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CONTENT

The Legal Framework for Electronic Signature in Jordan
A Comparative Study with EU Regulations

AL ANIMAT, MOHAMMAD ELAYAN KARIM*

ABSTRACT *Electronic signature, owned by the owner is a matter of trust, and it may be difficult for the other contracting party to verify its authenticity , hence the importance of dealing with and organizing digital signature is of paramount importance., The aim of this study is to compare the legislation of the EU and Jordan in governing the responsibility of the authentication service provider concerning electronic signature, to find out whether there is a lack of organized legislation with regard to the work of electronic signature service providers. The article will also examine the adequacy of general regulations in supervising the duties of electronic service providers under Jordanian law. I will emphasize the importance of establishing specific regulations, and the need to establish special rules for this particular responsibility, especially with regard to the development of specific rules in line with the UNCITRAL model law on electronic signatures. As regards the EU directives on electronic signatures and other international legislations, it must be emphasized that the issue of electronic authentication services raises several legal problems that can be resolved. Among others the legal nature of the liability of electronic authentication service providers, their legal basis, and their establishment are still subject to legal controversy. In addition to the scope of this responsibility and the issue of determining the extent of compensation that can be imposed in the event of harm to the customer or others, the Jordanian legislators have not established a specific legal system for the responsibility of the employer and the electronic authentication provider to clarify all the ambiguities to which electronic banking operations are exposed to in order to create an independent and sustainable legislative environment for all the rapid technological development.*

KEYWORDS *electronic bank, security, digital, certificate, authentication*

1. Introduction

Countries are increasingly interested in preparing and issuing legislation that ensures the creation of the legal infrastructure for e-commerce and also the removal of obstacles to its prosperity in a manner that ensures the enhancement

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of confidence in transactions that take place over the internet. The aim is to provide safe methods for verifying the identity of the contractors, as well as ensuring the security of information transmission in a virtual world surrounded by a set of considerations related to the security and safety of electronic transactions. The need to provide the greatest degree of confidence in these transactions arose, which is represented mainly by the need to verify the validity of these contracts and their issuance by whom they are attributed. For this reason, written and electronic signature have emerged as tools that are consistent with the nature of electronic transactions. Electronic signature has formed one of the most prominent components of electronic commerce and many forms of this signature have emerged, such as the electronic pen signature and biometric signature.[1] Nevertheless, resort to signature goes beyond the problems that would have been caused by the use of ordinary written ones. The electronic one raises the issue of confidence in the attribution of the signature to its owner, and thus in the electronic transaction in general, as it may be difficult for the other contracting party to verify the authenticity of this signature and to attribute it to its owner. This highlights the need for a neutral and trusted party to be the link between the sender and the addressee within this field. Hence the importance of dealing with digital signature and with the existence of a system[2] is to verify the authenticity of digital signature and attribute it to its owner. Electronic authentication is the system in which an electronic authentication service provider issues an electronic certificate that includes elements and data specified by the law that ensures the validity of digital signature and guarantees its attribution to its owner. Through this the authentication authority verifies the integrity and validity of the data contained in the certificate in a manner that gives third parties confidence in the integrity of the transaction that he submits.
This task was undertaken by the electronic authentication service providers, who play the role of mediator between the parties and are subject to a special legal system. Their provisions are regulated by special rules expressed in the law on electronic transactions in countries such as Britain and France. Nevertheless, the Jordanian Electronic Transactions law does not explain in a clear, precise and detailed way how an electronic certificate should be granted.

[1] For a review of the concept and effects of a digital signature and a certificate of authenticity, see Aiman Musaed, "Digital Signature and Certificate of Authenticity: Concept and Legal Implications," *Al-Manara Journal – Al al-Bayt University* 11, no. 4 (2004): 12., and see also online for more information Lorna Brazell, *Electronic Signatures – Law and Regulation* (London: Sweet and Maxwell, 2004), 66–58., and Paul R. Rice, *Law: Electronic Evidence Development and Evidence* (American Bar Association Publication, 2008), 11.

[2] Lina Ibrahim Youssef Hassan, *Electronic Documentation and the Responsibility of the Competent Authorities* (Amman: Dar Al Raya, 2009), 101.; Al-Jammal Saud, *Contracting Through Modern Communication Techniques* (Cairo: Dar Al-Nahda Al-Arabiya, 2006), 321.; Al-Sabaheen Sami, "Electronic Signature And Its Authority In Proof" (PhD diss., Amman Arab University, 2005), 156.; Maître Bernard Burn, *Nature Et Impacts Juridiques De La Certification Dans Le Commerce Électronique Sur Internet*, Mars 2000, https://www.lex-electronica.org/files/sites/103/7-1_brun.pdf.

This is the justification and the importance of this study, as it will make an attempt to shed light on the shortcomings contained in the Jordanian electronic transactions law. It will also try to find appropriate solutions to this problem, by using the provisions of comparative legislation that had previously organized the topic accurately. The complexity involved in proving the traditional conditions of liability prompted the legislators of many states to regulate them with special provisions. Since this issue has not been written about yet, I will intend to demonstrate the present situation. This topic, namely the the development concerning legislation has not been discussed in Jordan yet, and this is one of the difficulties and challenges that I faced. That is the reason why I relied on the comparison with international legislation, analyzing it, and obtaining a clear picture of the subsequent needs. The EU legislators were alerted to the need to intervene in the regulation of the electronic authentication process and the responsibility resulting from it, given the role this process plays in facilitating and flourishing electronic commerce.[3] Thereafter, French legislators harmonized their law with the EU directive, and regulated the process with Trust law,[4] which established a special responsibility for electronic authentication service providers within the official economy for the year 2004, inspired by the provisions of the EU directive.

The importance of this study emerged from an attempt to demonstrate the adequacy of the general provisions on liability to cover the liability cases of the electronic authentication provider, and to examine whether there is a need for the Jordanian legislators to adopt rules for the liability of electronic authentication service providers.

2. Methodology and data used

This article is built on the comparative-analytical approach that aims to facilitate access to facts. The aim is to analyze the principles of digital signature related to the topic of research, by discussing the methods currently used in electronic financial operations. I will present some examples of judicial rulings of the EU Court of Justice and recommendations of the EU directive in this regard. I will also deal with the regulations and instructions of the Jordanian Transaction law concerning the principles of electronic digital signature and methods of cyber adaptation and will draw some important conclusions as regards the UNCITRAL model law on electronic commerce and related laws issued by the Untied Nations.

In this article, the definition of the scope of responsibility and the issue of determining the extent of compensation that can be imposed in the event of

[3] Éric A. Caprioli, "La directive européenne 1999/93/, du 13 décembre 1999, sur un cadre communautaire pour les signature électronique," https://www.caprioli-avocats.com/ .

[4] Philippe Le Tourneau*, Contrats informatiques et électroniques* (2006), 11.; *Droit de la responsabilité et des contrats; Neveux les prestataires de service de certification*: *quelle responsabilité pour quelle service* (2022), 39.

damages to the customer or to third parties appear, since the Jordanian legislators have not set a specific legal system for the responsibility of the third party.The importance of this study emerged from an attempt to prove the adequacy of the general provisions of liability to cover liability issues for the electronic authentication provider, and to reveal whether there is a need for the Jordanian legislators to adopt rules for the liability of electronic authentication service providers.

