling the very conditions of co-presence through a specific suite of technologies: the temporal cage that enacts a denial of coevalness; the abyssal line that produces “toxic atmospheres” of structural neglect; a managerial jurisprudence that renders its own procedures opaque while neutralizing dissent; and a weaponized politics of the hijacked grievance that saturates the relational field with zero-sum logic. To unmask this compromised order, so profoundly implicated in the very harms it purports to address, is to confirm that a mere critique is rendered insufficient. The diagnosis itself forces the demand for a radical alternative.<sup>18</sup>

What is thus required is a fundamental reconstruction of law’s philosophical foundation—a critical project that redefines “legality” not as a property of formal, state-conferred rules, but as an ethical-spatial condition of relational integrity. Legality, we argue, finds its genesis in the pre-legal accusative demand that erupts from the wound. This defiant rupture is a juris-generative act, transforming the passive victim into an enactive political agent by refusing to plead its case in the sterile grammar of the powerful. This is the “fuck you moment”: the raw, pre-legal refusal that is not a request for inclusion but a fundamental challenge to the legitimacy of the established order.<sup>19</sup>

This section, therefore, begins that constructive project. It introduces the core philosophical architecture of RLP by forging a critical dialogue

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<sup>18</sup> The imperative of “co-presence” (Araújo 2024) provides critical validation for RLP’s core thesis. Co-presence demands the “abandonment of the linear conception of time”, mirroring RLP’s critique of the temporal cage, and mandates that legal diversity be accepted through reciprocal transformation. Araújo’s critique of legal centralism as a “Eurocentric instrument that limits political imagination” and his exposure of the “failed promises of recognition without co-presence” diagnoses a political problem for which RLP provides the architectural solution. The relational fabric (*fūdō/aidagara*) defines the object of repair, while the jurisprudence of strangerdom (Reason Test) provides the procedural rigor required to regulate the encounter and achieve that reciprocal transformation. This is the method for enacting the political possibilities that Araújo’s critique opens up.

<sup>19</sup> It is not a request for inclusion but a fundamental challenge to the legitimacy of the established order, the juris-generative act that transforms the passive victim into an enactive political agent. The pathway from this accusative demand to relational repair is one of political contestation. It begins when the raw “accusative demand” from the wound creates a “rupture”, an act of “epistemic disobedience” (Mignolo 2011) that rejects the legitimacy of established processes. The strategic aim is to make the cost of ignoring the wound politically untenable, thereby forcing an opening where the demanding work of relational repair can begin.

between decolonial theory and the Japanese philosophy of Watsuji Tetsurō, systematically developing his conceptual triad, *fūdō* (juridical atmosphere), *aidagara* (relational betweenness), and *kū* (emptiness), into sharp, politically and procedurally aware tools for legal analysis.<sup>20</sup> This reconstruction will proceed by following Watsuji’s triadic grammar, repurposed here as a critical tool. We will first argue that legality is primordially grasped through *aidagara*, where its healthy state is the integrity of the relational fabric and its rupture is a tangible wound. Second, we will show how law is always conditioned by *fūdō*, insisting that it is never placeless but is an atmospheric quality that can either nurture or poison relations. Third, we will introduce *kū* as a principle of radical contingency, positing legality not as a fixed state, but as a dynamic, unending process of mending relational bonds. Crucially, this deep relationality is not a sentimental communitarianism; as we will demonstrate, it finds its necessary procedural form in a jurisprudence of “strangerdom” (Krentos 2026), which provides the respectful epistemic distance required for a non-coercive mending of these bonds to be possible.<sup>21</sup>

## Watsuji’s core intervention: prioritizing ethics over ontology

Watsuji’s decisive philosophical intervention directly contests the ontological primacy of temporality and individualism that has long subjugated Western thought, particularly evident in the foundational work of his contemporary, Heidegger. Heidegger’s *Being and Time* (1927) famously posited temporality as the possible horizon for all understanding of being; this powerful analytic, however, came at the catastrophic cost of foreclosing explicit ethical inquiry. As a generation of critics from Emmanuel Levinas (1969) to Iris Murdoch (1970) have charged, this

<sup>20</sup> The deployment of Watsuji Tetsurō throughout this article is a deliberate critical appropriation, undertaken with full awareness of its theoretical risks. The framework fully acknowledges the extensive critiques of Watsuji’s involvement in providing philosophical support for Japanese nationalism, with its emphasis on cultural particularity and the subsuming of the individual. However, this article’s central methodological argument, that *separates philosophical content from political use*, is that Watsuji’s own philosophical grammar contains the very tools needed for its decolonial repurposing. It proceeds by deploying his concept of *kū* (emptiness), understood here not as an ontological ground but as an epistemic principle of reflexive negation, to function as a “philosophical solvent”. This move is designed to separate his profound insights into spatial and relational ethics (*fūdō* and *aidagara*) from their essentialist historical applications, with the aim of yielding a universally applicable relational ethic for a post-Western critique of coloniality—inside and outside. For foundational work on this method, see Murphy (2021, especially chapters 3 and 4); for other engagements with Watsuji in a global context, see Sevilla (2015, 2017).

<sup>21</sup> This synthesis resolves an apparent tension between Watsuji’s *aidagara* (profound connection) and Krentos’s (2026) strangerdom (epistemic separation), arguing that true relational repair requires building an “architecture of intelligibility” across the stranger-to-stranger gap, not erasing it.

intense focus on the self's solitary being-toward-death—the structural consequence of a temporal–ontological bias—eclipsed the primary ethical demand issued by the face of the Other. The result is the creation of a goal-oriented “self-subject”, a figure of subjective self-mastery that is preoccupied with its own projects and has effectively “unlearned how to relate”, rendering it incapable of the “receptivity” necessary for genuine ethical encounters.<sup>22</sup>

Levinas, of course, charged that this very privileging of ontology was the signature error of the entire Western philosophical tradition, demanding a correction that made the ethical relation “first philosophy”. Watsuji ([1935] 1961) mounted a similar critique, though from a spatially grounded direction: he argued that Heidegger's near-exclusive focus on time and individual subjective experience constructed a flawed and culturally ethnocentric ethical system. To counter this structural deficit, Watsuji introduced spatiality as a co-equal, if not conceptually primary, dimension of human existence. By grounding our being in the shared, concrete space of co-presence, moving beyond the constraints of the temporal self, Watsuji was able to posit the conceptual priority of ethics over ontology.<sup>23</sup>

The critical appropriation of Watsuji's system permits a crucial inversion of the traditional Western jurisprudential sequence, which typically begins with ontology, defining the being of the legal subject, the state, or the rule. Instead, RLP asserts the ethical encounter in the “betweenness” (*aidagara*) of social life as the primary reality from which all other concepts, including subjectivity and law itself, must emerge. This philosophical inversion finds its necessary procedural analogue in a jurisprudence of strangerdom, which grounds legality not in an ontological definition of law, but in a set of *a priori* ethical-procedural “terms of participation” that must govern the relations between subjects

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<sup>22</sup> Stefanie Gabriele Sachsenmaier (2024) uses François Jullien's critique of the “self-subject” to argue for “receptivity” as an ethical posture that moves beyond the projecting, goal-oriented subject of Western thought. Jullien points to receptivity as an underdeveloped concept in European thought and explores its potential to challenge established values centring on what he terms the “self-subject”. This underdeveloped concept is the direct and necessary consequence of a Western philosophical tradition that begins with an active, world-mastering subject: see Jullien (2020).

<sup>23</sup> Watsuji's contribution here is radical, moving toward the proposition that we share consciousness through the relational structures of *fūdō* and *aidagara*. As Joel Krueger argues, this extends beyond mere phenomenological description to challenge the internalist assumptions prevalent in dominant paradigms. Watsuji's alternative model of “subjective extendedness” thus holds significant potential for enriching our understanding of social cognition and its implications for democratic practices (Krueger 2013, 2014, 2018; see also Johnson 2019).

before the law speaks (Krentos 2026). This singular spatial–ethical inversion provides the key to the entire RLP framework.<sup>24</sup>

### *Fūdō* and the juridical atmosphere

The first conceptual pillar of RLP’s reconstruction, *fūdō*, denotes the irreducible socio–environmental entanglement, what is termed here the “juridical atmosphere”, that constitutes both subjectivity and legality. A critical deployment of *fūdō* directly confronts the inherent “placelessness” of Western legal theory by insisting on a foundational truth: law is always embodied and spatially situated. A border camp or a neglected housing estate is not a neutral coordinate on a map; it is an a-legal *fūdō*, its atmosphere saturated with colonial legacies and charged with the affective experience of abandonment.

This spatial analysis provides a thicker account than the valuable but more formalist work of thinkers such as Lindahl on legal boundaries. While Lindahl (2013) valuably theorizes spatiality via the logic of legal boundaries, the “distinction between a familiar distribution of places, an inside, and a strange place, an outside”, RLP’s concept of *fūdō* aims for a more atmospheric analysis of the *quality of life* within and between these bounded zones. In this sense, the concept of a toxic *fūdō* is the lived, affective reality of the abyssal line,<sup>25</sup> translating its abstract philosophical division into a concrete atmosphere of exclusion and non-existence. It resonates instead with critical geographers such as Doreen Massey, who frames space as the very dimension of ethics, posing the fundamental question: “how are we going to live together?”<sup>26</sup> Infused with a decolonial critique, this project’s use of *fūdō* thus grounds Walter Mignolo’s “loci of enunciation”<sup>27</sup> not in an abstract identity but in a concrete, material, and affective milieu.

<sup>24</sup> Krentos’s (2026) “Reason Test” can be seen as a set of *a priori* ethical commitments that structure the relationship between strangers, making his framework an example of an “ethics-first” proceduralism.

<sup>25</sup> See “Abyssal thinking as the operating logic of hegemonic law” above.

<sup>26</sup> This “spatial turn” resonates deeply with a parallel movement in Western critical thought. Henri Lefebvre (1991) insisted that space is actively and socially produced. More pointedly, Massey (2005: 195) frames space as the very dimension of ethics, presenting us with “the radical contemporaneity of an ongoing multiplicity of others ... and the ongoing and ever-specific project of the practices through which that sociability is to be configured”.

<sup>27</sup> See Mignolo (2000), especially the introduction and chapter 1, where he insists that “every thinking subject is located in geopolitics of knowledge”, and critiques the myth of universality (Mignolo 2002), in which he explicitly contrasts “zero-point epistemology” with locus of enunciation.

RLP's critical appropriation requires expanding *fūdō* beyond a descriptive concept of milieu into a diagnostic tool that is political, affective, and procedural. Politically, it is a dynamic field that is actively produced and contested, operating as a toxic *fūdō* of nativist grievance deliberately manufactured by hegemonic forces to "hijack" public discourse and legitimize violence. Affectively, it shapes our relational capacity, fostering a neoliberal *fūdō* of "separability" where we have "unlearned how to relate", or conversely, serving as a deliberately cultivated reparative *fūdō*—a "rehearsal space" where the ethical preconditions for justice are fostered. Procedurally, it structures intelligibility: a just legal order strives to create an intelligible *fūdō*, an "architecture of intelligibility" where shareable, non-arbitrary reasons can circulate among epistemic strangers, as opposed to a *fūdō* of opacity built on "closed epistemic resources".<sup>28</sup>

### *Aidagara* and the relational subject

While *fūdō* establishes the necessary spatial context, *aidagara* articulates the ethical structure of existence within it. The Japanese term for human, *ningen*, combines characters for "person" and "interval", signalling a profound truth: to be human is to exist in the *aidagara*, the relational "betweenness" that constitutes us. This concept directly challenges the foundational Western philosophical fiction of the autonomous, pre-social individual. Within this framework, law emerges not from an abstract subject but from the concrete reality of embodied co-presence. The primary juridical question is, therefore, displaced from "What is the rule?" to "Where is the wound?", law in the accusative: a diagnostic question that identifies a rupture in the very fabric of *aidagara*.

Yet this relational ontology must itself be deepened through a decolonial feminist critique. Thinkers like María Lugones and Sylvia Wynter reveal how the capacity for relation is systematically fractured by the "coloniality of gender" and the violent construction of Western "Man" against its racialized Others.<sup>29</sup> The "wound", in this thicker analysis, is therefore not merely an interpersonal rupture but a tear in the fabric of being itself. Consequently, the project of relational repair becomes, by necessity, a decolonial struggle to reconstruct the very meaning of the human.

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<sup>28</sup> Krentos (2025) reframes the rule of law as an "architecture of intelligibility" built on "shareable expectations, between epistemic strangers", which in RLP's terms is a specific type of procedurally healthy juridical atmosphere.

<sup>29</sup> See Lugones (2008 and 2010) on the coloniality of gender, and Wynter 2003 on the post-humanist challenge to the concept of "Man".

A critical engagement with contemporary political struggles requires that we expand this concept of *aidagara* even further. It is not a neutral fabric that is simply “ruptured” by injustice, but a dynamic and contested field always-already saturated with historical power asymmetries. We must, therefore, redefine *aidagara* as a fiercely contested political arena, a relational field that can be internally fractured and stratified, which explains the complex dynamics of relational hegemonies where “the wounded can also wound”. In its most pathological form, the *aidagara* can be hijacked by hegemonic forces seeking to violently redefine the very terms of co-presence (see Shah 2024). The health of this fabric depends not only on political justice but on its procedural and affective qualities. It is healthy when it functions as an intelligible space for epistemic strangers and pathological when its communicative channels collapse into opacity. It thrives when its participants cultivate the “receptive” capacity to attune to one another and withers when they have “unlearned how to relate”.<sup>30</sup>

### *Kū* and the rejection of closure

The epistemic foundation for this entire framework is *kū*, or emptiness, fundamentally reframed here as a principle of reflexive negation. Derived from Nāgārjuna’s philosophy of radical interdependence, *kū* is the core insight that all phenomena are contingent and lack any independent, intrinsic nature (Garfield & Priest 2002). This immediately translates into its function as a “philosophical solvent”, which deconstructs the claims of universal and immutable legal norms that sustain Western jurisprudence. By exposing how these traditions reify their systems, *kū* radically challenges ontological closure and allows us to grasp the fluid, relational dimensions of social life.

This principle is the ultimate critical safeguard against the project hardening into another static system. Functioning as a logical stance concerned with questioning the legitimacy of all ontological status (Ganeri

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<sup>30</sup> This erosion of ethical capacity is the psycho-affective core of relational hegemony. The hegemony works by structurally producing the “self-subject”, the goal-oriented, world-mastering individual criticized by Jullien (2020), who, having “unlearned how to relate” (Sachsenmaier 2024), lacks the fundamental “receptivity” to the Other. This affective deficit is what directly enables relational hegemony’s managerial “positive-sum” pole, which pathologizes deep-seated conflict as a mere “cognitive error” (Fearon & Ors 2021). By accepting this managerial illusion that all social problems are merely psychological or informational barriers, the subject remains existentially blind to the dire social, political, and environmental consequences of late modern capitalism. This deficit is essential for maintaining the denial of coevalness and preventing the system from responding to relational trauma (Nandy 1983). The pathology of *aidagara* is thus rooted in the Western subject’s philosophical and affective incapacity for genuine encounter.

2019),<sup>31</sup> *kū* is the philosophical response to the entire architecture of foreclosure established above.<sup>32</sup> It fundamentally negates the rigid, spatial essentialism of the abyssal line and dissolves the unilinear, fixed history of the temporal cage.<sup>33</sup> This prevents the major political error of inverting the colonial binary. Where a politics of identity can replace a Eurocentric universal with a new essentialism, a jurisprudence founded on emptiness renders such a move impossible, ensuring the framework remains perpetually one of relation over identity (Murphy 2021).

This principle of reflexive negation animates the dialogical movement of the law in the accusative, a process of relational transformation that stands in stark contrast to the synthetic drive of a classic dialectic. The process begins with the accusative rupture, the juris-generative moment when the scream from the wound punctures the toxic *fūdō* (milieu). Faced with a demand it cannot easily dismiss, the institution is forced into crisis where *kū* acts as the solvent, dissolving the claims to neutrality and emptying out the fictions that sustain the jurisprudence of management. This compelled epistemic humility is the necessary precondition for the final aim: not a Hegelian “synthesis”, but a difficult, forward-looking political renegotiation to transform the *aidagara* (betweenness) from domination to mutual responsibility.

This philosophical principle has concrete procedural and political analogues that give it practical force. Procedurally, *kū* finds its direct counterpart in the principle that strangerdom must have “a-priority” over any other role or identity, acting as a procedural solvent to dissolve claims

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<sup>31</sup> In *Epistemic Pluralism: From Systems to Stances* (2019), Jonardon Ganeri develops a model of “stance pluralism” grounded in Jaina philosophy, arguing that inquiry proceeds through multiple, partial, and non-dogmatic epistemic stances rather than through competing, closed systems of belief. Each stance offers a valid but incomplete grasp of a multi aspectual reality. In Murphy (2021), I advance a related claim through the Buddhist concept of emptiness (*kū*), arguing that legal and political concepts lack inherent essence and therefore must be approached as context dependent, relational, and open-ended. Both approaches reject monistic epistemic authority, though my argument emphasizes the ontological incompleteness of concepts rather than the methodological plurality of stances.

<sup>32</sup> See “Law’s own crisis” above.

<sup>33</sup> It is important to stress the point that emptiness is not nihilism; it is the epistemic principle that dissolves ontological closure, thereby enabling the continuous reflexive negotiation of the relational fabric. It does not dissolve duties but re-grounds them, shifting their foundation from a fixed, essentialist identity to the procedural ethics of the present encounter (*aidagara*). The result is a non-arbitrary duty enforced by the Reason Test: a duty that remains intelligible because it is justified by shareable, public reasons. This ensures that the duties articulated from the wound, such as the “role-status of the wounded” (Letsas 2024), are rendered both enforceable and non-arbitrary, precisely because of, not in spite of, the ultimate contingency of all social facts.

to epistemic privilege based on status.<sup>34</sup> Politically, *kū* provides a direct antidote to the danger of the hijacked grievance. While an authoritarian force like the Hindu Right presents its wounded national identity as an absolute and sacred truth, a jurisprudence founded on *kū* rejects all such essentialist claims to closure, exposing them as dangerous political constructions.<sup>35</sup>

## Reimagining law and the legal subject

Taken together, this triadic framework offers the potential for a profound reimagining of law. Rather than a system of rules imposed upon a society from above, law becomes a dynamic, living process emerging from the relational matrix of a community. It becomes the practice of negotiating the constant, irresolvable tension between individual creativity and the ethical demands of social life. Its logic is not the bivalent logic of legality/ illegality, but a multivalent, aesthetic rationality that can account for ambiguity, juridical silence, and unarticulated harm.

This, in turn, transforms our understanding of legal and political identity. The subject of RLP is not the passive, foreclosed entity produced by the hegemonic logics detailed above; rather, RLP posits an enactive agent whose legal subjectivity is forged in the dialectic of the accusative and the enactive. Agency, in this framework, is not a pre-given faculty but an achievement born of suffering. It begins in the accusative, in the visceral experience of being wounded, silenced, or abandoned, but it does not end there. The struggle to articulate this demand and achieve repair is an enactive process. This enactive capacity provides the necessary psychological and political antidote to the passive, traumatized subject of relational hegemony,<sup>36</sup> directly countering Nandy's "relational trauma" by asserting agency. This creative, enactive subjectivity requires an account of being human that rejects the closure of political identity, moving beyond a passive existence achieved through abstraction or essentialization. The embodied RLP agent is constantly and generatively theory-forming of their world, understood spatially, allowing for the articulation of rights not as

<sup>34</sup> This principle of strangerdom is a procedural solvent because it is a rule of encounter, an *a priori* commitment to knowledge parity, that must be established *before* the encounter can proceed. It denies the validity of any claim that rests on a privileged, non-negotiable status (eg "sovereign", "citizen", "expert"), thereby forcing the subject of law to appear as a stranger, subject to the same terms of intelligibility as any other.

<sup>35</sup> Shah (2024: 553) warns that the discourse of national grievance is often hijacked by authoritarian/fascist forces to justify the violent silencing of minorities. A jurisprudence founded on *kū* resists this political weaponization by refusing to confer ontological status or sacredness upon the wound, recognizing it instead as a political construction used to demand zero-sum closure.

<sup>36</sup> See the section on "The mechanics of relational hegemony" above.

entitlements, but as necessary points of critique.<sup>37</sup> In doing so, the subject constitutes themselves as a legal and political agent. This enactive agent is the ethical and embodied counterpart to the procedural “reader” of the law; an epistemic stranger who uses their “right to begin” a new chain of reasons to participate as a co-equal in a “reader economy” (Krentos 2026).<sup>38</sup> This is the foundation of enactive freedom: a freedom that is not granted by an external authority or possessed by an abstract individual prior to society, but is realized in and through the act of relating to others in a shared space. It is a freedom understood not as separation from others, but as the capacity to transform the very relations that constitute the self.

It is this interactional space between self and other that is the site of social, cultural, political, and legal creativity, but also of domination. This is where the article’s central aim, to offer an alternative meaning of a democratic rule of law culture, finds its theoretical footing. By re-founding law in the ethical demands of co-presence and defining freedom as a relational capacity, we can begin to imagine a democratic practice that is not about abstract procedures or the sterile management of competing interests, but about the ongoing, difficult, and creative work of mending our wounded relations. This is not a romantic ideal but the demanding political work of building solidarity across difference, a practice that requires the affective groundwork of receptivity and attunement while remaining vigilant against the risk of the relational space itself being “hijacked” by the forces of domination.<sup>39</sup>

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<sup>37</sup> The claim that RLP relies on “subjective, affective states” is addressed by making these concepts procedurally and epistemologically auditable. Receptivity is operationalized as the non-arbitrary standard of the Reason Test (Krentos 2026); an institutional lack of receptivity is diagnosed when its justification retreats into “closed epistemic resources”, which is a definitive procedural failure of the rule of law.

<sup>38</sup> RLP’s focus on the *aidagara* is deliberately mediated by the jurisprudence of strangerdom (Krentos 2026) to prevent coercive communitarianism. The a-priority of strangerdom serves as the liberal firewall: it mandates that the individual’s right to contribute legal meaning, the right to begin, must take precedence over any fixed institutional or communal identity. This ensures that the pursuit of relational health (*aidagara*) cannot be achieved by sacrificing the individual’s status as an autonomous, contributing agent, thereby integrating individual protection within the relational frame rather than dissolving it.

<sup>39</sup> This links the praxis of repair to its affective and political conditions. See Sachsenmaier (2024: 12), who, following Ahmed, notes that this form of “political solidarity” requires “commitment, and work”. See also Shah (2024), whose analysis serves as a caution that the relational space of repair is always a contested political arena vulnerable to capture.

## [D] METHODOLOGICAL FRAMEWORK: LAW IN THE ACCUSATIVE

Having established the theoretical foundations of RLP, this section translates its philosophical concepts into a robust and defensible methodological framework. It details the unique qualitative approach of law in the accusative, designed to diagnose injustice from the perspective of the wound. Deviating from methodologies focused on doctrinal analysis or conventional socio-legal approaches, RLP's method is inherently context-sensitive, critical, spatial, and ethically reflexive. While sharing the critical spirit of methods like standpoint theory, law in the accusative is distinct in its philosophical grounding. By integrating the concepts of *fūdō*, *aidagara*, and *kū*, it provides a unique analytical gestalt that allows us not only to hear the testimony of the wounded but to map the relational and spatial dynamics of the wound itself.

The core of this methodology is built upon interlocking principles that flow directly from the conceptual architecture of RLP, providing a practical research agenda for a jurisprudence of relational repair (see Table 1). The crucial procedural armature for this methodology is the Reason Test, a concrete method for assessing the intelligibility and legitimacy of an institutional response.<sup>40</sup> The triadic RLP framework operationalizes this test by translating each philosophical concept into a specific methodological practice that corresponds to a particular diagnostic pathology:

- ◇ “Contextual immersion” to map the *fūdō*: this practice diagnoses the toxic milieu of neglect or spatial exclusion and assesses whether it functions as an “architecture of intelligibility” or is structured by “closed epistemic resources”. Methodologically, this corresponds to the Reason Test’s requirement that institutional justifications avoid arbitrariness and remain existentially social, grounded in a shared reality.

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<sup>40</sup> Krentos’s “Reason Test”, with its three prongs—(1) avoid arbitrariness; (2) be existentially social; and (3) preserve the right to begin—provides the practical, procedural toolkit for RLP’s ethical demand to listen from the wound. In practice, and with an eye to future research and development, the view is that the Reason Test is operationalized through a set of critical diagnostics that assess the procedural health of the *aidagara*. For instance, the researcher interrogates whether an institution’s justifications terminate in an arbitrary “just because”, thereby exiting a relationship of reason altogether; whether its reasons are “existentially social” and grounded in a shared reality, or if they represent a retreat into the opacity of its own “closed epistemic resources”; and, crucially, whether the institutional response preserves or forecloses the wounded party’s right to begin, thereby recognizing them as a co-equal legal subject. This provides the concrete procedural armature for evaluating institutional conduct and diagnosing a definitive failure of the rule of law.

- ◇ “Relational mapping” to analyse the *aidagara*: this practice identifies ruptured relations and diagnoses failures of attunement or violations of the right to begin. Methodologically, this corresponds to the Reason Test’s crucial demand that the institutional response preserves the agent’s right to begin, thereby recognizing the wounded party as a co-equal legal subject.
- ◇ “Employing emptiness” to negate closure (*kū*): this practice uses the principle of *kū* as a critical solvent against the ontological closure and essentialism that fuel the political pathology of the hijacked grievance. Methodologically, this corresponds to the violation of the a-priority of strangerdom, which prevents any single, fixed identity from claiming absolute epistemic privilege.

This integrated approach provides the concrete diagnostics for evaluating institutional conduct and defining a definitive failure of the rule of law.

*Table 1: The conceptual architecture of RLP.*

Core concept—post-Western	Diagnostic Function (the problem)	Procedural analogue	Affective condition	Political pathology	Methodological principle
<i>Fūdō</i> (juridical atmosphere)	Toxic milieu of neglect (Grenfell), spatial exclusion (EU border)	Architecture of intelligibility versus closed epistemic resources	Ethos of separability versus cultivated rehearsal space	Production of a nativist <i>fūdō</i> of grievance	Contextual immersion
<i>Aidagara</i> (relational betweenness)	Ruptured relations (Grenfell), negation of status (migrant)	Failure of Reason Test, violation of “right to begin”	Lack of “attunement”	“Hijacked” <i>aidagara</i> ; weaponized relations	Relational mapping
<i>Kū</i> (emptiness/negation)	Ontological closure, essentialism	Violation of “a-priority of strangerdom”	Lack of “receptivity”	The “hijacked grievance” as an absolute truth	Employing emptiness

## Contextual immersion (*fūdō* analysis)

The methodology begins with a phenomenological engagement with the specific spatial, historical, and socio-environmental context (*fūdō*) under consideration. This first step is a direct application of the “spatial turn” to jurisprudence, requiring a sustained effort to understand the “juridical atmosphere” of a place. This means the researcher must diagnose the political, affective, and procedural quality of this atmosphere: is it a toxic *fūdō* of grievance, politically produced to legitimize harm; an affective environment defined by a neoliberal “ethos of separability” that inhibits relation or a procedurally intelligible *fūdō* where shareable reasons can circulate among strangers?

This foundational principle acts as a direct counter to the entire jurisprudence of management,<sup>41</sup> whose core feature is its placelessness. By insisting that no normative claim can be understood when it is detached from the milieu that gives it meaning, contextual immersion forces the legal encounter to acknowledge the spatial wound. Furthermore, this analysis is operationalized through a suite of qualitative techniques, including ethnographic fieldwork, archival research, and critical spatial analysis (Philippopoulos-Mihalopoulos 2014). It is not a mere exercise in data collection but a rigorous method for reading the “production of space” (Lefebvre 1991) and perceiving the irreducible ethical demands that arise from a “contemporaneous multiplicity” (Massey 2005). Crucially, this practice provides the concrete method for mapping the boundaries of the abyssal line,<sup>42</sup> translating its philosophical division into a tangible, measurable atmosphere of exclusion and non-existence. This first principle therefore insists that the wound is inseparable from the space of its infliction.

### Relational mapping (*aidagara* analysis)

From this rich contextual grounding, the method proceeds to a relational mapping of the intricate web of relationships (*aidagara*) that constitutes the social field. This involves charting key actors, their interdependencies, and, most crucially, the communication blockages and ethical ruptures that mark the site of the wound. This is not merely a descriptive network analysis but a diagnostic tool designed to make power dynamics visible. To operationalize this, RLP draws directly on Young’s “social connection model” of responsibility, using her four practical parameters, power, privilege, interest, and collective ability, as a heuristic to analyse the deep-seated power asymmetries that have produced and sustained the relational wound. This moves the analysis beyond simply identifying plural sources of law to examining the quality, health, and pathology of the relational tissue in which those norms are embedded.

This diagnostic mapping is acutely attuned to the specific relational pathologies identified by RLP’s expanded understanding of *aidagara*. The mapping is particularly sensitive to the complex dynamics of relational hegemony,<sup>43</sup> charting how the relational fabric may be internally fractured and stratified by power, and listening for evidence of a hijacked *aidagara*, where the very terms of relation have been weaponized by a dominant

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<sup>41</sup> See “The jurisprudence of management as a hegemonic technology” above.

<sup>42</sup> See “Abyssal thinking as the operating logic of hegemonic law” above.

<sup>43</sup> See “The mechanics of relational hegemony” above.

group.<sup>44</sup> Procedurally, it identifies “communication blockages” as a failure of intelligibility between epistemic strangers, such as the denial of a subject’s right to begin a conversation.<sup>45</sup> Affectively, it assesses whether the relational tissue is eroded by an “ethos of separability” or nourished by a capacity for “receptivity”, recognizing that a breakdown in procedural fairness often correlates with a deficit in the affective capacity for genuine relation.<sup>46</sup>

## Prioritizing the accusative voice

“Listening from the wound” is the ethical centre of the entire methodology, a practice that centres the lived experience of those subjected to, harmed by, or excluded from a given legal regime.<sup>47</sup> This is a consciously decolonial political act. It directly counters the logic of coloniality, which operates by constructing a normative category of the fully “human” through the violent exclusion of its racialized and gendered Others. Prioritizing the accusative voice is therefore RLP’s direct methodological response to the entire framework of the jurisprudence of foreclosure (detailed above). It centres the subject whose very relational capacity has been targeted and whose full humanity has been denied. This necessitates a method that ethically extracts both explicit and implicit assertions, acknowledging that the body serves as an epistemological locus and that harm may manifest through behaviour, gestures, or communal practices prior to being articulated as a formal legal complaint.

This concept of “accusative attunement” finds a parallel with what Sara Ahmed (2021) describes as “feminist ears”: the development of an institutional and personal ability to recognize and affirm experiences that prevailing structures aim to disregard. To operationalize this means establishing strategies such as survivor-led narrative jurisprudence, survivor mapping, or in-depth legal ethnography, following Maksymilian

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<sup>44</sup> Shah’s (2024) analysis of “internal differentiation within oppressed/marginalized communities” provides a concrete example of a “fractured and stratified” *aidagara* that this methodology would seek to map.

<sup>45</sup> This part of the mapping directly applies Krentos’s (2026) procedural tests, listening for violations of the right to begin or a retreat into “closed epistemic resources” as evidence of a communication breakdown.

<sup>46</sup> The health of the *aidagara* is assessed against the affective pathologies, like the “ethos of separability”, that Sachsenmaier (2024) diagnoses. The erosion of this ethical capacity is the psycho-affective core of relational hegemony (see the section on “Aidagara and the relational subject” above), which maintains its managerial pole by cultivating a subject who has “unlearned how to relate.”

<sup>47</sup> Prioritizing the accusative voice operationalizes Krentos’s (2026) the right to begin, treating the wound not as an object of policy but as a legitimate, juris-generative starting point for a new legal negotiation.

Del Mar's (2020) suggestion to utilize the legal imagination not as a sterile instrument for abstract thinking, but as an essential ability for emotional and sympathetic resonance with the pain of others. This ethical demand is impossible without the capacity for "receptivity", the key affective counter to the self-subject produced by relational hegemony.<sup>48</sup>

This ethical commitment is disciplined by procedural, affective, and political considerations. Procedurally, this principle is the ethical expression of the right to begin, the entitlement of every wounded stranger to initiate a new legal conversation on their own terms. Affectively, such listening is impossible without the groundwork of "receptivity", the radical ethical posture of setting aside institutional prerogatives to genuinely attune to a claim of harm.<sup>49</sup> Finally, this principle must be armed with a critical political lens. The methodology must possess the tools to distinguish a legitimate accusative voice from a hijacked grievance manufactured by hegemonic forces, ensuring that the act of listening serves the cause of liberation, not oppression.

## Identifying juridical silence and interlegality

Throughout this process, RLP actively seeks to identify juridical silence not as a mere void or oversight, but as an active technique of governance (Moncrieff 2025). This aligns with Santos's (2004) concept of a "sociology of absences", a method for making visible what abyssal thinking renders non-existent.<sup>50</sup> RLP operationalizes this critique by providing a multidimensional framework to chart the specific contours of this absence. It provides the philosophical grammar (*fūdō*, *aidagara*) to map the spatial and relational damage, the procedural lens (the Reason Test) to identify the "closed epistemic resources" that create the silence, and the affective attunement (receptivity) required to even perceive what has been made invisible.

Analytically, this includes attending to what Conte (2019) terms "athetic validity": norms that exert deontic force without any thetic act of positing. These unspoken, un-enacted norms often structure behaviour more powerfully than formal law, and RLP examines how they interact with, supplement, or undermine state legality. In this sense, juridical

<sup>48</sup> See "The mechanics of relational hegemony" above.

<sup>49</sup> Sachsenmaier's (2024) concept of "receptivity" provides the affective basis for "accusative attunement", defining it as a "let[ting] go of [the subject's] own prerogatives" that makes an ethical encounter possible. Shah's (2024) analysis of the Hindu Right's manufactured "wound" serves as a critical reminder that a methodology centred on suffering must be able to differentiate between subaltern claims and the weaponized grievances of the powerful.

<sup>50</sup> See "Abyssal thinking as the operating logic of hegemonic law" above.

silence becomes legible not as emptiness but as a failure of relational integrity (*aidagara*) that shapes the wounded landscape itself.

Methodologically, this “refusal to hear” manifests in identifiable ways. Procedurally, juridical silence is enacted when an institution offers reasons that fail the Reason Test, collapsing into an arbitrary “just because” that is unintelligible to the stranger. This is the practical consequence of an institution retreating into its own closed epistemic resources, rendering its justificatory process opaque and foreclosing genuine dialogue. Politically, such silence is often strategic: a tactic in the hijacking of a wider narrative, where inconvenient truths are deliberately rendered non-existent. Affectively, it is the signature of an institution that lacks the capacity for receptivity—an active closing-off that prevents any attunement to the wound and thereby sustains the very absence it purports not to see.

### Employing emptiness (*kū*) as critical epistemology

While identifying juridical silence reveals the what of law’s absence, the framework demands a critical instrument to prevent its own analysis from hardening into another form of ontological closure. This is the crucial function of its guiding epistemic principle: *kū* (emptiness). Deployed throughout the research process, *kū* operates as a constant reminder of contingency and radical interdependence, serving as the primary methodological safeguard against essentialism (Watsuji 1996). It promotes a rigorous critical reflection on the researcher’s own positionality and demands a constant questioning of dominant narratives and emergent certainties.

This principle is the direct philosophical counter to the entire jurisprudence of foreclosure. The researcher, guided by *kū*, is methodologically sceptical of all claims to ontological closure. They are trained to spot when a political actor makes an essentialist claim to a hijacked grievance and to identify when a legal procedure grants an unearned a-priority to a specific role over the fundamental condition of strangerdom. Employing *kū* is thus the practice of maintaining a radical “receptivity” to the contingency of all social facts. By challenging the “hegemony of words” and the “Promethean myth” of reason’s capacity for total control, *kū* ensures that RLP remains a critical and ethically responsive framework where the ultimate goal is not to arrive at a final truth, but to remain perpetually open to the articulation of injustice.

Ultimately, the principles of “Law in the Accusative”, from contextual immersion (*fūdō*) to relational mapping (*aidagara*) and the Reason Test,

constitute a broader methodological commitment to what can be termed “structured and defensible subjectivity”. This paradigm does not seek to eliminate the researcher’s interpretive judgement but to make it a transparent, rigorous, and auditable part of the research process itself. Having thus defined this coherent research agenda, the following section will now apply the RLP framework to concrete case studies to demonstrate its analytical purchase and its capacity to illuminate the often-unseen relational dynamics of law and sovereign power.

## [E] APPLICATIONS: RLP, ACCUSATIVE ATTUNEMENT, AND THE LIVED REALITIES OF JURIDICAL RUPTURE

With the theoretical and methodological architecture of RLP now fully articulated, this section demonstrates the framework’s analytical power and versatility through its application to two distinct “epistemological anchors”. It will first apply RLP to the localized, domestic wound of the Grenfell Tower fire, revealing a catastrophic failure on the affective, procedural, and political levels. It will then scale the analysis to the geopolitical realm of the EU’s border regime, showing how the same logics of spatial abandonment and status negation operate on a global scale.

Together, these case studies will provide a stark and visceral illustration of the fortified RLP framework in action, making a powerful case for its real-world analytical utility. Specifically, they will demonstrate how the material harms of the jurisprudence of foreclosure are produced through the foundational spatial violence of the abyssal line and sustained through the procedural failures of the jurisprudence of management. Furthermore, these case studies will be used to demonstrate how these material harms are produced and sustained through specific procedural failures, such as the retreat into “closed epistemic resources”, and are vulnerable to the political danger of a hijacked grievance, revealing the deep interconnection of the material, the procedural, and the political.<sup>51</sup>

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<sup>51</sup> This signals the integrated nature of the analysis to follow. The “institutional deafness” (Ahmed 2021) will be analysed through the procedural lens of Krentos’s critique of “closed epistemic resources” (Krentos 2026), while the “diffused structural responsibility” (Young 2006) will be examined in the context of the political pathologies, such as a hijacked grievance, identified by Shah (2024).

## Grenfell: ruptured *aidagara* and a failure of reason

The Grenfell Tower fire of 14 June 2017 is not merely a tragedy; it is a stark and visceral manifestation of law operating through spatialized neglect. An RLP analysis reveals how the *fūdō* of the tower was a dense socio-legal space saturated with a precarity that was both racialized and classed. Though the official Inquiry Report recognizes that the tower housed a “significantly disproportionate number” of residents from ethnic minority or socially disadvantaged backgrounds, it simultaneously deemed the systemic reasons for this reality to be outside its terms of reference (Gohil 2024). This early procedural bracketing is a textbook example of the strategic juridical silence<sup>52</sup> that characterizes the jurisprudence of management. This active refusal to hear obscured how the toxic *fūdō*\* was produced. Affectively, it was a catastrophic failure of institutional attunement, a refusal to connect the material conditions of the building to the lived experience of the people inside it.

This condition of fatal neglect was the direct result of a catastrophically broken *aidagara*. The Inquiry Report itself describes the “toxic atmosphere” in which residents were viewed by the tenant management organization (TMO) as an “uncaring and bullying overlord”. This dynamic is the lived reality of the psycho-affective core of relational hegemony.<sup>53</sup> The TMO’s dismissal of residents’ warnings represents a catastrophic failure of the Reason Test. Their reasons for inaction, based on internal logics of cost-cutting and managerial efficiency, were not existentially social or shareable with the residents they were supposed to serve. By systematically dismissing the residents’ “accusative voice” and pathologizing them as “militant troublemakers”, the TMO fundamentally violated the residents’ right to begin a legal and political conversation about their own safety. The TMO retreated into its own “closed epistemic resources”, bureaucratic procedure and technical jargon, rendering the residents’ embodied knowledge of their “intolerable living conditions” inadmissible.

This procedural failure was embedded within a wider structural injustice. An RLP analysis enhanced by Young’s social connection model demonstrates that accountability transcends the TMO, implicating a broad array of actors: the cladding manufacturers, the government agencies that pursued a reckless agenda of deregulation, and a wider public participating in a political system that tolerates the systemic neglect of social housing. From this perspective, the residents, by virtue

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<sup>52</sup> See “The jurisprudence of management as a hegemonic technology” above.

<sup>53</sup> See “The mechanics of relational hegemony” above.

of their vulnerability, occupied what Letsas (2023) terms the “role-status of the wounded”, a relational status that should have generated powerful duties of care that were catastrophically breached. Finally, applying *kū* as a critical epistemology allows us to challenge the Inquiry’s attempt at “legal closure”. Its conclusion that there was “no evidence” of racial prejudice being a causal factor, despite the victims’ demographics, is a final, rhetorical act of temporal violence, attempting to confine the structural injury to a discrete past event and finalize the wound.<sup>54</sup> This feels, for a community where a majority of those who died were from minority ethnic backgrounds (Gohil 2024), like a continued denial of reality, a final rupturing of *aidagara* at the level of official truth-telling.

### The European Union border regime: “lawlessness law” and the negation of status

The EU’s external border policy represents a notable geopolitical framework of “spatialized legal exclusion”. It enacts what Ganty & Ors (2023: 79, 103) describe as “EU lawlessness law”, which represents a convoluted and often vague array of legal tactics utilized to ensure that the pervasive denial of rights for the “racialised passport poor” is never recognized as a definitive violation of the law. This regime exemplifies a systematic institutional rejection of the ethical responsibilities associated with accusative attunement, so establishing a *de facto* “passport apartheid” (Ganty & Kochenov 2024: 85) that aligns with the legal structures of colonial oppression.

This approach creates a severe *fūdō* at the EU’s borders, an environment marked by deliberate precariousness, widespread violence, and substantial rights deprivation. This environment is the precise, institutionalized space of the abyssal line,<sup>55</sup> a demarcation that divides the metropolitan zone of law from the colonial zone of appropriation and violence. It is an architecture of rejection, the affective antithesis of the “receptivity” required for any ethical encounter.<sup>56</sup> At the EU–Belarusian border, the concept of “lawlessness law” is illustrated by systematic pushbacks and cruel treatment, justified by the official state narrative of the “instrumentalization” of migrants (Ganty & Ors 2023: 11). This official story is a paradigmatic example of a hijacked grievance—a manufactured wound of a nation “under attack” used to legitimize state

<sup>54</sup> See “The mechanics of relational hegemony” above.

<sup>55</sup> See “Abyssal thinking as the operating logic of hegemonic law” above.

<sup>56</sup> The border regime is the materialization of a lack of receptivity, a system designed to “close off our bodies” to those who are “not in tune” with the established political order.

violence. Procedurally, it is a top-down, non-shareable reason that catastrophically fails the Reason Test; it is a reason designed to end, not begin, a legal conversation. This spatialized cruelty deliberately and systematically dismembers *aidagara*, depicting the migrant as a non-entity whose suffering invokes no moral responsibility.

FRONTEX (the European Border and Coast Guard Agency) is a significant institutional entity within this framework. Despite an expanded mandate and increased resources, an “accountability paradox” persists, indicating a systematic failure of institutional alignment (Ganty & Kochenov 2024: 139). In 2021, the European Parliament’s FRONTEX Scrutiny Working Group concluded that the agency possessed “evidence substantiating allegations of fundamental rights violations ... yet failed to address or pursue these violations” (European Parliament 2021). This signifies a profound institutional insensitivity at the heart of the EU’s border system. The justification for this modern “lawlessness law” has a direct and disturbing antecedent in colonial administration. Koskenniemi (2016: 262-263) elucidates that the French Code d’indigénat categorized the “indigenous” population as subjects, so deliberately removing them from citizenship and creating a separate legal status designed to facilitate control and limit rights. Hanna Eklund (2023) asserts that these contemporary arrangements are not merely historical echoes but “reiterations of a legal framework already ingrained in the Treaty of Rome”. This continuity is the enduring logic of the coloniality of power and knowledge.<sup>57</sup>

From an RLP standpoint, this entire system operates by officially denying the migrant’s relational status. It refuses to acknowledge that the migrant, because of their significant vulnerability at the border, adopts the “role-status of the wounded” (Letsas 2023). This rejection allows the system to evade the substantial care-giving duties that should arise from such a deeply inequitable encounter. More fundamentally, the regime is built upon a systematic and foundational violation of the right to begin. The migrant is constructed from the outset as an object of policy, not as a legal subject who can contribute to legal meaning. The “passport apartheid” is a direct institutionalization of knowledge asymmetry, a flagrant violation of the a-priority of strangerdom, which insists that individuals must be treated as strangers first, before any other role or status. By making a pre-legal identity, citizenship, the absolute precondition for entering a legal

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<sup>57</sup> See “Abyssal thinking as the operating logic of hegemonic law” above. The juridical silence surrounding the EU’s colonial foundations is a profound institutional feature, not a mere oversight. This is powerfully illustrated in Dimitry Kochenov’s edited collection *EU Law of the Overseas* (2011). As Eklund (2023) notes, across its 485 pages, the index contains no entry for “colonialism” or “postcolonialism” and only a single reference for “decolonization”.

relationship, the regime places migrants outside the “reader economy” altogether, rendering them legally invisible and procedurally mute.<sup>58</sup>

## The space between them: hegemony and repair as a dialectical struggle

What fundamentally links the localized tragedy of Grenfell Tower to the expansive geopolitical regime at the EU’s borders is not thematic resonance, but a shared mobile logic of governance that RLP makes visible. Both are potent expressions of a spatially articulated power that operates by producing and policing a false distinction between a supposedly safe, regulated “inside” and an abandoned, lawless “outside”. This logic, deploying techniques of colonial administration, exposes a foundational misreading of modernity. RLP argues, alongside thinkers from Césaire (2000) to Gopal (2019), that the freedom of the inside was never separate from, but was actively constituted by, the unfreedom of the outside, a colonial interdependence legally codified in the very founding of institutions like the EU (Eklund 2023).

Confronted with such cases, conventional jurisprudence is rendered conceptually mute.<sup>59</sup> Trapped on the inside of an abyssal line (Santos 2014) it cannot see, its managerial tools are not just ineffective, they are complicit. This jurisprudence of foreclosure is sustained by relational hegemony, a mode of power that controls the conditions of encounter by imposing a false choice between its brutal, zero-sum manifestations and its deceptively benign, managerial positive-sum pole. This positive-sum ideology is managerial because it pathologizes deep structural conflict as a mere cognitive error or procedural glitch, thereby foreclosing the possibility of transformative justice and ensuring the underlying, zero-sum colonial structure remains unquestioned. RLP, by contrast, takes this pathological interdependence, this violent tearing of *aidagara*, as its starting point.

<sup>58</sup> By denying migrants the right to begin and violating the a-priority of strangerdom, the EU border regime exits a rule-of-law relationship and enters a purely coercive one, treating persons as mere objects of state power.

<sup>59</sup> A sophisticated defender of the mainstream tradition, such as Cormac Mac Amhlaigh (2020), would argue that this claim is overstated. For Mac Amhlaigh, the true failure is not a conceptual one, but the inability of legal systems to fully embrace the procedural pluralism that their own existence presupposes. By contrast, RLP argues that the procedural failures are the symptoms of a foundational conceptual failure—the ontological bias (see “Re-finding law in space and relation” above) that grants ultimate priority to the temporal, abstract sovereign state over the spatial, ethical demands of co-presence. Because conventional jurisprudence begins by placing the sovereign on the “inside”, it is structurally unable to perceive the violence on the “outside” that sustains its own coherence.

The entire journey of this article, from the deconstruction of hegemony to the construction of RLP's triad, is a unified argument for relational repair. Relational repair is the political practice of transforming a relationship of domination into one of mutual responsibility by transforming the material, affective, and procedural conditions of co-presence. The philosophical core (*fūdō*, *aidagara*, *kū*) translates the ethical demand of the wound into the methodological framework of law in the accusative. This method, enacted by the enactive agent, is the counter-praxis required to dismantle the five interlocking technologies of relational hegemony.

On the level of affect, hegemony's foundational act is to engineer an affective deficit, producing the dehumanized subject that Nandy (1983) identifies as the "intimate enemy". The symmetrical counter-praxis must therefore begin with affective work: cultivating the institutional and personal capacities of receptivity and attunement to heal the intimate enemy and recover the self-capable of engaging in repair.

On the level of procedure, hegemony enforces this affective deficit by retreating into "closed epistemic resources" (Krentos 2026) to shatter knowledge parity. The counter-praxis must be a procedural engagement that follows fair and transparent rules of dialogue, pursuing "epistemic justice" and applying the rigour of the Reason Test to build an "architecture of intelligibility" across the stranger-to-stranger gap.

On the level of relationships, hegemony weaponizes the very idea of community, hijacking grievances through authoritarian populism to poison the relational fabric (*aidagara*). The counter-praxis is therefore a political struggle, where those who have been harmed organize to make their "accusative voice", the "return of the Real", heard. This struggle disarticulates hegemonic narratives and forces institutions into a genuine, non-zero-sum relationship.

On the level of space, hegemony creates "toxic atmospheres" (*fūdō*) of neglect, using the abyssal line (Santos 2014) to make systemic harm seem natural. The counter-praxis must have an ethical goal: a collective effort to fix the underlying broken spatial structures (Young 2011), detoxifying the *fūdō* through practices like "counter-mapping" and "decolonial urbanism".

On the level of time, hegemony imposes a single, official history, using the temporal cage (Wheatley 2017) to "freeze" the marginalized in the past and justify their spatial abandonment. The counter-praxis, therefore, creates a legal/moral imperative in the present. It establishes that the vulnerability of the wounded generates specific, enforceable duties of care,

a “role-status of the wounded” (Letsas 2024) that cannot be dismissed by appeals to a superseded past.

This entire dialectical process is held together by a philosophical commitment to the principle of *kū* (emptiness). This principle functions as the framework’s ultimate critical safeguard. As a “philosophical solvent”, *kū* insists that all positions are relational and contingent, thereby grounding a politics of relation over a politics of identity (Ganeri 2019). It preserves the “decolonial option”, the right to refuse engagement, and ensures that repair never becomes just another tool of managerial co-optation.<sup>60</sup>

## [F] CONCLUSION: A JURISPRUDENCE OF THE THRESHOLD

This article has advanced the case for RLP as a necessary departure from a Western juridical imagination ill-equipped for a world of spatial abandonment and legitimized harm. The article’s core journey, from deconstruction to construction, has argued for a foundational shift in legal thought: from a temporal-ontological focus on what law is to a spatial-ethical focus on what happens between subjects.

This reorientation grounds a “jurisprudence of the wound”, a framework that locates law’s true genesis not in a sovereign decree but in the accusative demand that emerges from the lived, material experience of relational harm. By drawing critically on the conceptual grammar of Tetsurō’s *aidagara*, *kū*, and *fūdō*, RLP offers a new vocabulary for diagnosing injustice and, ultimately, for building a politics of repair.

The normative horizon of this framework, relational repair, is not a therapeutic ideal but a contested and demanding political practice; a relentless counter-praxis to relational hegemony.<sup>61</sup> A fortified RLP praxis

<sup>60</sup> The “jurisprudence of the threshold” is not an ambiguous moral choice, but a procedural calculus based on the Reason Test. The framework provides clear guidance: refusal is mandated when the institution systematically abandons the terms of participation (Krentos 2026). This occurs when the sovereign’s response is no longer existentially social and fails to preserve the right to begin, signalling a decisive retreat into pure coercion. At this point, the institution has definitively failed the rule of law, making withdrawal a coherent jurisprudential choice rather than an external political gamble.

<sup>61</sup> The normative horizon of relational repair points toward two critical areas of future research. The first is the pursuit of shared citizenship: a transformative model of democratic agency that translates this article’s relational subject (*aidagara*) and spatial focus (*fūdō*) into a political ontology emphasizing interdependence over atomized autonomy. The second is the full development of “Law-making in the Accusative” as a methodology, reframing the legal system not as a passive arbiter but as an active, justice-oriented instrument designed to amplify marginalized voices and proactively rebuild the legitimacy of the legal order itself.

insists that this work is impossible without its affective, procedural, and political preconditions. It requires the cultivation of institutional receptivity to make genuine attunement to the wound possible. It must be procedurally robust, holding institutions accountable to the shareable, non-arbitrary standards of a Reason Test to ensure the encounter is an intelligible dialogue between strangers, not an act of managerial power. And it must be politically vigilant, armed with the critical tools to distinguish a legitimate, subaltern wound from a hijacked grievance manufactured by hegemonic forces. RLP is therefore not simply an ethic of compassion, it is a juridical mode centred upon the relentless work of exposure and the demand for material accountability.

It is precisely this dual capacity for both immanent engagement and transcendent critique that ultimately positions RLP as a jurisprudence of the threshold. Through the framework of relational repair, it offers a concrete set of tools for working with and through law to painstakingly mend relationships. Yet, through its guiding epistemic principle of *kū*, it remains perpetually open to the decolonial politics of refusal: the possibility that when a legal grammar is the primary instrument of harm, the most just response is to withdraw from it entirely. This makes the choice to refuse not merely an external political act, but a coherent jurisprudential one, justified when an institution systematically fails the procedural and ethical terms of a legal relationship. The methodology navigates the risk of subjectivity through *kū*, which methodologically disciplines the researcher, requiring a critical distance from all claims, including those of the wounded, to ensure “listening from the wound” remains a critical and analytical practice. RLP does not, therefore, pledge to resolve law’s fractures, but to dwell within them more honestly, transforming jurisprudence into a global method for the difficult, creative, and ongoing practice of mending our relations with one another.

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Visual Law

## THE ABSOLUTE

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Edition of One, Ljubljana, Slovenia

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I speak through the stones  
In words as whorls and worlds.  
I rest in calm, unagitated  
By wind, waves, or wandering.  
What has always passed  
Into places beyond stones or wood.  
What will be is the wildest dream,  
The question and answer as One.  
Life turns on the slimmest chance  
Into an immeasurable quest.  
The heart rises with moon and stars,  
And clouds drift over inner seas.

—Anonymous (Keeney 2023)



*Haunted Tableau, Garli, Himachal Pradesh, India. Photo: Ishita Jain.*

How to make the question and answer as One? How to make the life and the work the life-work? How to repair the broken centre? Three questions. They converge in and through what may be termed works-based agency: the immemorial, authorial force that resides in a work prior to its commodification, signalling its existence as prior art. This agency suggests the presence of the Absolute, long absent from cultural discourse other than as *presence as absence*. This erasure has, arguably, occurred across the history of intellectual property (IP) rights and accelerated exponentially with the capture of immaterial culture by the digital commons—a model of shared governance for data, information, and culture that is itself subjected to capitalist enclosure and commodification. In this process of capture, works-based agency is precisely what is erased. Thus, the hyper-capitalized knowledge commons has, through the very mechanisms of command and control, blocked access to that indeterminate and semi-mythical realm hidden in works. For this reason, a proper renaissance of works-based agency requires the elective abolition of IP rights in tandem with an a-legal stance denoted “No Rights” (Keeney 2026) such that “the Absolute” might emerge, freeing both subjects (authors) and works.

There are moments when the diachronic and the dialectical collapse. There are times when something is seen that has long been inferred but deferred. This *vision*, if that is what it is, inhabits and haunts all works that strenuously resist rote commodification. In the slipstream of cultural production, that haunted tableau appears only to disappear. It is driven once again into *exile* by the laws of cultural production. It can be configured in different ways, since it concerns not so much methodology as content. The presence of the Absolute in art and in literature (and in literary–artistic scholarship) is, notably, transformational. Its mere presence alters the premises of works through engagement with the common good. Yet that methodology and content can and often do appear in time as One. Even if rare, the appearance pre-figures an Absolute in cultural production that seeks return through the life-work, which it then privileges through and beyond conventional terms of engagement. Perhaps this is why Alain Badiou (Badiou 2005, 2013; Naderi 2023) resorts to mathemes to access what he calls the “Infinite”? Is the Infinite formless until it is given form? This particular paradox concerns what we might call time-senses (multivalent analogical states) in works. It is the clash between the linear, commodifying time of the market (*chronos*) and the disruptive, qualitative time of the artistic event (*kairos*). This clash exposes what has been hidden in the research biases of scholarship and the market-driven ideology disfiguring the knowledge commons. Telos, in this case, is not ethos. They are divided. Telos becomes force and farce, in turn driving scholarship into the abyss of

marketability. The legal and economic register enforces this logic, ensuring the “haunted tableau” disappears, insofar as that tableau is, precisely, a form of insurrection and renewal.

What appears here as a metaphysical clash between temporalities is, at the level of cultural production, a juridically engineered fact: copyright law operates as a governor of creative time. More precisely, it generates a legislated, commodifiable temporality (*chronos*) to manage, stabilize, and economically exploit the constitutive gap between the singular event of creation (*kairos*) and the work’s life in the market. The foundational legal categories of *author*, *originality*, and *property* are the malleable tools of this temporal governance. Critical legal scholarship has long deconstructed these categories, revealing them as social constructs that serve specific historical power structures (Borghi 2023). In this context, the temporal critique advanced here converges with a generative moment in IP law scholarship, a moment Craig (2019) identifies as a “second wave” of critical legal studies. It argues, however, that the operative logic of IP law in late capitalism ultimately supersedes (or suspends) its traditional justifications—whether utilitarian, personality-based, or Lockean (Moore & Nimma 2022)—by subordinating them to a singular function: the creation and stabilization of assets. Where Borghi (2011) theorizes copyright as a sphere for the *communicative act*, this analysis instead treats copyright as a governing discourse that captures, and commodifies, the *prior agency of the work* itself.

The treaties that supposedly underpin author protection—namely the Berne Convention for the Protection of Literary and Artistic Works and the Trade-Related Aspects of Intellectual Property Rights Agreement (TRIPS)—function, in practice, as a global framework for commodification. Their core principle of national treatment does not, in itself, harmonize law; rather, it delegates authority, creating a territorial marketplace where states are licensed to implement the logic of asset creation. Thus, international law provides the legitimizing structure, while national law wields the operating tools. Within this permissive structure, jurisdictions enact markedly different balances between, on one hand, the author’s inalienable moral rights of attribution and integrity (Berne Convention, Article 6bis) and, on the other, the demands of the asset economy.

The “work for hire” of the United States (US) doctrine provides the clearest instance of this logic pushed to its extreme. It legally constructs the employer or commissioner as the “author” from the very moment of creation (Copyright Act 1976, section 101), performing a complete juridical severance of the creator from the moral authority and future fruits of the

work. A similar, if less absolute, common-law logic of dispossession operates in the United Kingdom (UK), where statute designates the employer as the “first owner” of copyright in employee-created works (Copyright, Designs and Patents Act 1988, section 11(2)). These Anglo-American models exist in permanent, systemic tension with the *droit d’auteur* traditions of civil law jurisdictions, which philosophically resist the full alienation of the author from the work and uphold the primacy of moral rights enshrined in Article 6bis of the Berne Convention. It is, perhaps, unsurprising that the international system thereby thus institutionalizes a fundamental conflict between legal philosophies, ensuring the “haunted tableau” of works-based agency is perpetually caught in a cross-border legal vacuum.

The consequences for individual authors are a direct, foreseeable outcome of this design. Seeking to navigate this territorial maze, authors find that purported safeguards are neutralized by its complexity. Statutory termination of transfer rights, designed to allow authors to reclaim their copyrights after 35 years as a corrective to unequal bargaining (US Copyright Act 1976, section 203), is often so complex—and weaponized by corporate rightsholders—that it fails to achieve its redistributive purpose (Menell & Nimmer 2009). The moral rights enshrined in Article 6bis, a core *droit d’auteur* principle, are routinely waived in standard global publishing contracts, often leaving authors with only a domestic “patchwork of protections” (US Copyright Office 2019)—a practical vulnerability underscored by scholarly critiques of the conceptual instability of the personality-based justification upon which such rights are theoretically founded (Simon 2023). Furthermore, procedural requirements for exercising such rights can be rendered null by common corporate structures like “loan-out” companies (Moss 2020). For the individual, invoking the international principles meant to protect them is fraught with legal peril. Recent novel litigation, where an author’s attempt to terminate a worldwide grant has led a US court into uncharted legal territory regarding the global reach of US copyright law, only highlights the chaotic conflicts this system generates (Moss 2024; Moy 2025).

Therefore, the proposed a-legal stance of “No Rights” should be understood as a tactical refusal of this entire territorial, state-centric architecture. It seeks an exit not only from the discourse of temporal commodification but from the Westphalian logic of the Berne system itself—a system designed to manage national differences in the service of the asset economy, not to uphold the sovereignty of the creative act. This legal architecture forms the very laws of cultural production that historically precipitate exile and failure. The cyclical fate of the artistic avant-garde provides a clear historical demonstration of this dynamic.

Avant-gardes come and go, and some are destroyed by subsequent avant-gardes. This is particularly true of architectural avant-gardes, but also literary and artistic avant-gardes. In part, avant-gardes are destroyed by criticism, with criticism being a form of cultural production that privileges diachronic time combined with narratology. Hidden within the history of the modernist avant-garde is, for example, anti-modernism. But what anti-modernism was able to detect and subsequently deflect was ideological content that disfigured the quest for the Absolute as presented through modernist insurrections. If that Absolute took on diachronic agency, or if it took on utilitarian concerns that aligned it with political or social agendas, the qualitative leap sought through avant-gardism was compromised. Many demolition projects therefore involved removing last traces of ideology to see what was left. Quite often there was nothing there. The ideological empty centre was exposed and the debris field included the presumptions of architects and artists, exposing works as secretly aligned with a demiurge.

If in 2001, amidst the last ravages of postmodernism, Roberto Calasso (2002) took up the subject of the “Literary Absolute”, it was in many respects an acknowledgment that cultural critique had once again become a spent force. The proverbial centre could not hold—as often is the case in times of crisis. All manner of contagions had been released from the postmodern Pandora’s Box. As Massimo Cacciari (2018) would note more than a decade later, Epimetheus had been turned loose while Prometheus was once again bound in chains. The social contract, always constructed and often enforced, needed once again to become optional. The escape route was almost always the same: exiting through “exile” and only returning through a renewal of works-based agency once again haunted by the Romantic quest for the Absolute (or the Infinite).

This all comes to a focus in the theologically inflected insurrection known as post-phenomenology. Within that particular turn was to be found temporally deduced traces of a sublimity long bracketed in art-world and academic discourse. In some ways it emerged from postmodernism (which had emerged from structuralism). What was finally at stake was a proper demolition of law—insofar as law signalled ideological reserves present in cultural production. Far from being a relativization of the Absolute, this shift in cultural perspectivalism (a peculiar game of parallax) sponsored a renewed instance of stepping outside of and beyond socio-political, empirical, or linguistic biases (as manifestations of law) to see what else was in play. This philosophical insurrection against ideological law finds its necessary, concrete counterpart in a legal insurrection against the statutory laws of copyright, which institutionalize those very biases.

As the first two decades of the twenty-first century played out, the field of intellectual and moral debris only grew more extensive, circling the globe and returning to source (crude, algorithmic techno-determinism, driven by market ideology), to be recycled or repackaged in entirely new forms associated with a highly debauched knowledge commons. The primary legal instrument enabling this debauched knowledge commons is the very system of IP rights that power and law enforce *en route* to destroying works-based agency. The absence of any emergent avant-garde during this 20-year period (versus neo- or retro-avantgardes) suggests that something had, indeed, been exhausted. Both the art world and architecture would attempt to revive cultural determinism through an accelerating set of interventions staged as cultural spectacle. Schools would repeatedly reconfigure their agendas to service capital while slowly destroying the arts and humanities, through de-funding the arts and humanities. The law of late capitalism was now commodify or perish. The arts and humanities are nominally useless to capital unless commodified, whereas uselessness is also their highest purpose. Indeed, it is the swindle associated with the 500-600-year history of IP rights, on behalf of the book trade, that remains the greatest hurdle today for scholars insofar as universities have introduced metrics and research standards that require the commodification of works. A system originally designed to incentivize creation has been twisted into a mechanism for the perpetual proprietization and metricization of knowledge, directly enforcing the commodify or perish dictate within academia.

The Romantic quest for the Absolute (as depicted by Calasso (2002) in *Literature and the Gods*) requires a quite different return to source, ending the cycle of appropriation and misappropriation. What comes in and out of view (as in a spirited dance with parallax) is when and how artists and scholars may become a law unto themselves. This is hardly a case of nihilism, even if certain forms of enlightened nihilism do embrace such an ethos. For an ethos of this order to emerge through works, there must first be an abandonment of law such that other laws may be brought into play through works.

Today this spirited dance requires the elective abolition of authorial privileges and an engagement with anonymity. This constitutes a refusal to engage with the law's governing discourse of temporal commodification and its constructed ambiguities. Anonymity is—in Calasso's terminology—the signature event of analogical creative expression. It is the obscure source, a door to the Absolute. If the Absolute is inherently non-commodifiable and exists prior to authorial identity, then any legal system whose constitutive function is to commodify and assign identity (ie copyright) constitutes, by its very design, a structural barrier to its access. It is also the source that

ideological agendas seek to overwrite by imposing the very laws of cultural production and commodifiable identity that this essay critiques. To erase these agendas and free authors and works to access the Absolute would require, in terms of IP law, an entirely new ecosystem for scholarship that permits authors to engage in collectively produced works of literary–artistic merit and to edition those works beyond Open Access protocols and beyond the metrics-driven systems imposed upon academia by the external forces of capital—competition, public relations, and so on. This is not an alternative licence but a teleological suspension of the legal framework itself—a stance that distinguishes itself from, for example, a Creative Commons Zero (CC0) dedication, by seeking not just to place a work in the public domain but to dissolve the author–work–property nexus entirely.

For the question and answer to become One, it is necessary to find (as Kierkegaard suggested) a form-of-life for life-works where ethos and telos merge (Kierkegaard 2019). Strangely, and given the place at which we have arrived in terms of the capitalist exploitation of knowledge, the implied lexical markers, Anonymous and No Rights, need a paradoxical adjustment through negation to ~~Anonymous~~ and ~~No Rights~~. What this confers upon works that engage with “the Absolute” is a set of a-legal terms that lead *into, through, and beyond* the prevailing venues and laws of cultural production as of 2025. The a-legal stance is thus not a nihilistic rejection of order, but a precise, tactical refusal of the logic of commodification—a logic in which the law’s primary function is to create and stabilize assets, a function that now often benefits platforms and capital more than authors. These measures introduce a measure of justice on Earth for the work itself, however temporal, and however endangered by reappropriation or coercion by law. This measure of justice is thus a restorative one: it returns to the work its primary ontology as a vessel of the Absolute, correcting the temporal and distributive injustice of a system that would reduce it to a mere asset.

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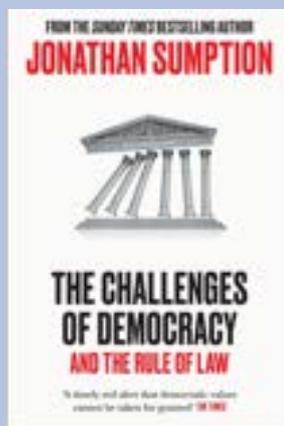
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**DEMOCRACY'S DEFENDER:  
THE CHALLENGES OF DEMOCRACY AND THE RULE  
OF LAW BY JONATHAN SUMPTION**

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Jonathan Sumption (2025)  
*The Challenges of Democracy  
and the Rule of Law*, published by  
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In this collection of revised and published essays, distinguished historian and former United Kingdom (UK) Supreme Court justice Jonathan Sumption ponders on the threats to democracy and the rule of law presented by contemporary phenomena. These include the decline by the public in faith in politicians and organized politics, climate change and public hostility to unpopular measures to address its effects, intergenerational conflict in the allocation of resources and a growing faith in right-wing populist parties and opportunistic policies encouraged by autocratic and dictatorial regimes not only in Hungary, Turkey and India but the full monty, as seen in Russia, China and North Korea. Donald Trump's admiration for the dictators who strive to be masters of all in their spheres of influence has driven the United States (US) President's own ambition to imperialize the US under a strong-man militaristic ruler who brooks no interference from courts, congress, state governors or the Constitution—or from a free press and conventional media, which are labelled “fake news”.

Even in those countries which are not presently under autocratic rule, a pandemic has facilitated extraordinary executive centripetalism and

extreme restrictions on those liberties associated with liberal society: in particular, freedom of speech, freedom of assembly, even freedom of movement. More damaging to freedom of speech has been the assault on “influencers” from the past and on historical tradition by forces of darkness, as Sumption would see them, who have sought to impose their *politique idéologique* on racial or sexual oppression or gender identity on the silent majority. At root, Sumption believes, is an assault on the foundations of democracy in the modern world and its virtues of cooperation and compromise, negotiated outcomes accepted by the majority, even though not liked by all, and personal liberty. Faced by these threats, if democracy is to survive, a “higher political morality may be required not just of politicians but of those who elect them” (xiii).

In his obvious regard and esteem for conservative philosophers and a traditional Conservative party—not the scions led by Boris Johnson and Liz Truss—and the individual’s responsibility and courage to speak out, Sumption shows himself to be a contemporary Burkean. Burke idealized tradition, the knowledge of collective experience and traditional institutional sagacity built on the past and enshrined in the eighteenth-century English constitution and its protection of property and liberty. He opposed slavery, supported Catholic emancipation, believed in limited monarchy and supported the impeachment (unsuccessful) of Warren Hastings and his corrupt rule in India. Burke has often been described as a liberal conservative which is what Sumption also shows himself to be. Sumption’s account of how fortunate we Brits are with our parliamentary sovereignty and monarchical unwritten constitution (37) when compared with the excesses of presidential forms of governance is straight out of Burke. His denunciation of Johnson’s attempt to claim a mandate directly from the people, like a president, is keenly to the point.

The essays in this book, titled the *Challenges to Democracy*, are grouped around four themes: politics and the state; law in our lives; the international dimension of law; and freedom of speech.

The first group fastens on familiar themes in Sumption’s previous work, namely the assault on our civil liberties and freedoms by global events such as the Covid pandemic and consequential disillusionment with democracy, especially, he notes, among the young, and a growing attraction to what is perceived as strong autocratic rule to fix the problems of modernity. Democracy, he believes, is threatened by economic insecurity, intolerance and fear. The protection of liberty, compromise and a greater prospect of efficiency, all of which come with democracy, are being undermined by the weakening of representative democracy, the

promotion of party caucuses and the refusal to accept negotiated outcomes with which we do not agree. There is a growing conviction in absolutism which sees former Tory and Labour supporters turn to erstwhile fringe parties pursuing populist and extreme policies. Tackling the climate crisis has produced unpopular policies and has increased the cost of living. Global indiscriminate lockdowns and their widespread acceptance by cowed populations revealed an aversion to the risks associated with normal processes of life, he writes. Such aversion to risk, he claims, is an open invitation to authoritarian government to put it “right”. It has its analogues in the philosophy of Hobbes, Sumption believes, who advocated the all-powerful state in his *Leviathan*.

Hobbes was writing after the brutal and ravenous civil war that tore through all four countries of what was to become the union. Little surprise that he wanted a strong system of government and one to which a war-torn populace was willing to trade its freedom (Sumption says freedom but was it not trading “an old order”) for security. The interregnum did not only produce the “strong state”, but it saw numerous (short-lived) legal reforms in the public interest as Stephen Sedley has catalogued, including a written constitution that presaged essential features of the 1688-1689 Bill of Rights and the earliest Law Commissions promoting law reform (Sedley 2015: chapter 4); it also saw the Levellers and radical egalitarian claims. Such claims were bound to fail in any era and not simply in Hobbes’ England.

Among the chapters on politics and the state is an interesting chapter on the transition to communism from British rule in Hong Kong in 1997. Hong Kong had existed as a Crown colony under paternalistic colonialism and a system of law built upon common law foundations. Attempts by the last British governor (Chris Patten) to set up a more democratic system of governance before the Chinese takeover—after 155 years of British rule—were swept away by Beijing and its national security priorities, leading to a harsh regime of repression and authoritarianism. Sumption’s observations are not those of passing interest. He was a visiting justice on Hong Kong’s Court of Final Appeal. The rule of law he says is not indivisible (79), and the harsh consequences of growing authoritarianism impelled him to resign from the court. A very eminent judge once told me that if capital punishment were reintroduced, he would impose it. But torture was a resigning issue.

The second theme offers discussions on the legitimacy of law, the rule of law and human rights, and a critique of the judgment of the US Supreme Court (USSC) on the criminal liability of the President (*Trump*

*v United States* 2024). The preoccupation of the first two essays is on the role of the judge, not as an interpreter of the law within accepted confines, but as a policy-maker subverting the role of elected assemblies. The European Court of Human Rights (CHR), he believes, empowers its justices to decide things in ways which are not in the “textes”, as the French lawyer would describe it, not in the words of the treaty and not agreed to by the signatory states. The CHR is not a forum which is subject to electoral control. Societies, he claims, “evolve” through instinct and experience. This is ill at ease with law that has become dependent upon abstract thinking and more “idealistic”; should one go further and say ideological?

This dependency on idealism, Sumption continues, has seen a growth of public interest law, human rights and social rights law: in short, public law. Much of this has been made by judges, very often under the influence of the CHR. The problem, he believes, is that when law is not made by a democratic political process, it lacks legitimacy. The common law, including judicial review, has been made by judges. Does that lack legitimacy? Does *Donoghue v Stevenson* (1932) deserve any less adherence or respect than the Scotch Whisky Act? If a right is not given by legislation, what, he asks, gives the right its legitimacy? Judge-made law in tort, contract, property rights and what we term private law are acceptable, he argues. But in the sphere of public rights which are based ultimately on moral and political values, what right does a judge have to be an arbiter of morality? Some person’s values at the end of the day, he believes, are simply deemed by that judge to be more valid than another’s. Like private law, most of our public law, I would argue, is based on reasoned principle and is about doing justice on the basis of that principle. Our judicial review is not a catalogue of individual moral preferences but a body of articulated and consistent principle built up and developed over centuries.

The targets here are Ronald Dworkin and John Rawls and their theories based on rational justice and, in Dworkin’s case, equal concern and respect. That is the keystone principle, argues Dworkin, to be applied in those cases if rights are to be taken seriously in adjudication. I have never subscribed to Dworkin’s belief that in hard cases there is only one correct answer. But, like Dworkin, I expect an answer to be given after detailed, meticulous and unbiased reasoning by the judge supported by precedent. Where there is no constitution, and the US Constitution makes no reference to equal concern and respect, what are we to infer from a democratic society that takes human rights seriously? Sumption does in fact refer to “equal concern and respect” for his own purposes:

he hopes that a legislature will treat and determine our interests in that manner (105). For Dworkin, it is the lynchpin principle in adjudication, especially where basic rights are in contest. This is the point of divergence: for Dworkin, our basic rights are *rights*; for Sumption, they are political interests.