3. The legal framework for the responsibility of the electronic documentation service provider

The Jordanian legislation within the Electronic Transactions law did not address the civil liability of documentation service providers, because the Jordanian legislator did not regulate the subject with special provisions.[5] The regulations were limited to electronic systems and imposed financial penalties and fines for providing false data. As a result, it was necessary to resort to general rules to determine the legal liability of the electronic documentation service provider.
However, the EU legislation affected by the EU directive on electronic signatures has adopted a system of responsibility for electronic authentication providers,[6] and this prompts us to study the most important features of this system in an attempt to push the Jordanian legislators to consider the legislation and follow the approach in developing special provisions to regulate the legal liability of authentication service providers in Jordan. It also raises the question of the nature of the responsibility arising from the electronic authentication process and its legal basis. Whether it should be included within the framework of contractual responsibility based on the provider's breach of the electronic authentication contract that binds the customer who obtained the certificate or it should be included within the scope of the default nature of the responsibility based on the provider's breach of the imposed legal obligations, according to the legislation that regulated the electronic authentication process. Therefore, concerning the legal nature of the liability of the electronic documentation service provider, it can be said that the specificity of the electronic authentication process and the complexity of the relationships resulting from the issuance of the electronic certificate justify the possibility of envisioning several assumptions of responsibility arising from electronic authentication services. Consequently, the contractual liability of the responsible party of the provider towards the certificate holder and the hypothetical responsibility of the provider towards others can be imagined.[7]

[5] Article 25, Electronic Transactions Law No. 15 of 2015.
[6] Directive 93/13/EEC protects consumers in the EU from unfair terms and is amended by Directive (EU) 2019/2161.
[7] Adnan Ibrahim Al-Sarhan, and Nouri Hamad Khater, *Explanation of Civil Law. Sources of Personal Rights* (Amman, 2021), 302.

There is a relationship between the provider of electronic authentication services and the holder of the certificate regulated by the electronic authentication contract. There is also a relationship between the provider and third parties who rely on the electronic authentication certificate to conclude some actions.[8] There is a relationship between the holder of the certificate and others, which is based on a contract that they wish to conclude, and which is the subject to the provision on specific goods or services.[9] This raises the question of responsibility arising from all of the damages resulting from a defect in the electronic documentation process. Whether the provider is responsible, whether it is the liability of the client holding the certificate, whether it is possible to envisage exempting the provider from liability or liability can be limited.

4. The contractual framework for the service provider

It is understood that contractual liability arises from the occurrence of damage resulting from the debtor's breach of an obligation deriving from the availed contract. This breach is either the debtor's failure to perform his obligations or is due to an existing and valid contract. As a consequence the client who owns the certificate of authenticity may suffer defective implementation or even delay fully or partially. The application of damages as a result of a breach by the authentication service provider is one of his obligations under the authentication contract concluded between them or under the stipulations of the law.[10] Pursuant to this the authentication provider and the client holding the certificate have the right to set what is required if a provider breaches. They may enter into reciprocal terms and obligations according to the principles of contractual freedom and the authority. If the provider of documentation services,[11] or the client, undertake one of these obligations, their contractual responsibility is held.[12] At the same time, contractual liability arises as the electronic authentication contract imposes mutual obligations on both parties, and any breach by the provider or the certificate holder of the obligations incumbent on

[8] Peter Mell, Jim Dray, and James Shook, *Smart Contract Federated Identity Management without Third Party Authentication Services* (Bonn, 2019), 15.

[9] Shu Yun Lim, Pascal Tankam Fotsing, Abdullah Almasri, Omar Musa, Miss Laiha Mat Kiah, Tan Fong Ang, Reza Ismail, "Blockchain Technology the Identity Management and Authentication Service Disruptor: A survey," *International Journal on Advanced Science, Engineering and Information Technology* 8, no. 4-2 (2018): 1735-1745.

[10] For the nature of the contractual relationship between the certification service provider and the signature holder, see Mark Plotkin, *E-Commerce Law and Business, The Nature of the Contractual Relationship between the Certification Service Provider and the Signature Holder* (USA: Aspen, 2003).

[11] Abdel Fattah Hegazy, *Introduction to electronic commerce in Arabic* (Alexandria: University Thought House, 2003), 7.; Caprioli, "Régime juridique du Prestataire," https://www.caprioli-avocats.com/.

[12] Pierre Trudel, France Abran, Karim Benyekhlef, and Sophie Hein, *Droit du cyberespace* (Montréal: Éditions Thémis, 1997), 3.

each of them assesses the party's contractual responsibility. It is often included in contracts that the provider is obligated to confirm the validity of the data contained in the certificate and to verify, if it is attributed to the owner of the electronic signature, even if it is not determined by a special provision of law. This is because the commitment constitutes the core and basis of the electronic documentation process. It is the formula of the agreement the define the nature of the obligation and states whether it is a commitment to reach a result or it is just an obligation to exercise care.[13]

In the absence of a legal provision that establishes this obligation, there is nothing to prevent the parties from including any clause in the electronic authentication contract that stipulates the obligation of the provider to save the personal data of the client who holds the certificate and that it may not be used, processed, or given to others without the client's consent. The provider may be obligated under this condition not to modify, or delete any data related to the customer without the consent of the person concerned. Accordingly, the provider is contractually liable for any breach of the obligation to create, use or trade this data without the consent of the customer. As for the obligation to suspend or cancel the electronic authentication certificate, it was regulated by the Jordanian electronic Transactions law and imposed penalties for breaching it. Nevertheless, if the parties agree on the provider's obligation to suspend or cancel the certificate upon the customer's request, or if there are reasons for its suspension or cancellation, the provider's contractual liability must be based on any damage resulting from the provider's breach of this obligation.[14]

This can be applied to any breach of another obligation contained in the electronic authentication contract, where the provider's contractual liability arises for breach thereof. It is also possible to envisage the supplier's contractual liability towards third parties if the latter was linked to a direct contractual relationship, and the breach of the implementation of this contract resulted in damages.

In a situation where a third-party electronic authentication provider is involved, the certificate that was viewed as a result of a contract he had with them becomes invalid, revoked, or suspended without the authentication services provider informing him. This causes him harm because he had entered into contracts with clients who had the certificate based on the trust he had gained from it, when discussing the provider's and third-party's doctrinal relationship, it's important to consider how the certificate is obtained: directly from the provider or, more practically, from the certificate holder or the authentication provider. However, if the third party obtained the authentication certificate and the public key directly from the certificate holder, we are facing a contractual relationship between the provider and third parties, and therefore it is not possible to imagine the contractual liability of the provider. The third party may also obtain the authentication certificate and the public key from the provider as

[13] Peter Mell, James Dray, and James Shook, *Smart Contract Federated Identity Management Without Third-Party Authentication Services* (Bonn, 2019), 15.

[14] Article 25, Electronic Transactions Law No. 15 of 2015.

a result of a contract,[15] which leads to the possibility of conceiving the existence of a contractual relationship between them, with which the third party was associated with the provider of authentication services and thus the possibility of raising the rules of contractual liability if the third party who relies on this certificate incurs any damages.[16]

This way arises the possibility of conceiving contractual liability for damages incurred by third parties, who also see reliance on the certificate vis-à-vis the provider based on the stipulation theory for the benefit of others. Thus, all damages may be inflicted on third parties because they rely on the electronic authentication certificate. In fact, the contractual liability of the electronic authentication service provider raises several questions that the general provisions may fall short of answering. Some difficulties may arise during implementation, such as the need to prove the error of the electronic authentication provider, nevertheless it is often difficult to prove. The existence of a contractual relationship between the parties must also be the proprietor of the contract to arise. This is difficult to imagine in practice, as there is no contractual relationship between them in most cases.