For Sumption, moral values and disputes thereon are best resolvable democratically; democracy is a representative collective endeavour. But entrenched majorities, rigged systems, inertia and sheer discrimination have often made the elected chamber far from truly representative. And a minority remains a minority to be outvoted. No judge-made rule, says Sumption, could not have been made by a legislature “had there been a sufficient appetite for it”! But this is the problem. There is no appetite because it would brook vested interests, or greed, or, to put it at its strongest, evil. Or it may touch upon matters on which there is no vote.

“If we dispense with collective consent in pursuit of a nobler morality [like Dworkin], we will end up with institutions that dispense with consent in pursuit of other ends that we may regard as utterly ignoble” (97). This seems to suggest that Solomon will lead to Hitler and that they are just the same, or equally dangerous.

These points are reprised in the following chapter on human rights and the rule of law. Sumption does accept that there are fundamental rights which he views as essentially of two types: the first category includes a right to physical integrity and a resort to impartial and independent courts (prohibition of slavery and torture are not expressly mentioned but could be inferred from his list). These rights are “implicit in the rule of law” (103). Without them social life is not possible.

He also identifies a second category of rights which are essential to democracy, such as freedom of speech and thought, assembly and participation in their broadest sense “and the right to participate on equal terms with everyone else in fair and regular elections”. It follows that “people must have sufficient liberty to make use of these rights” (104). Although the second category of rights are “fundamental”, they are not a part of the rule of law, he argues, but like the first group they do not depend upon political choice. As well as being valued, these rights must be defended; but he doesn’t say how. There is a passing reference to entrenchment. No explanation is essayed on how this could be achieved in the UK’s unwritten constitution built on the legislative sovereignty of the Crown in Parliament to change any law. And if they are not dependent upon political choice, what gives them special status if *not* a part of the rule of law? And like the first group, what happens if

our governors do not take them seriously? Why should governors take them seriously if they wish to remove or ignore them? All other rights, which would include many widely regarded as fundamental such as privacy, social security and race relations, are subject to the political process, he writes. The safeguard against abuse is a political one.

Abortion in the US is used as an example of the serious shortcomings of entrusting to courts the creation or removal of a right to abortion as a fundamental right. In the US it has turned “presidential elections into contests for the right to appoint suitably biased Supreme Court justices” (108) to vote on party lines. This says more about the shortcomings in appointing USSC justices in the US than it does about judicial protection of fundamental rights. If a woman is not allowed to terminate her pregnancy subject to reasonable conditions and time limitations, she is not being accorded her bodily autonomy and right to private life. To equate a woman’s choice in this to legalizing the taking of narcotics or prostitution as the USSC majority did in *Dodds v Jackson* (2022) borders on perverse.

The following chapter on the President’s crimes is a stinging rebuke to the inadequacies of the USSC majority judgment in *Trump v US* (2024). In *Trump*, the USSC ruled 6:3 (though Barret dissented on one evidentiary point) on party political lines that the President is immune from criminal prosecution for his official acts while in office and the immunity does not cease when he has demitted office. Trump had been indicted for conspiring to overturn the result of the 2020 presidential election. The case was sent back to the lower court to determine whether the alleged acts were within his official functions and immune, but the majority issued capacious guidelines bringing many criminal acts within his official functions. Where there was a “presumptive immunity” regarding his “outer perimeter” responsibilities, courts can neither examine the President’s motives in acting the way he did nor the manner in which he acted. There is no place for irrationality or proportionality, let alone, it would seem, illegality. When exercising his “core” responsibilities under the Constitution the immunity was absolute. The President was given effectively *carte blanche* to act like a criminal.

Sumption relates the history of partisanship of allegiances within the USSC. It is a political court. But, to repeat, this does not undermine the argument for judicial protection of fundamental rights. It argues for reform of the USSC and its appointment processes and quality of appointments. “The United States has never stood in greater need of

impartial constitutional arbiters in its highest court, and has never been further from getting them” is his grim summation (123).

*Trump v US* centred on Trump’s abuse of the law and the Constitution. Since Sumption wrote this book, Trump has returned to power as President in a clear victory and his assault on the federal courts, and where not successful his attempt to ignore them, is repeated almost daily. He has ruled by executive decree, or order as it is known, downplaying or by-passing Congress, and his Government’s invasion of civil liberties is frightening. Top law firms and Ivy League universities have cowed before his excesses. Almost alone, Harvard has stood up to Trump, refusing to be intimidated although the college now has a co-protagonist, so it seems, though not a partner, in Elon Musk. Meanwhile the USSC has been sedulously reversing precedents going back almost a century, depriving the federal regulatory agencies of their independence and expertise and bringing them within Trump’s empire. In *Trump v CASA* (2025) the USSC dramatically neutered the injunction as a federal remedy against *prima facie* unconstitutional action by the president. For so many years American public law was exemplary in offering numerous lessons and striking examples in the legal control of government. There is very little to look up to now. The advice of de Tocqueville offers little comfort at this juncture of history:

Let us look to America, [he wrote] not in order to make a servile copy of the institutions that she has established but to gain a clearer view of the polity that will be best for us (de Tocqueville 1874: xviii).

And, attributed to the same scholar: “America is great because she is good. If America ceases to be good, America will cease to be great.” The world is taking note.

The third of Sumption’s themes addresses the international dimension of law. The specific points addressed are the proper place for international law, the tendency of the CHR to engage in “mission creep”, specifically examined in relation to Article 6 of the European Convention on Human Rights (ECHR), and the European Union (EU) and the place of national law, especially constitutional law. The basic premise is that international law is best suited to interstate disputes and grievances in the form of treaties and tribunals established by those treaties. Since the Second World War, however, and commencing at Nuremburg, there has been a proliferation of international bodies/courts established by treaty that have adjudicated on the behaviour of states towards individuals, either their citizens or aliens, and allegations and holdings of breaches of their rights under fundamental rights treaties. These courts stand in judgment

over the domestic law of the state complained against. Such courts—he focuses on the CHR—have a common practice of expanding their power, influence and in effect jurisdiction. Their status is approved by treaty. But the CHR goes beyond the words of the treaty agreed to by the signatory states, describing the treaty as a “living charter” to be interpreted according to contextual and developing circumstances. In doing so the CHR undermines national political norms and democracies. The CHR has become an “ideological court”, he claims (143). There is nothing, he argues, that is contained in international human rights treaties that cannot be achieved domestically “if there is sufficient democratic support for it” (137).

In the cases of Russia (which is no longer a member of the Council of Europe following ejection), Hungary, Turkey and various other states, this may not be a surprise that their state practices are in need of international oversight. Their respect for democracy and human rights is non-existent or marginal to put it mildly. But for a democratic state such as the UK, Sumption sees this as a usurpation of its representative democracy. It is fair to say he dismisses this as arrogance writ large by the CHR; to such an extent that he advocates Britain (UK) withdrawing from the Convention (148).

This, I believe, would be a tragedy. There is no doubt the CHR has made mistakes; even its grand chamber and especially decisions of the lower chambers occasionally can be suspect. It has qualified or reversed its decisions in the light of critical UK judgments. What court doesn't make mistakes? But in asserting that Blackstone in the eighteenth century included “the most important human rights” in his *Commentaries* and that judicial decision and legislation had embraced them before the Human Rights Act 1998 (HRA) is a serious overstatement. It waxes into lyricism what was often a lamentable position. Too often, the courts in England shrank in the face of executive excesses. Nothing in English law could stop phone-tapping (interceptions)—except a judgment of the CHR. Nothing opened up British prisons to legal scrutiny—except judgments of the CHR. Discrimination against homosexuals in the armed services for simply being homosexual, not for practising sexual relations in the forces it must be emphasized, was stopped not by national law, it was powerless, but a judgment of the CHR. Left to ourselves, change would have been a long time coming. And so on, and so on. The comment also undermines the fact that the ECHR makes the human *right* protected a right subject to qualifications that have to be established on grounds of necessity, proportionality or in the public interest. Our domestic law

treated them as *liberties* subject to legislation or executive discretion and fiat. Once the contrary fiat was exercised, that was the end of it.

Sumption focuses on case law surrounding Article 6 ECHR which gives a right to a fair trial. Dramatic footage from early 1940s Germany of Roland Freisler, who as judge prosecutor presided over some of the most harrowing of trials of those who stood up to Nazism, gives an idea of what was in the minds of the drafters of the Convention. His starting point is *Golder v UK* (1975) in which an English prisoner was prevented from contacting his solicitor to commence legal proceedings against the Home Office. Under prison rules he had to submit the application to the authorities first. He petitioned the then Commission of Human Rights and eventually the court ruled there had been a breach of Article 6. Sumption's umbrage, shared by the Home Office, was that a right to a "fair trial" had morphed into a right to a trial and therefore access to a court (one of Sumption's human rights above!) which implied a right to a lawyer. This, the CHR reasoned, was a requirement of the rule of law, one of the general principles of law agreed by civilized nations and supported by Article 31 of the Vienna Convention on treaties. But the words of Article 6 did not actually specify this, the UK and dissenting judge (a UK judge) ruled.

It seems to suggest that an international court that reasons by analogy, context and principle is straying off-piste. This, of course, is the method of the common law. But that is a domestic method—no matter that common law claims norms of customary international law to be a part of the common law. Put simply, the argument is the narrowest of originalist positions—what the words said and meant in 1950 is what they mean now. Is it really an abuse of language to say that a right to a fair trial also includes a right to a trial, and for a right to a trial one must have access to a court, and to be deprived of access to a lawyer preventing access to a court breaches Article 6? The courts would have taken up Golder's case if submitted to them asserts Sumption, but how would Golder have penetrated the barrier that the Home Office placed in his way? Sumption is on stronger ground in criticizing judgments of the CHR on Article 6 where the court has misunderstood the true position of domestic law (*Osman* 1998), failed to appreciate a limitation in domestic courts' jurisdiction (*Cudak v Lithuania* 2010) or simply acted as an appeal court from a domestic court's interpretation of its own law (*Al-Adsani* 2001 and *VKSS* 2024).

Our domestic courts have come a long way and have been reinforced by the HRA which incorporates the ECHR into UK law. Our record before the

CHR is generally good in terms of victories. UK compliance is also good—though I would query whether remedying a shortcoming in domestic law established in CHR jurisprudence is simply a matter of political prerogative, as Sumption suggests (89), but rather an obligation on the executive under international law (Article 46 ECHR: *Ilgar Mammadov v Azerbaijan [GC]* 2019, paragraph 147). More fundamentally, Sumption believes there is no real place for international law in the protection of human rights. I am saddened by this statement from a very able and learned judge. Error can creep in to the courts at any level domestically. A fairly long period of right-wing populist government can, or may, make judges think differently and diffidently even after fairly prolonged HRA contact. Such a populist occurrence would doubtless hasten our departure from the Convention in any event. UK judges may not always be so robustly independent and apolitical as Sumption claims they are now, and I would accept his assessment at present as to their independence. But fundamentally, and hoping that we avoid a populist catastrophe, even our law and judges can learn from other systems and their judges. Nobody is above learning.

The criticism of the European Court of Justice (ECJ) in the following chapter is not as outspoken as that of the CHR. Indeed, Sumption expresses his regret at the UK decision to leave the EU (192) following the 2016 referendum. The core of his interest in this chapter is the clash between the primacy of EU law, as promoted by the ECJ, and a *contretemps* between that primacy and the sovereignty of national constitutional law. He examines the case law of constitutional courts in Poland, Hungary and Romania where those courts have criticized the ECJ in terms which reject the overriding “sovereignty” of EU law. Basically, such ultimate sovereignty was not “conferred” under the EU treaties, national courts argued. Following on from its jurisprudence on EU legal sovereignty, the ECJ has long held that constitutional provisions in national law must give way to EU law (*Frontini* 1973). Otherwise, there could be 27 versions of EU law.

The most celebrated clash between a national court and the ECJ is that involving the German constitutional court, the Bundesverfassungsgericht (BVG). In case law stretching back over many years the BVG has ruled that German ministers and its Parliament cannot transfer German constitutional identity and constitutional rights to the EU in a manner which breaches the German Constitution. It has listed the “core” national constitutional features of Germany—a very long list—which cannot be so transferred. Nor can EU institutions act in a manner that allows them to determine the scope of the powers they have: they can only operate

within the powers conferred in the treaties and the member states are the authors of the treaties.

In a remarkable case in 2020 involving the purchase of state debt and assets by the European Central Bank (quantitative easing), and therefore fiscal and monetary policy, and which the ECJ had approved, the Court of Justice of the European Union was ruled by the BVerfG to have exceeded its judicial mandate, as determined by the functions conferred upon it in the second sentence of Article 19(1) of the Treaty on European Union, where it renders an interpretation of the Treaties which “is not comprehensible and must thus be considered arbitrary from an objective perspective”. The ECJ decision was on a preliminary reference from the German court in its earlier hearing on the case. Basically, were the powers being exercised by the European Central Bank (ECB) within EU monetary union or were they under the rubric of economic management and outside the ECB’s competence? The BVerfG ruled that, if the Court of Justice of the European Union acts unlawfully, its decisions are no longer covered by Article 19(1) above in conjunction with the domestic German Act of Approval; at least in relation to Germany, these decisions lack the minimum of democratic legitimation necessary under Article 23(1) (second sentence) in conjunction with Article 20(1) and (2) and Article 79(3) of the German Basic Law (*Weiss* paragraph 112).<sup>1</sup> The BVerfG’s orders were against the German Government and the German Parliament (Bundestag) in relation to the conduct of the ECB and its review of the debt-purchasing programme. It did not rule against the ECJ itself but it declared that German national authorities which pursue unlawful EU orders are behaving unconstitutionally.

The following year, the BVerfG did not find fault with the review of the measures under challenge by the German Bundestag and refused further relief.<sup>2</sup> The German Government gave “suitable assurances” to the Commission when the latter commenced legal enforcement proceedings against Germany for breaching EU law, thereby settling the action. It was not an assurance from the court, as Sumption rightly observes. The *Weiss* 2020 judgment of the BVerfG still stands.

In terms of the UK, almost a quarter of a century ago Sir John Laws ruled, *obiter*, that the fundamental legal basis of the UK’s relationship with the EU rests with domestic, not European, legal powers. The relationship is governed by national law:

In the event, which no doubt would never happen in the real world, that a European measure was seen to be repugnant to a fundamental

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<sup>1</sup> See the [Judgment of 5 May 2020](#).

<sup>2</sup> See [Order of 29 April 2021](#).

or constitutional right guaranteed by the law of England [sic], a question would arise whether the general words of the European Community Act were sufficient to incorporate the measure and give it overriding effect in domestic law (*Thoburn* 2002, paragraph 69).

This *obiter* has been confirmed subsequently by the UK Supreme Court (UKSC) (*Miller No 1* 2017; *HS2* 2014). This seems to be the accepted position *within* member states; the sovereignty of EU law cannot override constitutional fundamentals whether in a written or unwritten constitution. The ECJ steadfastly adheres to the sovereignty, though primacy is often the chosen epithet, of EU law. The warning to EU institutions is: don't do anything that is repugnant to, or contravenes, national fundamental or constitutional rights. If a member state has to accommodate constitutional amendment to comply with EU law, amend the constitution or negotiate an opt-out to avoid an impasse.

Sumption believes the Brits had their constitutional moment in 2016 just as the German BVerfG has experienced its own in the *Weiss* and earlier case law! The BVerfG's constitutional moment came when it criticized the ECJ's application of EU law (it was a preliminary reference), the very thing Sumption criticized when the CHR ruled that national courts had erred in applying national law.

He sees a sharing of "constitutional identity" in the example of the constitutional case law of European national courts and the vote to leave the EU in 2016 by the UK in a tight majority (51.9%:48.1%). Unravelling why people vote a particular way is always a matter of conjecture. Some may well have been motivated by constitutional considerations, if that is not over-gracing the epithet in this context, and a fear of being subordinated by a "distant European polity" (226). Having pointed out so clearly that there was a strong consensus in the national jurisprudence of many courts that there was a limit to what the treaties authorized, and in the British case the overriding sovereignty of Parliament had not been displaced by EU law, dramatically emphasized by *Miller No 1* where Sumption joined in with the majority, he then makes this highly questionable conjecture. Furthermore, the BVerfG's judgment seems to be an act of constitutional creativity, which he denies to other courts in most of the essays where he sides with democracy against "judicial rights".

Sovereignty or primacy of EU law applies where EU law has competence. Much of our law remained untouched by EU law. And in *Miller No 1*, the constitutional importance of the UK leaving the EU impelled the majority to make a striking departure from our law of foreign relations to rule that our constitutional law required parliamentary review and legislation

authorizing notice of withdrawal from the EU and not just an act of Crown prerogative.

Many “leavers”, I conjecture, were influenced by repeated and invariably false claims disparaging the EU in much of the English press. Many, I conjecture, were moved by xenophobic and chauvinistic considerations, to which they were entitled. Many, I conjecture, were motivated by populist policies fanning fear by persuasive demagogue(s). Many, I conjecture, were inspired by a desire to spike David Cameron/George Osborne and their six-year-long imposition of austerity which hit working-class areas severely and which still does. The pair had constantly rubbished the EU and then sought to defend it prior to the referendum. Their case for staying in the EU was pathetic. All of these putative motives are “Nonsense”, says Sumption. The Brits knew what they were doing. They knew the consequences. The decision to leave is made and that belongs to the past. The UK has suffered economically because of Brexit; stagnating by degrees is not an exaggeration. Our international influence is diminishing. Our immigration has actually increased since 2020. And we face the prospect of greater alignment with EU law to strengthen our trading relations with the EU, increased EU/UK youth mobility and increased defence, security and policing cooperation. All the while having to deal with the wild card of Trump’s unpredictability and caprice.

At the end of the day, Sumption seems to be saying that the ECJ was an international court that had gone too far. As he himself argues, international relations are unavoidable and treaty commitments bring plusses and minuses. It is a bargaining process, and we can only hope our leaders fully protect our interests. My fear is that those who decry international law will take comfort from Sumption’s critique. As Richard Hermer has recently argued (2025), “progressive realism”, which believes national interests are best protected by strength abroad, not armed force but influence and persuasion, combines both a pragmatic approach to the UK’s national interests with a principled commitment to a rules-based international order. This at a time when our “soft power” presence in the world through the British Council, the BBC World Service and foreign aid is being ravaged. The removal by Cameron and his successors as Tory prime ministers of international law from the “overarching duty on ministers to comply with the law *including international law and treaty obligations*” in the 2015 Ministerial Code comes to mind. Keir Starmer restored “international law and treaty obligations” in his 2024 Code (paragraph 1.6, emphasis added).<sup>3</sup>

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<sup>3</sup> See [Ministerial Code](#). HM Government, November 2024.

The concluding subject is freedom of speech. The problem as set out is the assault on the UK's historical integrity built on custom and culture by ideological and tendentious critiques. Influencers from the past have been criticized on the basis of sexist, racist and ableist criteria labelling them as, in one way or another, benefiting from slavery, imperialism or class domination. There were, critics allege, societal biases revealing a white patriarchal hegemony that was in command. The attack on the past has been widespread, Sumption writes. Leading universities have embraced "decolonization" statements for their curricula to jettison the colonial heritage. Race becomes the absolute phenomenon masking all other complexities of culture. In common parlance, the chapter is an attack on "wokeness". America is tearing itself apart in the war on woke and the expurgation of liberal values.

Underlying these developments, Sumption claims, are attempts to purify epistemology—knowledge claims—of received science and learning and to acknowledge collective guilt for the wrongs of the past and the "heroes" who perpetrated them. What this amounts to, he believes, is little more than taking some obvious wrongs of the past and treating them as if they were the sole contribution of forgone ages and prominent individuals. His opponents would willingly align Sumption with Trump's attacks on universities and museums in the US and the wholesale assault on DEI (diversity, equity and inclusion) in public and corporate institutions. They will see an echo of Truss's claim that British institutions were captured by a leftist doctrine that hates western civilization, claims repeated by other Conservative former ministers and behind Reform's desire to root out DEI units in the local authorities that they won in the May 2025 elections; apparently there weren't any!

Sumption is above that. The attacks on western culture, he claims, are based on the assumption that there is no such thing as "objective truth", at least not as transmitted by the past. He makes a bold statement at page 224: truth is an existential reality existing "somewhere out there whether we like it or not". I share some of Karl Popper's scepticism about seeking absolute truth in preference to reducing ignorance and advancing knowledge. Popper called it a process of falsification. I would agree with Sumption that we have got closest to the truth by objective study of the available material, by abandoning fixed conceptions, "by logical reasoning and by a willingness to engage with dissenting opinion" (208). Amen to that. There are no alternative routes to truth dependent upon "different racial identities or different hierarchies of power" (208). But different experiences may expose one to different interpretations.

The problem is intensified by social media and algorithms which are able, as expressed in popular tropes, to intensify epistemic capsules, reverberate communal echo chambers and propel populist tribalism generated by a handful of fanatics. With these tools, the new influencers are powerfully assisted in their social construction of a new reality and the deconstruction of an old one.

It would be wrong to place Sumption alongside the drum-beaters of anti-wokeism. He is too subtle a thinker for that. He may well be overstating his case, and there is more than a touch of the advocate pressing his cause in the style of delivery, but he sees a growing problem, especially among today's youth. And there is a problem. But the problem is not new. Academia has always been susceptible to cliques who indoctrinate, like the Taliban. If they prevail, he writes, it will lead to the fragmentation of society and an intolerance built on conformity. This doesn't seem to be that far from what Trump is trying to achieve in the US or other autocrats elsewhere. It is also of interest to note again that, in criticizing the intolerant and structural influencers as "new roundheads", the interregnum in which the Roundheads prevailed led to many notable and liberal legal reforms which were done away with on the restoration of Charles II. It wasn't all about banning Christmas.

The concluding chapter continues the theme of enforced conformity in contemporary society and the danger this poses for freedom of speech. Freedom of speech was formulated in struggles against the state and religious bodies. But, following J S Mill, Sumption argues that public opinion to which individuals feel compelled to conform ropes them in, octopus-like. To which I imagine the new influencers would say they are simply trying to disabuse society of the prevalent false consciousness dominating traditional patriarchal, racist or whatever structures. All around we see an attack on those things which Sumption holds most dear: pluralism and diversity of opinion. The attack, he believes, is destructive of tolerance. The attack is facilitated by criticism of individualism, that characteristic so precious to Mill. The underlying objective is conformity by "systematic coercion" (216).

Sumption offers examples that come from the methods and campaigns of transgender groups and the promotion and invocation of hate speech crimes based on subjective identification of a feeling of harm rather than an objective standard of appraisal. Similar approaches are found in sexual, racial and political grievances to such an extent that hate speech operates like censorship, he argues. It has led to disciplinary proceedings for academic staff, course modifications, cancelled speeches and

publications described by Sumption. Professor Kathleen Stock resigned from Sussex university after hostile student and union reaction to her gender critical views. For Sumption, this amounted to “hounding out” (223), he somewhat emotively writes. The university was fined £585,000 by the university regulator for breaches of freedom of speech regulations. The fine was criticized by the vice-chancellor at Sussex for being unfair and disproportionate (Roseneil 2025). And in *For Women Scotland Ltd v The Scottish Ministers* [2025] UKSC 16 the UKSC ruled that “sex”, “man” and “woman” for the purposes of the Equality Act 2010 meant “biological sex” “as any other interpretation would render the EA 2010 incoherent and impracticable to operate”. It did not include sex defined by gender reassignment certificates.<sup>4</sup> Sounds like Sumption’s empire is fighting back. Nonetheless, Sumption will be accused of oversimplifying complex arguments and developments which belittle the feelings and position of individuals who see themselves victimized.

He ends by delivering a clarion call for free debate, freedom of speech and advancement of knowledge through discussion of conflicting views and opinions. “We cannot have truth without accommodating error” (226). I cannot disagree. But the opinion that no one should be entitled to “intellectual safety” (225) would, I believe, be better expressed as intellectual inviolability. We should be physically safe in expressing the views of our intellect even though they are not beyond criticism.

But I would also add, as I hope Sumption would, that it is not just the left or the woke who need censure. Right-wing ideologues and evangelical conservatives need correction too. They are certainly as great a danger to democracy and the rule of law as the crusaders he criticizes. At the moment Trump and his acolytes are in the ascendant. Their promotion of social media techs, freedom of speech without restraint (for some), economic blacklisting and power of the federal purse and military are, if anything, more insidious than the subjects of Sumption’s scorn.

## CONCLUSION

This is a very readable collection of essays by a formidable intellect. It may not be obvious from the preceding review that it has made me think about the many issues with which it grapples. The author’s delivery is always clear and well expressed, often forthright. This is not the worm’s eye view of the law, but the eagle’s. Sumption is from the upper echelons

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<sup>4</sup> *For Women Scotland Ltd v The Scottish Ministers* [2025] UKSC 16, paragraph 264. See [feminists@law 14\(2\) \(2025\)](#) and critical gender comments. [feministsatlaw/](#)

of society, privileged, well educated in prestigious institutions which have bestowed a confidence lacking in many of those who advocate anti-racism and who stand up for minorities and who feel the injustice of centuries of oppression, sometimes with bitter personal experience. Nearly 30 years before George Floyd's murder, Rodney King was subjected to a horrific beating by the Los Angeles police, the video of which caused worldwide uproar. Such racist violent abuse of power was not a novel event. One may not necessarily agree with tearing down statues of bygone slave-traders and imperialists, but one can sense the deep offence such statutes cause in a totally different society. I would favour balanced discussion about whether they should remain. I am sure the suffragettes met with similar antipathy from society's male elites in protests advancing their cause of equality. Gender recognition has fomented some of the most divisive disputes, and Sumption's account of how opposing views to those seeking transgender recognition were in essence censored is worrying. But it is his account. For their part, advocates of gender rights will argue that Sumption's views are overstated and they face hostile and overwhelming barriers in promoting their views. Social media may open up communication but it cannot stop physical exclusion.

In advocating that we take up the cudgels for free speech and combat the new ascendancy and assert our individualism, I can see that those on the left will need to be inspired by his arguments. Make no mistake, Trump and his acolytes are out to get them. Courage will be required, as Sumption demonstrates, to maintain democratic decency and integrity. Democracy is Trump's justification for his outrageous behaviour. Democracy will survive although metaphorically Cromwell's advice to "Keep your powder dry", intellectually that is, should not be forgotten.

I hope Sumption's wishes on the UK leaving the CHR do not come to fruition. He doesn't mention leaving the Council of Europe. A condition of membership of the Council of Europe is that the member state ratifies the ECHR. He would like to see the ECHR without the CHR incorporated into our law and additional safeguards introduced. This has been doing the rounds since Cameron was prime minister. A preoccupation at present is getting clarification on Articles 3 and 8 because too loose an interpretation affords convicted foreign criminals and asylum seekers unnecessary protection, Starmer's Government claims. What one asks is unworkable with the HRA? The internationalizing of domestic policy, Sumption argues, will simply fan the flames of populist politicians and lead to a world without any international law dominated by combatting autocracies (150). What if domestic policy included sending deportees to countries

where they face death or torture? Or reintroducing the death penalty; one way to resolve the problem of over-populated prisons. One can only say “stick” with what we have and not “twist”. We would end up with Hobbes’ pre-*Leviathan* nightmare in the international sphere. It may be well on the way.

### ***About the author***

**Professor Patrick Birkinshaw** was Emeritus Professor of Public Law, University of Hull, until he passed away on 23 November 2025. He was a regular contributor to *Amicus Curiae*, and we are honoured to publish his final piece for the journal. His colleague Yseult Marique has written a tribute to Patrick’s academic life and work which is published on page 830 of this issue.

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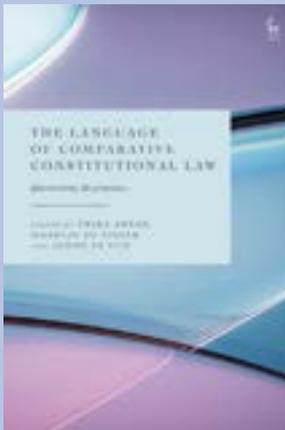
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**THE LANGUAGE OF COMPARATIVE CONSTITUTIONAL  
LAW: QUESTIONING HEGEMONIES** EDITED BY **ERIKA  
ARBAN, MAARTJE DE VISSER AND JEONG-IN YUN**

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Erika Arban, Maartje De Visser and  
Jeong-In Yun (2025)  
***The Language of Comparative  
Constitutional Law: Questioning  
Hegemonies***, published by Hart  
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ISBN 9781509983940

The book, *The Language of Comparative Constitutional Law: Questioning Hegemonies*, edited by Erika Arban, Maartje De Visser and Jeong-In Yun, constitutes the first comprehensive volume dedicated to the linguistic dimensions of comparative constitutional law. Recognizing the epistemological and conceptual implications of English as the predominant *lingua franca* in the field, the book examines how language shapes comparative constitutional inquiry from multiple perspectives. Its central aim is to heighten scholars' awareness of linguistic influence, particularly when engaging with foreign constitutional systems expressed in languages other than English. By doing so, the collection demonstrates that language is neither neutral nor merely instrumental; rather, it carries hegemonic expectations and exerts normative pressures. Featuring contributions from authors deeply embedded in national comparative constitutional discourses conducted in diverse languages, the volume offers a nuanced and wide-ranging analysis of the challenges posed by linguistic barriers in research within this field.

The book is divided into three parts, each deliberately organized to address distinct issues arising from linguistic practices in the comparative constitutional law.

The first part, “Language Barriers and Epistemic Imbalances”, comprising six chapters, examines a central challenge posed by linguistic constraints: the marginalization of non-English-speaking jurisdictions within the mainstream of comparative constitutional scholarship. Such exclusion risks narrowing theoretical development and analytical frameworks, which may become disproportionately shaped by experiences of English-speaking systems rather than a broader plurality of constitutional traditions. Drawing on perspectives from scholars in Japan, Italy, Germany and elsewhere, this section analyses the epistemic imbalances generated by the predominance of English and the resulting conceptual consequences.

The second part, “Language Biases and Contextual Dilemmas”, extends the discussion and raises further concerns about biases emerging from language choices in comparative research, particularly the recurring preference for English. Across six chapters, contributors offer personal and methodological reflections on the dilemmas created by linguistic barriers and reaffirm the necessity of engaging with local context when studying foreign jurisdictions. Such engagement is essential to mitigate distortions, marginalization and other complications introduced through translation.

The final part, “Legal Translation, Multilingualism and the Discursive Way”, presents critical reflections on the advantages and limitations of adopting either a single official language or a multilingual approach in comparative constitutional studies. Although the theoretical and technical dimensions of these debates are well developed in other disciplines, they remain underexplored within comparative constitutional law, and this section seeks to address that gap. Building on the insights of the preceding parts, it also proposes potential strategies for responding constructively to linguistic challenges in the field.

The volume begins with an introductory chapter by the editors, “Language Matters”, which outlines the foundational concepts that underpin the subsequent analyses. Addressing themes ranging from the relationship between language and law to the dynamics of *lingua franca* and hegemony, the editors argue for sustained attention to linguistic influences within comparative constitutional inquiry. These conceptual premises frame the discussions developed throughout the remainder of the book.

The first part examines linguistic barriers in comparative constitutional studies through the perspectives of six scholars from diverse cultural and legal backgrounds. The principal strength of this part lies in its

empirically grounded critique of English linguistic dominance, articulated through diverse national perspectives. By combining theoretical reflection with concrete case studies, it exposes the epistemic and methodological consequences of linguistic barriers while offering context-sensitive insights that substantially enrich comparative constitutional scholarship.

In chapters 2 and 4, Masahiko Kinoshita and Michael Goldhammer highlight challenges faced by scholars whose native languages differ substantially from English, as well as the limitations of relying on English as the *lingua franca*. They identify issues such as the under-representation of peripheral jurisdictions, the inadequate reflection of their experiences in global academic discourse, concerns over Anglophone constitutional imperialism and the epistemic distortions introduced by translation. Drawing on Japan, a jurisdiction with notably low English proficiency, Kinoshita offers a layered account of obstacles to Japanese participation in global comparative constitutional debates. He begins with the linguistic distance between Japanese and English, proceeds to consider the practical difficulties of accessing Japanese law in translation and concludes with proposals for improving engagement. Goldhammer develops a parallel critique from the German context. After defining linguistic hegemony within comparative law, he examines how dominant linguistic standards may be subtly imported into comparative reasoning as an unintended by-product of English's dominance. His argument is illustrated through three examples demonstrating the inadequacy of English translations of core German constitutional concepts. The disadvantages of English as a *lingua franca* extend beyond research and impact pedagogical settings as well. In Chapter 3, Francesco Biagi analyses the Italian experience of teaching comparative constitutional law in English. He identifies four principal challenges for instructors: translating foreign legal terminology into English, the influence of Anglo-Saxon teaching methods and curricula, the rise of multicultural classrooms and the growing expectation to broaden comparative coverage to additional legal systems. His analysis underscores the need for pedagogical adaptation in increasingly globalized educational environments.

Although the widespread use of English or other dominant languages has facilitated broader engagement in comparative constitutional scholarship, significant concerns remain. Translation limitations may lead to the unnecessary reinvention of established concepts or the loss of normative, historical and philosophical richness embedded in original terminology. These issues are addressed in chapters 5 and 6 by Joel I Colón-Ríos, Graziella Romeo and Elisa Bertolini. Colón-Ríos discusses how linguistic barriers can produce duplications of existing

constitutional ideas, thereby impeding conceptual clarity. Romeo and Bertolini examine the reliance of comparative work on translation and identify three categories of challenges: linguistic (structural differences between source and target languages); pragmatic (contextual factors such as time and place of translation); and cultural. Their analysis of the Italian term “*forma di Stato*”—and its inadequate English rendering, “form of state”—demonstrates how simplification for accessibility risks diluting academic rigor. While acknowledging the potential of artificial intelligence (AI) to assist with translation, they caution that human oversight remains indispensable. Concluding the first part, chapter 7 by Leonardo Pierdominici investigates the factors shaping the dominant narrative in contemporary comparative constitutional law. He argues that the prevailing discourse has been influenced both by the language used by scholars comparing the United States and European Communities (EC) law and by the federal English terminology adopted to describe key concepts of EC law.

Part II of the book continues the examination of linguistic biases and the contextual dilemmas they generate in comparative constitutional law. With six chapters covering jurisdictions from South Africa and India to Central Asia, this section analyses various manifestations of language bias and proposes methods for addressing them. Through this approach, linguistic bias is discussed within broader questions of power, identity and constitutional transformation across varied legal contexts. The section moves beyond critique to propose conceptually grounded approaches for addressing and decolonizing linguistic hierarchies in comparative constitutional law.

In the opening chapter, Odile Ammann identifies several forms of linguistic bias in comparative constitutional scholarship and outlines possible strategies for mitigation. Of particular interest is her discussion of AI as a potential tool for counteracting the dominance of English in the field. Building on this theme, Nomfundo Ramalekana offers a detailed analysis of epistemic injustice resulting from the adoption of English in South Africa, illustrated through the marginalization of the constitutional value of *ubuntu*. Examining judicial attempts to retrieve the philosophical substance of *ubuntu*, she argues that courts could develop a jurisprudence grounded in this concept to promote the decolonization of South African law and its emancipation from Western epistemic frameworks.

The persistence of English as a *lingua franca* in many post-colonial states is further explored in chapter 10 by Vikram Aditya Narayan and Uday Vir Garg. Focusing on India, they trace how English, initially entrenched

through colonial rule, has evolved into a lasting feature of governance and legal practice. Their analysis demonstrates that English has shaped India's postcolonial constitutional identity and that its retention as an official language reflects both elite preferences and the need to mediate between national aspirations and international engagement. In contrast, chapter 11 by Aziz Ismatov examines a different model of constitutional transition adopted in Kazakhstan, Kyrgyzstan and Uzbekistan. Rather than consolidating a single dominant language, these states engage in deliberate mixing of languages and terminologies with distinct conceptual foundations as part of their constitutional modernization projects. Through careful analysis, Ismatov argues that this semantic interplay serves to replace Western constitutional vocabulary with locally grounded concepts, enabling these states to balance stability with modernization. He concludes that strategic linguistic manoeuvring between national and global legal standards may help maintain a coherent yet adaptable political and legal order.

The final two chapters of part II, authored by Konrad Lachmayer and Ilker Gökhan Şen, examine linguistic factors from an epistemological standpoint, focusing on their influence on the development of legal terminology and constitutional concepts. In chapter 12, Lachmayer explores how language shapes the interpretation of foreign constitutional systems, the interplay between law, language and culture and the methods through which comparative constitutional knowledge is generated. He then introduces the concept of translanguaging as a means of cultivating a cross-linguistic epistemology that mitigates bias, promotes cross-cultural understanding and supports the broader project of decolonizing comparative constitutional law. While advocating for linguistic plurality, Lachmayer recognizes the practical necessity of employing a dominant reference language to ensure accessibility for readers and to support the coherent construction of comparative constitutional knowledge across different jurisdictions. Chapter 13, authored by Şen, addresses the epistemological imbalance between the state-centred theoretical and conceptual structures characteristic of Continental European legal traditions and the behavioural and descriptive approaches prevalent in Anglo-American scholarship. Seeking to "untangle" influential buzzwords originating in Anglophone discourse and integrate them more coherently into Continental conceptual frameworks, Şen proposes retaining established foundational categories while examining how these concepts interact within particular constitutional contexts. This approach, he argues, provides the most effective means of bridging methodological

and linguistic divides and reduces the risk of losing substantive insights through translation.