The multiplicity of relationships arising from it, in addition to the technical and modern nature of the various techniques of electronic signature and authentication certificates, the issue of determining the nature of the provider's commitment and whether it constitutes an obligation to take care or achieve a result; makes the burden of proof difficult[17]. The parties can undoubtedly avoid these difficulties through the terms agreed upon in the electronic authentication contract. Therefore, the parties should be vigilant and careful when drafting the terms of this contract, especially those related to the terms of the exemption and mitigation of liability, since many of these terms may be considered a kind of arbitrary terms that are subject to deletion or modification. In particular, the provisions of EU directive of 5 April 1993 on unfair conditions can be applied to the relationship between customers and suppliers, and directive 93/13/EEC protects consumers in the EU from unfair terms and conditions which might be included in a standard contract for goods and services they purchase. As part of the New Deal for Consumers the notion of 'good faith'[18]is introduces to avoid any significant imbalance in mutual rights and obligations.

The electronic Transactions law of 2001 is devoid of any provision specifying the conditions for cases where the documentation provided is responsible and its legal system is clarified. The legislators are satisfied with including provisions that impose a criminal penalty for issuing an inaccurate, suspended,

[15] Anwar Yaqoub, *Civil Liability of the Certification Service Provider*, 313.

[16] The public key: is the symbol assigned or approved by the electronic authentication authorities to a user Electronic authentication certificate in order to verify the validity of the electronic signature; according article 2, Electronic Transactions Law No. 15 of 2015.

[17] Al-Sarhan, and Khater, *Explanation of Civil Law*, 302.

[18] Directive (EU) 2019/2161, which aims to modernise EU consumer law and improve its enforcement.

or revoked certificate of authenticity. In light of the absence of a special provision it is not possible to establish the liability of the electronic documentation service provider. In the Jordanian legislation it was necessary to resort to the rules concerning civil liability. In order to provide confidence in these transactions the electronic signature has emerged as a tool in line with the nature of electronic transactions. The validity of these contracts must be emphasized because electronic signature is the most important means of electronic commerce.[19]

When taking an extensive look at the legal and financial rules and principles of the UNCITRAL law regarding ratifications of service providers and the most important regulatory reference points, we will address the EU directive in this regard. International use of electronic authentication and signature methods may also benefit from the adoption of UNCITRAL standards, for electronic and paper-based digital signature systems.[20] The criteria for functional equivalence between electronic signatures and paper ones may provide an international common framework for allowing electronic authentication and signature methods to meet foreign signature requirements. Some problems may persist, however, in connection with the international use of such methods that require the involvement of a trusted third party in the authentication or signature process.[21]

5. Place of origin reciprocity and local validation

One of the most important obligations of a local certification service provider, certification authority or regulatory authority is to have country-specific signatures and certificates for some form of verification. Based on reciprocity, signatures and certificates are legally issued by one country to another. Many recognition systems are likely to have some discriminatory effects when not intended; for example, if you are incorporated in a non-EU country, you have three options for certification recognition. If you are in the EU, certification service providers must meet the requirements of the EU electronic signatures directive and will have accreditation under a system set up in a member state.[22] The directive effectively requires foreign certification service providers to comply with both their home country and EU regulations, which is a higher

[19] Electronic Transactions Law No. 85 of 2001.

[20] Trudel, Abran, Benyekhlef, and Hein, *Droit du cyberespace*, 33.

[21] UNCITRAL Promoting confidence in electronic commerce: legal issues on international use of electronic authentication and signature methods, (Vienna: United Nations, 2009).

[22] Regulation (EU) no. 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/ec article 25/3 legal effects of electronic signatures: a qualified electronic signature based on a qualified certificate issued in one member state shall be recognized as a qualified electronic signature in all other member states.

standard than would be required of certification service providers accredited in a member state. In addition, the EU directive on electronic signatures has been implemented with some deviations. Ireland and Malta, for example, recognize foreign digital signatures (creditable certificates in EU terminology) as equivalent to domestic signatures provided that other legal requirements are met. On the other hand, recognition is subject to local verification (Austria, Luxembourg) or a decision by a local authority (Czech Republic, Estonia, Poland) and this tendency to insist on some form of local verification, usually justified by legitimate concerns, regarding the reliability of foreign certificates. It leads in practice to a system of distinguishing foreign certificates according to their geographical origin. The EU directive on electronic signatures requires foreign certification service providers to comply with both their original data and the EU system, which is a higher standard than the accredited certification service providers in an EU member state.[23]

One of the most important documents was the EU directive on electronic signatures. Article 6 of this directive included a legal regime for the responsibility of the French provider of electronic documentation services in confidence in the digital economy in 2004, to confirm this trend. Authentication services with specific rules by the nature of the tasks performed by these providers and the role they play were given the extreme dominance of the electronic authentication process in internet contracting and commercial trust. The directive includes several rules that highlight the specificity of the rules of liability for services however, electronic documentation is distinguished from the general rules of liability, At the same time the EU directive established the legal system for the liability of suppliers on several grounds, including the obligation to distinguish between an approved electronic certificate and a non-accredited certificate. It also resorted to strictness in the responsibility of the suppliers, as it is an assumed responsibility**,** (the EU directive also allowed the possibility of limiting the extent or scope of his responsibility, unless the provider proves the opposite).[24]

On November 11, 2020, the Court of Justice of the EU held that the near-field communication (NFC) functionality of a bank card, also known as contactless payment, in itself is a "payment instrument" as defined in the EU payment services directive 2015/2366 PSD 2, and the ECJ also clarified the meaning of "anonymous use" under PSD 2 about NFC functionality. The Court stated that a bank may not exclude its liability for unauthorized low-value transactions in its general terms and conditions by simply claiming that blocking the NFC

[23] Article 7, European Union directive on electronic signatures, Article 7, Eligibility for notification of electronic identification schemes An electronic identification scheme shall be eligible for notification pursuant to Article 9 (1).

[24] Valérie Sédallian, and Jérôme Dupré, "Le développement du commerce electronique," *Le contrat d'achat informatique: Aspects juridiques et pratiques* (Vuibert, 2005); Caprioli, "La directive européenne 1999/93/, du 13 décembre 1999, sur un cadre communautaire pour les signature électronique," www.europea.EU.intal/comm/dg/fr.

functionality would be technically impossible but must prove impossibility in light of the objective state of available technical knowledge when a customer reports a lost or stolen bank card. Furthermore, the Court ruled that if the user is a consumer, general terms and conditions provide for tacit consent to possible future amendments to such terms and conditions and must comply with the standard of review set out in directive 93/13 on consumer rights protection, not with PSD2. It defines the responsibilities required from each party and defines the responsibility of the certificate authentication service provider, which defines the actions of the authorized party. The relying party bears the legal consequences of failing to do so; (i) take reasonable steps to verify the authenticity of an electronic signature, (ii) if the electronic signature is supported by a certificate, reasonable steps shall be taken; (iii)verifies that the certificate has been suspended or revoked and that any certificate restrictions are observed.[25]

6. Discussion

The idea seems to be that a party intending to rely on an electronic signature should consider whether and to what extent such reliance is reasonable in light of the circumstances. It is not intended to address the issue of the validity of the electronic signature, which is addressed under article 6, and should not be dependent on the behaviour of the relying party. The question of the validity of an electronic signature should be separated from the question of whether it is reasonable for a relying party to rely on a signature that does not meet the standard set out in article 6.[26] Whereas article 11 may place a burden on authorized parties, particularly when such parties are consumers, it may be recalled that the model law is not intended to invalidate any rule governing consumer protection, nevertheless, it may play a useful role in educating all relevant equal relationships, including authorized parties, regarding the standard of reasonable conduct that must be met concerning electronic signatures. In addition, establishing a standard of behavior whereby a relying party must validate the signature through accessible means may be seen as necessary for development.[27]

The electronic signatures model act of 2011 must be emphasized, which outlines the responsibilities required from each party and delineates the

[25] Jenny Gesley, European Union: European Court of Justice. Rules on Liability of Banks for Unauthorized Low-Value Transactions Using Contactless Payment, *Library of Congress* 2020. https://www.loc.gov/item/global-legal-monitor/2020-12-21/european-union-european-court-of-justice-rules-on-liability-of-banks-for-unauthorized-low-value-transactions-using-contactless-payment/.

[26] Article 6, UNCITRAL Model Law on Electronic Signatures with Guide to Enactment UNITED NATIONS (New York, 2001).

[27] Article 11, UNCITRAL Model Law on Electronic Signatures with Guide to Enactment UNITED NATIONS (New York, 2001).

responsibility of the certificate authentication service provider, and outlines the procedures for the authorized party. The relying party bears the legal consequences for failing to take reasonable steps to verify the authenticity of the electronic signature. Provided that the electronic signature is supported by a certificate, reasonable steps must be taken to verify that the certificate has been suspended or revoked and that any restrictions related to the certificate are observed. Under article 11 a party intending to rely on an electronic signature should consider the question of whether and to what extent such reliance is reasonable in the light of the circumstances. It is not intended to address the issue of the validity of an electronic signature, which is dealt with in article 6 and should not depend on the conduct of the relying party. The validity of an electronic signature should be separated from the question of whether it is reasonable for the relying party to rely on a signature that does not meet the standards set forth in article 6.

While article 11 may place a burden on authorized parties, particularly where such parties are consumers, it may be recalled that the model law is not intended to override any rule governing consumer protection, however, the model law may play a useful role in educating all related equal relations, including authorized parties, and the standard of reasonable conduct that must be met in connection with electronic signatures. In addition, establishing a standard of behaviour according to which the relying party must verify the validity of the signature through accessible means may be seen as essential to the development of any public infrastructure system infrastructure system.[28]

Finally, I believe that reliance on the reasonableness of reliance on the certificate of authenticity, as a condition for the service provider's civil liability is necessary to strike a balance between providing protection to third parties and moving away from imposing excessive obligations on the provider. If it is unreasonable for a third party to rely on a defective authentication certificate because of its previous dealings with the certificate holder or by the nature of the transaction, it is not reasonable to say that the authentication service provider is responsible in this case. The provider’s responsibility for the damages resulting from the electronic document may be negated if one of the reasons for the general rules of liability is present, including force majeure, the act of third parties, and the action of the injured party.

As for the decision according to force majeure as the reason for the supplier’s negation of liability, the supplier’s liability for the damage caused may be nullified if he proves that the damage occured due to an uncontrollable cause and is due to an unexpected event outside his control. There may be exceptional reasons beyond the will of the parties, such as the failure of an external person, however it is required that it is unexpected and that the occurrence and damage of the electronic devices used in the electronic authentication processes are due to the occurrence of an earthquake, volcano, wars or floods.

It is noted that these cases revolve around the non-liability of the provider due to the act of the customer holding the certificate or his decision of the general

[28] Article 11, UNCITRAL Model Law.

rules on liability. Thus, the provider's act is influenced by a third party and is not the consequence of force majeure, and the damage that arised is due to other factors and he is not responsible for suspending or cancelling the stipulations of the certificate.[29]

Similarly, if the certificate holder fails to keep the secret number of the electronic signature confidential or fails to inform the provider if a third party has obtained or taken control of the private key, or if any modifications have been made to the data after the certificate has been issued, the responsibility of the provider may be negated. Additionally, if it can be proven that it is not reasonable for a third party to rely on the electronic authentication certificate, such as in cases where the certificate has been suspended or permanently revoked, and this is clearly indicated in the electronic certificate registry that the provider is required to maintain, this will be considered as a valid reason for the provider not being liable for any damages resulting from unreasonable reliance on the electronic certificate.

7. Conclusion

The study deals with issues that previously have not been touched on. I researched the writings and articles that experts discussed in the past. This topic has not been discussed in Jordan yet, and this is one of the difficulties and challenges that I faced, so I relied on comparison with international legislation, analyzing it, and obtaining a clear picture of the subsequent needs.

Indeed, interested customers may encounter a legal void and instability related to legal liability, the conditions for its creation, and the consequences associated therewith when engaging in electronic signature activities. The Jordanian legislators did not explicitly address these points within a specific, detailed, and comprehensive legal framework of all possible developments in the accelerating world of electronic commerce, which raises questions about liability, including the liability of the provider for damages resulting from defects in the electronic authentication process, and the responsibility of the customer for violating the certificate.

The Jordanian legislators must realize the importance of developing laws, especially those working in the field of information technology and financial transfers as they need to be developed continuously to keep pace with the course of global electronic commerce, avoid legal instability, and use the European experience to be a motive for setting the exact details and required legislation and clarifying any ambiguity, as stability encourages investors in the field of electronic commerce to move forward.

[29] Hegazy, *Electronic Commerce*; Caprioli, "Régime juridique du Prestataire," https://www.caprioli-avocats.com/.

In addition, the provider is obligated to refrain from deleting, adding, or modifying the personal data necessary to provide and maintain the certificate however the possibility of limiting or excluding the provider's liability remains uncertain. Thus, the provider bears contractual liability for any breach of the obligation to generate or use data without the consent of the customer.

The Possibility of Addressing Mandatory Rules and Its Adjustments in the Framework of International Commercial Arbitration

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ABSTRACT *Mandatory rules are rules that apply to disregard the law chosen by the parties in their agreement. In this article, we will examine and address the role of international commercial arbitration and arbitrators when facing issues related to mandatory rules. It should be stated that mandatory rules pose conflicts for arbitrators because they place the state's and the parties' interests in competition. This highlights the main issue of whether the arbitrator should apply the related law when the parties' agreement does not include this law. In other words, what should the arbitrator do in this case? The answer to this issue varies due to the variety of ways in which the "nature of arbitration" might be legally interpreted. However, a practical solution is needed. In order to reach a practical solution, the author will assess, from a normative approach, the relative benefits of various methodological techniques and their adjustments that are now in use. Then finally, conclusions will be reached regarding the approach and methodological techniques that best balance the parties' interests.*

KEYWORDS *mandatory rules, international commercial arbitration, arbitrator, legal framework*

1. Introduction

As it is known, the primary technique for resolving disputes between parties involved in cross-border business transactions is arbitration. International commercial disputes and conflicts are now most often resolved through arbitration. There are several institutions, laws, acts, and conventions that provide parties the opportunity to have their disputes arbitrated in a more effective setting. For example, the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards[1] and the Permanent Arbitration Court attached to the Hungarian Chamber of Commerce and Industry, which has also played a significant role due to its functioning across

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[1] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) n.d. https://www.newyorkconvention.org/english.

sectors.[2] Also, since arbitration is based on the parties' approval and consent, this provides more flexibility over a wide variety of issues, including choice of substantive and procedural law.