The final part of the volume addresses the gap between the theoretical and technical dimensions of debates concerning language choice in comparative constitutional law. Comprising seven chapters, this section examines multiple aspects of legal translation and multilingualism. Chapter 14, authored by Claudia Marchese, analyses the advantages of adopting multilingualism in the drafting of legal documents, drawing on insights from legal linguistics and comparative studies. She concludes that multilingualism facilitates a more accurate understanding of the complexity of multiethnic societies, strengthens democracy at the national level and promotes equality between states and international actors at the supranational level, thereby enhancing legal certainty on a global scale.

The interaction between multilingualism and comparative law, particularly within the context of European Union (EU) law, is further explored in chapters 15 and 16 by C J W (Jaap) Baaij and Francesco Palermo. Under Council Regulation No 1/1958, EU legislation exists in 24 languages, all of which are equally authentic. In practice, however, English has become the dominant language in legislative drafting and legal interpretation, creating practical constraints on the implementation of the EU's commitment to institutional multilingualism. These tensions are critically examined by Baaij in chapter 15, where he analyses the influence of pragmatism on EU language policy. He argues that pragmatism should not be viewed as a compromise of democratic principles but rather as a catalyst for enhancing democratic participation and transparent governance. The chapter concludes by proposing the promotion of English as a means of fostering broader public engagement in EU democratic processes. Building on this discussion, chapter 16 by Palermo highlights the inherently comparative nature of EU law, which arises from its complex linguistic regime. He identifies both the limitations of multilingualism and the essential role of comparative law in navigating multilingual legal environments within the EU.

Turning more directly to the relationship between language and comparative constitutional research, the subsequent four chapters of part III explore different dimensions of linguistic sensitivity in the field. In chapter 17, Jaakko Husa distinguishes between approaches to language in comparative law and comparative constitutional law. Noting the significant growth and diversification of comparative legal scholarship in the twenty-first century, particularly in constitutional studies, Husa observes that language is conceptualized differently across these

domains. While comparative law tends to treat language as an integral component of foreign legal systems, comparative constitutional law often prioritizes substantive analysis and accords language a more marginal role. He suggests that adopting a flexible vocabulary provides a more effective means of addressing language sensitivity across these related fields. Chapter 18, authored by Giovanna Tieghi, further examines the tension between multilingualism and the use of a common language in comparative constitutional studies. Seeking to promote a more realistic understanding of the field, she uses judicial language as a case study to identify existing challenges and propose solutions to issues of legal-linguistic interdiscursivity. Tieghi observes a growing reliance on comparative law in judicial reasoning, reflecting broader trends associated with the emergence of a “World English Umbrella”. This development demonstrates how the language of law can illuminate the contextual and socio-political variability of constitutionalism at a global level. In this process, the quality of translation plays a crucial role. However, translation has long been treated as a purely technical task and has only recently attracted sustained attention from comparative constitutional scholars. This renewed focus is taken up in chapter 19 by Lucja Biel, Hanem El-Farahaty and Francesca L Seracini, who examine the role of linguistic methods and translation in comparative constitutional law. They discuss two widely used analytical approaches: quantitative corpus linguistics and qualitative metaphor analysis. While corpus-based methods enable systematic comparison of constitutional texts and the identification of concepts specific to particular legal systems, metaphor analysis reveals shared foundations and cultural divergences in cross-constitutional interpretation. The authors conclude that, although translation facilitates access to foreign constitutional texts, it also reinforces reliance on English as a global *lingua franca* and risks imposing Anglo-centric perspectives on diverse constitutional traditions. They therefore argue that translation, especially translation made by AI, must be undertaken with expertise, interpretive skills of legal scholars and deep engagement with the source languages and legal cultures.

The final chapter of the volume, authored by Ngoc Son Bui, seeks to integrate a recent theoretical development—discursive institutionalism—into comparative constitutional law. This approach conceptualizes constitutional development as a process in which multiple actors deploy spoken and written language to articulate, disseminate and contest constitutional ideas across public, political and academic arenas. Chapter 20 offers a detailed examination of the core components of a discursive framework for comparative constitutional analysis, including

objects, actors, actions and spaces. A defining feature of the discursive approach lies in its shift of focus from language embedded in formal regulatory texts to constitutional discourse itself, encompassing both oral and written forms. These discursive objects are produced and shaped by a wide range of institutional actors, such as legislatures, executives, courts and civil society organizations, as well as by individual actors, including politicians, legal professionals and ordinary citizens. The approach is inherently comparative, as it entails the systematic comparison of constitutional discourses articulated by different actors across jurisdictions. At the same time, discursive comparative constitutional law faces linguistic challenges similar to those encountered in other comparative methodologies, requiring researchers to possess sufficient language proficiency to engage meaningfully with, and contribute to, cross-national constitutional discourse.

This edited volume by Arban, De Visser and Yun constitutes a substantial and innovative contribution to comparative constitutional studies by placing language at the centre of scholarly attention—an element long treated as peripheral or merely instrumental. The collection convincingly demonstrates that language is not simply a tool for accessing foreign constitutional materials, but a constitutive force that shapes comparative methodologies and the production of constitutional knowledge. By exposing the epistemic, normative and practical implications of linguistic choices, the volume challenges assumptions about neutrality and universality within comparative constitutional inquiry. Importantly, the book moves beyond diagnosis to offer constructive pathways forward. Through its diverse contributions, it equips comparatists with conceptual tools, methodological reflections and practical strategies for engaging more critically and reflexively with language in comparative research. At the same time, the volume could be further strengthened by the inclusion of additional empirical case studies from under-represented linguistic regions, such as parts of Africa beyond South Africa, Latin America or Southeast Asia, which would deepen its commitment to epistemic plurality. Moreover, while the book engages with AI and translation technologies, a more sustained and forward-looking examination of digital tools and their implications for comparative constitutional research would further enrich the analysis. Taken as a whole, this volume is not only of scholarly significance but also of practical value to students, legislators and judges who engage with constitutional ideas across linguistic and legal boundaries.

***About the author***

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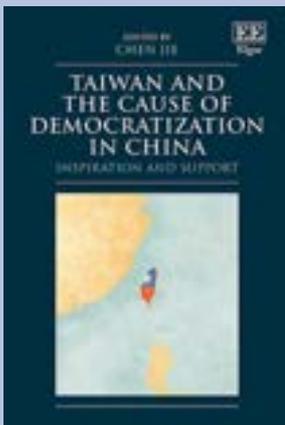
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**TAIWAN AND THE CAUSE OF DEMOCRATISATION IN  
CHINA: INSPIRATION AND SUPPORT**  
**EDITED BY CHEN JIE**

JEAN-PIERRE CABESTAN  
French National Centre for Scientific Research

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Chen Jie, ed (2024)  
*Taiwan and the Cause of  
Democratisation in China:  
Inspiration and Support*, published  
by Edward Elgar, Cheltenham  
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This is a stimulating but rather depressing book. It is stimulating because it shows that not only democracy is living and dynamic in Taiwan but also that this democratic experience has inspired many Chinese-speaking people around the world. However, it is depressing because neither Taiwan nor the Chinese Communist Party (CCP) are interested in the democratization of the People's Republic of China (PRC).

Edited by Chen Jie, Associate Professor of Political Science at the University of Western Australia, who is well known for his deep knowledge of Taiwan, this volume primarily “intends to enrich the discourse on Taiwan democracy and its implications for China” (17).

Because of its “niche position in the Chinese-speaking world at the beginning of the 2020s” (1), Taiwan’s democratic experience has the potential to influence political change in the PRC. Indeed, Chinese liberals and dissidents have shown a strong interest in Taiwan democracy as a model for China; and often they publish their work in Taiwan. But as Chen Jie himself demonstrates, particularly in chapter 2, Taiwan’s support of the cause of democracy and human rights in China and Hong Kong, be it under former Presidents Ma Ying-jeou or Tsai Ing-wen, has been weak.

There are two major reasons for that: on the one hand, the fear of provoking China, which explains Ma's rare mentions of the human rights situation in the mainland; on the other hand, and this is the main cause, the emergence of Taiwanese identity and even nationalism or what the PRC and the Kuomintang (KMT) call the island's "de-sinification".

True, Tsai did welcome some Chinese dissidents; the Taipei-based Taiwan Foundation for Democracy (TFD) has funded works in China and Hong Kong. And after the introduction of the National Security Law in the former British colony in June 2020, Taiwan has received around 30,000 Hong Kongese; nonetheless, only 16% of them had been granted permanent residency by the end of 2022 (35). When Tsai came to power, 42,000 Chinese students were taking part in study camps (*yanxi ying*) (29), but their number dropped to 4300 in 2021 and after (34); China has remained a low priority for the TFD; and Tsai only made a few public statements on China's human rights situation and the need to democratize.

In chapter 3, Joseph Yu-shek Cheng, retired professor at City University of Hong Kong—who had to leave his hometown shortly after 2020 and is now a non-resident senior research fellow at the Stockholm International Peace Research Institute—concur with this conclusion. Focusing on Taiwan's support for the cause of democracy in Hong Kong, his contribution shows perfectly well the influence of Taiwan's spring 2014 Sunflower Movement on Hong Kong's autumn 2024 Umbrella movement. He also convincingly demonstrates how much Hong Kong's 2019 protest movement helped Tsai's re-election as President of Taiwan in January 2020. However, Cheng also admits that, since 2020, Taiwan's interest in Hong Kong has been on the decline, which has been a source of frustration for the metropolis' democrats. Another source of frustration for the Hong Kong activists who decided to take refuge in Taiwan has been the lukewarm welcome they have witnessed from both the island's Government and society.

Taiwan remains a source of inspiration on same-sex marriage (SSM) and LGBTQ rights for the Chinese-speaking world. In chapter 4, Frédéric Krumbein, professor at Tel Aviv University in Israel, highlights how much the island-state is ahead of other Chinese communities in these areas. But he also carefully analyses how LGBTQ activism in Taiwan has been linked to the rise of Taiwanese identity and what he calls "Homonationalism" (93-94). In other words, "many LGBTQ are pro-human rights and pro-self-determination" (95) which obviously contributes to creating a distance between gay rights activists both in post-2019 Hong Kong and

mainland China. Moreover, Krumbein admits that there has been little media coverage of LGBTQ or SSM in the Chinese media. While on SSM this coverage tends to be more neutral in English than in Chinese (100), the Hong Kong media are more positive. However, although in September 2023 the Hong Kong Court of Final Appeal made a decision in favour of SSM, in September 2025 the Hong Kong Legco, the local parliament, voted against its legalization, probably under the pressure of the PRC central government's Hong Kong Liaison Office.

Authored by Chia-chou Wang, professor at I-Shou University in Kaohsiung, chapter 5 provides some cautious optimism. It is a case study concentrating on Chinese students in Taiwan and the impact of their experience there on their political beliefs. His conclusion is that these students have become more critical and more sceptical towards the PRC Government as well as its achievements overseas. One can object to the small size of the sample on which this study is based (101 individuals, more than three-quarters of them being women). Yet, at the end of their stay, while some Chinese students have become even more patriotic, the majority of them go back to the PRC with a positive view about Taiwan's democratic experience.

This book's last chapter is probably the least innovative. Written by Yeau-tarn Lee, a Professor at National Chenchi University, its ambition is to unpack the theoretical debate on the relevance of Taiwan's democratic transition model for China. Nevertheless, inspired by Samuel Huntington's Third Wave and Larry Diamond's democratization theories, this contribution presents more about Taiwan's well-known success story than China's distinct and divergent political experience and future path. Lee is right to underscore the compatibility between liberal democracy and the Chinese cultural background, but he does not tell us much about all the obstacles the PRC political regime would need to overcome to democratize. The CCP is far from being divided about the need to keep a one-party system; authoritarianism has not prevented the PRC from developing and modernizing the country; and, while liberal values may be more common, they are much weaker than nationalism and a general support for the security that the regime offers. Moreover, while civil society exists in China, it has remained on a very short leash, highly dependent upon the Party-state and, although Christianity's influence has increased and may favour the dissemination of democratic ideas, Western religions will remain attractive to only a minority. And, contrary to the situation in Taiwan, external factors will probably not play a big role. In other words, the CCP has remained very strong and is equipped with the financial and technical capabilities to prevent any "snowballing

effect”. As Lee admits, a new form of “digital totalitarianism” (155) has emerged in China that has killed any hope in the foreseeable future for the emergence of a constitutional order and a civil society conducive of peacefully democratizing China.

This book’s conclusion can thus only be rather pessimistic. As indicated in the introduction, Taiwan’s overall agency in democracy promotion targeting China is “declining” (20). It is a “beacon of democracy by default” (166). In the early 2000s, Chinese pro-democracy promoters such as Liu Xiaobo had already invited the Taiwanese to get more interested in China’s democratization (15-16). And his successors, such as Li Weidong in 2020, have not been short of ideas, proposing for China a return to the Republic of China’s 1947 Constitution. But they may be out of touch with Taiwan’s new reality because the Democratic Progressive Party is opposed to Taiwan’s return to China and the KMT does not want to “provoke” Beijing (49-50). In 2022, Wang Juntao asked a group of young Taiwanese if they were interested in China’s democratization. Much to Wang’s chagrin, they candidly answered that it was not their business (48).

Despite the rather bleak picture that it offers, this book should be read by anyone who is interested in China’s democratization and Taiwan’s role in this process.

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Special Section:  
Introducing Deaf Legal Studies, edited by Rob  
Wilks, pages 721-829

**EDITORIAL**

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[A] INTRODUCTION

Law has long failed to understand deaf people. When law does see us,<sup>1</sup> it does so narrowly, most often through the lens of disability, while ignoring other ways of framing deaf experience as a language minority, a culturo-linguistic group, an ethnic group and an Indigenous group (Wilks 2019; in press). This misrecognition can have profound consequences: deaf people are either made invisible in legal frameworks or offered only symbolic rights and minimal adjustments. Such responses do little to challenge structural barriers or the deeper hearing bias built into law (Wilks 2025).

In this Special Section, “deaf” is used to describe all kinds of deaf persons, and “Deaf” is used to refer to sociocultural entities or established theoretical concepts such as “Deaf culture” (Kusters & Ors 2015). It introduces Deaf Legal Studies (DLS), an emerging field that seeks not only to critique how hearing-centred assumptions shape participation, authority and justice across the diversity of deaf experience, but also to advance a positive project grounded in deaf epistemologies, lived experience and co-produced research. Drawing on these perspectives, DLS invites wider jurisprudential reflection. In this sense, the questions raised by deaf experience are not confined to deaf communities, but speak to how law recognizes and validates knowledge more generally.

The timing is significant. Globally, campaigns for sign language law, the incorporation of disability rights instruments, and intersectional approaches to deaf lives are gathering momentum. Significantly, in July 2025, at the 24th International Congress on the Education of the Deaf in Rome, a Joint Declaration issued by leading global deaf organizations called on deaf educators to renounce the 1880 Milan resolutions. Adopted at an earlier International Congress, the Milan resolutions endorsed oralism and led to the systematic exclusion of sign languages from

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<sup>1</sup> Note the author is a deaf BSL signer.

deaf education worldwide, shaping educational policy and professional practice for more than a century. The Declaration affirms sign languages as full and natural languages and advocates their legal recognition and early access for deaf children (World Federation of the Deaf 2025).

Similarly, a cultural shift is underway in the United Kingdom. This shift is unfolding alongside wider cultural and institutional changes, including increased public visibility of British Sign Language (BSL), sustained advocacy by the British Deaf Association and other deaf organizations, the enactment of BSL legislation across the UK's four nations, and emerging debates within deaf education about the value of sign language and the continuing influence of medicalized approaches (O'Neill & Ors 2025; Wilks & O'Neill 2025). This evolving context confirms the continuing relevance of DLS.

The contributions to this Special Section reflect these shifts: from the incorporation of the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) in Northern Ireland, with attention to provisions on sign language (Byrne), to the implementation of the Dutch Sign Language Recognition Act (Oyserman), a legal mapping method for analysing deaf rights in Brazil (Beer) and the protection of deaf survivors of domestic abuse in England (Gorman).

These contributions show that DLS is more than a critique: it is the foundation of a new field, one that challenges how law misrepresents deaf people and offers new ways of imagining justice, rights and participation, aligned with Deaf Gain perspectives that recognize the value of deaf ways of being to hearing society (Bauman & Murray 2014).

## [B] DEAF LEGAL STUDIES

Since the late nineteenth century, a substantial number of scholars have carried out deaf legal research. It is not possible to catalogue this literature fully in an editorial of this kind, with at least 80 relevant publications identified. Instead, a thematic approach is adopted to introduce a selection of key contributions, which date from 1857 to the present day.

### From legal status to legal systems

Early deaf legal research focused on questions of legal status, capacity, and responsibility, treating deaf people as subjects whose competence required legal classification and regulation (Peet 1857). Comparative and doctrinal work at the turn of the twentieth century examined how deafness affected legal personhood across different legal systems (Gaw

1906; 1907). Mid-twentieth-century scholarship continued to explore whether deaf people could hold rights, bear duties, or be held legally responsible, often within explicitly medicalized frameworks (Myers 1967; 1970). Later work shifted attention away from abstract questions of status towards the operation of legal systems and institutions (Goldberg 1980), including how justice is administered in practice (Brennan & Brown 1997). More recent scholarship has examined this shift as part of a broader move towards analysing the systemic structures that shape deaf people's encounters with law (Wilks 2024; in press).

## Procedural justice as a long-running spine

Procedural justice forms a persistent concern across deaf legal research, with repeated attention to whether deaf people are able to participate meaningfully in legal processes (Berko 1992; Brennan & Brown 1997). This body of work has examined a wide range of procedural settings, including police interviews (Vernon & Ors 2001), courtroom proceedings (LaVigne & Vernon 2003; Pravda & Mosier 2011), jury service (Napier & Spencer 2008), access to legal advice (Kyle & Ors 2012), and pre-trial decision-making (Vernon & Ors 2001), consistently identifying barriers linked to communication, understanding, and evidential fairness. Related scholarship has extended this analysis beyond the courtroom to consider imprisonment and detention, showing that procedural failures often persist after conviction and continue to shape deaf people's experiences of custody and punishment (McCulloch 2012; Kelly 2017). Comparative and cross-jurisdictional research further suggests that these difficulties are not isolated or context-specific, but reflect broader systemic features of criminal justice systems (Olsen & Kermit 2015).

## Interpreters: from solution to problem

A recurring theme in deaf legal research concerns the role of interpreters and translation within legal settings. Earlier scholarship often treated interpreting as the primary mechanism through which deaf people could access legal processes, assuming that communication barriers could be resolved through professional mediation (LaVigne & Vernon 2003; Brunson 2008). More recent work has challenged this assumption, showing that the presence of an interpreter does not necessarily secure fairness, understanding, or equality, and may introduce new risks, distortions, and power imbalances within hearing-centred legal systems (Kermit & Ors 2011; Roberson & Ors 2011). This has led to a broader reframing of interpreting, from a technical solution to a structural feature

of legal processes requiring critical scrutiny (Napier & Banna 2016; Wilks 2022).

## From courts to everyday life

While early deaf legal research focused largely on courts and criminal justice, later scholarship increasingly examined how law shapes deaf people's experiences beyond formal legal proceedings such as making decisions for deaf children regarding cochlear implants (Brusky 1995). This work extends into everyday domains such as healthcare (Steinberg & Ors 2006; Schwartz 2008; Arrowsmith 2013; SignHealth 2014; Kuenburg & Ors 2016; Laur 2018; Royal National Institute for Deaf People & SignHealth 2025), education (Fernandez-Viader 2004; Snoddon 2009), employment (Barnes 2017; Action on Hearing Loss 2018; Rahman & Ors 2021; Lindsay & Ors 2023), and equality, showing how legal rules and obligations operate in routine interactions with public services rather than only at moments of litigation (Steinberg & Ors 2006; Snoddon 2009). Research in these areas highlights how legal frameworks governing health, work, and social participation continue to structure deaf people's opportunities and exclusions in daily life (Barnes 2017; Rahman & Ors 2021; Lindsay & Ors 2023).

## Recognition of sign languages

From the mid-2010s onwards, the legal recognition of sign languages has emerged as a prominent strand within deaf legal scholarship (Wheatley & Pabsch 2012; Batterbury-Magill 2014). This literature examines the forms recognition takes, its legal consequences, and its limitations across different legal contexts (De Meulder & Ors 2019; Tupi 2019; Wilks & Venade de Sousa 2025). While often framed as progress, recognition is frequently shown to be symbolic, weakly enforced, and unevenly implemented (Snoddon & Wilkinson 2019; Busatta 2022; Bloxs 2025; Wilks 2026).

## From national to comparative and international perspectives

Earlier deaf legal research tended to focus on domestic legal systems, particularly within Anglo-American contexts (Gaw 1906; 1907). Over time, the literature has become increasingly comparative and international, examining deaf people's legal experiences across jurisdictions and legal traditions (Sabatello 2005; Olsen & Kermit 2015). This shift has also brought greater engagement with broader human rights frameworks

and regional or international legal contexts (Haricharan & Ors 2013; Tupi 2019; Venade de Sousa 2019). More recent work continues this direction through further comparative and cross-jurisdictional analysis, reinforcing the limits of purely national approaches to systemic exclusion and legal inequality (Ferri & Ors 2024; Roy & Ors 2024; Wilks & Venade de Sousa 2025).

## Increasingly empirical and interdisciplinary approaches

Finally, the literature shows a clear movement towards empirical and interdisciplinary approaches over time (Steinberg & Ors 2006; Battersby & Ors 2008). While doctrinal analysis remains important, later work increasingly draws on qualitative research (Kermit & Ors 2011), mixed methods (Haricharan & Ors 2013), and policy analysis (Engelman & Deardorff 2016), alongside insights from linguistics, sociology, disability studies, and translation studies. This methodological diversification has enabled closer examination of how sign language can function as a working legal language (Stone & Mirus 2018), developed Deaf Legal Theory (Bryan & Emery 2014; Wilks 2022; 2025), examined the experiences of First Nations deaf people (Elder & Ors 2024), and considered whether a code of practice is needed for teachers of the deaf (O'Neill & Ors 2025).

It is immediately clear from the preceding discussion that deaf legal research has been undertaken for at least 140 years. While this work has not previously been described in these terms, it is argued here that, taken together, these and others not cited here constitute a distinct body of DLS.

## [C] METHODOLOGIES

To be clear, it is possible to utilize any research methodologies for DLS research. Given that DLS is predominantly about the law and legal systems, it goes without saying that the law and legal concepts (Hutchinson & Duncan 2012), that is, the traditional black-letter law approach, should be employed in some shape or form. However, modern scholars, most notably Cotterrell (1998), argue that true legal scholarship entails a sociological understanding of law. Indeed, law cannot be separated from social, political, and economic issues (Scarman 1968), and Singhal and Malik (2012) warn against relying solely on doctrinal research for this reason.

To achieve this sociological understanding of law, the socio-legal methodology is of particular use. Socio-legal methodology aims to examine legal systems, legal institutions, legal actors, and legal processes, seeking to uncover the underlying social dynamics that influence the production, interpretation, and application of law (Cownie & Bradney 2017; Creutzfeldt & Ors 2019; Wheeler & Thomas 2000; Socio-Legal Studies Association 2021). By understanding how law interacts with society, socio-legal research can inform legal reform, promote social justice, and enhance our understanding of the human condition (Feenan 2013).

Socio-legal scholars employ various methods, including content analysis—analysing the content of textual, visual, or audio information (Krippendorff 2022)—and empirical research (Webley 2019), which can involve systematic investigation through direct observation or experimentation, gathering and analysing data to test hypotheses and answer research questions (Blackham 2022). Case studies (Argyrou 2017; Simons 2025), historical analysis (Seal & Neale 2019), theoretical critiques (Cotterrell 2017; 2023) such as Deaf Legal Theory (Wilks 2022; 2025), and autoethnography—“a form of self-narrative that places the self within a social context” (Reed-Danahay 2020: 9)—can also be used.

Another often utilized legal research methodology is that of comparative legal research, conventionally understood as the study of differences and similarities between distinct legal systems across jurisdictions (Zweigert & Kötz 1998). This can assist understanding as to how law functions in context, to identify best practice, and to inform legal reform (Örücü 2012).

There is a plethora of research methodologies available, and the beauty of legal research is that DLS researchers are not constrained to legal research methodologies only. Given the multidisciplinary and interdisciplinary nature of socio-legal research in particular, it is possible to “borrow” methodologies from other disciplines, including sociology, anthropology, criminology, linguistics, translation studies, disability studies, education, and the health and social sciences.

## [D] THIS SPECIAL SECTION

This Special Section brings together four articles that examine deaf people’s encounters with law across different jurisdictions, legal domains, and methodological traditions. Taken together, they demonstrate the breadth of contemporary deaf legal research and illustrate how law continues to shape deaf people’s lives through a combination of formal recognition, institutional practice, and regulatory design.

The first article, by Bronagh Byrne, examines the incorporation of the UNCRPD in Northern Ireland, with particular attention to the legal status of sign language and its implications for access to justice. The article situates sign language within international human rights law while remaining attentive to the domestic constitutional and political context in which incorporation operates. Rather than treating incorporation as an end in itself, the analysis highlights both its potential and its limitations, demonstrating how international legal instruments may offer leverage for reform while remaining dependent on national implementation and institutional will.

Joni Oyserman's contribution turns to the Netherlands and provides a detailed examination of the implementation of the *Wet Erkenning Nederlandse Gebarentaal* (Dutch Sign Language Recognition Act). Drawing on empirical data, the article interrogates the gap between legislative recognition and lived legal experience, showing how formal acknowledgment of sign language does not automatically translate into meaningful change.

The third article, by Hanna Beer, offers a detailed legal mapping of how Brazilian federal legislation regulates linguistic rights and linguistic duties related to Brazilian Sign Language (Libras). Grounded in the field of *Direito Linguístico* (Linguistic Law), the article analyses legislation as a form of translation governance, examining how the state structures and administers linguistic access through dispersed regulatory instruments. By tracing how linguistic obligations are embedded within accessibility frameworks, the article provides a systematic account of how language is regulated across legal domains, contributing a comparative and Global South perspective to the Special Section.

Finally, Abigail Gorman's article focuses on deaf survivors of domestic abuse in England. It examines how legal and support systems intended to protect victims may instead produce exclusion and harm when communication needs are inadequately addressed. Through its analysis of institutional responses and professional practices, the article highlights the ways in which law operates not only through formal rules but through everyday systems of access, interpretation, and decision-making.

Across the four articles, several common themes emerge. Each contribution highlights the limits of formal legal recognition when it is not accompanied by effective implementation, enforcement, or institutional change. All four demonstrate that deaf people's exclusion from law often arises not from the absence of legal norms, but from the ways in which those norms are operationalized within legal systems and public institutions.

Methodologically, the articles reflect the interdisciplinary character of deaf legal research, combining doctrinal analysis, empirical methods, legal mapping, and policy critique. Collectively, they illustrate how DLS can be used to interrogate the relationship between law, language, and power across diverse legal contexts, while remaining attentive to deaf people's lived legal realities.

## [E] CONCLUSION

This Special Section is not offered as a definitive account of DLS, nor as a fixed or closed framework. Instead, it reflects an open and developmental approach, inviting scholars to apply, adapt, and critique DLS across diverse legal contexts. Its significance lies less in resolving debate than in creating space for further engagement—through empirical research, doctrinal analysis, policy work, and collaboration with deaf communities—to rethink how law engages with deaf people's lived realities.

In this spirit, the establishment of the [Deaf Legal Studies Association](#) (DLSA) provides a practical space for collaboration, critical debate, and collective development, offering a forum through which DLS can continue to evolve in response to the real-world legal challenges faced by deaf people. Readers are invited to engage with and contribute to this developing field.

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# UNTAPPED POTENTIAL? INCORPORATION OF THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES AND SIGN LANGUAGE JUSTICE: LESSONS FROM NORTHERN IRELAND

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## **Abstract**

This article explores the extent to which making the United Nations Convention on the Rights of Persons with Disabilities (CRPD) (2006) part of domestic law, that is, incorporation, can act as a supportive mechanism in the pursuit of sign language justice. Despite parallel developments in incorporation of human rights treaties and sign language recognition, these legal processes have largely been explored in isolation of each other. Using Northern Ireland as a case study, the article argues that making the CRPD part of domestic law, in some form, provides a strategic vehicle to hold states parties to account in their actions around sign language rights.

**Keywords:** sign language recognition; UNCRPD; incorporation; language justice; rights.

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## [A] INTRODUCTION

The United Nations (UN) Convention on the Rights of Persons with Disabilities (CRPD) was the first human rights treaty of the twenty-first century, adopted by the UN in 2006. The premise of the CRPD is “to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity” (Article 1 CRPD). In this context “persons with disabilities” is given particular but non-exclusive meaning and “includes those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others” (Article 1 CRPD). This can be read as including those who are deaf. Indeed, the CRPD makes specific reference to those who are deaf, deafblind, to the deaf community, and to sign language; the first time this has been the case in an international human rights treaty of

this type. For this reason alone, the CRPD is of huge significance, not least given that 185 of the 193 UN member states have ratified the CRPD at the time of writing.

This significance is somewhat disjointed by the fact that many deaf people do not view themselves as “disabled” but as part of a cultural and linguistic minority (Batterbury 2012). Across law and policy, however, deaf people can be understood to have “dual category status” (De Meulder & Murray 2017: 139), due, on the one hand, to their disability group status and, on the other, their minority language status as sign language users. Rob Wilks (2022) refers to this as the “Deaf-disabled and language minority dichotomy”, noting that the law recognizes “Deaf-disabled rights” and offers protections if deaf people in turn accept that classification (Wilks 2025). In contrast, while language-minority rights exist, predominantly in the form of sign language recognition law, these generally provide fewer substantive protections (De Meulder 2015; De Meulder & Ors 2019; Wilks 2022). In practice, however, the decision of whether or not to occupy a disability category status or language minority status is not a binary one (Wilks 2022). The consequence of this disconnect is that the legal protection of sign languages remains uneven and situated at the intersection of disability rights and linguistic rights (Ferri & Ors 2024).

At the time of writing, 81 countries across the world have recognized sign language in some form (WFD 2025). In parallel, there has also been a global general trend towards incorporation of international human rights treaties into domestic law, including those where there is explicit reference to disability, that is to say, the UN Convention on the Rights of the Child 1989 (CRC)<sup>1</sup> and the CRPD. Incorporation refers to the legal process through which international treaties are made part of domestic law in some form, either in full or in part (Denza 2006). These legal processes, incorporation of the CRPD and the development of sign language law, have been largely explored in isolation from each other despite their complementarity and strategic transformative potential as a holistic body of work.

Transformative potential in this regard can be understood as the desire to harness existing learning to foster a move towards transformative equality. Transformative equality, as Wilks (forthcoming) notes, seeks to change societal attitudes and eliminate deeply entrenched structural inequalities that emanate from the taken-for-granted rules of everyday practice(s). In the same way that claiming Deaf-disability rights and

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<sup>1</sup> The CRC was the first treaty to make explicit reference to disability. Article 2 includes disability as a ground for non-discrimination while Article 23 sets out the rights of children with disabilities.

language-minority rights at the micro level do not need to be a binary choice, neither does their analysis at doctrinal level. As Sarah Batterbury argued (2012: 253), the CRPD “provides the best hope for sign language policy notwithstanding its disability framing”. Article 24(3) of the CRPD, for example, requires states parties to “facilitate the learning of sign language and the promotion of the linguistic identity of the deaf community”, while Article 30 establishes that “persons with disabilities” are entitled to recognition and support of their specific cultural and linguistic identity, including sign languages and Deaf culture. These entitlements can be found, in varying forms, in standalone sign language legislation in different jurisdictions.

This article seeks to confront the existing disconnect by exploring the extent to which international legal protections offered on the basis of deaf-disabled status (specifically the CRPD) that are incorporated into domestic law can contribute to the development of a supportive architecture for language-minority rights, and ultimately to achieving sign language justice. To do so, the article, for the first time, explores the specific role of CRPD incorporation for achieving sign language justice. The focus, therefore, is less on the CRPD generally, and more on the untapped potential that the legal process of *incorporation*—that is, what making the CRPD part of domestic law (whether in full or in part)—offers sign language law. It applies the author’s extensive work around incorporation of the CRC, and more recent work on incorporation of the CRPD,<sup>2</sup> as a framework to identify the potential benefits and challenges of this process for sign language justice.

Using Northern Ireland as a case study, where both a Sign Language Bill, and, separately, a proposed Private Member’s Bill (PMB) on incorporation of the CRPD, are in progress at the time of writing, it is argued that direct legal incorporation of the CRPD whether in full, or in part (in respect of sign language provisions), provides a strategic vehicle to hold states parties to account in their actions around sign language rights by promoting greater opportunities for enforceability and justiciability of sign language rights at a domestic level as well broader cultural change on the ground. This is not to say that the CRPD is without its limitations (Byrne 2022; Sousa 2023; Ferri & Ors 2024), but that its realization does indeed have something to offer sign language justice given its almost uniform ratification across the globe.

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<sup>2</sup> A body of work does not yet exist on incorporation of the CRPD to the same extent as the CRC. This is due in part to the CRC’s long-standing status and the time it takes post ratification for countries to develop legislation that integrates it into its domestic law where applicable.

The article begins by outlining the methodologies employed before moving on to briefly examine the key concepts of sign language justice and incorporation that underpin the discussion. The article then explores the incorporation of human rights treaties in more depth, situating this within the context of the CRC and CRPD. The focus then moves on to sign language law, with a discussion of what this looks like in the United Kingdom (UK) before exploring the proposed Sign Language Bill for Northern Ireland specifically. The final substantive section examines the proposed PMB in Northern Ireland on incorporation of the CRPD before exploring the untapped potential that this might offer for sign language law. While initially discussed through the lens of Northern Ireland, it has clear applicability for how incorporation of the CRPD could support—or indeed, transform—the development and implementation of sign language law in states that have either ratified the CRPD and are considering taking a more formal approach of incorporation, and in states that have already ratified the CRPD and wish to strengthen existing or proposed sign language law. The article concludes by summarizing the main findings and presenting recommendations for the way forward.

## [B] METHODOLOGY

A multi-method approach to exploring the potential benefits of CRPD incorporation for sign language law is utilized in this article. It draws, firstly, on the author's existing body of research on the legal implementation of the CRC in selected countries across the world. This comparative analysis included both empirical research and documentary analysis on the actions of states parties in this regard (see below for further discussion). Secondly, it uses critical content analysis of selected and relevant international human rights treaties, domestic law and related policy documents.

In adopting a critical analysis approach, it is important to be mindful of the social and political contexts in which texts and documents are produced, and the ways in which they can either create, challenge or reaffirm social inequalities (Holland & Novak 2017). Critical content analysis of texts aims to uncover taken-for-granted or normalized assumptions, looking both at what is there, but also what is not there that should be there (Diem & Ors 2014).

As Alysia Blackham (2025) notes, content analysis can act as a critical component to doctrinal analysis, with Mark Hall and Ronald Wright (2008) contending that this method brings the rigour of social science methods to legal research. These methods are adopted in the context of

a case study approach to Northern Ireland where moves are currently being taken both to adopt sign language law and legal incorporation of the CRPD. As Aikaterini Argyrou (2017) notes, a case study approach aims to provide in-depth exploration and detailed descriptions of a phenomenon, helping to answer questions of “how” and “why”.

## [C] CONCEPTUAL FRAMEWORK

The concepts of incorporation and sign language justice form the overarching framework for this article. This section sets out their meaning for the purposes for the present discussion. Human rights treaties impose duties on states parties to respect, protect and fulfil the rights contained therein (Bantekas & Oette 2024). In general, treaties impose duties on states parties to take all appropriate measures to implement them. This includes both legal and non-legal measures. Given the implementation gap that exists across many treaties in practice, growing attention has been paid to the measures of legal incorporation; in other words, making a treaty part of domestic law. This has been a particular feature in so-called dualist jurisdictions where human rights treaties do not automatically become part of domestic law upon ratification as is usually the case in monist states (see, for example, Denza 2006). Despite the transformative potential of incorporation, there is a limited body of published work that explores this in practice, particularly in relation to the CRPD. However, work that has begun to emerge is beginning to show the significant impact that legal incorporation can have on the covered population group’s experiences of their rights (see, for example, Lundy & Ors 2013; Kilkelly & Ors 2021).

A distinction can be made between different types of incorporation. Direct incorporation occurs when the treaty, either in full or in part, is incorporated directly into the domestic legal system. This may be at constitutional level or in a statute, or similar legal instrument (Lundy & Ors 2013). Indirect incorporation occurs when measures are taken to give the treaty some effect in national law, but they stop short of making substantive rights part of the domestic legal order. An example of full and direct incorporation is the UNCRC (Incorporation) (Scotland) Act 2024 (see, for example, McCall-Smith & Kirk 2025).

This article uses the term “sign language justice” to situate the desired outcome of sign language law, whether alone or as supported by incorporation of the CRPD. It builds upon Batterbury’s (2012) use of the term “language justice” which views language access and legal recognition of language as a means of achieving social justice. As Alison Cardinal and

colleagues (2021) highlight, however, access can be understood as a social construction that predominantly focuses on translation and interpreting only when requested rather than seeking to disrupt entrenched forms of oppression and taken for granted spoken language-oriented day-to-day practices. The concept of sign language justice is therefore here understood to be about more than language access and the availability of information in signed languages. Rather, it is understood here as about the overcoming of language “injustice” (Fraser 2012), through challenging the subordination of sign language, and as a key component of transformative approaches to equality, alongside challenging attitudes and dismantling the root causes of the structural inequalities that deaf people experience (Wilks forthcoming).