In numerous domestic legal systems, participants involved in international commercial agreements possess the authority to select both the governing law and the venue for addressing potential contractual disputes. Essentially, arbitration agreements underscore the legal relationship between parties and establish the legal foundation for arbitrators' competence in settling disputes arising from these agreements. Legal scholar Professor Dr Ádám Boóc stated that "The judgment underlines the characteristic of the arbitration relationship, which has been a feature of arbitration since Roman law, namely that the arbitration relationship is essentially a contractual relationship with the characteristics of a mandate".[3] To honor the principle of party autonomy and this mandate, arbitrators are required to uphold and align with the parties' intentions and concerns during the resolution of conflicts. However, this selection of governing law is not without limitations, particularly in the presence of mandatory rules. Mandatory rules are rules that apply automatically, irrespective of the chosen governing law decided upon by the parties. Mandatory rules impose limitations on the principle of party autonomy. This complicated scenario presents arbitrators with a complex dilemma when determining the applicable law. Thus, the central issue can be framed as follows: "When a law stipulates that arbitrators must apply it, even though the parties' contract does not incorporate this law, how should arbitrators proceed? Which perspective should they endorse?"

While various instances of legal models and efforts by international arbitration bodies like the International Chamber of Commerce (ICC), the United Nations Commission on International Trade (UNCITRAL), and even Hungarian arbitration law have addressed this central concern, it remains unresolved. For example, the Hungarian Arbitration Act does not specify any mandatory rule that must be followed by law; instead, party autonomy governs the formulation of the norms guiding the arbitral procedure under Hungarian arbitration law.[4] Consequently, it becomes imperative to address the arbitrator's obligation not only to adhere to the parties' chosen legal framework but also to abide by any obligatory regulations in place. This assumes particular significance due to the fact that numerous complex challenges in both the theory and practice of

[2] László Kecskés, "Some ethical problems of arbitration," *Acta Universitatis Szegediensis: Forum: Acta juridica et politica* 11, no. 3 (2021): 211–218. http://acta.bibl.u-szeged.hu/73793/1/juridpol_forum_011_003.pdf#page=211

[3] Ádám Boóc, "Liability of Arbitrators in Hungarian Law with a View to the Latest Amendment of the Rules of Procedure of the Arbitration Court Attached to the Hungarian Chamber of Commerce and Industry," *Romanian Arbitration Journal / Revista Romana de Arbitraj* 17, no. 1 (January-March 2023): 60–84.

[4] "International Arbitration 2023 - Hungary | Global Practice Guides | Chambers and Partners." Practiceguides.chambers.com. https://practiceguides.chambers.com/practice-guides/international-arbitration-2023/hungary.

arbitration arise from the inherent clashes between the independence of the involved parties and the legal limitations imposed by states. These expected conflicts between party autonomy and constitutional restrictions underlie a substantial portion of disputes within the scope of arbitration philosophy and practice. Additionally, it is noteworthy that mandatory rules commonly serve to protect economic, social, or political interests and may reflect a state's domestic or foreign public policy.

According to the article "Mandatory Rules of Law in International Arbitration" written by Professor Pierre Mayer[5], "mandatory rules are laws that assert to be applicable regardless of the applicable law to the agreement or the parties' selected procedural system. Mandatory rules in International Arbitration remain to be a source of debate".

However, mandatory rule issues are getting worse, which makes things more difficult. Mandatory rules difficulties are believed to develop in more than fifty percent (50%) of cases due to the rising popularity of arbitration, widened ideas of arbitrability, superior legislative activity[6], and many more.

The purpose of this article is to tackle the debate concerning mandatory rules from a normative perspective using a legal descriptive approach by defining the concept of the mandatory rule vs. the principle of party autonomy by referring to the related/ relevant conventions, discussing the various methodological techniques and approaches that are now in use, and the role of International Commercial Arbitration to reach the approach that best balances the parties' interests.

2. Mandatory Rules of Law vs. Party Autonomy

Similarly to any agreement, arbitration operates based on a contract and serves as a mechanism for settling conflicts. These arbitration agreements grant the tribunal the authority to address a specific dispute. As a result, it is essential for the tribunal to adhere to the arbitration agreement, particularly when making determinations concerning the composition of the dispute, jurisdiction, and elements pertaining to scope, remedies, and the relevant legal framework. It is worth highlighting that all of this originates from the widely recognized concept and principle in arbitration referred to as "Party Autonomy."

The concept of party autonomy has been addressed in several conventions such as Article 28(1) of the UNCITRAL Model Law[7] and Article 35(1) of the

[5] Pierre Mayer, *Mandatory Rules of Law in International Arbitration* (Arbitration International, 1986), 274–275.

[6] Gary Born, *International Commercial Arbitration: Commentary and Materials* (Kluwer Law International 2nd edition, 2001), 560.

[7] United Nations Commission on International Trade Law, *UNCITRAL Model Law on International Commercial Arbitration 1985 with amendments as adopted in 2006*, 17 https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09955_e_ebook.pdf.

UNCITRAL Arbitration Rules[8]. These articles provide parties the freedom to choose any law or international convention they deem appropriate to be applied to their dispute.

Also, Article V(1)(c)[9] of the New York Convention along with Articles 34 (2)(a)(iii)[10] and 36 (1)(a)(iii)[11] of the Model Law adopted by the United Nations Commission on International Trade Law (UNCITRAL) highlight the concept of party autonomy.

We can infer from Article V(1)(C) of the New York Convention that the recognition and enforcement of an award may be rejected if it attempts to deal with a dispute that was not contemplated by or does not fall within the terms of the submission to arbitration, or consists of decisions on matters outside the scope of the submission to arbitration. In other words, an arbitral award can be set aside if the arbitrators have exceeded their scope of powers and authority. The same explanation can also be deduced from Articles 34 (2)(a)(iii) and 36 (1)(a)(iii) of the United Nations Commission on International Trade Law Model Law (UNCITRAL). [12]

Still, the concept or principle of party autonomy is not absolute, especially in situations involving mandatory rules. The existence of mandatory rules gives rise to a significant conflict between party autonomy and public policy standards. In such cases, the arbitrator's role becomes fundamental in finding a suitable compromise between these conflicting interests.

There exist various interpretations of the term “Mandatory Rules of Law.” For instance, Donald Donovan has described mandatory rules as regulations that “originate beyond the contract, are applicable regardless of the parties' mutual agreement, and typically aim to safeguard public interests that the state prohibits parties from waiving.”[13] Additionally, Professor Pierre Mayer has

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[8] “UNCITRAL Arbitration Rules | United Nations Commission on International Trade Law.”
Uncitral.un.org. https://uncitral.un.org/en/texts/arbitration/contractualtexts/arbitration.

[9] “U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards.” 1968. International Legal Materials 7 (5): 1042–1061.

[10] United Nations Commission On International Trade Law, *UNCITRAL Model Law on International Commercial Arbitration 1985 with Amendments as Adopted in 2006*, 19. https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09955_e_ebook.pdf.

[11] United Nations Commission On International Trade Law, *UNCITRAL Model Law on International Commercial Arbitration 1985 with Amendments as Adopted in 2006*, 21. https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09955_e_ebook.pdf.

[12] Hossein Fazilatfar, “Public Policy Norms and Choice-of-Law Methodology Adjustments in International Arbitration,” *South Carolina Journal of International Law and Business 18, no.* 2, Article 7 (2022): 92. https://scholarcommons.sc.edu/scjilb/vol18/iss2/7.

[13] Loukas A Mistelis, Julian D M Lew, and Queen Mary, *Pervasive Problems in International Arbitration* (Alphen Aan Den Rijn: Kluwer Law International, 2006), 36–38.

outlined Mandatory Rules of Law as "binding legal provisions that must be enforced in an international relationship, regardless of the governing law of that relationship. Alternatively, mandatory rules can be seen as expressions of public policy, commanding such authority that they must be enforced even if the overall body of law they belong to lacks jurisdiction due to the relevant conflict of laws principle. The practical nature of these rules is what renders them enforceable."[14]

Based on the definition provided earlier, it can be inferred that while party autonomy stands as a fundamental concept within Private International Law and a significant factor in international interactions granting parties the liberty to select the governing law for their dispute, mandatory rules of law are identified as regulations rooted in public policy. These rules are enforced in international contexts irrespective of the law selected by the parties, as explained by legal experts like Donald Donovan.

Furthermore, by examining the provisions of the New York Convention and the Model Law of the United Nations Commission on International Trade Law (UNCITRAL), we can conclude that the inclusion of rules and regulations not explicitly stated in the arbitration agreement will not invalidate the arbitration award. Nonetheless, arbitrators must refrain from exceeding their designated jurisdiction and authority when resolving disputes and rendering the arbitration award, otherwise the concern of exceeding their authority arises.

As mentioned earlier, although the arbitrator should apply and respect the will and interest of the parties, under certain circumstances if the arbitrator and the arbitral tribunal have applied a law/ mandatory rule related to public policy different than the law chosen by the arbitral parties, this is not considered as violating the principle of party autonomy according to Professor Pierre Mayer.[15] However, the debate over applying mandatory rules by arbitrators and taking no notice of the law chosen by parties highlights how the "nature of arbitration" is interpreted, since conflicting interpretations affect how parties' and arbitrators' rights are understood and analyzed. Several of these interpretations and theories will be discussed in Section 3.

3. The Nature of Arbitration

The ongoing debate about the fundamental essence of arbitration is a matter that the majority of arbitrators are confronted with. Different interpretations of what arbitration truly encompasses influence the way the rights and obligations of both parties and arbitrators are perceived. Such divergent viewpoints result in practical challenges. There are three main theories or viewpoints that provide different interpretations of the nature of arbitration. These theories include the contractual theory, the jurisdictional theory, and the hybrid theory, all of which require thorough examination.

[14] Mayer, *Mandatory Rules of Law in International Arbitration*, 274–275.
[15] Ibid.

3. 1 The Contractual Theory

According to this theory, arbitration is viewed as having a contractual basis. The entire arbitral procedure is viewed as the result of the parties' agreement, including the creation of the tribunal, the authority of the arbitrators, and the binding nature of the judgment.[16] As a result, according to this theory, arbitration is a tool of "free enterprise" and is distinct from the government system because governments do not impose restrictions on people's rights and freedoms. The state will easily step in to enforce the parties' agreement as a formed agreement if one party attempts to avoid its contractual obligations by avoiding arbitration or by failing to comply with the arbitrator's judgment. It follows that state legal systems have no business influencing how contracts governing the arbitration procedure are interpreted. The idea holds that necessary regulations should only be applicable if they are a part of the contract or demonstrate the invalidity or illegality of the parties' agreement.

3. 2 The Jurisdictional Theory

According to this theory, national sovereignty is the key characteristic. Contrary to the contractual theory, which views arbitration as a form of free enterprise, the jurisdictional theory recognizes that all activity taking place on state territory is inevitably subject to that state's jurisdiction.[17] The proponents of this view contend that all parts of the arbitration, including the validity of the arbitration contract, the power of the arbitrators, and the capacity to enforce the award, are governed by domestic legislation. The laws of the seat and the country where implementation is sought will be of main concern regarding the conduct of arbitration. Thus, according to this theory, arbitrators must ultimately turn to domestic laws, particularly, the laws of the seat, just like a local judge does, when establishing the law that applies to the merits of the dispute. They are still free to implement foreign laws, but they must do so in compliance with conflict of laws guidelines. As a result, decisions about whether to apply an obligatory rule should also be made using conflict rules, starting with the seat's conflict rules.

3. 3 The Hybrid Theory

According to this theory, most people now consider that contractual or jurisdictional theories do not fully explain arbitration. They argue that components of each of these ideas are necessary for arbitration. It is contractual in that the parties decide on some details, such as whether to arbitrate a dispute

[16] Horacio A. Grigera, *Choice-of-Law Problems in International Commercial Arbitration* (Tübingen: J.C.B. Mohr, 1992).
[17] Pieter Sanders, *International Arbitration* (The Hague: Martinus Nijhoff, 1968), 157–162.

and the chosen arbitrators, yet it is jurisdictional in that it ultimately depends on the will of the states, which may choose to reject arbitrability. Thus, most people today agree that arbitration is a combination of the two views. Among many legal experts, Okezie Chukwumerije also believes that "[t]he reality is that an understanding of the concept of arbitration must acknowledge the interaction of both its consensual basis and the legitimacy and support conferred on the process by national legal systems"[18].

However, accepting this expanding pattern only partially resolves the issue. There is plenty of opportunity in the middle for diverse conceptions of the hybrid view if the many perspectives on arbitration's character may be seen as points along a continuous spectrum, with the contractual and jurisdictional theories at each end. It should be noted that the closer arbitrators are to the contractual theory, the less likely they will be to restrict party autonomy. Therefore, recognizing arbitration as a hybrid does not establish the proportional importance of the many interests and concerns involved. We can deduce that the question of the nature of arbitration is more challenging to answer, but what are the possible approaches and techniques for addressing mandatory rules?

4. Possibilities for Addressing Mandatory Rules

Applying mandatory rules is a debatable topic, since it is harder to balance the conflicting interests between the state and parties. There are three different approaches and techniques applied for addressing mandatory rules by arbitral tribunals, (a) applying all mandatory rules, (b) applying no mandatory rules, and (c) applying mandatory rules at the arbitrator's discretion. However, these approaches have advantages and disadvantages, which will be treated in this section.

4. 1 Applying All Mandatory Rules

According to this approach, all mandatory rules will be applied by arbitrators despite the related rules. This approach highlights several advantages, the first advantage being that applying this approach would guarantee the protection of state interests and maintain official support for arbitration, because all necessary regulations would be applied irrespective of their nature, origin, or relevance to the dispute. Another benefit could be that it would result in predictability and consistency if the parties were informed of all possibly applicable required rules. However, the number of necessary mandatory rules is already increasing.[19] If they were to be implemented regardless of how strong the connecting variables were, it might be challenging and therefore ineffective for

[18] Okezie Chukwumerije, *Choice of Law in International Commercial Arbitration*, (Westport, Conn: Quorum Books, 1994).