## [D] INCORPORATION OF HUMAN RIGHTS TREATIES

In 2012, a major study was undertaken by Lundy and colleagues for UNICEF UK, exploring legal implementation of the CRC in 12 countries (Lundy & Ors 2013).<sup>3</sup> This took the form of a comparative empirical and documentary analysis of how a number of states parties to the CRC had approached the legal implementation of the Convention, and based on the obligation under Article 4(3) of the CRC that states parties:

undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognised in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources.

While legal measures are not the only way of implementing the CRC, the Committee on the Rights of the Child (the CRC Committee), the associated treaty-monitoring body, has also highlighted the importance of this approach. According to the CRC Committee (2003), incorporation occurs when “the provisions of the Convention can be directly invoked before the courts and applied by national authorities”. The findings from the study illustrated that higher levels of legal implementation were associated with greater levels of respect for children’s rights. A follow-on study in 2021 built on this research, exploring the legal landscape of the CRC in a further 12 countries with a mix of legal traditions, including the United States which has not ratified the CRC (Kilkelly & Ors 2021). The findings from both studies highlighted that there is no single way to

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<sup>3</sup> The 12 countries chosen for inclusion in the study were: Australia, Belgium, Canada, Denmark, Germany, Iceland, Ireland, New Zealand, Norway, South Africa, Spain, and Sweden.

achieve legal incorporation of a human rights treaty and that there are different forms of legal incorporation.

While there remains limited evidence about the cause and effects of incorporation, research points to greater implementation of children's rights in countries that have achieved greater levels of legal incorporation (Kilkelly & Ors 2021), contributing to a culture where children are visible and viewed as rightsholders.

While the research discussed relates to the CRC, similar principles apply when exploring incorporation of the CRPD, in that each country will find itself at different points along the incorporation journey, and the ultimate aim is for the greatest level of implementation possible. This provides us with a useful starting point in exploring the implications of legal incorporation for contributing to achieving or at least progressing language justice in the absence of a similar body of knowledge that explores the effects of CRPD incorporation. Similarly to the CRC, Article 4(1) CRPD requires states parties to:

To adopt all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the present Convention.

Uniquely, Article 4(3) of the CRPD further requires that:

In the development and implementation of legislation and policies to implement the present Convention, and in other decision-making processes concerning issues relating to persons with disabilities, States Parties shall closely consult with and actively involve persons with disabilities, including children with disabilities, through their representative organizations.

The CRPD Committee has consistently called on states parties to incorporate the Convention across its Concluding Observations (see, for example, CRPD Committee 2024; 2019; 2017—in respect of Sweden, Cuba and the UK). It is here that the discussion around measures of implementation takes on renewed import for the area of sign language law and policy. Where a state fully and directly incorporates the CRPD, this should, in theory, provide strong(er) protections and justiciability for sign languages in domestic law and contribute to the development of a culture where sign languages are respected on the same basis as spoken languages. As noted earlier, Articles 21 and 30 of the CRPD place duties on states to facilitate the learning of sign languages and promote the linguistic identity of the deaf community. There are also other relevant provisions in the CRPD which need to be considered for the holistic achievement of language justice.

Article 9(2e) of the CRPD requires states parties to provide forms of “live assistance and intermediaries” including sign language interpreters, to facilitate accessibility to buildings and other facilities open to the public. Article 21 requires states parties to take all appropriate measures to ensure “persons with disabilities” can exercise the right to freedom of expression and opinion, including the freedom to seek, receive and impart information on an equal basis with others, including by “accepting and facilitating the use of sign languages ... in official interactions”. (Article 21(b)), and “recognizing and promoting the use of sign languages” (Article 21(e)). Elsewhere, Article 24(3) also requires that states parties ensure that education for children who are deaf, blind or deafblind is delivered in the “most appropriate languages and modes and means of communication for the individual”. To realize this right, states parties are obliged to take appropriate measures to employ teachers, including teachers with disabilities, who are qualified in sign language.

There are also other general references to communication through the CRPD which can be taken to include sign languages. While imperfect, and more frequently highlighted as a gateway to accessibility of an identity or cultural issue (Bantekas & Ors 2018), the CRPD does provide a minimum set of standards against which countries that have ratified the CRPD can be held to account. It is important to emphasize that the rights contained in any human rights treaty reflect the minimum standards and entitlements, not the maximum, yet these tend to be provided, presented, or perceived, as aspirational and in a way that implies, however subtle, that the rightsholder should be grateful if or when these entitlements are made real in domestic law or policy. While ratification of the CRPD provides a broad framework that the deaf community can use to negotiate and lobby for change, its incorporation via legal measures, based on the explicit duties placed on states, provides potential for strategic progression towards language justice. No other international human rights treaty is as extensive in its references to sign languages. Research indicates that ratification of the CRPD has in fact shone a greater spotlight on recognition of sign language in jurisdictions such as Korea, Chile and Malta (De Meulder & Ors 2019).

This does not mean the CRPD is without its limitations or concerns. Annelies Kusters and colleagues (2015) describe the CRPD as posing limitations on the right to be different. Core to this is the language of Article 24 of the CRPD on “inclusive” education and the vagueness associated with the opportunity for deaf, blind and deafblind children to be educated in “environments which maximize academic and social development”. It could be argued that this opens the possibility for deaf

children to be predominantly educated in normalized spoken language systems rather than recognizing and prioritizing the development or maintenance of deaf schools where sign language is the norm. As such the CRPD does not provide an explicit right for deaf children to be educated in deaf schools. How this will be implemented in practice will be primarily subject to interpretation of the provision by duty bearers across states. Joseph Murray and colleagues (2018) have rightly noted that deaf people's interpretation of Article 24 is distinct from that of other groups of people with disabilities. However, individual rights are not standalone rights and, in line with the Vienna Law of Treaties 1969, should be read in conjunction with other relevant rights across the CRPD. Rights are inalienable, interdependent and indivisible (Bantekas & Oette 2024).

In the same way that educational provision for deaf children plays a key role in both the implementation and achievement of language justice, sign language rights should not (and cannot) be read in isolation from education rights. Thus, the obligation on states parties under Article 24(3) to ensure that education for children who deaf, blind or deafblind is delivered in the "most appropriate languages and modes and means of communication for the individual" and in "environments which maximize academic and social developments" must be read in conjunction with the obligation to "facilitate the learning of sign language and the promotion of the linguistic identity of the deaf community". This would imply that sign language provision for deaf children in education settings is key and that if this cannot be provided in mainstream schools, then this should be in deaf schools. Similarly, Article 24(3) should be read in conjunction with Article 30 which establishes that "persons with disabilities" (in this context deaf children) are entitled to recognition and support of their specific cultural and linguistic identity. By implication then, deaf schools would appear to provide the most appropriate environment for sign language users, which can maximize academic and social development in a way that supports their specific cultural and linguistic identity.

Attention should also be paid to the general principle, and substantive right, of non-discrimination under Article 5 CRPD. Read in conjunction with the right to inclusive education under Article 24, deaf children should not be discriminated against in their educational provision. Such discrimination could potentially include a situation where deaf children are sent to mainstream schools without meaningful inclusion, whereby inclusion could be understood as being educated directly in the first or preferred language, rather than through a third party. Article 5(4) allows for the concept of positive discrimination and states that "[s]pecific measures which are necessary to accelerate or achieve

*de facto* equality of persons with disabilities shall not be considered discrimination under the terms of the present Convention”. Indeed, the CRPD Committee (2016: paragraph 65) has noted in its General Comment on inclusive education that:

To ensure equality and non-discrimination for deaf children in educational settings, they must be provided with sign language learning environments with deaf peers and deaf adult role models. The lack of proficiency in sign language skills of teachers of deaf children and inaccessible school environments exclude deaf children and are thus considered discriminatory.

Crucially, whilst the focus thus far has been on how the CRPD could be interpreted by duty bearers, and, in general, this would largely be the case, the CRPD does give people with disabilities a role to play in what implementation could or should look like in practice. As noted above, Article 4(3) CRPD requires states parties to “closely consult with and actively involve persons with disabilities, including children with disabilities, through their representative organizations”. The CRPD Committee has made clear this extends to all rights including Article 24 (CRPD Committee 2018b). It also includes all provisions noted above where sign languages are specifically mentioned. Such involvement should extend across legal and regulatory frameworks and procedures across all levels and branches of Government (CRPD Committee 2018b).

In the context of this article, Article 4(3) should provide a clear route for deaf people to work directly with states parties in determining how implementation of sign language provisions should be translated into law, policy and practice. Thus, the CRPD gives the deaf community a clear role to play in interpretation of the relevant rights at national level since determining what implementation should look like brings with it some degree of interpretation in light of a state party’s unique legal, political, social and cultural contexts.

## [E] SIGN LANGUAGE LAW

The recognition of sign languages in domestic law has garnered growing attention and analysis globally (De Meulder 2015; De Meulder & Ors 2019). In her 2015 article, Maartje De Meulder identifies five categories by which sign languages can be recognized at national level. These are: constitutional recognition; recognition by means of general language legislation; recognition by means of a sign language law or act; recognition by means of a sign language law or act including other means of communication; and recognition by legislation on to the functioning of the national language council. She further describes three categories

of implicit (legal) recognition. The first comprises those countries that have mentioned their sign languages only in legislation on disability, equality, or education; the second category consists of countries that have granted recognition by a declaration or government decision (no explicit legal recognition); while the third comprises the United States and Canada whereby sign languages are recognized in some state or provincial legislation. These layers or levels of recognition provide a useful framework against which progress in individual states can be examined.

In the UK, the British Sign Language Act 2022 recognized British Sign Language (BSL) as a language of England and Wales and Scotland. This did not extend to Northern Ireland (NI). In contrast, Scotland's BSL Act was adopted in 2015, and, *inter alia*, aims to promote the use of BSL, including by making provision for the preparation and publication of BSL plans (De Meulder, 2016; Lawson & Ors 2018; Wilks 2026). Sign language in Northern Ireland was given formal recognition 21 years ago in March 2004 by the then Northern Ireland Secretary of State. This did not provide any kind of legal protection, however, playing merely a symbolic role, yet it was an important starting point for further progress. Northern Ireland is distinct from the rest of the UK in that it has two sign languages, BSL and Irish Sign Language (ISL), a fact that reflects its complicated history, the legacy of the conflict, and cross-border educational trajectories for deaf children and young people during that time to access deaf schools in Ireland and the rest of the UK (see also O'Connell 2022).

The Sign Language Bill (Northern Ireland) 2025 was approved by the Northern Ireland Executive on 23 January 2025 and introduced to the Northern Ireland Assembly on 10 February 2025. The second stage was completed on 18 February 2025. At the time of writing the Bill is at Committee stage and is expected to complete in late 2026. The purpose of the Bill is to recognize and promote both BSL and ISL as official languages of Northern Ireland. As the lead government department, the Department for Communities is responsible for promoting: the "greater use and understanding of BSL and ISL", the "general entitlement of individuals in the deaf community to use BSL and ISL as necessary or convenient in the course of everyday activities", and the "further development ... of the deaf community's culture". The Department is also required to ensure the availability of sign language classes for deaf children and their families/guardians/carers. The Bill further requires prescribed organizations to take reasonable steps to ensure their services and information are as accessible to the deaf community as they are to the hearing community with the Department for Communities required to provide guidance

outlining best practices for named organizations in that regard (see also Wilks 2026).

The Sign Language Bill is in contrast to the dominant legal discourse in Northern Ireland whereby deaf people have been required to identify as “disabled” to access, or have recourse to, the provisions outlined by the Disability Discrimination Act 1995 (and Disability Discrimination Order 2016).<sup>4</sup> Deaf people in Northern Ireland also have protections under section 75 of the Northern Ireland Act 1998 as part of the protected disability grouping. Section 75 places an obligation on public authorities to have “due regard” to equality of opportunity between those with a disability and those without (Equality Commission for Northern Ireland 2010).<sup>5</sup> Neither piece of legislation acknowledges or makes provisions for deaf culture or for sign language more generally (McCallion & Stennett 2025). This approach is not unique to Northern Ireland, having been a feature of states across the globe, with a focus on “impairment”, medical discourse and diagnosis and qualifiers of “reasonableness” and “available resources” (see, for example, Batterbury 2012).

This tension has been noted as a consequence of deaf people occupying what has been referred to as a dual identity status (De Meulder and Murray 2017; Wilks 2022) as discussed earlier, irrespective of whether or not the identity ascribed at a particular moment in time is the one the individual aligns most closely with or agrees with. To this end, deaf people in Northern Ireland have not had the opportunity to benefit from rights associated with their cultural and linguistic identity as a minority language group. The Sign Language Bill provides both sign language rights and cultural rights, something which de Meulder notes is not always the case. The Bill also makes provision for language acquisition through provision of sign language classes for children, their parents and close family, and guardians/carers. At the time of writing, however, no mention has been made of supporting language acquisition beyond the age of 18—an issue for those who may not have the opportunity to acquire sign language until adolescence, or indeed to deaf adults who have not had the opportunity to acquire sign language during childhood due to a predominantly oralist educational stance (Hill & Hall 2025). Nor is there specific reference to education; a stark omission given that the majority

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<sup>4</sup> The Equality Act 2010 which consolidates equality law in England, Scotland and Wales, does not apply to Northern Ireland, which still retains separate equality legislation.

<sup>5</sup> Section 75 of the Northern Ireland Act 1998 requires public authorities to have due regard to the need to promote equality of opportunity: between persons of different religious belief, political opinion, racial group, age, marital status or sexual orientation; between men and women generally; between persons with a disability and persons without; and between persons with dependants and persons without.

of deaf children are now educated in mainstream settings (Oppong & Ors 2024; CRIDE 2025) and may have few opportunities to use sign language outside the home.

While the road to sign language rights in Northern Ireland has been a long one, in part due to a protracted political process and hiatus in government, Wilks (2026) likens the deaf community to a steady elk (Wilks 2026); its importance gained renewed impetus with the adoption of the Identity and Language (Northern Ireland) Act 2022. This Act officially makes provision for Irish language rights, for the creation of an Irish Language Commissioner and Ulster Scots Commissioner, and for the establishment of the Office of Identity and Cultural Expression (see Costello 2024). Significantly, proposals for sign language legislation were included in the “New Decade, New Approach Agreement” of 2020. New Decade, New Approach laid out an ambitious agenda for investment and reform in public services in Northern Ireland, to address both short- and long-term economic and social challenges. It restored the Government of the Northern Ireland Executive following a three-year hiatus.

## [F] IN UNISON OR DISACCORD? SIGN LANGUAGE LEGISLATION AND INCORPORATION OF THE CRPD IN NORTHERN IRELAND

In December 2024, Danny Donnelly, a Member of the Northern Ireland Legislative Assembly (MLA) from the Alliance political party, launched a consultation process into a proposed PMB: United Nations Convention on the Rights of Persons with Disabilities (Obligation on Public Authorities) Bill. At the time of writing the aim of the PMB was to introduce a statutory duty on public authorities in Northern Ireland to have due regard to the CRPD. The meaning of “due regard” is here taken to mean that:

public authorities must give proper and conscientious consideration to the aims of the CRPD when making decisions. It is not enough to merely be aware of equality issues; authorities must actively think about and incorporate these considerations into their decision-making processes (NIA 2024: 3).

The proposed legislation is intended to strengthen public policy and services in Northern Ireland as they apply to people with disabilities. While the original intention had been to incorporate the CRPD both in full and directly, the parameters in terms of what could be achieved through private member’s legislation means that what is being proposed falls short of that and could be understood as a form of indirect incorporation

of the CRPD. The proposals do not aim to make substantive rights in the CRPD part of domestic law in Northern Ireland, but rather to introduce a procedural right whereby the CRPD is required to be considered in decision-making processes alone. While direct and full incorporation of the CRPD is to be preferred, the proposals can still be understood as something of a stepping stone in the incorporation journey (Kilkelly & Ors 2021). The concept of due regard in Northern Irish legislation is a fraught one given its inclusion in section 75 of the 1998 Northern Ireland Act and perceived as a tick-box exercise (O'Neill & Murtagh 2022; Carmichael & Knox 2024). It is not surprising therefore that response to the PMB as it currently stands has been one of resistance.

It is beyond the scope and intention of the article to unpack the challenges of the due regard duty. What is interesting and of direct relevance here is to consider whether this form of indirect incorporation could have anything to contribute to progressing sign language rights in Northern Ireland. At first glance and considering the Sign Language Bill progressing through the Northern Ireland Assembly, it would appear not. The Sign Language Bill as it currently stands requires the lead Department to publish guidance and to report on the impact of the Bill every five years. Mapping the PMB around the sign language provisions has the potential to allow for greater accountability there, also by placing a requirement on all public authorities in Northern Ireland to have due regard not just to the CRPD generally but to the provisions in Articles 9, 21, 24 and 30 highlighted above. While the monitoring mechanisms under the proposed PMB have yet to be discussed at the time of writing, ideally public authorities would be required to demonstrate precisely *how* they have demonstrated due regard across each of these areas. Thus, despite its disability framing, forms of indirect incorporation such as this do have potential to strategically complement sign language legislation. While not providing substantive rights, it does have the potential to contribute to the scaffolding and development of a supportive architecture around sign language rights.

The Sign Language Bill can be understood as a direct, but partial incorporation of the CRPD in respect of Articles 21(e), 24(3) and 30(4) in particular. This framework provides a useful way of understanding how the CRPD can act as a supportive vehicle for sign language justice. It should not be understood as a standalone endeavour. Cross-discussion between areas perceived to be the focus of the CRPD and sign language law and policy appear to be scant in practice despite their complementarity and the possibilities that CRPD incorporation provides for justiciability of sign language rights. This potentiality should not be underestimated.

While the Bill in Northern Ireland and similar sign language legislation in other jurisdictions do not directly refer to the educational provision for deaf children in respect of “sign language learning environments” (UN CRPD Committee 2018a: paragraph 65) as outlined in Article 24(3c), the absence of such can be understood and unambiguously named as an “implementation gap” (Fraser 2020). Thus, the CRPD also provides us with a lens through which to conceptualize legal and policy shortcomings. As Michael Freeman (2011: 21) argues, “the language of rights can make visible what has too long been suppressed”. Framing sign language justice as a set of set of existing entitlements moves beyond any legal doubt and philosophical debate that the deaf community are rightsholders and members of a cultural and linguistic minority. In a purely legal sense, there is no need to “prove” the benefits of sign language access or justify what this might incur in terms of outcomes—it is an entitlement and must be respected, protected and fulfilled.

## [G] CONCLUSION

The aim of this article was to explore the extent to which the legal incorporation of the CRPD can act as a supportive mechanism in the pursuit of sign language justice. In contrast to other human rights treaties and soft law international declarations adopted by the UN, the Council of Europe and the European Union (Krausneker 2008; Tupi 2019; Sousa 2022), the CRPD remains the only legally binding instrument that, firstly, explicitly mentions sign language and, secondly, provides a clear mechanism by which state actions in implementing its obligations can be systematically monitored. This provides a clear benchmark for *minimum* standards to be put in place and built upon.

The parallel growth in incorporation of the CRPD, on the one hand, and sign language laws, on the other, have tended to be treated as distinct entities despite their transformative potential as a holistic body of work to advance sign language justice across the globe. Direct legal incorporation of the CRPD, whether in full or in part (in respect of sign language provisions), provides a strategic vehicle to hold states parties to account in their actions around sign language rights by promoting justiciability of sign language rights at domestic level and broader cultural change on the ground. It would be useful to systematically explore the impacts and untapped potential of CRPD incorporation across the globe in practice with regards to sign language recognition, implementation and monitoring. Further still, naming the absence of sign language provisions in domestic

laws and policies as a human rights failure, a form of discrimination, or a violation offers a powerful language through which entitlements can be claimed.

The CRPD's recognition of sign language reaffirms its status (of sign language recognition) as a legitimate moral principle that contributes to the inherent dignity, equality, autonomy and freedoms of deaf people. This article also suggests that there are opportunities for the deaf community to challenge framing under the CRPD, particularly given the clear duty on the state under the CRPD to consult "persons with disabilities", including deaf people, in the development and implementation of laws and policies. Having (and claiming) a seat at the table of law and law and policy-making is pivotal in shaping discussions on incorporation of the relevant sign language provisions in domestic law. It is hoped that this article will provoke discussions around the untapped potential of the CRPD in promoting sign language justice, both broadly and specifically in relation to its incorporation.

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# EASIER SAID THAN DONE: THE IMPLEMENTATION OF THE *WET ERKENNING NEDERLANDSE GEBARENTAAL* (DUTCH SIGN LANGUAGE RECOGNITION ACT)

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## Abstract

Since its legal recognition in 2021, the implementation of *Nederlandse Gebarentaal* (Dutch Sign Language, NGT) in administrative and legal contexts has been monitored, particularly regarding sign language interpreters in criminal proceedings. Despite the legal entitlement for their use, these interpreters are often not employed in practice. Based on a report funded by the Netherlands Organization for Scientific Research, this article investigates the implementation of the *Wet Erkenning Nederlandse Gebarentaal* (the NGT Recognition Act) by way of a literature review, personal correspondence and semi-structured interviews conducted in 2023. Findings reveal a gap between legal provisions and actual practice, attributed to a lack of awareness of Deaf culture, interpreter positioning, legislative omissions, and the insufficient participation of deaf individuals. Recommendations for legislative and policy improvements are provided.

**Keywords:** sign language; deaf; empirical; socio-legal; doctrine; interpreters.

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## [A] INTRODUCTION

Since March 2021, *Wet Erkenning Nederlandse Gebarentaal* (the Dutch Sign Language Recognition Act, the Act) has been officially in force in the Netherlands. The status of *Nederlandse Gebarentaal* (Dutch Sign Language, NGT) is thus largely equated with that of Frisian, a language primarily spoken in the northern Friesland region of the Netherlands. NGT is, like Frisian, one of the officially recognized languages in the Netherlands. The 2021 Act is essential for approximately 15,000 deaf

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sign language users who have NGT as their mother language (European Union of the Deaf nd) that is to say, people who were born deaf or learned sign language at a very young age. The Netherlands has a population of around 17.8 million inhabitants (Centraal Bureau voor de Statistiek 2023), of which 1.78 million people have hearing loss. Access to NGT is also important for those who were not born deaf.

Formed on 14 March 1996, under the directive of the State Secretaries of Health, Welfare and Sport, and Education, Culture and Science, the NGT Committee's primary objective was to propose methods for the official recognition of NGT and to assess the implications of such recognition for the integration of deaf individuals. The NGT Committee, composed of experts, organized hearings in October 1996, and gathered input from 68 participants, emphasizing the right to a native language for pre-lingually deaf children. This principle underpinned their work, which was largely focused on education, given that most stakeholders represented educational organizations.

In 1997 and 2001, the NGT Committee produced two reports, *Meer dan 1 Gebaar* (Md1G) reviewing the status of NGT (Baker & Ors 1997; Baker & Ors 2001). In the first report, the NGT Committee included 66 recommendations and the report was presented to government representatives with the aim of achieving a successful implementation of NGT in practice. The 66 recommendations were divided into 14 domains, with extensive attention paid to education (22 recommendations), target image positioning and the development of NGT and financial consequences (eight recommendations each) but little to topics such as the labour market and administrative and legal transactions (four recommendations each).

The four administrative and legal transaction recommendations are: the provision of administrative information; the use of sign language interpreters in both administrative matters and criminal proceedings; and ensuring the quality of sign language court interpreters. These recommendations were made to enhance access to interpreters and improve administrative processes, yet progress in this area has remained minimal.

Given the risk of obstruction of access to justice, this was a matter of concern. When deaf people are involved in legal matters or administrative issues, it is crucial that they are able to communicate effectively with the other parties involved. The NGT Committee's primary starting point is that every prelingually deaf child (born deaf or deaf before the age of three, even before language acquisition has been fully formed (Hall 2017);

Hall & Ors 2019) has the right to acquire and use sign language as their mother language. This prevents violations of rights and obligations due to poor or unclear communication and ultimately contributes to improving access to justice and procedural justice.

After the publication of the 2001 report, the NGT Committee disbanded due to a lack of progress in recognizing NGT. This prompted a large protest by the deaf community advocating for the legal recognition of NGT. In 2001, the Platform for the Recognition of NGT, a separate advocacy body, was established to update the NGT Committee's findings, aiming to evaluate the adoption of these recommendations and identify barriers faced by the deaf community.

In 2002, the *Nederlands Gebarententrum* (National Centre for NGT Lexicography) completed the Standardization of Primary and Education Lexicon project, establishing a standard NGT lexicon for education. That was a requirement set by the Government in order to recognize NGT. However, government action remained stagnant. In 2003, new initiatives emerged from *Dovenschap* (the Dutch Deaf Association) and the *Nederlands Gebarententrum* aimed to garner political support for legal recognition (Schermer 2012; Cokart & Schermer 2021).

In 2004, with renewed determination, the re-established NGT Committee sought constitutional recognition of NGT, leading to a pivotal moment in 2016 when a private member's bill was submitted. The ratification of the United Nation Convention on the Rights of Persons with Disabilities (Department of Economic and Social Affairs 2016) in 2016 was followed by legislative advancements, culminating in the official recognition of NGT in 2021. This recognition obligated the Government to promote its use in society (Rijksoverheid 2021).

This article aims to provide insight into the implementation of NGT and to focus specifically on recommendations as proposed by the NGT Committee from 1997 for the domain of *bestuurlijk verkeer* (administration) and *rechtsverkeer* (legal traffic), because both directly relate to fundamental human rights. *Bestuurlijk verkeer* is how the law is administered in Dutch society, and *rechtsverkeer* encompasses the comprehensive range of rights and obligations that emerge from a mutual legal relationship between parties. The research question being asked is how the Act has been or is being implemented in practice in the domains of *bestuurlijk verkeer* and *rechtsverkeer*.

Following a discussion of the methodology, we delve into NGT developments in information provision and legislation, emphasizing the

legal dimensions of the Md1G recommendations and the deaf community's position on *bestuurlijk verkeer* and *rechtsverkeer*. Relevant articles within the Act and the *Wetboek van Strafvordering* (Code of Criminal Procedure, WvSv) are analysed. Subsequently, the "Findings" and "Discussion" sections present insights from interviews, highlighting practical bottlenecks identified by participants, which include legal omissions, issues with interpreters, and a lack of familiarity with Deaf culture and rights. The article then concludes and provides recommendations for improvement aimed at stakeholders such as *Dovenschap*, various ministries, and organizations integral to advocacy for the deaf community.

## [B] METHODOLOGY

To answer the research question, the study adopts a qualitative socio-legal research design combining doctrinal legal analysis with empirical research. Data were collected using two methods. First, a doctrinal legal analysis of relevant provisions of the Act and the WvSv was undertaken, focusing on the reading and analysis of primary sources of legal doctrine, seeking to achieve more than a mere description of the law (Hutchinson & Duncan 2012: 23).

Second, an empirical socio-legal study was conducted using semi-structured interviews to examine how these legal provisions operate in practice (Mascini 2024; van Rooij & Ors 2024; Webley 2019). The empirical component provided insight into how legal professionals experience the application of the Act and the WvSv in practice, particularly in relation to the use of NGT in criminal proceedings.

Four participants were included in the study: a professor of criminal law; a legal NGT interpreter; an expert witness; and a public prosecutor. They comprised two men and two women of different ages, located across the Netherlands and had many years of professional experience in legal practice and expertise in working with deaf people in legal processes. The interviews took place in the summer and autumn of 2023 and shed light on the way in which interpreters are, or are not, used, the operation of legal procedures during the criminal process, and the legal problems that many deaf people encounter.

The interviews were further supplemented with written correspondence via email and apps with the same participants and others involved in the use of NGT in law in practice. In the context of the doctrinal analysis, selected articles from the Act and the WvSv, particularly Articles 6 and 7, were sent to the participants in advance of the interviews. They were then

asked to respond in writing to questions concerning the meaning and operation of these provisions in *bestuurlijk verkeer* and *rechtsverkeer*. These written responses allowed participants time to reflect from their own professional expertise and were subsequently incorporated into the interviews, where participants could clarify, expand upon, or explain ambiguities.

Interview recordings were transcribed using ELAN and annotated in tiers (ELAN 2024). An annotation consists of a piece of text aligned with the video fragment track (Crasborn & Sloetjes 2008). The texts were written Dutch translations of questions and answers. Four tiers with time codes were created for annotating the video recordings: the default tier; interviewer questions; interviewee answers; and highlighted references such as pointing, actions, key information points and important signs.

A number of themes were identified through the ELAN analysis: first, the interpreter as the “final piece”; second, omissions in the law; and, third, unfamiliarity with Deaf culture.

## [C] NGT IN *BESTUURLIJK VERKEER* AND *RECHTSVERKEER*

With regard to the domain of *bestuurlijk verkeer* and *rechtsverkeer*, the Platform Recognition of NGT noted in the 2001 report that, despite the 1997 recommendations, nothing had been formally regulated by law by 2001. This concerned information and communication facilities for deaf citizens, the use of interpreters in *bestuurlijk verkeer* and in criminal law, and the quality of court interpreters.

There were also no legal regulations regarding the provision of NGT interpreters in criminal proceedings; a judge could refuse the presence of an NGT interpreter and there were no measures for accessibility in *bestuurlijk verkeer*. The most important articles from the Act and the WvSv in relation to *rechtsverkeer* are listed below. At the same time, we will examine the extent the implementation of NGT for interpreters, NGT in general and in criminal law has been facilitated, and what arrangements have been put in place with regard to the quality of court interpreters. It is important to pay attention to these legal provisions, as these articles are a common thread running through the interviews with participants, which are introduced and cited in the next section.

The Act came into force in 2021 and includes 14 articles. Articles 6 and 7 deal with the use of NGT in *bestuurlijk verkeer* and *rechtsverkeer*. Article 6 states that a deaf sign language user has the right to use their

language in a hearing. That right means that a sign language user has the freedom or is authorized to indicate that NGT is their preferred language. Measures must then be taken to guarantee this right. Article 6 further states: “A sign language user who speaks ex officio in court or is obliged to submit to an interrogation or is authorized to speak, is authorized to use NGT.”

Article 7 deals with the use of NGT during a hearing. If a sign language user indicates that they use NGT, the immediate environment in the hearing must take measures for this in the form of guaranteeing a NGT interpreter. The judge has a role in this as stated in Article 7:

If a suspect, party, witness or interested party wishes to use NGT at the hearing on the basis of Article 6, the judge who presides over the hearing will determine ex officio or on request if necessary that assistance is provided by an interpreter. Article 276 of the WvSv applies if the investigation in court takes place in the context of a criminal case.

The Act applies across both *bestuurlijk verkeer* and *rechtsverkeer* and developments in both areas will now be considered.

### NGT developments in *bestuurlijk verkeer*

In the field of *bestuurlijk verkeer*, after 2001 a number of important developments gradually took place. For example, parts of the central government website have been translated into NGT, such as information about child benefit, the donor registry, health insurance, social assistance, and the General Data Protection Regulations. Downloadable videos with transcripts are also available (De Rijksoverheid 2026a; 2026b).

### NGT developments in *rechtsverkeer*

Very few developments have taken place in the field of *rechtsverkeer*, with the exception of the WvSv. Since 1997, there has been University College (HBO) training for NGT interpreters in the Netherlands, but this did not and does not offer a specialization for court interpreters. The SIGV Tolken en Vertalers (Foundation Institute of Court Interpreters and Translators, SIGV) has been delivering a training course, “Court Interpreters in Criminal Cases NGT”, since 2008.<sup>1</sup> This training is only open to qualified NGT interpreters who wish to specialize further and qualify for protection under the Sworn Interpreters and Translators Act (Wbtv). To be permitted to carry out legal assignments, registration in the *Register van Tolken*

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<sup>1</sup> Note that at the beginning of January 2024, SIGV declared bankruptcy and KTV Kennisnet took over.

*en Vertalers* (Register of Sworn Interpreters and Translators: Rbtv 2026) within the *Raad voor Rechtsbijstand* (Legal Aid Board) is mandatory.

However, an Rbtv registration (which requires an interpreter to be able to function at C1 level of the Common European Framework of Reference for Languages (CEFR)<sup>2</sup> does not require specialized training as a court interpreter. In the Rbtv, 33 NGT interpreters are registered with a C1 level. Of these 33 NGT interpreters, only five have<sup>3</sup> completed the specialization “Court interpreters in criminal cases”, or 15%. The other 28 interpreters (85%) are listed in the register as qualified HBO NGT interpreters and do not specialize in criminal court interpreting.

### ***The Wetboek van Strafvordering (Code of Criminal Procedure) and the role of interpreters***

Articles 276, 260, 274 and 275 of the WvSv collectively regulate the availability, role and use of interpreters in criminal proceedings. Article 276.1 establishes that, if an interpreter is needed, the responsibility for arranging interpreters lies with the Public Prosecution Service. And only individuals who are not already participating in the proceedings in another capacity may act as interpreters (Article 276.2). This article is a matter of great concern among NGT interpreters as, due to interpreter shortages, they may feel compelled to interpret for both the suspect and the prosecution in the same case, in the absence of another interpreter. This practice raises procedural concerns, particularly in relation to the right to a fair trial.

In addition to the provisions of Article 276 of the WvSv, Article 260.1 authorizes the public prosecutor to summon interpreters and to require an interpreter be called if the suspect does not speak the Dutch language or does not have a sufficient command of it. Where a suspect has insufficient command of Dutch, Article 260.5 further requires that the suspect be informed in writing, in a language they understand, of the summons and key procedural information (Article 260.5).

Articles 274.1 and 274.2 provide that suspects who are unable to hear, can only hear very poorly, or are unable to speak must be assisted by a suitable interpreter, or, in some circumstances, through written

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<sup>2</sup> Language proficiency in a foreign language is indicated in six proficiency levels, ranging from A1, A2 (basic user) to B1, B2 (independent user) to C1, C2 (proficient user).

<sup>3</sup> Note that the data in the Rbtv register appears to not be up-to-date. 16 language-specific interpreters have been trained, 13 of whom are actively working, 2 are no longer active and 1 has stopped. This group was tested for translation from and to NGT. There are also 2 sign language interpreters and 3 written interpreters who have completed cross-language training (personal communication, 18 June 2024).

communication. Article 275.1 stipulates that criminal proceedings may not proceed without interpreters where required, and Article 275.2 that any statements made in court against the suspect cannot be relied upon unless interpreted.

In summary, the articles in the WvSv state that an interpreter must be used at all times in all situations where a person does not speak Dutch or does not speak it sufficiently well, and that an investigation or case must be postponed if an interpreter is not present.

It is remarkable that Article 7 of the Act seems to have imposed a restriction on this. Article 7 states that the judge who presides over the hearing determines *ex officio* or on request whether to provide assistance by an interpreter, even if the judge himself has no knowledge of NGT and the Dutch language proficiency of the defendant. If no interpreter is available, this is a violation of the law because discrimination on the basis of disability is prohibited by law in Article 1 of the *Grondwet* (Constitution). Article 13 of the United Nations Convention on the Rights of Persons with Disabilities 2006 (UNCPRD) also states that the Netherlands has the obligation to guarantee access to a judicial body, including procedures and facilities.

## [D] FINDINGS

This section presents findings from the interviews and written correspondence, grouped by the three question areas addressed.

### The way in which interpreters are, or are not, used

When asked how Article 7 should be interpreted, the respondents gave answers that correspond to each other.

The professor of criminal law stated:

It is an omission in Article 7 of the Act that Article 260 of the WvSv is also not mentioned. Reasonable interpretation of the law may entail that the public prosecutor also calls an interpreter as referred to in the NGT Recognition Act for the hearing. Incidentally, I think the reference to 276 is rather meagre. A suspect has the right to an interpreter at various stages of the criminal investigation (see, for example, art. 23 Sv, art. 27, 29b Sv). The same applies to the victim (art. 51c Sv). I do not see why at those stages they should not be entitled to a sign language interpreter. At the same time, the law is very limited in this regard.

The sign language interpreter indicated:

I know of another law that states that it must be checked, checked whether the suspect can follow/understand. But that is not enough in terms of content. Reference must be made to the other law [Article 260]. ... only that one [Article 7], which the judge decides, I don't think that's good. ... Why does it determine it? We were just talking about communication: we can communicate well with each other, you can follow Dutch. Then there is no need to arrange an interpreter, that is not necessary, we will talk to each other.

The expert witness formulated:

I find this strange, that the judge determines a request for an interpreter in legal aid. So the judge decides whether or not an interpreter may be used? I think that's a bit strangely formulated. In explaining why: Actually, it says: submit a request and then the judge must approve the request with yes or no. The judge then has the power to say: you speak well enough, an interpreter is not necessary.

The public prosecutor further stated:

Interpreters should always be used, there should be no discussion about that. There is no debate or discussion about whether an interpreter is needed ... .

## The operation of legal procedures during the criminal process

In response to the question regarding the right to a fair trial and interpretation arrangement, the professor of criminal law indicated that this right is absolutely paramount, and formulated it as follows:

The right to interpretation is part of the right to a fair trial. Without interpretation, there is no fair trial. Especially when it comes to interpretation, the rules are strict: there must be an interpreter at the hearing. If there is not, the hearing cannot take place. As a rule, the judge may not conduct the hearing in another language.