[19] Andrew T. Guzman, "Arbitrator Liability: Reconciling Arbitration and Mandatory Rules," *Duke Law Journal* 49, no. 5 (2000): 1279.

parties to be aware of every legislation that might be relevant. This could lead to inequity between the parties since less experienced parties who cannot afford legal counsel might not be aware of pertinent requirements. On the other hand, mandatory rules that protect parties as well as those that protect weaker parties would always be in effect. As a result, it is difficult to predict the overall degree of damage that the parties might experience.

Therefore, and concerning what is stated above, one disadvantage is that arbitration would lose favor with the business community since national legal systems would probably have a better possibility of evading the necessary regulations of third countries. Another is the encouragement of state-level legal expansion. If this concern is to be taken into account, it can be argued that this approach makes such expansion more obvious than any other, because governments would be guaranteed that their mandatory principles are observed until there is a conflict of mandatory rules.

However, the main concern with this approach is that it denies party autonomy. According to this approach, even if we lean toward the contractual theory, arbitrators should not mindlessly follow the parties' instructions, who will still have every right to criticize a strategy that essentially gives states total control. Party autonomy is nevertheless a key component of arbitration, although it is less potent than it is frequently rumored to be.[20] There are valid concerns about the tribunal's authority and jurisdiction to adopt a position without attempting to weigh this against the other opposing factors.[21]

However, according to several legal scholars and jurisdictional reasoning, this strategy does not make sense. A tribunal would be bound by the seat's required rules but would only take into account foreign mandatory requirements if the conflict of laws rules of the seat permitted it. Conflicts might prevent the enforcement of all foreign mandatory laws, especially if they reflect unjustified state interests or also if they are laws that are against transnational public policy. Therefore, it is not difficult to understand why this strategy has so little academic support.

4. 2 No Mandatory Rules Applied

Contrary to the “Applying All Mandatory Rules” approach, this approach has several advantages. The key benefit is that arbitrators have less discretion, which improves uniformity and predictability and eliminates complaints of arbitrariness. Additionally, the argument for state legal expansionism is eliminated.

[20] Marc Blessing, “Mandatory Rules of Law Versus Party Autonomy in International Arbitration,” *Journal of International Arbitration* 14, no. 4 *(*1997): 23–40.

According to Emmanuel Gaillard and John Savage [22], this is the optimal method since under any other technique arbitrators face the possibility of going beyond the scope of their work, making their award susceptible to a motion to set aside in some jurisdictions.
However, despite the advantages of this approach, it also has disadvantages. One disadvantage is that state interests are given less protection, which increases the possibility that arbitrability would be denied, resulting in an ineffective arbitral system. In this case, it is important to distinguish between two meanings of the term "arbitrability": a) the first refers to whether the dispute has ever been capable of being resolved through arbitration, and b) the second is whether the parties' arbitration agreement, when properly interpreted in the given case, covers the disputed issue.
According to the first definition, litigation would be permitted in the event of an inarbitrable conflict. The second concerns the agreement's scope and interpretation, and it asks if the arbitration clause should be interpreted as superseding the courts on all matters, including mandatory rules that are not covered by the arbitration clause. Additionally, it means that arbitration gives parties the chance to escape state attempts to regulate what takes place inside their borders. This might potentially harm the larger community in addition to undermining state sovereignty. Furthermore, it does not support the adoption of a required regulation based on worries about its enforceability, which could result in costly failures of enforcement actions.

4. 3 Applying Mandatory Rules at the Arbitrator's Discretion

The majority of legal experts appear to support a strategy that provides arbitrators the freedom to enforce strict regulations. When opposing factors are present, discretion seems logically preferable, since it enables the delicate balancing of the pertinent factors. A strategy like this could, however, be used inconsistently if it is unknown how much weight each factor merits. Conferring discretion raises questions regarding consistency, because it allows arbitrators' moral convictions or conscience goals to preserve party autonomy in decisions.[23] All of these approaches make us question the recent adjustments followed by arbitrators in approaching mandatory rules, which will be tackled in the below section.

5. Adjustments in Approaching Mandatory Rules

Moreover, it has been established that arbitrators possess the option to approach mandatory rules with a hybrid, jurisdictional, or contractual perspective. The

[22] Philippe Fouchard, Emmanuel Gaillard, Berthold Goldman, and John Savage, *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (The Hague; Boston: Kluwer Law International, 1999), 856–857.
[23] Fazilatfar, "Public Policy Norms and Choice-of-Law Methodology Adjustments in International Arbitration," 92.

existence of a strict method guaranteeing the accurate application of public policy rules, also known as mandatory rules, in every circumstance, is lacking.[24] Nevertheless, arbitrators can consider various adjustments to effectively determine the suitable mandatory rule relevant to the dispute. Many legal experts propose that, in this instance, the arbitrator should either (a) evaluate the utilization of dépeçage, a principle permitting the utilization of different legal frameworks for distinct elements or issues within an international transaction, thus applying distinct legal structures to each contractual element, or (b) undertake the role of a mediator during the arbitration process to facilitate the resolution of the conflict.

Applying the dépeçage concept will allow the use of several law concepts regarding the different components of the dispute to adjust the instant application that some mandatory rules deserve.[25] Dépeçage occurs everywhere as a result of problems like procedural classification, the rejection of specific provisions of foreign law due to public policy considerations, or even when a specific provision of foreign law is replaced by a public policy norm. This overall strategy is also adopted by the American Restatement (Second)[26], Conflict of Laws, which "directs the court to divide the matter into parts, or issues, and to make a distinct choice of law determination with respect to each of them." While in European countries, dépeçage is permitted in a more restricted context and only in rare circumstances, the issue-by-issue approach is used, which is known as "principled dépeçage" and necessitates express party stipulation.[27]

According to the article "European Conflicts Law after the American "Revolution", the underlying presumption is that parties are unwilling to have their transaction divided across several different bodies of law.[28]

However, on the other hand, broader use of dépeçage has been argued to better serve the international nature and aspects of multistate situations. The principled dépeçage adds assurance to the parties' agreement, the choice of applicable law, and conflict settlement, while the American style offers flexibility. Despite that, when the involved norms are default norms, implementing dépeçage in the European way is considered by many experts as a superior strategy and approach. The main question is what is the reason behind the need for party stipulation ('principled dépeçage') when overriding mandatory rules of certain states call for instant application in a given scenario? The answer to these questions is that, if a transaction has been carried out in

[24] Jeffrey Maurice Waincymer, "International Commercial Arbitration and the Application of Mandatory Rules of Law," *Asian International Arbitration Journal* 5, no. 1 (2009): 1–45. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1912318.

[25] Peter Hay, "European Conflicts Law After the American 'Revolution' – Comparative Notes," *University of Illinois Law Review*, (2015): 2056–2070. https://www.illinoislawreview.org/wp-content/ilr-content/articles/2015/5/Hay.pdf.

[26] Ibid.

[27] Ibid.

[28] Ibid.

many jurisdictions and those rules are in question, then arbitrators may use dépeçage as a last resort to support the adoption of specific public policy norms. However, unlike a generic approach under the American Restatement, the limit might be applied late and specifically to mandatory rules of the location of implementation.