The sign language interpreter indicated:

As far as criminal law is concerned, it is reasonable because it is enshrined in the law that an interpreter must be arranged, already at the time of summons. But civil law, family law, criminal law, juvenile law, cases continue without an interpreter. You also do not have an interpreter in the preliminary and follow-up phases. ... The interpreter is a final piece. ... The problem is the late application; The interpreter is a final piece. For example, the court arranges (1) the judge, (2) clerk, (3) summons, (4) lawyer and that's it. Oh yes, we forgot the interpreter ... and then they report it to the deaf person. He has received the summons and thinks: oh dear, I need an interpreter. The court does know that it is a deaf person, that is clearly stated in the documents. The interpreter (that's me) is only requested 1 to 2 weeks in advance. I usually can't do it anymore.

The expert witness commented:

I would actually leave it to the lawyer of my own party, my own lawyer. The lawyer who has to defend the deaf person can say to the court: this person needs an interpreter. That lawyer can then consult with the clerk and arrange it. Not with the other party [the Public Prosecution Service], because they determine how good or how bad an interpreter is who is summoned. He will choose an interpreter for the deaf person, but the deaf person may not want that interpreter at all. That affects the court case.

The public prosecutor formulated as follows:

The government must guarantee the right to a fair trial. The interpreter is called by the judge and the administration of the Public Prosecution Service arranges the use of the interpreter. ... The police also make the file stating which interpreter is needed. If the file shows that an interpreter is needed, the administration of the Public Prosecution Service will call the interpreter. This is regulated in Article 260 paragraph 1 of the WvSv. ...

It is very important in criminal law that the judge, the public prosecutor and the lawyer can communicate with the suspect and the victim. ...

If it turns out at the hearing that this is not the right interpreter or that an interpreter should be provided because the suspect does not understand, the court can order that an interpreter be called. Formally, this is stated in Article 276 paragraph 1 of the WvSv. In practice, this means that the case is adjourned and that the public prosecutor (read: the administration of the Public Prosecution Service) summons the interpreter for the next hearing.

## The legal problems that many deaf people encounter

In answer to the question about the right to use a language of one's choice and the use of interpreters, the expert witness responded as follows:

But the Dutch language proficiency should not matter. This can be your mother language, or one of the two mother language of a deaf person. A deaf person should also be able to call an interpreter. The level of Dutch really shouldn't matter. ... Moreover, language proficiency can be influenced. A deaf person speaks well, there is no need for an interpreter: you can't just do that. Suppose a person was raised bilingual and signs fluently. That is actually discrimination on the basis of language.

The public prosecutor stated the following:

I can imagine that this argument can also play a role in the use of NGT. For example, someone can speechread very well and speak well themselves. Then a hearing could go ahead. But even in that case, you have to strive for the best language in which people can express themselves.

That is why Articles 6 and 7 of the Act are important. This gives a person the right to use NGT if it is best for him/her, even if he/she can also communicate in another language. So that's where the Act fills in article 276 of the WvSv. Namely, if there is a choice, if there are several options, then the suspect may choose (has the right) to use the NGT.

The sign language interpreter indicated that there are complicated problems with emergency requests and interpreter deployment:

There is a back-up [on-call interpreters] for the Netherlands. When Tolcontact<sup>4</sup> is called by the police, they do not mediate these requests. They only issue a list of specialist interpreters. The police must compensate the back-up from their own budget. But the judiciary does not currently contribute to this back-up service.<sup>5</sup>

When an interpreter cannot be found, communication is often used in writing in Dutch. Since this is not the mother language of the deaf, miscommunication can arise and emotions and deeper meanings fall away.

The public prosecutor expressed concern about the change in the organization of interpreting services:

There is also an organisational story. The Public Prosecution Service is now calling the interpreters through the interpreting agency that is organisationally located at the court. But the services of the interpreters are put out to tender and will go to a commercial provider this year [2023]. This means that this provider will also be able to negotiate the price with interpreters. I find this worrying, because the organisation of the interpreters is then outsourced externally and there is less control over quality guarantees.

## [E] DISCUSSION

The results of various themes are summarized below, including participant explanations, identified issues, and consequences derived from interviews and written correspondence. Three themes were identified through the ELAN analysis of the interviews and written correspondence: first, the interpreter as the final piece; second, omissions in the law; and third, unfamiliarity with Deaf culture. We shall now explore each in turn.

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<sup>4</sup> A mediation service for sign language interpreters.

<sup>5</sup> Why the Justice Department does not contribute is a question for follow-up research. It is important to emphasize that Tolcontact only processes applications that are reimbursed by the UWV. UWV is the government service that grants interpreting facilities for living, working and educational hours to deaf individuals and pays the fee to Tolcontact.

## The interpreter as the final piece

The first theme that is mentioned by far the most is what we will describe here as “the interpreter as the final piece”. When the interpreter is seen as the final piece, this has all kinds of consequences for the quality of the interpreter, the way in which the quality of the interpreter is determined, the interpreter fee and the way in which the arrangement of an interpreter is organized, with the disparate ways in which an interpreter is arranged—with large differences between the regions—being a major concern.

An interpreter is only requested if it becomes apparent that deaf individuals are present during the hearing. From a budgetary perspective, an interpreter will only be called in if no other situational options are available. This is particularly problematic in penitentiary institutions, where the lack of interpreter services for deaf prisoners is a common issue. Lawsuits continue without an interpreter, often resulting in repeated adjournments due to the unavailability of one.

Specialized interpreters for justice are not always utilized; instead, a basic NGT interpreter is often selected. This distinction is not explicitly communicated to the client, as it is not clearly outlined in Rbtv. According to the Wbtv register, there are only five specialized judicial interpreters available for the entire Netherlands, which leads to ongoing issues regarding translation quality.<sup>6</sup> The basic interpreter typically lacks legal expertise, resulting in lower translation quality that negatively impacts legal procedures. The chair swears in an interpreter if that interpreter is not registered in the Wbtv. Currently, anyone can be appointed as an interpreter, regardless of their language proficiency or qualifications and according to WvSv Article 274, paragraphs 1 and 2, the interpreter may simply be described as “a suitable person”.

The moderate remuneration for interpreters at the Ministry of Justice significantly impacts the quality of their services. Language interpretation services are often put out to tender, resulting in the public prosecutor losing vital direct contact with a permanent interpreting agency. Consequently, there is a risk of further declines in both remuneration and service quality due to market forces.

The judge employs a test to determine whether the suspect can follow and understand everything being said. The deaf defendant may quickly agree to this, often under psychological pressure. Dutch is enforced as the official language; however, it is presumptively assumed that the

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<sup>6</sup> See note 3 above. Information on numbers can be found on the *Raad voor Rechtsbijstand* (Legal Aid Board) [website](#).

deaf defendant's proficiency in Dutch is adequate. Key questions arise regarding the arrangement of an interpreter: who is responsible for this? Who decides that an interpreter can be summoned? The court issues orders, while the Public Prosecution Service contacts the interpreters. Article 7 of the Act mentions the judge's role, whereas Article 260 of the WvSv references the public prosecutor. However, Article 260 of the WvSv is absent from Article 7 of the Act, with only Article 276 included.

## Omissions in the law: Articles 6 and 7

A second theme arising relates to omissions in the law, in particular Articles 6 and 7 of the Act.

Participants reported omissions in Article 6, which lead to misinterpretations regarding its formulation. Specifically, the authority outlined in the article indicates that it is not a duty but rather an allowance. This raises the question: who determines that this is permissible? The judge is responsible for determining the presence of the interpreter.

Omissions in Article 7 have also been noted by participants. What are the roles of the judge and the public prosecutor concerning interpreter decisions? Why are they permitted to decide whether an interpreter will be present? A suspect has the right to an interpreter at various stages of the criminal investigation, which suggests that an interpreter may only be utilized during criminal proceedings and not in other processes. Spoken language interpreters are engaged much earlier in the criminal process, whereas sign language interpreters are not. In Dutch courtrooms, proceedings are conducted in Dutch. This means that deaf individuals who do not speak Dutch or do not speak it sufficiently have the right to use their own language. An interpreter must be present to ensure the right to a fair trial; however, these rules are not consistently observed, resulting in court trials continuing without an interpreter. This means that the public prosecutor must be aware of these requirements before the hearing and is responsible for calling the interpreters. While the judge is vigilant about the need for interpretation, they do not initiate contact with the interpreter (as stated in Article 260, paragraph 1 of the WvSv). In addition, the right to an interpreter is explicitly stated in Article 6 of the European Convention on Human Rights and in Article 2 of the Directive on the Right to Interpretation and Translation in Criminal Proceedings (2010/64/EU).

Deaf individuals frequently experience language oppression and discrimination due to their deafness being perceived as a disability. As a cultural minority group, they face disadvantages in legal proceedings

compared to the hearing majority. Moreover, a lack of knowledge about Deaf culture and sign language contributes to a pervasive sense of distrust. As a follow-up from this, deaf individuals often grant permission for the use of particular documents too quickly, unaware of their rights and unaware that they are entitled to legal representation. Consequently, from the outset, the preliminary process and subsequent procedures go awry. Errors occur in documentation and procedures because deaf individuals provide consent without fully understanding their rights.

## Unfamiliarity with Deaf culture

The third theme identified includes topics such as the lack of knowledge about deaf people about their rights, and unfamiliarity of hearing people with deafness and Deaf culture.

The right to an interpreter at various stages of the criminal investigation is not consistently guaranteed, leading to questions about the fairness of trials. Deaf individuals are often not informed of their basic rights from the outset, resulting in rights infringements. The Government has an obligation to ensure the right to a fair trial; however, there is often ignorance regarding the presence of deaf individuals, including defendants.

This lack of awareness is reflected in documentation at the beginning of the preliminary process. For instance, in cases involving youth care, a minor son may be a suspect while having deaf parents. Since the parents are legally responsible for a child under 18, their presence at court can cause surprise when others realize that they are deaf.

Dealing with deaf individuals should be uniform nationwide; however, this is not the case. Some regions pay more attention to the needs of deaf people than others, leading to a lack of harmonization in implementation.

Judges, public prosecutors, and lawyers often lack understanding of deaf individuals and their needs. While interpreters possess relevant knowledge, they serve only as intermediaries and operate under a code of confidentiality, prohibiting them from interfering in trials or interrogations. There is a pressing need for a centralized knowledge base where judges, public prosecutors, lawyers, and other relevant parties can easily access accurate information about deaf individuals, covering both legal matters and aspects of language and culture. This central knowledge base should be structurally maintained across the Netherlands, providing clear guidelines and descriptions of procedures pertaining to interactions with deaf individuals.

## [F] CONCLUSION AND RECOMMENDATIONS

Following the official recognition of NGT in 2021, the report (Oyserman 2024) upon which this article is based looked at the implementation of the Act in *bestuurlijk verkeer* and *rechtsverkeer*. The data for this was collected in 2023. As long ago as 1997, recommendations were made to improve the implementation of NGT in this domain.

Based on the research results, a number of things have become clear. The relationship between the Act and the WvSv raises questions about the division of roles between the judge, the suspect and the interpreter. In particular, the interpretation of Articles 6 and 7 of the Act and Articles 260, 274, 275 and 276 of the WvSv is crucial.

The interpreter is seen as the “final piece”. All participants mention that this happens in daily practice. Reactive action is taken when judicial authorities are confronted with the fact that a case with a deaf person is imminent. However, the judicial authorities must act proactively on the basis of a centrally accessible scenario. The participants all agree that there must always be a guarantee that a registered legal interpreter will be used for NGT. The profession deserves more attention and better pay. The tendering process is cited as one of the main problems, causing a lack of oversight of quality. The participants also indicated that too much room is left in terms of interpretation with regard to interpreting use, as a result of which there is no harmonization in the Netherlands, and no guarantee. A *status aparte* (a specialized interpreting agency with knowledge of disabled people and with sign language interpreters, and associated good interpreting rates) would provide clarity for all parties, and create more urgency to properly arrange communication in matters with a deaf citizen. By arranging this, the legal right to a fair trial is better guaranteed.

Experiences of deaf citizens in court cases, as indicated by the participants, are not always positive, because they do not get full and unrestricted access to their rights, and their rights are not clearly explained. The quotes from the interviews and the written communication show that, in legal proceedings, cases are handled (or continue) without an interpreter. The lack of an interpreter is a violation of the law, as discrimination on the basis of disability is prohibited under Article 1 of the *Grondwet*. Article 13 of the UNCRPD obliges the Netherlands to guarantee access to justice, including procedures and facilities.

We have clarified how the Act has been implemented in practice in the domain of *bestuurlijk verkeer* and *rechtsverkeer*, and what has and

has not yet been achieved in the period 1997-2023. The Government ought to guarantee the right to a fair trial. In practice, however, there are uncertainties about how that right should be safeguarded and implemented. People often point the finger of blame at each other, and, of course, money plays a role in financing facilities for deaf people.

The interpreter is generally seen as the final piece. In addition, the absence of an interpreter and the quality of translation have a major influence on the course of the legal process. There is a great shortage of registered and qualified legal interpreters, which means that basic interpreters without knowledge of legal processes are also frequently called upon, and this may also include a suitable person who can sign adequately. Article 274 paragraphs 1 and 2 WvSv allows this. In order to guarantee the right to a fair trial, this should be removed from the law.

Finally, this research into the implementation of the Act in *rechtsverkeer* shows that many steps still need to be taken to optimize the laws, so that deaf people are also guaranteed their rights in legal traffic. The right to an interpreter must be guaranteed at all times from the very first moment a deaf person comes into contact with the police or judicial authorities.

In conclusion, we can say that the four recommendations for the domain *bestuurlijk verkeer* and *rechtsverkeer* have been partially realized. New recommendations are presented below.

## Recommendations

In order to guarantee the accessibility of legal processes for deaf citizens and to successfully implement the laws, the judicial authorities, the police, and the Ministry of Justice and Security will have to take further steps. These steps will be described here.

To ensure the accessibility of legal processes for deaf citizens and to facilitate the effective implementation of relevant laws, it is imperative that judicial authorities, law enforcement agencies, and the Ministry of Justice and Security undertake several essential measures. First and foremost, it is crucial to employ interpreters for deaf individuals from the outset of legal proceedings. This practice should be widely communicated to both the Ministry of Justice and Security and the pertinent judicial institutions. Additionally, an independent and centralized reporting mechanism should be established, allowing the above-mentioned groups and their designated partners to support deaf individuals who encounter obstacles in Dutch legal procedures and are uncertain about how to

proceed. This reporting system should receive structural funding to ensure its sustainability.

A further recommendation involves the creation of a centralized knowledge base for law enforcement and judicial bodies, thereby enhancing access to vital information. Moreover, also necessary is the development of a procedural framework for interpreting services, in collaboration with *Nederlandse Beroepsvereniging Tolken Gebarentaal* (the Dutch Professional Association for Sign Language Interpreters, NBTG) and deaf interest groups, in conjunction with law enforcement and judicial authorities, as well as the Ministry of Justice and Security. This procedural framework should be systematically disseminated across all relevant departments, the police force and the judiciary. Furthermore, it is essential to avoid assigning a single interpreter to serve both parties in any legal matter and to amend existing legislation that permits the use of “suitable persons” for interpretation purposes. All newly enacted laws in the context of legal procedures and deaf individuals should be evaluated against UNCRPD and Article 1 of the *Grondwet*.

Additionally, it is necessary to revise the legal stipulation that grants judges the discretion to determine interpreter usage. Legal provisions must explicitly stipulate that NGT interpreters must also be certified for use in court and that these professionals must be given priority when deployed.

Lastly, to facilitate a swift increase in the number of qualified and registered judicial interpreters, a training programme should be initiated without delay. This initiative ought to be supported by consistent funding, ensuring fair compensation for legal interpreters over the long term.

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# **DIREITO LINGUÍSTICO (LINGUISTIC LAW) AND THE REGULATION OF LIBRAS: LINGUISTIC RIGHTS AND DUTIES IN FEDERAL LEGISLATION**

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## **Abstract**

This article examines how Brazilian federal law regulates Brazilian Sign Language (Libras) through the articulation of linguistic rights and duties linked to fundamental rights. Grounded in *Direito Linguístico* (Linguistic Law), it maps federal legislation enacted after the legal recognition of Libras in 2002, focusing on labour, political participation, and healthcare. The analysis shows that linguistic regulation is largely structured through accessibility norms and sector-specific legal instruments, alongside language-specific policy. While this framework establishes binding obligations, persistent failures derive not from normative insufficiency, but from institutional practices and prevailing conceptions of language and deafness that remain misaligned with Deaf communities' claims to linguistic agency and self-determination.

**Keywords:** Linguistic Law; Brazilian Sign Language (Libras); linguistic rights and duties; linguistic regulation; Deaf rights.

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## [A] INTRODUCTION

Access to rights is inseparable from access to language. Legal systems are constituted, interpreted, and applied through language, yet language itself has rarely been treated as an autonomous object of legal regulation within mainstream legal analysis. For linguistic communities outside the state's dominant language(s), the effective exercise of fundamental rights on how languages—and legally regulated practices of translation, interpretation, and communicational access—are structured through binding norms and implemented by public and private institutions

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Over recent decades, the legal recognition of sign languages has expanded across multiple jurisdictions (De Meulder & Ors 2019b; World Federation of the Deaf 2026). In Brazil, the recognition of Brazilian Sign Language (Libras) emerged from political mobilization by Deaf communities from the 1980s onwards (Brito 2013; Quadros & Stumpf 2019), culminating in the enactment of Law No 10.436/2002 (*Lei de Libras*, Libras Law) and its regulation by Decree No 5.626/2005. These instruments established the explicit legal recognition of Libras<sup>1</sup> and form the core of Brazilian federal sign language policy.

Comparative research shows that this configuration is not unique to Brazil. Deaf people are frequently positioned in law through a dual categorization: simultaneously as members of a linguistic minority and as persons with disabilities (De Meulder 2017; De Meulder & Ors 2019a). Within such frameworks, sign language recognition operates too through implicit forms of legal regulation, embedded in disability, accessibility, or equality law, rather than through language-status or language-rights legislation (De Meulder 2015).

While Libras benefits from explicit legal recognition through language-specific legislation, the dual categorization of deaf people as both a linguistic minority and a disability group also enables sign language to be regulated indirectly through statutory and regulatory frameworks whose primary object is not language. As a result, legal duties concerning Libras can be articulated through accessibility, equality, or other sector-specific norms. In Brazil, this produces a dispersed regulatory landscape in which obligations relating to accessible communication and information emerge across federal legislation governing constitutionally protected domains such as labour and employment, political participation, and healthcare—areas in which the effective exercise of rights presupposes communicative interaction between individuals and public or private authorities.

Against this background, this article examines how Libras is regulated within Brazilian federal law by mapping dispersed statutory and regulatory provisions of linguistic rights and duties. Informed by the perspective of *Direito Linguístico* (Linguistic Law), the study adopts a legal-mapping approach based on the systematic examination of Brazilian federal legislation, analysing normative acts in force to reconstruct how legal norms—whether explicitly linguistic or not—render linguistic obligations

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<sup>1</sup> Following De Meulder (2015), *explicit legal recognition* refers to the formal recognition of a sign language as a language in its own right through dedicated legal instruments that name and define the language as such. This contrasts with implicit legal recognition, whereby sign languages acquire legal relevance indirectly through provisions on disability, equality, or non-discrimination, without being recognized as languages of institutional operation.

legally operative (Turi 1986; 1990; Abreu 2016; 2019; 2020; Sigales-Gonçalves 2019; 2020).

The aim is to clarify the normative architecture through which linguistic rights and duties may arise across federal law, rendering visible obligations that are often beyond language-, disability-, or equality-specific legislation. The contribution lies in making these normative connections intelligible, thereby enabling a more precise understanding of the legal bases upon which such duties may be attributed, coordinated, and invoked in institutional contexts. Moreover, bringing light to the fact that the conditions under which existing norms are read, aligned, and operationalized, may also shape the effectiveness of linguistic rights and duties as claimed and experienced by Deaf people in constitutionally protected domains.

The article is structured as follows. Section [B] outlines *Direito Linguístico* as a legal field and linguistic duties as objects of legal regulation. Section [C] examines the legal recognition of Libras and its principal implications. Section [D] presents the legal-mapping methodology. Section [E] discusses the results in dialogue with existing scholarship. The final section addresses concluding considerations, limitations, and directions for future research.

## [B] *DIREITO LINGUÍSTICO AS A LEGAL FIELD*

### Conceptual foundations

*Direito Linguístico (droit linguistique)* offers a legal-analytical framework for examining how languages are regulated through legal norms. Its conceptual foundations were developed by Joseph-Giuseppe Turi, who advanced language as a distinct object of regulation within positive law. Writing in the Quebec context in the mid-1980s, Turi observed that although legal systems necessarily operate through language, linguistic regulation tends to appear in a fragmented and often implicit manner, rather than as a clearly articulated legal domain (Turi 1986; 1990).

In Turi's framework, *droit linguistique* operates in both an objective and a subjective sense. Objectively (*entendu objectivement*), it refers to the body of legal norms governing the status and use of one or more languages within a given political and institutional context (Turi 1990: 641). Subjectively (*entendu subjectivement*), it encompasses individual and collective linguistic entitlements, including the distinction between the right to *une* (a) language—the right to use designated languages

in official or institutional domains—and the right to *la* (the) language, understood as the broader freedom to use any language, particularly outside such domains (Turi 1990: 641-642). These distinctions are linked to the principles of territoriality and personality, and reflect the tendency of language law to regulate language primarily as a medium of communication (*langue-médium*), rather than as expressive content (*langue-message*) (Turi 1990: 644).

A central feature of this account is the dual position of language within the legal system: language functions simultaneously as the medium through which legal norms are formulated and as an object of legal regulation. This duality underscores the structural complexity of linguistic regulation, insofar as law operates through the very medium it may also seek to regulate (Turi 1986: 465).

Turi (1990) further emphasizes that linguistic regulation acquires legal relevance only insofar as it produces concrete normative effects within the legal order. Linguistic rights attain juridical significance when they are embedded in enforceable legal norms capable of structuring conduct, allocating competences, or generating obligations and constraints within institutional settings. Where linguistic recognition remains merely declaratory or programmatic, it tends to lack legal robustness and practical effect.

## Field construction and theoretical development

Drawing on international theoretical foundations and responding to the specific features of the Brazilian legal system and its sociolinguistic complexity, Brazilian scholarship has progressively articulated *Direito Linguístico* as a field within legal studies. A foundational contribution in this regard is offered by Ricardo Abreu (2016), who situates *Direito Linguístico* within legal theory. Abreu defines it as the field concerned with legal norms that regulate language use and the rights of individuals and groups to use languages (Abreu 2016; 2020).

Crucially, Abreu emphasizes that *Direito Linguístico* cannot be reduced to the mere recognition or enumeration of linguistic rights. Rather, it encompasses the broader normative architecture through which language is legally governed, including constitutional principles such as human dignity, equality, and non-discrimination, as well as the institutional and interpretive mechanisms that condition the application and effectiveness of linguistic norms (Abreu 2016; 2019; 2020).

Building on this field-consolidating framework, Jael Sigales-Gonçalves (2020) advances an analytical shift from the formal recognition of linguistic norms to their material operation within legal and institutional practice. In her work, *Direito Linguístico* is concerned not only with what the law declares about language, but with how linguistic regulation is produced, distributed, and operationalized through legal and administrative arrangements (Sigales-Gonçalves 2020).

This approach is illustrated in her analysis of institutional regulation affecting forced migrants' access to public higher education in Brazil. Although linguistic diversity is formally acknowledged, access and permanence are conditioned on proficiency in Portuguese, which functions as an implicit institutional requirement (Sigales-Gonçalves 2018; 2020). Linguistic regulation thus operates indirectly, through administrative practices that naturalize language requirements while obscuring their normative and political character (Sigales-Gonçalves 2018).

Similarly, Sigales-Gonçalves and Monica Zoppi-Fontana (2021) show that linguistic regulation may operate through legally constituted conditions of eligibility rather than through explicit language-rights provisions. Analysing Brazilian migration law and jurisprudence on naturalization, they demonstrate that the requirement to “communicate in Portuguese” functions as a legally operative criterion for access to citizenship, establishing language proficiency as a normative threshold for institutional membership. Language thus operates as a juridical condition for the exercise of rights, enforced through statutory interpretation and judicial reasoning.

From this perspective, linguistic rights cannot be analysed in isolation within *Direito Linguístico*. Linguistic regulation takes shape through the interaction between rights and legally imposed duties, in which language operates as a normative condition structuring access to institutions and participation in legally protected domains. This shift in focus brings into view not only who is the subject of linguistic rights, but which actors bear obligations, and through which legal mechanisms these obligations are produced and enforced.

## Linguistic duties as objects of legal regulation

Sigales-Gonçalves (2018; 2020) contributes to *Direito Linguístico* by shifting the analytical focus from the declaratory recognition of linguistic rights to the legal duties through which language is regulated in practice. Rather than treating language primarily as an object of rights attribution, she shows that its legal relevance often emerges through conditions and

requirements that structure access to legally regulated domains, even where language is not framed as a protected legal interest.

This perspective is articulated through a distinction between explicit and implicit linguistic duties, developed primarily in the context of migration law (Sigales-Gonçalves 2020). Migration regimes offer a particularly clear analytical site, as access to residence, documentation, or naturalization is routinely conditioned on language-related requirements.

Explicit linguistic duties arise where legal norms directly prescribe language-related obligations, such as statutory requirements to demonstrate proficiency in the official language or provisions designating the language of administrative and judicial procedures. In these cases, language operates as an identifiable legal criterion, generating defined obligations and, in some instances, enforceable legal positions.

Implicit linguistic duties, by contrast, arise where language is not expressly regulated but nonetheless becomes legally relevant for the exercise of recognized rights. Here, legal norms governing access to procedures or public services presuppose linguistic competence, effectively transforming language into an unstated condition of participation. Linguistic regulation thus operates not only through express mandates, but also through the legal structuring of access, shaping who may exercise rights directly and under what conditions institutional participation becomes possible (Sigales-Gonçalves 2020).

From this perspective, linguistic rights and linguistic duties operate as legal mechanisms through which language is regulated in practice. Legal systems may formally recognize access as a right while simultaneously conditioning its exercise on compliance with explicit or implicit language-related requirements (Sigales-Gonçalves 2020). Linguistic regulation thus shapes legal subjectivity by determining who may access rights directly, who must rely on mediation, and under what conditions institutional participation becomes legally possible. This perspective makes it possible to identify legally operative language obligations even where they are treated as procedural, technical, or discretionary, thereby clarifying the normative bases upon which institutional responsibilities may be assessed.

Although this body of scholarship does not take sign languages as its primary object of analysis, it provides a coherent analytical framework for examining their legal regulation. The following section therefore reconstructs the normative background through which the regulation of Libras has been incorporated into the Brazilian legal system.

## [C] THE LEGAL RECOGNITION OF LIBRAS

The legal recognition of Libras in Brazil resulted from political mobilization by Deaf organizations and their allies (Quadros & Stumpf 2019). As documented by Fabio Brito (2013), from the late 1980s onward Deaf movements challenged dominant educational and medical framings of sign language, contesting its treatment as a merely communicative resource detached from Deaf culture. Instead, they advanced claims grounded in the linguistic legitimacy of sign languages and in their recognition as central to Deaf cultural identity and collective life.

This mobilization culminated in the enactment of the *Lei de Libras*, which formally recognizes Libras as a *meio legal de comunicação e expressão* (legal means of communication and expression) used by Deaf communities in Brazil. The statute represents the first instance of explicit legal recognition of a sign language (De Meulder 2015) within Brazilian federal law.

Following the enactment of Law No 10.436/2002, the recognition of Libras was substantively developed through Decree No 5.626 of 22 December 2005, which implements the *Lei de Libras* by specifying concrete legal obligations. Together, the statute and the decree function as language-specific policy instruments regulating the use and promotion of Libras as the language of Deaf communities. The decree specifies obligations concerning the teaching of Libras, the training of professionals, the regulation of translators and interpreters, and the provision of interpreting services—most notably in education and public services (Quadros & Stumpf 2019).

At the same time, the legal status conferred on Libras through this framework remains institutionally circumscribed. Law No 10.436/2002 recognizes Libras as a *meio legal* (legal means), rather than as an official or national language. As Angela Baalbaki and Isabel Rodrigues (2011) observe, this formulation establishes an intermediate legal category: it authorizes the use of Libras in legally relevant interactions while excluding it from the constitutional framework governing state languages and core institutional functions. As Abreu (2019) demonstrates, it neither presumes institutional use nor entails a reorganization of administrative or judicial language practices, rendering the practical operation of Libras dependent on subsequent regulation and sector-specific norms.

As Brito (2013) documents, this limited institutionalization is not accidental. The *Lei de Libras* emerged from political negotiations in which demands for linguistic legitimacy and cultural recognition advanced

by Deaf movements were partially accommodated, while medical, rehabilitative, and assistential views of deafness continued to shape societal attitudes and policy-making processes. The resulting statute thus combines symbolic recognition with limited institutionalization.

This outcome is not unique to the Brazilian case. The resulting hybrid legal configuration exemplifies the broader dual categorization through which Deaf people have been positioned in law, simultaneously as a linguistic minority and as persons with disabilities (De Meulder 2017; De Meulder & Ors 2019a). The tension between recognition and legal effect that follows from this duality provides a key lens for analysing how Libras is regulated across different legal domains.

Within this context, as Sigales-Gonçalves (2020) observes, linguistic regulation rarely operates through a single, comprehensive legislative framework. Instead, it is typically produced through the interaction of norms distributed across distinct areas of law. In Brazil, linguistic rights and duties relating to Libras may also emerge from a fragmented set of statutory and regulatory provisions dispersed throughout federal legislation.

This dispersion makes it insufficient to analyse the legal regulation of Libras by reference to a language-specific regulatory framework. The following section therefore outlines the methodological approach adopted to reconstruct the relevant normative architecture and to identify the concrete legal bases through which linguistic rights and duties concerning Libras are constituted and may be attributed across constitutionally protected domains, such as labour and employment, political participation, and healthcare.

Across the domains examined below, a recurring tension emerges between the treatment of Libras as a means of mediated access—activated primarily through interpretation—and its recognition as a language of direct institutional operation, capable of structuring linguistic practices within public and private institutions.

## [D] METHODOLOGY

This study adopts a qualitative approach grounded in a plural conception of methodology in the social sciences, understood as the articulation of theoretical perspectives and analytical procedures for the systematic interpretation of social reality (Minayo 2008). Methodologically, it follows a descriptive documentary design (Gil 2010), appropriate to the examination of legal norms as social and institutional artefacts.

In this framework, descriptive documentary research aims to characterize a phenomenon on the basis of primary documentary sources that have not been subjected to prior systematic analysis. The phenomenon examined here is the federal legal regulation of linguistic rights and duties related to Libras. The empirical corpus consists of official federal infra-constitutional normative acts—primarily statutes and decrees—selected for their relevance to communicative and linguistic obligations. Consistent with Maria Oliveira (2007), documentary research is understood as the systematic examination of documents not produced for scientific purposes and is employed as the central analytical instrument of the study.

The analysis builds on a broader legal mapping of Brazilian federal legislation developed in previous research (Beer 2024). The present article constitutes an analytical subset of that mapping, concentrating on norms situated in three constitutionally protected domains in which communicative conditions are integral to the exercise of rights: labour and employment; political participation; and healthcare.

## Corpus construction

The corpus comprises federal infraconstitutional legislative instruments—laws and decrees—currently in force and enacted after April 2002, when Law No 10.436/2002 formally recognized Libras. This temporal delimitation reflects the understanding that the *Lei de Libras* constitutes a legal and political turning point, inaugurating a new phase in the federal regulation of language in relation to Deaf communities in Brazil.

Corpus construction and refinement were conducted in successive stages to ensure analytical relevance and informational reliability. All documents were retrieved exclusively from the *Portal da Legislação Federal Brasileira* (Brazilian Federal Legislation Portal), an official repository maintained by the Brazilian Government. As the corpus consists solely of authenticated statutory and regulatory texts, it presents a high degree of institutional reliability and ensures the authenticity and replicability of the search procedure (Cellard 2008).

The documentary search employed the following Portuguese keywords in order to capture variations in legal terminology:

- i) “*Libras*” returned 49 documents;
- ii) “*língua de sinais*” (sign language) returned 4 documents;
- iii) “*linguagem de sinais*” (sign communication/sign-based communication) returned 12 documents;

- iv) “*tradutor e intérprete*” (translator and interpreter) returned 19 documents;
- v) “*intérprete de Libras*” (Libras interpreter) returned 5 documents;
- vi) “*formatos acessíveis*” (accessible formats) returned 17 documents;
- vii) “*acessibilidade*” (accessibility) returned 247 documents.

These terms were selected to capture both explicit and implicit regulation of Libras. The initial search yielded 353 documents. For each document, basic metadata were recorded, including document type, number, date of enactment, official summary, and URL.

## Screening and refinement

Corpus refinement was carried out in successive stages to ensure analytical relevance and consistency with the objectives of the study. Following criteria adapted from prior documentary research (Bernieri 2020), selection was guided by four cumulative parameters: (i) a chronological criterion (2002-2023), corresponding to the period following the formal legal recognition of Libras; (ii) a typological criterion, limited to federal laws and decrees; (iii) pertinence, requiring that the meanings associated with search terms correspond to the analytical focus on language, communication, translation, and interpretation; and (iv) relevance, retaining only documents meaningfully connected to the regulation or exercise of fundamental rights.

In the first stage, *pré-leitura* (preliminary screening; Cervo & Bervian 2002) was used to assess semantic pertinence. Documents were excluded where search terms were employed with unrelated meanings (eg *libras* as a unit of measurement), where accessibility was addressed exclusively in architectural or physical terms, or where the content did not concern linguistic or communicational regulation. Revoked norms, temporary budgetary instruments, and provisions relating solely to concluded events were also excluded. Normative acts retrieved through multiple search terms were counted only once to avoid duplication. After this stage, 94 documents remained.

The second stage consisted of *leitura seletiva* (selective reading; Cervo & Bervian 2002), aimed at assessing substantive relevance. Documents were retained only where their provisions could be analytically linked to the regulation or institutional implementation of constitutionally protected rights, specifically work, political participation and health. Following this refinement, the final corpus comprised four federal legislative instruments. Table 1 presents the corpus analysed in this study.

Year	Search terms	Legislative instrument	Domain(s)
2005	Libras; tradutor e intérprete; Intérprete de Libras, acessibilidade	<i>Decreto n° 5626 de 22 de dezembro de 2005</i> (Decree No 5,626 of 22 December 2005—Regulation of <i>Lei de Libras</i> )	Health
2009	Libras	<i>Lei n° 12034 de 29 de setembro de 2009</i> (Law No 12,034 of 29 September 2009—Amendment to the Electoral Law)	Political participation
2015	Libras; Tradutor e intérprete; formatos acessíveis; acessibilidade	<i>Lei n° 13.146 de 06 de julho de 2015</i> (Law No 13,146 of 6 July 2015—Brazilian Inclusion Act)	Work, political participation, health
2018	Acessibilidade	<i>Decreto n° 9.405 de 11 de junho de 2018</i> (Decree No 9,405 of 11 June 2018—Regulation of accessibility obligations in labour policy)	Work

*Table 1: Federal laws and decrees composing the final corpus analysed in this study (selection criteria adapted from Beer 2024).*

## Analytical categories

The analysis of the final corpus focused on identifying linguistic rights and linguistic duties regarding translation and interpretation related to Libras, whether explicitly provided for in legal texts or implicitly derived. The analysis also examined how legal provisions conceptualize the role of Libras within institutional interaction, distinguishing between interpreter-mediated access and the direct use and dissemination of sign language in public and private services and institutions.

Analytical criteria were drawn from Sigales-Gonçalves (2020) and applied to each document. These include: (i) the sources and institutionalization of regulation; (ii) the explicit or implicit articulation of rights and duties; (iii) the nature of linguistic duties (positive or negative); (iv) the configuration of the legal relationship (subject- or object-centred); (v) the identification of right-holders and duty-bearers; and (vi) the nature of linguistic rights as legally enforceable entitlements.

## [E] LINGUISTIC RIGHTS AND DUTIES RELATED TO LIBRAS IN BRAZILIAN FEDERAL LEGISLATION

This section presents selected results and discussion arising from the legal mapping of Brazilian federal legislation regulating Libras, conducted in accordance with the methodology outlined in Section [D].

## Accessibility

A central feature of the Brazilian regulatory framework is that obligations concerning Libras have been articulated predominantly through accessibility norms, rather than through stand-alone language-policy instruments (Beer 2024). This configuration is anchored in the Lei Brasileira de Inclusão da Pessoa com Deficiência (Brazilian Inclusion Act, Law No 13.146/2015) which establishes accessibility as a transversal and legally enforceable regulatory category across the federal legal order.

Article 3(II) of the Act defines accessibility as:

possibilidade e condição de alcance para utilização, com segurança e autonomia, de espaços, serviços, ... informação e comunicação, inclusive seus sistemas e tecnologias [the possibility and condition of safe and autonomous access to spaces, services, ... information, and communication, including their systems and technologies].

Article 3(V) further defines communication as encompassing “languages, including Brazilian Sign Language (Libras)”, alongside other communicative modalities.

Enacted to internalize the United Nations Convention on the Rights of Persons with Disabilities (CRPD), these provisions in the Act normatively integrate Libras into the legal architecture of accessibility as a protected form of communication.

This structure mirrors the international framework of the CRPD, whose Article 2 similarly defines communication as including languages and sign languages. Once incorporated into domestic law, this definition enables accessibility provisions to operate as binding sources of linguistic regulation whenever legal obligations concern access to information, services, procedures, or institutional interaction.

Within this framework, linguistic regulation does not rely solely on language-specific policy. It also arises through legally binding rights and duties to ensure accessible communication.

## The right to work

The right to work is recognized in Brazil as a fundamental social right. Article 6 of the Federal Constitution of 1988 expressly includes work among social rights, while labour is further affirmed as a foundational value of the constitutional order. Work is thus protected not merely as an economic activity, but as a condition for dignity and equal participation in social life.

However, as Maurício Delgado (2007) argues, constitutional protection must be read in material terms: fundamental rights acquire juridical relevance insofar as they secure the conditions necessary for effective social participation. This interpretation is reinforced by Articles 170 and 193 of the Constitution, which ground the economic and social orders in the valorization and primacy of work.

Read together, these provisions establish the right to work as a structural constitutional principle guiding the interpretation of infra-constitutional legislation and supporting positive state obligations to address barriers that impair equal participation. In this sense, constitutional protection of work provides a normative basis for assessing whether legal and institutional arrangements effectively enable or hinder access to employment on equal terms (Delgado 2007).

Within Brazilian federal legislation, the Brazilian Inclusion Act (Law No 13.146/2015) gives concrete effect to constitutional commitments in the employment context by treating accessibility as a legal condition of the right to work. Article 34 establishes a linguistic right to “employment under *accessible and inclusive* conditions, on equal terms with others” (emphasis added). Paragraph 1 confers direct normative force on this right by imposing an explicit positive linguistic duty on all legal persons, public and private, to guarantee “accessible and inclusive work environments”.

Paragraphs 2, 4, and 5 specify the legally protected content of this right by recognizing rights to fair working conditions, equal remuneration, and accessible access to professional training, continuing education, and career advancement. Correspondingly, these provisions impose explicit positive linguistic duties on employers to ensure accessibility not only at the point of hiring, but throughout the professional trajectory, including qualification, progression, and participation in workplace life.

Articles 37 and 38 extend accessibility obligations to the point of entry into employment. Article 37 establishes the right to competitive placement in the labour market under accessible conditions and imposes corresponding explicit positive linguistic duties on employers to comply with accessibility rules, including reasonable accommodation and assistive resources. Article 38 reinforces this framework by imposing an explicit positive linguistic duty on entities responsible for recruitment and selection procedures—public or private—to observe accessibility norms.

Although these provisions do not enumerate specific linguistic measures, the requirement of communicational accessibility—defined in the Act as encompassing languages, including Libras—renders language(s) a legally

operative condition. Employers and recruiting entities are therefore subject to linguistic duties to ensure that Deaf signers can effectively access recruitment, training, and career progression processes through measures including sign language interpretation or the direct use of Libras.

Moreover, the interaction between accessibility obligations and other binding legal norms gives rise to additional implicit duties. Where communicational accessibility is ensured through interpreter-mediated interaction, compliance with statutory obligations necessarily presupposes the use of qualified professionals, in accordance with Law No 12.319/2010,<sup>2</sup> which regulates the profession of Libras translators and interpreters.

Although Articles 34, 37, and 38 do not expressly refer to Law No 12.319/2010, the effective fulfilment of accessibility obligations presupposes compliance with the professional standards governing interpretation. This illustrates a core insight of *Direito Linguístico*: linguistic duties arise not only from express legislative commands, but through the coordination of norms across distinct legal instruments, rendering language regulation operative by inter-normative interaction.

A similar logic applies to Decree No 9.405/2018, which modulates the temporal enforcement of accessibility obligations for microenterprises and small businesses without altering their substantive content. Accessibility—and by extension communicational and linguistic accessibility—is thus treated as a binding obligation whose implementation may be phased, but not displaced.

Nevertheless, the legal recognition of a right or a duty cannot be assessed solely at the level of formal normativity. Its effectiveness depends on how they are operationalized within institutional practice. This analytical focus is warranted because communicational conditions have historically structured access to work for Deaf people in Brazil: as Madalena Klein (2001) shows, linguistic exclusion has functioned as a structural mechanism sustaining occupational segregation, restricted access to professional qualification, and limited career mobility.

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<sup>2</sup> Law No 12.319/2010 regulates the profession of Libras translators, interpreters and guide interpreters in Brazil, establishing that its exercise is exclusive to duly qualified professionals (*exercício privativo*). As amended by Law No 14.704/2023, the statute defines minimum training requirements, working conditions, professional attributions, and binding ethical duties. The law therefore imposes an obligation on public and private institutions to engage qualified professionals when providing Libras translation or interpretation in order to comply with legal requirements.

Contemporary research indicates that these patterns persist under current legal frameworks. Drawing on interviews with human resources professionals in the private sector, Amanda Ponpeo (2021) documents recurrent strategies through which accessibility obligations are narrowly constructed and weakly enacted, including resistance to the provision of professional sign language interpreting at key institutional stages such as recruitment, training, and internal meetings. Employers' preference for hiring oral Deaf workers—perceived as requiring fewer organizational adjustments—facilitates formal compliance while materially limiting access to information, qualification pathways, and career advancement.

Similarly, initiatives presented as Libras training are often generic and insufficient to restructure communicational practices, functioning primarily as symbolic compliance rather than as mechanisms for transforming work environments. In this context, Libras is predominantly framed as a contingent accommodation—provided through interpretation when deemed necessary—rather than as a language capable of reorganizing workplace communication as a matter of ordinary institutional practice.

Similar dynamics are identified by Jorge and Saliba (2021), who show that Deaf workers remain disproportionately concentrated in low-qualification positions, face restricted promotion opportunities, and experience higher turnover rates. In these contexts, references to “communication difficulties” tend to operate as *ex post* justificatory narratives rather than as triggers for the activation of legally binding linguistic duties.

Research on Deaf workers in Brazilian public administration further confirms this gap between formal compliance and substantive inclusion. T G Nogueira and colleagues (2020) show that access to public employment does not ensure effective professional participation, as Deaf workers remain systematically excluded from meetings, training activities, and institutional decision-making due to the absence of communicational accessibility—what the authors characterize as false inclusion.

From a regulatory standpoint, these findings suggest a gap between legal norms and their institutional enactment. As Bernard Spolsky (2009) observes, language policy operates through the interaction of formal rules (management), (institutional) practices, and (shared) beliefs among different domains. In the employment context, linguistic rights and duties coexist with organizational belief systems that tend to frame sign language as exceptional, ancillary, or administratively burdensome.

Such belief structures may shape the operationalization of linguistic duties, leading institutions to adopt narrow or symbolic compliance strategies, rather than undertaking structural adjustments. In these cases, the difficulty lies not in the absence of legal norms, but in their limited activation in practice.

This configuration is not confined to employment relations. Comparable dynamics may also arise in other constitutionally protected domains where the exercise of rights presupposes communication. The following section therefore turns to political participation, examining how linguistic rights and duties concerning Libras are articulated—and constrained—within regulatory frameworks.

## Political participation

Political participation is constitutionally protected in Brazil as a fundamental right and a core element of democratic legitimacy. Article 1 of the Federal Constitution of 1988 establishes popular sovereignty as the foundation of the democratic state, exercised directly or through elected representatives.

Brazilian constitutional doctrine has rejected a restrictive understanding of political participation limited to the act of voting. As Bruno Chahaira (2024) argues, political participation must be understood in material terms, encompassing both the active and passive dimensions of political rights and requiring institutional conditions that allow citizens and social groups to effectively influence political processes and access positions of representation and power.

From this perspective, political participation operates as a conditioned fundamental right, whose effectiveness depends on the institutional arrangements through which it is exercised. Constitutional guarantees therefore give rise to positive state obligations to structure participatory and electoral processes in ways that mitigate structural asymmetries and promote material isonomy in political competition (Alves & Rigão 2017; Chahaira 2024). The concern is not merely with formal access to political procedures, but with the concrete conditions under which participation becomes feasible and meaningful.

Within the federal legislative framework, linguistic rights and duties related to political participation emerge not only through disability- or inclusion-oriented legislation, but also through general regulatory instruments governing electoral processes. A particularly salient example is the *Lei das Eleições* (Electoral Law).

Article 44(1) of the *Lei das Eleições*, as amended by Law No 12.034/2009, establishes an explicit positive linguistic duty by requiring free electoral television broadcasts to incorporate accessible communicational resources, including Libras or subtitles. This obligation is imposed on political parties and entities responsible for electoral propaganda and entails the active provision of accessible audiovisual translation—such as on-screen sign language interpretation—rather than a mere prohibition of discriminatory practices. Correlatively, the provision gives rise to a subjective linguistic right, enabling Deaf citizens to claim access to electoral information in Libras.

Notably, this linguistic obligation is embedded in a statute whose primary regulatory purpose is the organization of electoral competition and political communication, rather than the promotion of disability or inclusion policies. Its placement within Electoral Law illustrates a core insight of *Direito Linguístico*: linguistic regulation does not operate exclusively through language-specific statutes, but is frequently produced through the incorporation of language-related duties into general legal regimes that structure access to rights and institutional participation. In this sense, binding linguistic obligations may emerge incidentally, as a functional requirement for the effective exercise of constitutionally protected rights.

From this perspective, the implementation of Article 44 entails not only an explicit positive duty of provision—namely, the inclusion of communicational resources—but also implicit linguistic duties of effectiveness. Although the statute mandates the presence of accessibility resources, its proper fulfilment presupposes that such resources are capable of enabling meaningful participation. This requirement of effectiveness necessarily conditions how the duty is operationalized. In practice, it obliges political parties and audiovisual producers to engage qualified Libras translators and interpreters, whether Deaf or hearing, in accordance with the professional standards established by Law No 12.319/2010. Linguistic regulation thus also becomes operative through the coordination of electoral norms and professional regulation, rather than through express cross-reference.

This distinction between formal provision and effective access is not merely theoretical. Research indicates that the mere presence of an on-screen sign language inset does not, in itself, guarantee meaningful access to political information (Nascimento 2017). Accessibility measures are frequently implemented as compliance-oriented visual add-ons, with limited attention to translation quality, timing, framing, or communicative

adequacy. In such cases, broadcasts may formally satisfy statutory requirements while failing to secure intelligibility for Deaf viewers, thereby undermining the substantive purpose of the legal obligation.

As Jonas Angelim and Vinícius Nascimento (2022) observe, when compliance is reduced to the symbolic inclusion of a *janela de Libras* (sign language “window”), political communication is often designed without a Deaf addressee in mind. Language, in these contexts, remains formally present but substantively ineffective. This confirms that compliance with Article 44 cannot be assessed solely by reference to the existence of an accessibility feature, but must be evaluated in light of its capacity to enable informed, effective, and equal participation in democratic processes. Here, the recurrent reduction of Libras to an on-screen accessibility feature illustrates a broader tendency to treat sign language as an auxiliary resource for information delivery, rather than as a language of political communication addressed to Deaf citizens as full participants in the democratic process.

Having examined the articulation of linguistic duties within Electoral Law, it is necessary to situate these obligations within the broader legal framework governing political participation.

In this regard, the Brazilian Inclusion Act (Law No 13.146/2015) frames political participation as a binding obligation of the state, rather than as a discretionary policy choice. Article 76 guarantees persons with disabilities the full enjoyment of political rights on an equal basis, while Article 76(1)(I) specifies that voting procedures, materials, and equipment must be appropriate, accessible, and easy to understand and use. These provisions provide explicit, positive linguistic duties, oriented toward the effective exercise of political rights.

Responsibility for the fulfilment of these duties lies with the public authorities entrusted with the organization and administration of elections, notably the *Tribunal Superior Eleitoral* (Superior Electoral Court, TSE) and the *Tribunais Regionais Eleitorais* (Regional Electoral Courts, TREs).<sup>3</sup> Their obligations extend beyond the formal availability of voting rights to the concrete design of electoral procedures, information flows, and interactional conditions through which political participation is exercised.

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<sup>3</sup> The *Tribunal Superior Eleitoral* (TSE) constitutes the apex body of the Brazilian electoral justice system, with competence to regulate, supervise, and adjudicate electoral processes, including the issuance of binding normative acts. The *Tribunais Regionais Eleitorais* (TREs) exercise administrative and operational responsibility for the organization, execution, and supervision of elections at the regional level, including compliance with statutory obligations.

Electoral practice, however, indicates that the implementation of these duties is also shaped by underlying institutional beliefs about language (Spolsky 2009). In legal terms, such beliefs become relevant insofar as they inform discretionary choices, enforcement priorities, and compliance strategies adopted by public authorities when implementing formally binding obligations. In some instances, Regional Electoral Courts have sought to facilitate access by relying on volunteer interpreters or individuals with limited knowledge of Libras to assist Deaf voters during elections.<sup>4</sup> While often well-intentioned, such practices reveal an understanding of sign language as an auxiliary or charitable measure, relativizing both its status as a language and the legally regulated professional standards managing its use.

Moreover, Articles 76(1)(III) and 67 of the Brazilian Inclusion Act establish explicit positive linguistic duties requiring that official pronouncements, mandatory electoral propaganda, and televised political debates incorporate accessibility resources, expressly including Libras interpreting.

Research, however, highlights persistent limitations in the operationalization of these duties. Analysing Libras–Portuguese interpreting in Brazilian political broadcasts, Wharley dos Santos and Carlos Henrique Rodrigues (2022) show that sign language interpreting services are frequently treated as an accessory visual element rather than as an integral component of political communication. Recurrent problems relating to on-screen positioning, scale, visibility, and audiovisual integration result in broadcasts that may satisfy formal statutory requirements while remaining marginal for Deaf viewers.

Taken together, these analyses indicate that the persistence of shortcomings in the realization of linguistic rights—despite the clarity of statutory obligations—does not reflect a normative deficit, but deficiencies in normative construction, institutional implementation, and enforcement. Across both labour relations and political participation, binding statutory provisions formally recognize linguistic rights and impose positive duties on public and private actors in relation to core constitutionally protected rights.

Exclusion, however, arises not from the absence of legal norms, but from the restriction of their practical reach through institutional practices that preserve formal compliance while leaving communicational structures largely unchanged. Where language is treated as auxiliary or

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<sup>4</sup> See *Tribunal Regional Eleitoral do Ceará* (2022) and *Tribunal Regional Eleitoral de São Paulo* (2022).

merely symbolic, linguistic duties are effectively neutralized, weakening the constitutional guarantee of equal participation and contributing to what has been described as a condition of low-intensity democracy, in which participation is formally affirmed but substantively constrained (Santos 2003, cited in Ribeiro & Ors 2020).

The following section extends this analysis to healthcare, examining how linguistic rights and duties concerning Libras are articulated within Brazilian federal legislation.

## The right to health

The right to health is constitutionally recognized in Brazil as a fundamental social right and a duty of the state. Articles 6 and 196 of the Federal Constitution of 1988 establish health as a universal right, to be guaranteed through social and economic policies aimed at risk reduction and at ensuring equal access to actions and services for health promotion, protection, and recovery.

Brazilian constitutional doctrine has consistently rejected a reductive understanding of the right to health as mere access to healthcare services. As Ingo Sarlet and Mariana Figueiredo (2013; 2014) argue, the right to health possesses a complex normative structure, encompassing negative and positive obligations, individual and collective dimensions, and duties of both abstention and provision. Its legal effectiveness therefore depends not only on the formal availability of services, but on the institutional, procedural, and relational conditions under which healthcare is organized and delivered.

Accordingly, state obligations extend beyond infrastructure and treatment provision to include duties to structure healthcare systems in ways that safeguard human dignity, personal autonomy, and informed consent. In this sense, healthcare is inherently relational and mediated by communication: the exercise of the right to health presupposes conditions that enable individuals to understand relevant medical information, express concerns and preferences, and participate meaningfully in decisions affecting their own bodies and health trajectories (Sarlet & Figueiredo 2014).

Within Brazilian federal law, linguistic duties concerning Libras in the healthcare context are articulated primarily through Decree No 5.626/2005, a language-specific regulatory instrument implementing the *Lei de Libras*, and are further reinforced by the Brazilian Inclusion Act (Law No 13.146/2015). Unlike accessibility norms of general application,

the Decree directly regulates the use of sign language in institutional contexts, establishing concrete linguistic obligations for public authorities and service providers.

Chapter VII of Decree No 5.626/2005 specifically governs access to health services for Deaf persons and persons with hearing impairment, imposing binding obligations on both entities of the *Sistema Único de Saúde* (Unified Health System – SUS) and private providers delivering public health services. Article 25 establishes explicit, positive linguistic duties, requiring that healthcare be provided in Libras, either through direct communication by health professionals trained in Libras or through the use of qualified sign language translation and interpretation.

The language-specific character of this regulatory framework is reinforced by Article 26 of Decree No 5.626/2005, as amended by Decree No 9.656/2018. The provision introduces *explicit linguistic duty*, requiring that a minimum proportion of institutional staff (5%) within public administration bodies and public service concessionaires be trained in Libras. This requirement reflects a regulatory choice to embed sign language within ordinary institutional functioning, treating it as a structural component of healthcare delivery rather than as an exceptional or residual accommodation.

At the same time, Article 26, section 2, authorizes the use of interpreter services and communication mediation centres as complementary mechanisms, including through remote modalities. The lawful reliance on such measures is not unconditional: it presupposes adequate organizational and technological conditions—such as appropriate equipment, connectivity, system maintenance, and monitoring—so that communicational accessibility is substantively effective rather than merely formal. In this sense, the Decree differentiates between modalities of compliance while maintaining the effectiveness of communication as the governing legal standard.

This language-specific regulatory architecture is further followed—but not replaced—by the Brazilian Inclusion Act (Law No 13.146/2015). Articles 18 to 26 frame health as a fundamental right whose realization is inseparable from dignity, autonomy, and informed decision-making, extending binding obligations to both public authorities and private healthcare providers operating within the health system. Within this framework, several provisions generate explicit, positive linguistic duties, including the obligation to ensure adequate and accessible health-related information (Article 18, section 4(VIII)), to guarantee access to health services and information through all legally recognized forms of

communication (Article 24), to provide initial and continuous training of healthcare professionals (Article 18, sections 2–3), and to remove communicational barriers within healthcare environments (Article 25). Taken together, these norms confirm that linguistic accessibility is a legally binding condition for the effective exercise of the right to health, articulated through the coordination of language-specific and accessibility-based regulation.

Despite this robust normative design, research reveals a persistent gap between legal obligations and institutional enactment. Leticia Gomes and colleagues (2017), surveying physicians working within the SUS in the Federal District, found that only one out of 101 respondents reported basic knowledge of Libras, despite widespread experience in treating Deaf patients and general acknowledgment of the relevance of sign language to medical practice. This discrepancy has direct legal consequences, as it compromises the material conditions for informed consent, undermines patient autonomy, and affects the safety and effectiveness of care, thereby weakening the substantive enjoyment of the constitutionally protected right to health.

Further studies indicate that these shortcomings are not confined to the absence of direct communication. Gomes and colleagues (2021) show that linguistic mediation in healthcare is compromised where interpreters lack domain-specific medical expertise, with direct consequences for clinical accuracy and decision-making. Earlier work by Ringo Jesus (2017) identified structural constraints affecting the expansion of remote interpreting in healthcare, including unequal access to technological resources among Deaf users and an insufficient supply of interpreters adequately trained for medical and remote contexts.

The study also documents institutional barriers, including misunderstandings among healthcare professionals regarding the interpreter's professional role, resistance to mediated interaction, and ethical tensions inherent in triadic communication (Jesus 2017). Taken together, these findings demonstrate that the mere availability of mediation mechanisms does not ensure compliance with linguistic duties in the absence of adequate institutional capacity and adherence to professional standards.

As this section has shown, the healthcare domain confirms a pattern already observed in labour and political participation: the central difficulty lies not in the absence of legal norms, but in the material effectiveness of linguistic duties. The three domains illustrate how the persistent framing of Libras as a means of communication and access—rather than as a

language of institutional operation—functions as a common denominator across distinct legal regimes, despite differences in regulatory density and sector-specific obligations.

Even within a dense, language-specific regulatory framework such as Decree No 5.626/2005, the practical reach of these duties may be constrained when decisions concerning Libras are taken without the meaningful participation of Deaf communities and when sign language and interpreting services are treated as auxiliary communicative resources rather than as constitutive conditions of equality and institutional interaction. This misalignment does not suspend the validity of legal norms, but reshapes their institutional meaning, delimiting the scope of what counts as sufficient compliance within everyday administrative and professional practice. In such circumstances, regulatory compliance may be formally preserved while the substantive conditions for effective access remain unfulfilled.

This illustrates that linguistic regulation operates not only through statutory design, but through the alignment—or misalignment—between legal duties, institutional practices, and prevailing conceptions of languages and their users.

## [F] CONCLUSION

This article has examined how Brazilian federal law regulates Libras through the articulation of linguistic rights and corresponding institutional duties across a dispersed set of constitutional, statutory, and regulatory instruments. The analysis demonstrates that accessibility, as defined in Brazilian law, constitutes a legally dense and enforceable construct that expressly incorporates communication and languages, including Libras. Increasingly articulated through accessibility provisions—including in legal regimes not primarily concerned with language or inclusion, such as electoral law—this framework operates as a direct source of concrete linguistic rights and duties, even where sign language is not explicitly named. Brazilian legislation therefore already provides normative bases through which linguistic access may be demanded, supervised, and judicially enforced.

At the same time, existing research, when contrasted with this normative framework, points to persistent obstacles to the material implementation of these duties. Across labour relations, political participation, and healthcare, the literature documents recurring shortcomings, including inadequate technical infrastructure, insufficient professional training—particularly the absence of domain-specific qualifications—and the

non-fulfilment of explicit organizational obligations, such as staff training in Libras. These failures arise irrespective of whether linguistic duties are articulated through language-specific regulation or through general accessibility norms, indicating that the difficulty lies not in the formal source or density of the norm, but in how legal obligations are operationalized within institutional routines.

Beliefs and practices are thus analytically relevant not as extra-legal explanations, but as internal mediators through which binding legal duties are operationalized and enforced within institutional contexts. Where linguistic duties are grounded in binding norms, their non-fulfilment cannot be reduced to a policy deficit or discretionary shortcoming; it constitutes a legally cognizable failure of compliance, amenable to administrative oversight, judicial scrutiny, and institutional accountability. The recurring gap between legal provision and institutional practice therefore reflects not normative absence, but the mediating role of institutional beliefs about sign languages and Deaf communities in delimiting the practical scope of compliance.

The Brazilian case therefore demonstrates that the central challenge in sign language regulation lies less in expanding formal recognition than in activating, construing, and enforcing existing legal duties. Disputes involving Libras should accordingly be approached not as matters of accommodation or policy choice, but as questions of legal obligation within already established regulatory frameworks.

This article is limited to the analysis of federal normative texts and does not assess empirical compliance, institutional impact, or subnational variation in the implementation of linguistic duties. Its contribution lies instead in reconstructing the legal architecture through which linguistic rights and duties concerning Libras are produced, coordinated, and rendered legally enforceable within Brazilian federal law.

From this perspective, the findings suggest that disputes involving Libras are often mischaracterized as resulting from normative absence or policy discretion, when in fact they arise within an already dense and articulated legal framework. What remains underexamined is how these existing duties are systematically interpreted, activated, and constrained within administrative practice, judicial reasoning, and institutional routines. Future research may therefore productively focus on the operation of these duties in concrete institutional settings, as well as on the role of Deaf communities in shaping how formally recognized rights are translated into effective conditions of participation, equality, and linguistic justice.

### **About the author**

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Federal Constitution 1988 (Brazil)

Law No 10.436/2002 (Lei de Libras, Libras Law) (Brazil)

Law No 12.034/2009 (Lei das Eleições) (Brazil)

Law No 13.146/2015 (Lei Brasileira de Inclusão da Pessoa com Deficiência, Inclusion Act) (Brazil)

United Nations Convention on the Rights of Persons with Disabilities  
2006

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## DOMESTIC ABUSE, DEAFNESS AND THE PROBLEM OF LEGAL ACCESS IN ENGLAND

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### **Abstract**

This article examines Deaf survivors' access to domestic abuse protection in England through a socio-legal analysis combining doctrinal frameworks (European Convention on Human Rights, Equality Act 2010, the Public Sector Equality Duty, and the Domestic Abuse Act 2021) with a national mapping of provision. It demonstrates how hearing-normative system design, interpreter-dependent access, and fragmented commissioning produce patterned and foreseeable exclusion, constituting institutional legal harm. By contrasting these systemic failures with Deaf-led, BSL-first services, the article shows that rights become exercisable when accessibility is embedded by design rather than delivered through reactive adjustment. It conceptualizes this recognition–realization gap as the Deaf Legal Illusion: formal recognition without reliable, substantive access in practice. The article concludes by identifying system-level reforms necessary to make equality exercisable and accountability enforceable.

**Keywords:** Deaf Legal Studies; domestic abuse; British Sign Language (BSL); Equality Act 2010; Public Sector Equality Duty (PSED); access to justice; institutional legal harm; socio-legal research; commissioning; interpreter-dependent systems.

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### [A] INTRODUCTION

This article presents a qualitative socio-legal study of the United Kingdom (UK) legal framework for protecting Deaf survivors of domestic abuse and how that framework is implemented through protection institutions in England. Socio-legal research treats law not as an abstract system of rules, but as a lived institutional process shaped by governance, professional norms, and service design (Webley 2010; Cotterrell 2017); this approach enables analysis of how domestic abuse, equality, and human rights duties are implemented—or undermined—at the frontline.

Domestic abuse is recognized as a serious and systemic harm, addressed through criminal, civil, housing, and welfare law, including the Domestic Abuse Act 2021. Government policy, such as the Home Office *Tackling Domestic Abuse Plan* (HM Government 2022) and the Ministry of Justice’s European Convention on Human Rights (ECHR) memorandum (Home Office & Ors 2020) accompanying the Act, frames prevention, protection, and access to justice as core public functions. Yet for many Deaf people who use British Sign Language (BSL), legal recognition does not translate into reliable protection in practice.

Deaf BSL users often understand themselves as a linguistic and cultural minority. However, because UK policy frameworks rarely recognize sign-language minorities explicitly, issues of access, education, and participation are typically channelled through disability law and human rights instruments (De Meulder 2014; Wilks 2025). This positions Deaf people at the intersection of two identities: as a cultural-linguistic group and as individuals protected under disability rights paradigms.

It is essential to acknowledge the diversity of communication preferences and lived experiences within the Deaf community (De Meulder & Ors 2019; Moriarty & Kusters 2021). For some, written English is a chosen and effective mode of communication; for others, it presents a significant barrier to accessibility (Power & Ors 2007; Skinner & Napier 2023). Many Deaf people rely primarily on signed languages—which are complete, natural languages with their own grammatical structures—making BSL the preferred and essential mode of communication. This article focuses on Deaf people whose primary means of communication is a signed language.

UK and international research examines how Deaf people experience the legal system and consistently demonstrates that Deaf suspects, witnesses, and victims face persistent barriers when seeking help (British Deaf Association 2015; Skinner & Napier 2023; Napier & Ors 2024; Stonard & Ors 2025). These barriers arise not from individual communication difficulties but from institutional processes, service design, and hearing-normative assumptions embedded within policing, courts, and commissioned services (SignHealth 2025).

Studies of Deaf survivors of domestic abuse highlight a “knowledge gap” in recognizing non-physical forms of abuse. In BSL, commonly used signs for domestic abuse visually encode physical violence, which can lead survivors to interpret abuse narrowly and delay recognition of coercive control, economic abuse, or emotional manipulation. As Napier and colleagues (2024) explain, Deaf people are not inherently vulnerable;

they become vulnerable because of structural and institutional barriers. Many survivors describe financial or technological dependence on their abusers to navigate the hearing world, making them harder for services to reach.

While existing research offers strong empirical accounts of exclusion, it pays less attention to how legal duties are interpreted, operationalized, and enforced—and to how law itself can function as a mechanism through which exclusion is reproduced. The literature has yet to fully examine how institutional design, commissioning decisions, and procedural systems shape Deaf survivors' ability to realize their rights in practice (Webley 2010; Cotterrell 2017).

To analyse this recognition–realization gap, the article draws on Fredman's (2016) distinction between formal and substantive equality. Formal equality concerns equal treatment; substantive equality assesses whether rights are realized in practice. Deaf survivors may be formally recognized as rights-holders yet remain substantively excluded where protection relies on spoken-language systems or *ad hoc* adjustments that place the burden of accessibility on individuals.

This analysis is grounded in a national mapping of domestic abuse provision for Deaf survivors, conducted in 2021–2022 by SignHealth (2025), a Deaf-led health charity. The mapping examined availability, accessibility, and governance across specialist services, mainstream services, policing, courts, refuges, and perpetrator programmes. Rather than capturing isolated experiences, it provides a system-level account of how domestic abuse law operates in practice for Deaf survivors.

The article addresses three research questions. (1) How do Deaf BSL users experience domestic abuse protection in practice across services, policing, and courts? (2) How do commissioning and service design shape Deaf survivors' access to protection? (3) What do Deaf-led, BSL-first models reveal about the institutional conditions required for lawful, effective protection?

The article argues that Deaf survivors' recurring exclusion constitutes institutional legal harm—a patterned and foreseeable outcome produced by hearing-centred systems that treat spoken-language interaction as the norm (Napier & Ors 2024; Stonard & Ors 2025). This reflects the Deaf Legal Illusion: formal recognition without reliable, substantive access to protection (Wilks forthcoming). This article demonstrates that when accessibility is embedded by design rather than delivered through reactive adjustments, Deaf survivors' rights become exercisable in practice.

## [B] LEGAL FRAMEWORK: DUTIES, PARTICIPATION AND THE DEAF LEGAL ILLUSION

This section sets out the domestic abuse, equality, and human rights duties that govern Deaf survivors' access to protection in England. It explains how these frameworks collectively require protection to be accessible, participatory, and effective in practice, focusing on the Domestic Abuse Act 2021, the Equality Act 2010 (including the Public Sector Equality Duty (PSED)), the Human Rights Act 1998, and the United Nations Convention on the Rights of Persons with Disabilities (CRPD).

### Human rights and international obligations

The Human Rights Act 1998 incorporates the ECHR into domestic law. Domestic abuse engages several Convention rights—Articles 2, 3, 6, 8, 13, and 14—which the European Court of Human Rights (ECtHR) interprets as imposing positive obligations to prevent violence, protect individuals, and ensure access to justice in practice. These obligations are institutional: rights must be “practical and effective”, not theoretical. Where disclosure routes lack linguistic access, protection may fail and breach Articles 2-3 (*Osman v United Kingdom* 1998; *Opuz v Turkey* 2009; *Eremia v Moldova* 2013).

Article 6 guarantees a fair hearing, including effective participation. In *Cuscani v United Kingdom* (2002: paragraphs 38-40), the ECtHR held that inadequate interpretation breached Article 6, confirming that linguistic access is integral to procedural fairness. In domestic abuse cases, delayed or inadequate interpretation can undermine understanding, evidence-giving, and the ability to challenge decisions affecting safety, housing, child contact, and criminal accountability (Guthmann & Ors 2021). Articles 13 and 14 require effective remedies and prohibit discrimination, including indirect discrimination arising from hearing-normative design. Taken together, these provisions reinforce that exclusion from participation is not an administrative inconvenience but a failure of Convention compliance.

The CRPD provides an interpretive framework reinforcing these duties: Articles 9 and 13 require access to services and justice; Article 16 addresses violence; and Articles 5, 6, 21, and 31 emphasize non-discrimination, gender equality, access to information in sign language, and the collection of data on structural barriers. The CRPD Committee has raised concerns about systemic inaccessibility for Deaf people in justice contexts, placing the state on notice (CRPD Committee 2017).

## Equality Act 2010: reasonable adjustments and anticipatory duties

The Equality Act 2010 prohibits disability discrimination and imposes a duty to make reasonable adjustments (sections 20 and 21). The duty reflects a substantive equality model, requiring institutions to dismantle structural barriers (Fredman 2016). It applies where spoken-language systems create disadvantage, requiring barriers to be removed in advance. For Deaf survivors, this disadvantage arises routinely across domestic abuse pathways dependent on spoken or written modes. Where spoken-language processes create disadvantage, institutions must provide appropriate communication support in advance (Equality and Human Rights Commission 2026). Where interpreter-mediated access does not remove the disadvantage—particularly in high-risk contexts—the Act may require structural responses, including BSL-first models.

Under part 3, service providers and public authorities owe an anticipatory duty to identify and remove barriers in advance of need (Lawson & Orchard 2021). Parliamentary evidence shows widespread confusion about this duty and persistent failures across commissioned services. Outsourcing does not absolve public bodies of responsibility (Pearl & Lawson 2015). These failures are pronounced in crisis settings. Case commentary on *University of Bristol v Abrahart* (2024) illustrates the risks associated with reactive approaches, highlighting the importance of anticipatory planning where delay can have serious consequences (Burin & Atrey 2024). Empirical research shows that communication barriers—interpreter shortages, delays, and unsafe *ad hoc* practices—compromise safety and deter engagement. More broadly, disability-law scholarship cautions that over-reliance on individualized enforcement mechanisms limits structural reform and allows systemic barriers to persist (Napier & Ors 2024).

## Public Sector Equality Duty: design-stage accountability and commissioning

The PSED (section 149) is a structural governance duty. Courts require evidence-based consideration of equality impacts at the formative stage of decision-making, exercised in substance and capable of shaping system design (*R (Brown) v Secretary of State for Work and Pensions* 2008; *Bracking and Others v Secretary of State for Work and Pensions* 2013). Although the duty does not mandate particular outcomes, it requires authorities to prevent foreseeable disadvantage.

In domestic abuse contexts, this requires communication access for Deaf BSL users to be embedded in commissioning specifications, procurement criteria, funding models, and monitoring processes. Commissioning is not merely an administrative mechanism of service delivery but a legal site at which equality duties are either operationalized or diluted. Theoretical access to interpreters does not satisfy the duty where access is delayed, unstable, or unsafe. National mapping shows that Deaf accessibility is frequently treated as optional, with generic disability clauses substituted for enforceable BSL standards (SignHealth 2025).

Responsibility for compliance cannot be discharged through outsourcing of commissioning arrangements (*R (Kaur) v London Borough of Ealing* 2008). Yet, in practice, responsibility is routinely fragmented across multiple providers, enabling systemic failure without clear institutional ownership. Enforcement is further constrained by reliance on judicial review, a mechanism that is procedurally, linguistically, and practically inaccessible to most Deaf survivors experiencing domestic abuse. The result is persistent non-compliance that is formally recognized but substantively ineffective.

## Domestic Abuse Act 2021: statutory framework

The Domestic Abuse Act 2021 defines domestic abuse broadly, including physical, sexual, psychological and emotional abuse, threats, coercive control, and economic abuse. It does not require a pattern of incidents, recognizing that abuse may be cumulative, relational, or ongoing even when it is evidenced through a single act (Home Office 2022).

However, statutory recognition does not secure the institutional conditions necessary for protection. Criminalization may expand recognition without delivering safety where systems struggle to capture non-physical abuse (Douglas & Ors 2023: 1-12). For Deaf survivors, access to protection is often mediated through police-first and court-centred processes shaped by the Police and Criminal Evidence Act 1984 (PACE) and related criminal justice procedures (Home Office 2019). These pathways presume spoken interaction as the communicative norm and assume that timely interpreter provision can be delivered without operational difficulty. Empirical research documents chronic interpreter shortages, especially among legally trained BSL interpreters, and wide geographical disparities that impede consistent and rapid access to communication support across England (Napier & Ors 2024; SignHealth 2025). As Wilks argues, interpreter-mediated access is prioritized over

embedding internal BSL-mediated services, leaving Deaf survivors dependent on a resource-constrained modality (Wilks 2022).

Further limitations arise because part 4 of the Domestic Abuse Act is confined to accommodation-based support. It does not extend to the wider domestic abuse pathways, including initial police contact and investigation (PACE), multi-agency risk assessment conference (MARAC) processes, independent domestic violence advisers (IDVAs) and community-based support, safeguarding interventions, or health-based identification routes. Accessibility across these stages therefore depends on equality and human rights law rather than the Act itself.

Together, these frameworks presuppose that survivors can disclose abuse, participate meaningfully, and access remedies. For Deaf survivors, this presupposes direct and timely communication access. Where access relies on delayed or *ad hoc* interpretation, legal duties may exist formally but fail operationally.

## [C] METHODOLOGY

The Domestic Abuse Commissioner (DAC) Mapping is treated as empirical legal evidence evaluating whether statutory duties relating to protection, accessibility, participation, and prevention are realized in practice. The mapping captures recurring structural patterns rather than localized or temporary gaps, showing how responsibility for access is allocated, displaced, or fragmented across systems.

The national mapping was commissioned by the Office of the DAC and delivered by SignHealth, with the author as lead researcher. While the DAC's statutory remit extends to England and Wales, the empirical mapping underpinning this article examined provision in England only. As a Deaf researcher embedded in the domestic abuse sector, I approached analysis reflexively, recognizing both the value and limits of insider knowledge.

The original study combined: (a) systematic service mapping across England (unit of analysis: commissioned domestic abuse pathways and access points); (b) review of commissioning documents (tenders, specifications, contracts); and (c) qualitative interviews with Deaf BSL-using survivors and professionals.

This article undertakes a secondary analysis of these datasets, supplemented by a targeted review of publicly available organizational, commissioning, and policy documents reflecting provision as of 2025.

This secondary analysis treats the mapping not merely as descriptive service data, but as empirical evidence against which statutory duties relating to protection, accessibility, participation, and prevention can be assessed. Analysis draws on Deaf Legal Studies/Deaf Legal Theory, foregrounding language, power, and institutional design. Identified patterns are assessed against legal benchmarks to determine whether failures reflect institutional shortcomings rather than individual error.

Interviews used BSL/English informed consent, trauma-informed practice, safeguarding protocols, and strict anonymization. Data were stored on encrypted drives under General Data Protection Regulation-compliant procedures. Methodological limitations include pandemic-era constraints and reliance on organizational self-reporting; however, consistency across sources and alignment with wider research provide a robust basis for identifying structural legal harm.

## [D] DOMESTIC ABUSE SERVICES IN PRACTICE

To address the first research question, findings are organized at three sequential points in the domestic abuse pathway: (i) availability of accessible support; (ii) first contact and justice engagement; and (iii) accommodation-based support under part 4 of the Domestic Abuse Act.

At the time of mapping, large areas of England—including the South West and the North—were without funded Deaf-specialist domestic abuse services (SignHealth 2025: 14-16). Where Deaf-led provision existed, it was often sustained through short-term or insecure funding rather than embedded commissioning (SignHealth 2025: 18). In such areas, survivors were channelled to hearing-normative services reliant on interpreter mediated communication, written exchanges, or remote-only contact. Remote contact is not inherently inaccessible, but where the only route to support depends on hearing-normative design, survivors frequently experience barriers. Anticipating these barriers, some turn to informal networks, relying on family or community members rather than lawful and confidential routes.

From a legal perspective, this demonstrates that protection is delivered contingently rather than as an entitlement. Where access depends on geography or informal networks, rights that exist uniformly in statute are realized unevenly in practice. This triggers both the anticipatory reasonable adjustment duty and the PSED, as commissioning arrangements foreseeably disadvantage Deaf BSL users. Legal protection

becomes inconsistent: experienced not through stable public systems, but through variable local infrastructures and private relationships.

At the second point of the pathway, institutional access frequently fails in operation. Interpreter arrangements are treated as evidence of compliance, yet the mapping and related parliamentary evidence record persistent delay, discontinuity, and unsafe communication practices that obstruct effective participation. At the point of first contact with police—often the most critical safeguarding moment—Deaf survivors are repeatedly reported as not being provided with timely BSL interpretation (SignHealth 2025: 27; UK Parliament 2021: paragraphs 6-8).

Officers sometimes attempt communication through written notes or through third parties, including hearing relatives or, in some cases, children (SignHealth 2025: 17; UK Parliament 2021: paragraphs 6.2-6.3). In more serious instances, communication has been mediated by individuals connected to the alleged perpetrator (UK Parliament 2021: paragraph 6.3; SignHealth 2025: 19). Similar failures appear across MARAC processes, housing assessments, and social care engagement, evidencing a recurring institutional pattern (UK Parliament 2021: paragraphs 8.1-8.3, 11.1-11.2; SignHealth 2025: 21).

These early failures have cascading effects. Interpreter delays during disclosure undermine the quality and completeness of evidence, reduce confidence in criminal justice engagement, and influence decisions about whether to proceed (UK Parliament 2021: paragraphs 8.1-8.3, 11.1-11.2). Where access fails at entry, the evidence suggests it is rarely remedied later (SignHealth 2025: 18). Safeguarding systems reliant on timely, meaningful participation become functionally inoperative, despite having clear legal duties to protect.

Courts are subject to the Equality Act 2010 and Article 6 ECHR requirements of effective participation, yet a persistent gap remains between obligation and practice (UK Parliament 2021: paragraph 8.1). Survivors and Deaf IDVAs report attending hearings only to find that interpreters have not been booked. Hearings are delayed, adjourned, or proceed with partial access (SignHealth 2025: 29).

IDVAs are sometimes asked to “loan” their interpreters—allocated for the IDVAs themselves, not for the clients—placing them in ethically compromising positions (SignHealth 2025: 29). This forces IDVAs to choose between permitting unbriefed interpreters—who may lack case knowledge or specialist preparation—to be used in court, or refusing and triggering further delay. Either option (loaning or refusing) risks

undermining participation. Communication access becomes scarce and contingent, rather than a core procedural requirement.

Access failures also affect perpetrator management. Parliamentary and professional evidence indicates that, where interpreters cannot be sourced after arrest, Deaf perpetrators are often released on bail without accessible explanation of conditions. Without interpretation at interview, it is unlikely that bail conditions are understood, undermining both compliance and enforcement. This creates a dual risk: inadvertent breaches by those who did not understand the terms, and potential legal challenges to enforcement where procedural safeguards under PACE were unmet. Such failures compromise both fairness and safety (Home Office 2019: paragraphs 1.7, 3.12-3.17, 11.15; SignHealth 2025: 30-33). Taken together, these failures demonstrate that inaccessible justice processes compromise not only participation and fairness, but also the integrity and effectiveness of safeguarding itself.

Accommodation-based support under part 4 of the Domestic Abuse Act does not guarantee sustained accessibility in practice. Case study evidence shows that Deaf women often accept refuge placements despite staff having minimal awareness of Deaf communication rights, leading to isolation and information deprivation.

Some refuges arrange interpreters for induction, but this rarely extends to ongoing support. Deaf women frequently describe living in environments where they cannot reliably communicate with staff or peers, inhibiting access to counselling, advocacy, and peer support. Inadequate digital infrastructure—such as inconsistent internet access—further limits remote interpreting or video relay use (SignHealth 2025: 18-19, 21, 25). These barriers have divergent but significant consequences. Some Deaf women leave refuge prematurely due to isolation and distress (SignHealth 2025: 19). In some cases, others experience extended stays due to barriers in move-on pathways, including housing, court processes, and welfare systems. Service-level data indicates that Deaf women remain in refuge for an average of 8.5 months—more than twice the national average of four months (SignHealth 2011).

Exclusion also occurs at the point of entry, with some refuges refusing placements on purported “health and safety” grounds despite reasonable adjustments being feasible (SignHealth 2025: 26). Refuge environments may thus reproduce conditions akin to enforced isolation, forcing Deaf women to choose between physical safety and linguistic survival.

Across all stages, the mapping reveals access failures that are patterned, foreseeable, and embedded in system design and commissioning.

## [E] HOW ACCESS FAILURES PRODUCE HARM

This section answers the first research question by explaining how exclusion is produced through institutional mechanisms rather than isolated errors. The evidence shows that Deaf survivors' exclusion arises from three recurring mechanisms: (i) displacement of state responsibility to informal substitutes; (ii) structural language denial through interpreter dependency; and (iii) institutional and territorial exclusion from protection and accountability.

For the purposes of this analysis, *institutional legal harm* refers to patterned exclusion produced through system design and governance arrangements that render formally guaranteed rights unreliable in practice. It describes harm arising not from individual misconduct, but from the structural organization of institutions through which law is delivered.

Where lawful communication access is absent or delayed, Deaf survivors are frequently forced to rely on family members, friends, or children to communicate with police, social care, housing providers, and welfare services (SignHealth 2025: 17, 21, 28-29). These practices occur not as brief emergency measures, but as routine substitutes for statutory provision.

This constitutes a failure of the anticipatory reasonable adjustment duty and raises safeguarding concerns where children are involved. Responsibility for accessibility is displaced from public institutions onto private relationships, undermining autonomy, confidentiality, and evidential integrity. Informal substitution thus privatizes legal protection, delivering it unevenly and shielding systemic non-compliance from institutional scrutiny.

Second, harm arises through structural language denial resulting from interpreter dependency. Although institutions frequently cite interpreter provision as evidence of accessibility, the mapping demonstrates that reliance on interpreter-mediated access often functions as a barrier rather than a safeguard (UK Parliament 2021: paragraphs 6.1-6.6, 8.1-8.3). Delays, cancellations, fragmented booking systems, and lack of continuity routinely prevent timely and meaningful communication, particularly at critical safeguarding moments.

These failures produce procedural exclusion across policing, courts, and accommodation-based services. Deaf survivors experience incomplete disclosures, adjourned hearings, repeated retelling of trauma, and disengagement from systems intended to protect them (SignHealth 2025: 30). Such outcomes are indicative of non-compliance with both the anticipatory reasonable adjustment duty and the PSED, which require accessibility to be embedded by design rather than delivered reactively.

Analytically, interpreter dependency can operate as a form of language denial where reliance on interpreter provision produces delay, fragmentation, or exclusion rather than timely and meaningful participation. This argument does not suggest that interpreter provision is inherently unlawful or unnecessary. Rather, it contends that reliance on interpreter-mediated access alone cannot satisfy legal duties where it predictably produces delay, fragmentation, or exclusion in high-risk domestic abuse contexts. In systems organized around spoken-language norms, this can require Deaf survivors to adapt to inaccessible processes instead of enabling participation as a matter of right, with consequent harms to autonomy, dignity, and procedural fairness.

Third, harm is produced through institutional and territorial exclusion from protection and accountability. As documented in Section [D], the geographic absence of Deaf-led provision, combined with hearing-centred service design, produces unequal access to protection based on location and institutional capacity (SignHealth 2025: 14-16). Where Deaf-specialist services are unavailable, survivors are diverted into informal or remote-only pathways that relocate statutory protection into private space.

Legal rights remain formally intact but are realized only through personal networks, voluntary goodwill or specialist intervention. Protection becomes contingent rather than guaranteed, capable of engaging indirect discrimination under the Equality Act 2010 and exposing failures in commissioning and system design.

Institutional exclusion extends to perpetrators: there are no consistently available commissioned behaviour-change programmes accessible to Deaf BSL users. Safeguarding measures are sometimes imposed without ensuring comprehension, undermining preventive aims and accountability (Home Office 2019: 29, 32-33; UK Parliament 2021: paragraphs 15.1-15.5). Deaf perpetrators are excluded from rehabilitation pathways, while survivors remain exposed to ongoing risk. This selective accountability undermines the preventive objectives of domestic abuse law and reflects a system unable to operate effectively for Deaf people in any role.

Taken together, these mechanisms do not operate independently. Instead, they interact and compound across the domestic abuse pathway. Early failures at disclosure compromise later access to justice. Deaf survivors experience compromised disclosure, flawed risk assessment, interpreter dependency, procedural delay, attrition, and eventual withdrawal from formal protection.

This cumulative burden—often described by Deaf survivors as the “Deaf tax”—extends beyond inconvenience (UK Parliament 2021: paragraphs 4.1-4.5, 6.2-6.6, 8.1-8.4, 11.1-11.2; Aldalur & Ors 2022; SignHealth 2025: 26). In domestic abuse contexts, repeated access failures can compound delay, exhaustion, and disengagement from protection pathways, increasing vulnerability at critical moments. Reframing these failures as institutional legal harm highlights that, although duties exist, the infrastructure needed to realize them remains fragmented or displaced onto individuals and specialist advocates.

## [F] WHEN ACCESS WORKS: DEAF-LED SERVICES

This section answers the third research question by examining Deaf-led, BSL-first services and demonstrating what effective and lawful protection requires. Drawing on the DAC mapping and subsequent developments, the analysis shows that Deaf-led provision functions as rights-effective legal infrastructure: communication is direct, responsibility is institutional rather than individual, and continuity is built in rather than improvised.

At the time of mapping, SignHealth was the only Deaf-led, BSL-first specialist domestic abuse service operating with commissioned provision across multiple local authorities. Its work included Deaf IDVAs, specialist advocacy across legal and welfare systems, and support for children and families. Since the mapping was conducted, expansion in Deaf-led domestic abuse provision has occurred only through SignHealth’s Domestic Abuse Service, extending into a limited number of additional local authority areas (SignHealth 2026).

This is not presented as an endorsement of a single provider, but as evidence of model feasibility. When services are designed around direct linguistic access, Deaf governance, and continuity, Deaf survivors engage as legal subjects rather than interpreted proxies. Structural barriers identified in the previous section—interpreter delay, fragmented disclosure, and informal substitution—are removed through institutional

design rather than individual adjustment. Nominal legal rights become exercisable protections.

The mapping suggests lower levels of disengagement reported in Deaf-led services compared with mainstream provision (SignHealth 2025: 20). This differential is legally significant. It reflects the removal of structural barriers that undermine participation elsewhere and the restoration of Deaf survivors' capacity to engage meaningfully in safeguarding, evidential, and adjudicative processes. In legal terms, Deaf-led provision enables effective participation within Article 6 ECHR, satisfies the anticipatory reasonable adjustment duty at a structural level, and fulfils the PSED by embedding accessibility into system design. These outcomes demonstrate that barriers faced elsewhere result from institutional design rather than inevitability.

However, improved outcomes have not translated into structural security. Deaf-led domestic abuse services continue to operate within precarious funding environments, reliant on short-term grants, pilot funding, or time-limited commissioning rather than statutory embedding. This funding instability is not merely an organizational challenge; it can constitute a safeguarding risk (SignHealth 2025: 18).

Short-term funding undermines workforce stability, disrupts continuity of advocacy, and leads to the loss of trusted relationships at precisely the point where survivor safety depends on consistency. Deaf survivors may establish trust with specialist advocates—often for the first time in an accessible environment—only to lose that support when funding cycles end (SignHealth 2025: 15). Episodic access cannot satisfy legal duties that require protection to be reliable, timely, and effective.

This reflects a process of institutional risk transfer, in which the state displaces its responsibility to provide stable and accessible protection onto fragile funding structures. Deaf survivors' safety is rendered contingent on commissioning cycles rather than secured as a matter of legal entitlement.

Alongside SignHealth, the mapping identifies other Deaf-led organizations providing vital community-based advocacy, prevention, and support (SignHealth 2025: 12-13). These organizations offer linguistic competence, cultural knowledge, and trusted points of engagement where statutory systems remain inaccessible. Yet their impact is structurally constrained by limited geographic coverage, small staffing capacity, and fragmented funding arrangements. These constraints reflect commissioning choices rather than deficiencies in service design.

Despite evidence of effectiveness, there is no statutory requirement or commissioning framework to scale Deaf-led models nationally. Access therefore remains contingent and uneven.

The mapping further shows that statutory and mainstream services frequently rely on Deaf-led organizations to compensate for accessibility failures across policing, courts, housing, and welfare systems. Deaf-led providers are expected to mediate communication, resolve institutional delay, and enable participation within systems that remain inaccessible by design (SignHealth 2025: 18). This reliance is legally significant; while reliance on external specialist provision may secure access in individual cases, it does not amount to systemic legal compliance where mainstream pathways remain inaccessible by design. Responsibility for equality compliance remains with the public bodies that design, fund, and govern those systems. As a result, legal protections exist formally but are realized only conditionally, dependent on the availability and capacity of specialist provision rather than secured through public systems themselves.

This outsourcing of equality duties weakens accountability. When accessibility failures are resolved through specialist advocacy rather than structural reform, responsibility becomes diffuse and non-compliance normalized. Mainstream services may appear compliant through referral or partnership, while hearing-centred systems of policing, adjudication, housing, and safeguarding remain unchanged.

Deaf-led services demonstrate that accessibility is not aspirational but achievable. The question is whether domestic abuse systems will embed the principles of direct linguistic access, Deaf expertise, continuity, and enforceable accountability into statutory commissioning and governance.

## [G] WHAT THIS REVEALS ABOUT THE LAW

This section synthesizes empirical findings with the legal framework to explain why Deaf survivors' exclusion constitutes institutional legal harm. Across the domestic abuse pathway, the evidence shows a consistent pattern: where systems remain hearing-normative, protection fails operationally; where systems are designed around Deaf language and governance, rights become exercisable.

The analysis focuses not on institutional intent, but on how law functions through its delivery systems—and why exclusion persists despite robust statutory protections under domestic abuse, equality, and human rights law.

Formally, Deaf survivors are recognized as rights-holders: the Domestic Abuse Act 2021, Equality Act 2010, and Human Rights Act 1998 prohibit discrimination, require reasonable adjustments, and impose obligations to protect against serious harm. On paper, Deaf survivors fall squarely within the scope of these protections. In practice, however, access to these rights is conditional and frequently unavailable at critical moments. Survivors must navigate inaccessible systems, tolerate delays, and request adjustments repeatedly—burdens not placed on hearing survivors. This gap between recognition and realization constitutes the Deaf Legal Illusion: formal inclusion without reliable, exercisable access to protection in practice (Wilks forthcoming).

As the mapping shows, interpreter-dependent models are often treated as compliant while producing delay, fragmentation, and exclusion at critical moments. These failures generate procedural injustice, including incomplete disclosures, repeated retelling of trauma, and exclusion from decision-making processes conducted about survivors rather than with them.

This institutional design positions Deaf people as dependent on third parties to access their own rights, redistributing power away from survivors and undermining autonomy, confidentiality, and evidential integrity. In domestic abuse contexts—where timing and comprehension are central to safety—these effects constitute legal failure rather than administrative inconvenience.

These access failures persist not because legal duties are unclear, but because responsibility for accessibility is structurally displaced. Domestic abuse responses operate through complex networks involving police, courts, local authorities, housing providers, and commissioned voluntary-sector organizations, across which responsibility for accessibility is diffused through delivery systems and accountability pathways. While these actors operate within different remits, all remain bound by the same equality and human rights duties.

The mapping shows a recurring pattern in which responsibility for accessibility is displaced onto specialist Deaf-led organizations. These organizations are relied upon to mediate communication, resolve institutional delay, and enable participation within systems that remain inaccessible by design. While this intervention may secure immediate safety, it obscures the source of legal failure by treating accessibility as specialist support rather than institutional obligation.

This diffusion of responsibility is incompatible with non-delegable equality duties. Equality and human rights duties remain non-delegable even where service delivery is outsourced. Accessibility failures within commissioned systems therefore remain attributable to the public authorities that design, fund, and oversee them. The fragmentation of delivery does not dilute the legal responsibility of the state. Commissioning practices that prioritize service availability over access outcomes perpetuate exclusion under the appearance of compliance. Institutional non-compliance persists in part because enforcement mechanisms—complaints and litigation—are themselves inaccessible. Reliance on individual enforcement mechanisms, including discrimination claims and judicial review, presumes both linguistic access and personal resilience—conditions rarely present in high-risk domestic abuse contexts. Where enforcement depends on the capacity of survivors to initiate challenge, systemic exclusion remains insulated from structural correction. The lack of challenge reflects cumulative deterrents, not the absence of harm. Evidence of systemic failure has been documented extensively in research, reviews, and parliamentary submissions (UK Parliament 2021; SignHealth 2025). Yet, this yet has not translated into enforceable reform.

The contrast between mainstream and Deaf-led services demonstrates that exclusion is a matter of institutional choice, not feasibility. Reframing failures as structural legal breaches shifts attention from individual adjustments to systemic redesign. The Deaf Legal Illusion therefore offers a framework for analysing other contexts in which formal equality masks structurally embedded inaccessibility, extending beyond domestic abuse to wider domains of justice and public administration. The question is no longer whether additional guidance is required, but whether domestic abuse systems will be redesigned to make equality exercisable, accountability enforceable, and language access constitutive of justice.

What emerges here is a pattern that extends far beyond the domestic abuse sector. Although grounded in domestic abuse protection, similar systemic patterns appear across UK administrative systems. Research shows that the National Health Service repeatedly fails to implement the Accessible Information Standard and violates the Equality Act, despite formal duties, revealing major gaps between legal compliance and operational practice. This problem extends across health and social care, as confirmed by the Government's own BSL Advisory Board, demonstrating that these issues are structural rather than sector specific. Without a shift in how systems operationalize equality, formal legal compliance will continue to mask substantive exclusion in practice, and institutional

harm will persist under the appearance of legality (SignHealth 2021; UK Government 2022; UK Parliament 2022).

Without this shift, formal legal equality will continue to mask substantive exclusion in practice, and institutional harm will persist under the appearance of legal compliance.

## [H] CONCLUSION

This article has examined Deaf survivors' access to domestic abuse protection in England through combined doctrinal and empirical analysis. Bringing together domestic abuse, equality, and human rights law with national mapping commissioned by the DAC and evidence from Deaf-led provision, it demonstrates a persistent gap between the formal availability of legal protection and its realization in practice.

Across the domestic abuse pathway, statutory rights exist on paper but are delivered through systems that remain hearing-centred, fragmented in responsibility, and inconsistent in treating language access as fundamental. Exclusion arises not from the absence of law, but from institutional design, commissioning practices, and governance arrangements. This reflects the Deaf Legal Illusion: formal inclusion without reliable access to protection.

The mapping reveals systemic exclusion rather than isolated failure. Deaf survivors' access to safety and justice is shaped by geography, commissioning decisions, and interpreter-dependent models of access, producing a postcode lottery of protection. Interpreter-dependent systems cannot satisfy legal duties unless accessibility operates reliably in practice. The absence of accessible perpetrator behaviour-change programmes further weakens prevention and accountability.

By contrast, Deaf-led services delivered directly in BSL demonstrate that different outcomes are possible. Where systems are designed around direct linguistic access, Deaf expertise, and continuity of support, statutory rights become exercisable in practice. These models expose the contingent nature of existing protection and show that substantive equality is achievable where accessibility is embedded by design rather than retrofitted through crisis response.

These findings challenge the assumption that interpreter provision alone satisfies legal obligations: in high-risk domestic abuse contexts, compliance must be judged by whether protection operates effectively in practice, not by whether adjustments exist in theory. They also highlight

the central role of commissioning in producing or preventing exclusion. Equality and human rights duties apply at the level of funding, service design, and system architecture, and cannot lawfully be discharged through reliance on a small number of specialist providers where mainstream systems remain inaccessible by design.

Taken together, the analysis answers the three research questions: it (1) maps how Deaf BSL users experience protection in practice; (2) explains how commissioning and service design generate recurring access failures; and (3) shows what Deaf-led, BSL-first models reveal about the conditions for effective and lawful protection.

Reframing Deaf survivors' exclusion as structural legal harm shifts the focus from individual adjustment to institutional accountability. The evidence of access failure is longstanding and robust. What remains absent is enforceable, system-level reform. Until domestic abuse law is delivered through institutions designed for Deaf participation, rather than through interpretation and specialist advocacy, formal equality will continue to mask substantive exclusion.

The question is therefore not whether Deaf survivors are protected by law, but whether the legal system is structured to make that protection real.

### ***About the author***

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## Legislation, Regulations and Rules

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European Convention on Human Rights 1950

General Data Protection Regulation 2016

Human Rights Act 1998

Police and Criminal Evidence Act 1984

United Nations Convention on the Rights of Persons with Disabilities (CRPD).

## Cases

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*Cuscani v United Kingdom*, 35 EHRR 44 (ECtHR 2002)

*Eremia v Moldova*, 57 EHRR 28 (ECtHR 2013)

*Opuz v Turkey*, 50 EHRR 28 (ECtHR 2009)

*Osman v United Kingdom*, 29 EHRR 245 (ECtHR 1998)

*R (Brown) v Secretary of State for Work and Pensions*, EWHC 3158 (High Court 2008)

*R (Kaur) v London Borough of Ealing*, EWHC 2062 (Admin 2008)

*University of Bristol v Abrahart (EHRC Intervening)*, EWHC 299 (KB 2024)

**PATRICK BIRKINSHAW:**  
**5 MARCH 1951-23 NOVEMBER 2025**

YSEULT MARIQUE  
Essex Law School and UC Louvain\*

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Patrick Birkinshaw was a dedicated colleague, always eager to share his vast and detailed knowledge of United Kingdom (UK)/English public law with colleagues of all stripes. One week before the fateful Brexit referendum—about which he was not very optimistic—he welcomed me to Hull. He even kindly drove me back to the station, taking the opportunity to discuss Philip Larkin’s work as we passed the poet’s house. Following this visit, Patrick was invited to what would become his last official engagement before retiring: a lecture delivered at the British Academy in 2017, entitled “What Future for Public Law?”.<sup>1</sup> We subsequently discussed a wide range of topics arising from the Brexit landscape, including the UK’s approach to legal transplants, the principle of proportionality and constitutional conventions such as the Ministerial Code. Our email exchanges reveal Patrick’s particular gift: he invariably identified angles I would otherwise have missed and then, with characteristic kindness, nudge me to see links between ideas and concepts that I would not otherwise have seen.

This was Patrick’s hallmark: he consistently exhibited deep loyalty, curiosity and generosity—all features that marked his long tenure at Hull, which began in 1976. As mentioned by colleagues, his time as Head of School from 1997 to 2002 culminated in one of the School’s most notable achievements in the Research Excellence Framework. Patrick’s dedication to the European project crystalized in setting up the Institute

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\* Essex Law School and UC Louvain. This note benefited from the generous exchanges with colleagues who all shared kindly memories and/or documents. May Katarzyna Gromek-Broc (Pavia), Theodore Konstadinides (Essex), Nikos Vogiatzis (Essex), Tony Prosser (Bristol), Albert Sanchez Graells (Bristol) and Mike Varney (Lincoln) be thanked warmly. Other tributes to Patrick can be found at the following internet addresses: [Funeral Notices: Professor Patrick Birkinshaw](#); [Chaire Droit Public Politique Comparés: Hommage à Patrick Birkinshaw](#); and in a forthcoming *European Public Law* issue (by Mike Varney). A detailed account of Patrick’s work can be found in Gromek-Broc (2023: xxxvii-xliv).

<sup>1</sup> See, for example, Patrick’s article in *Ius Publicum: Network Review*.

for European Public Law at Hull in 1992 and the *European Public Law* journal for which he served as editor until his retirement (1994–2018). In short, as noted by John Bell, Patrick was a keen institution-builder. He was also a boundary spanner, building connections between institutions and engaging extensively with colleagues in France,<sup>2</sup> Italy<sup>3</sup> and Germany.<sup>4</sup>

Patrick chronicled the Brexit saga in his editorials for *European Public Law* (see Birkinshaw 2020a). He kept a vigilant eye on post-Brexit developments, critically analysing UK reforms in such areas as judicial review and the Rwanda Treaty. One cannot help but wonder what Patrick would have written about the news that Rwanda initiated arbitration against the UK for failing to honour the payment due under the Rwanda Treaty (Karsu 2026). According to Patrick, it was “self-delusion” on the part of the then Prime Minister Rishi Sunak to react to the Supreme Court’s November 2023 decision on the Government’s plan to deport asylum seekers to Rwanda by pursuing such a treaty (Birkinshaw 2024c: 86).

Beyond his scholarship dedicated to the European project, Patrick established a record of pioneering publications. He was an early scholar of non-judicial remedies, evidenced by his work *Grievances, Remedies and the State* (Birkinshaw 1985), and of transparency in government, authoring *Government and Information Rights: The Law Relating to Access, Disclosure and their Regulation* (Birkinshaw & Varney 2019). These contributions anticipated debates that would later become mainstream. For me, however, Patrick will be forever linked to another prescient early work *Government by Moonlight: The Hybrid Parts of the State* (Birkinshaw & Ors 1990). Its influence extended far beyond legal scholarship, finding a significant audience in public administration and critical accounting.

Across all of these writings, Patrick sought to surgically analyse the fine lines and interplays between law and politics, and the preconditions for a healthy rule of law. He scrutinized the tensions between government and the judiciary, particularly the willingness of the former to curb the latter’s scope of review (Birkinshaw 2022; Birkinshaw 2023). This scholarly dexterity was on display in one of his last writings for this journal: a characteristically witty, nuanced and rigorously critical engagement with Justice Sumption’s suggestions against judicial activism, in which he noted:

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<sup>2</sup> See, for instance, Patrick’s contributions to the [Observatoire du Brexit](#).

<sup>3</sup> See Birkinshaw (2024a).

<sup>4</sup> See, for instance, Patrick’s recollections of time well spent with J Schwarze (Birkinshaw 2024b).

Oppression and evil take many forms. If one expects the devil to be possessed of cloven hooves, goat's horns and a forked tail one will never see the devil ... . The concept of autocratic abuse of power is not framed in a time capsule. (Birkinshaw 2020b: 465)

Questions of evil, rule of law and separation of powers were also central to another review, this one of Stephen Sedley's *Lions* (Birkinshaw 2020c). Here Patrick delved deep into the dark schemes of intelligence services and transatlantic developments. Writing about Donald Trump's first presidential term, he stated: "Trump's presidency has been a remarkable exercise in autocracy. ... it is difficult to think of so much turning on one presidential election" (Birkinshaw 2020c: 101). One question is nagging—what would Patrick have made of the 2026 developments in the United States (US) or the worst current political scandal in the UK?<sup>5</sup> From Patrick's many committed publications, one motto stays with me: "Real success comes with consensus, cooperation and understanding. These truths will have to be re-learned after some very painful lessons" (Birkinshaw 2023: 74).

Nikos Vogiatzis, one of Patrick's former doctoral students, recalls his generosity with his time and steadfast supportiveness, which continued long after the completion of the thesis. Their meetings were occasions not only to discuss draft work, but for Patrick to draw on his vast experience and discuss relevant domestic and European developments. His recommendations would insightfully draw on a wide array of relevant scholarship, ranging from an obscure book published decades ago to a forthcoming report. Indeed, sprinkled across a prolific body of writings are rich caches of historical analysis and legal philosophy, alongside close engagement with current political and judicial developments. This multifaceted approach, grounded in curiosity and generosity, made Patrick's writing so engaging and created a platform for further personal exploration and reflection.

Patrick is remembered as an intellectually curious scholar who was keen to help early career colleagues. He was generous with his time, providing feedback on research drafts, and was consistently approachable and friendly. That innate kindness left a lasting impression even on brief acquaintances. An Essex colleague who met him only once recalls Patrick's perceptive remark about how people can judge you by the sound of your voice and your shoes—a comment that revealed his empathy and awareness.

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<sup>5</sup> See Bagehot (2026), referring to Prime Minister Starmer and the scandal around the former UK ambassador to the US, Peter Mandelson, as "Britain's worst political scandal of this century".

Patrick touched colleagues from near and far with his warmth and generosity. He will be greatly missed by all of us. May we cherish and honour his legacy by following his example of selflessness and kindness.

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## NEWS AND EVENTS

COMPILED BY ELIZA BOUDIER

University of London

### IALS News

#### 2025-2026 Inns of Court Judicial Fellow

In January, the Institute welcomed Her Ladyship Justice Jennifer A Dadzie, Court of Appeal, Accra, Ghana. She will be undertaking research on “Evaluation of the Efficacy of the Corporate Insolvency and Restructuring Act 2020 (Act 1015) in Ghana (A Comparative Analysis with the United Kingdom)”.

Her Ladyship Justice Jennifer A Dadzie was appointed a Justice of the High Court on 1 April 2015. Prior to this appointment, she worked with several law firms in Accra including REM Law Consultancy, Reindorf Chambers and Fugar & Company. She has also worked with Lexcom Ubom Law Group PLLC and Dadzie & Associates, PC, Washington, DC, USA and First Renaissance Ventures also in Washington, DC, USA.

She was a Dean’s Fellow to Professor Daniel Bradlow, Director of the International Legal Studies Programme at American University, Washington College of Law, Washington DC. She pursued

her pupillage at Lexcom Associates and was a Teaching and Research Assistant at the Faculty of Law, University of Ghana, Legon.

Regarding *pro bono* duties, Justice Dadzie worked as a Legal Aid Counsel at the African Society of International and Comparative Law as well as an Attorney for the International Federation of Women Lawyers between October 1998 and December 1999. She was appointed to the Court of Appeal Bench on 1 December 2022. She also teaches the Law of Interpretation of Statutes and Deeds at the Ghana School of Law.

She will be giving a seminar on her research: at 5:00pm–6:30pm on Tuesday 24 March 2026 in the Council Chamber at the Institute of Advanced Legal Studies, 17 Russell Square, London WC1B 5DR.

#### **William Lawrence Twining: 22 September 1934–9 October 2025—an appreciation by Professor David Sugarman**

It was with great sadness that we learned of the death of Professor William Twining (aged 91) peacefully at home on 9 October 2025. William served as the Quain

Professor of Jurisprudence in the Faculty of Laws at University College London 1983–1996, where he became Research Professor of Law from 1996 to 2004 and Quain Professor Emeritus from 2004. He had previously held chairs in Belfast and Warwick and had numerous visiting appointments. At the start of his career, he taught for seven years in Sudan and Tanzania and maintained a strong interest in Africa and the Commonwealth.

A giant of an intellectual, William's impact was profound. He inspired generations of students, law teachers and practitioners worldwide. While accepting that legal doctrine was important, he demonstrated that a diet of legal doctrine on its own was misleading. Law could only be understood in its larger historical, social, cultural, political and ethical context, and in the light of its operation in practice. A true Renaissance man, he drew freely on sources beyond law, notably, history, literature, anthropology and on Africa. The great importance that William attached to law in context, analytical rigour and conceptual analysis is evident throughout his hugely influential work on jurisprudence, legal method, evidence and proof, intellectual history, law and globalization, and legal education.

William is probably best known for promoting “law in context”,

and in advocating and advancing the teaching of “skills” as a major component of all legal education and training. As General Editor of the “Law in Context” series (1966-2020), William encouraged hundreds of authors, including many novice writers, to undertake legal scholarship in new ways.

An exceptional mentor, role model and friend to many from Australia to Zimbabwe, his support for students, colleagues and friends was legendary. As an activist law reformer, he served as a member of many national and international committees and bodies on legal education, and this included his longstanding and productive relationship with the Institute of Advanced Legal Studies. See [website](#) for the full article.

### **Professor David Sugarman**

Professor Emeritus David Sugarman has recently been awarded the Socio-Legal Studies Association (SLSA) 2025 prize for his “Outstanding Contribution to the Socio-Legal Community. This prestigious annual prize honours an individual who has made an exceptional and enduring contribution to the socio-legal community. It celebrates those whose sustained efforts have enriched the field of socio-legal studies and helped to strengthen, support and inspire those working in the field. The SLSA will make

a formal award at its Annual Conference this year at the University of Sussex (30 March -1 April 2026). Professor Sugarman is a Senior Associate Research Fellow, Institute of Advanced Legal Studies, University of London, and Senior Associate, Centre for Socio-Legal Studies, University of Oxford; and Professor of Law Emeritus, Lancaster University.

### **Law and the Humanities Hub**

The Law and the Humanities Hub (LHub) has entered 2026 with significant expansion and new initiatives. Ten scholars have joined the [visitorship programme](#), representing a diverse range of law and humanities disciplines. They will participate in LHub Days and lead projects that extend scholarship and outreach.

Among the year's initiatives is the [Four Nations Law and the Humanities Forums](#), a new collaboration designed to promote humanistic legal scholarship beyond London's academic centres. In partnership with the universities of Glasgow, Dundee, Queen's Belfast, Cardiff, and Warwick, the project will bring together early career researchers for workshops to be held across the UK, supporting academic excellence, intellectual community, and career development. The initiative also includes online content and events, with Dr Lucy Finchett-

Maddock appointed as Fellow in consultation with the steering group. Also significant is the recently announced Research Networks Programme. A panel of experts has selected the [Dance and Legal Materialities Network](#), which has published an outline of its annual programme. The hub additionally offers a home to collaborative research led by IALS fellows and affiliates. One of them is Professor Emily Grabham's new project, Power, Justice, and Imagination: [Creative Writing and Legal Research](#).

The beta launch of the open-access UK [Law and the Humanities Infrastructure Map](#), developed in collaboration with the AHRC- and UKRI-funded Mapping the Arts and Humanities project, and enhanced through focus groups and field feedback, now provides rich visualizations and search tools for the UK community and its collaborators. Internationally, the hub and its partners have launched the [Global Law and the Humanities Mentorship Programme](#), led by eight organizations across the UK, Europe, North America, Latin America, and Australasia. Over 100 mentors have committed their support. Over 60 mentees have been accepted for this academic year. Activities will include one-on-one meetings, a joint plenary and online workshops on publishing and interdisciplinarity.

## Selected Upcoming Events

### **In Media Lex: Authority and the Mechanization of Judgment in the 19th Century**

**Dates:** 10 March 2026

**Venue:** IALS Conference Room, Institute of Advanced Legal Studies, London

**Speaker:** **Xavier Nueno**

See [website](#) for details.

### **Comic Pleading 1000-1600—Law, Comedy, Dialogue**

**Date:** 28-29 April 2026

**Venue:** L103/104, Institute of Advanced Legal Studies, London

This two-day workshop brings together eight scholars from a range of disciplines who tackle various aspects of comic pleading in legal, religious, poetic, and dramatic texts, and think together about the intersection of law, comedy, and dialogue in the long medieval period. See [website](#) for details.

### **Computational Communications and Freedom of Speech**

**Date:** 19 May 2026

**Venue:** online

**Speaker:** Jennifer A Petersen, Associate Professor of Communication, University of Southern California.

See [website](#) for details.

### **17th International Disability Law Summer School: call for papers**

**Dates:** 15-17 June 2026

**Venue:** Centre for Disability Law and Policy (CDLP), University of Galway and online

**Theme:** The UNCRPD Twenty Years On: New Horizons and Emerging Challenges

See [website](#) for details. Call closes: **19 March 2026.**

### **On The Right Side of History – And Lesbians: Public Art, Law, and Concepts of Normativity**

**Date:** 30 June 2026

**Venue:** IALS Conference Room, Institute of Advanced Legal Studies, London

**Speaker:** Martin Firrell, Public Artist

See [website](#) for details.

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## IALS YouTube Channel

Selected law lectures, seminars, workshops and conferences hosted by IALS in the School of Advanced Study are recorded and accessible for viewing and downloading. See [website](#).





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