Lastly, an alternative method within the arbitration process is the one that involves the arbitrator also taking on the role of a mediator, a practice sometimes referred to as "arb-med-arb", noting that in some cases the method "arb-med-arb" can be implemented through appointing a separate mediator to handle the process. In other words, regardless of whether the method "arb-med-arb" is carried out by the same arbitrator or given to a separate mediator, it is a method where mediation is included into an ongoing arbitration procedure, according to Dr. Manuela Renáta Grosu. [29] This can prove to be an effective avenue for resolving a public policy concern during arbitration. Additionally, a variety of legally grounded avenues exist for the application of public policy criteria in arbitration.[30] Nonetheless, if the matter cannot be reconciled based on the provisions outlined in the parties' formulated contract or the statutes the arbitrator employs, mediation emerges as an extra-legal recourse. It should be noted that the "arb-med-arb" method is called "arb-med-arb", since it starts with arbitration, then the arbitrator suspends arbitration at some stage to allow the inclusion of mediation into the diuspute. However, if mediation does not succeed in settling the dispute, then the arbitration procees will resume and an arbitral award will be issued.[31]

Confronted with the intricacies of intricate subjects, such as public policy standards and obligatory regulations, an arbitrator might assume the role of a mediator owing to their comprehension of and proficiency in the matter under dispute. Nevertheless, the mediation's success hinges on the willingness and collaboration of all involved parties, but it is to be noted that this method might not solve the entire dispute but only a part of it.[32]

This "arb-med-arb" solution is a development consistent with the standard arbitration procedure.[33] Indeed, mediation is based on party consent and is governed by contracts, just like arbitration.[34] Therefore, the parties' consent is required before the arbitrator can begin with mediation. Any time during the

[29] Manuela Renáta Grosu, "Hybrid procedures: The Combination of Mediation and Arbitration in Resolving Commercial Disputes from Arbitrator, Mediator, Legal Representative, and Client Perspective" (PhD diss., Eötvös Loránd University, Budapest, 2021), 83–84.

[30] Fazilatfar, "Public Policy Norms and Choice-of-Law Methodology Adjustments in International Arbitration," 92.

[31] Grosu, "Hybrid procedures: The Combination of Mediation and Arbitration in Resolving Commercial Disputes from Arbitrator, Mediator, Legal Representative, and Client Perspective," 83–84.

[32] Ibid.

[33] Fazilatfar, "Public Policy Norms and Choice-of-Law Methodology Adjustments in International Arbitration," 92.

[34] Ibid.

arbitration process, the arbitrator may bring up the prospect of mediating the entire or a portion of the dispute.
The arbitrator-mediator should recognize the parties' choice of law throughout the “arb-med-arb” and look into any possible impact or implementation of the public policy norms of that state and any participating foreign governments which pertain to the areas of the arbitral proceedings, performance, and implementation. As a result, the arbitrator-mediator, with the parties, would also go over all implications of violating public policy for the implementation and enforcement of awards in the applicable jurisdictions. [35]
The arb-mediator may then, on an individual level and as appropriate, suggest that the parties adopt a particular body of legislation to apply to a section of their transaction (in accordance with the dépeçage already indicated) or modify the current choice of law after a dispute. Yet, there will be laws that benefit one party more than the other. In that situation, the arb-mediator should encourage parties to reach a settlement based on the problems at hand and the parties' interests rather than their position.[36]

6. Conclusion

Arbitration agreements define the legal relationship between parties and serve as the contractual foundation for arbitrators' empowerment to resolve commercial disputes between them. As previously noted, arbitrators are obliged to honor the parties' intentions and consider their concerns when rendering an arbitration award, thus preserving the principle of party autonomy. Nonetheless, a limitation exists in the requirement to uphold the essential regulations of governments that have a substantial interest in the outcome of the arbitration. This reservation to adhere to such regulations is not dissimilar to the arbitrators' responsibility to deliver a decision that can be legally enforced in a court of law. It can be difficult to use public policy principles in international arbitration. The law chosen by the parties, or any other appropriate legislation established by the tribunal is the initial and most important condition for implementing and maintaining public policy norms. The limits would take precedence over local procedural laws of the arbitration venue if the law of arbitration adopted by the parties had a territorial connection to the dispute. The foreign government's adherence to the selected law which has a direct connection to the case may also be implicated as overriding public policy norms and thus may prevail over the parties' choice of law. In actual reality, arbitrators can respond to foreign public policy standards in one of the three below suggested ways in order to best balance the parties’ and the state’s interests: applying norms as matters of fact or as a matter of law, or ignoring them with no consideration.

[35] Ibid.
[36] Ibid.

In considering public policy norms, the actual underlying principles of public policy are regarded as an unforeseen and uncontrollable event that renders the transaction unenforceable. On the other hand, in situations where foreign public policy norms are expressly invoked, the law chosen by the parties dictates all elements of the transaction, except when it contradicts a prevailing foreign public policy principle. In such instances, the foreign standard supersedes the previously chosen legislation.

Furthermore, tribunals dismiss foreign public policy norms when they lack either a pronounced significance or a robust link to the nation that introduced the norm. Nevertheless, the tribunal's decision could potentially face termination or denial of enforcement within the courts of the enforcing jurisdiction. This may eventually lead to the substitution of the chosen law by the prevailing standards of the host jurisdiction. This transformation occurs if specific prerequisites are met and the tribunal persists in disregarding the dominant public policy norm.

Moreover, we can also deduce that arbitrators are not required to reject the application of public policy principles, particularly, those that have a dominant or immediately applicable nature, and jeopardize the outcome of their ruling. They have the option to maintain party autonomy in all other areas of the case while applying the applicable rule to specific matters in the dispute or award on a case-by-case basis. With the parties' active participation, this might be done throughout the arbitration process, during mediation led by the same arbitrator who is the most familiar with the case.

Predictable Irrationality in Mediation: Observations on Behavioural Economics

ANTAL, ORSOLYA*

ABSTRACT *In my paper I attempt to provide a common intersection of mediation and behavioural economics. In doing so, I seek to identify the answers that can be used to assign the domain of mediation methodology where theorems of man's decisions of behavioural economics are validated. I seek to identify the answers that can be used to the domain of mediation methodology where behavioural economics can be applied to the theorems of man's choices. I do so in order to take account the phenomena behind human decisions, influencing them and determining their characteristics. Through this, I seek to prove the proposition that human behaviour is neither logical nor rational, a claim which plays an important role in mediation. Beyond this, the study discusses the statements of behavioural economics which also prove the above theorem. However, the aim of the paper is also to collide the results of behavioural economics with the practical experience of mediation, thereby answering the question whether theoretical results of behavioural economics on human decisions are validated in practice. The essence of mediation is to reach a favourable agreement, the in-process tool of which will influence human behaviour and decision-making towards this goal. In my study, accordingly, I intend to achieve the goal of naming the mediation techniques and tools that can be used to achieve the outcome of mediation that is a good agreement.*

KEYWORDS *mediation, human behaviour, decision theory, behavioural economics, irrationality*

„It is not the things that disturb us,
but our interpretation of their significance."
/Epictetus/

1. Identifying cognitive processes and cognitive biases in mediation

In many aspects of our lives, we like to believe that we are rational beings. We are logical people who see, weigh up the options and then make the right decision by calculating and proceeding along the path of reasoning. Since those

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who are rational say, they are able to put their emotions and passions on the back burner. But what about those who claim that thinking is fundamentally irrational and far from being logical? Neumann and game theory[1] have shown that the path to perfect rationality, however incredible it may sound, is through a die. Game theory also holds a number of solution keys in the field of conflicts and decision dilemmas, which clearly shows that conflict resolution is more emotional than logical[2]. In contrast to the rational approach, research has given us a glimpse into a world where it is clear how predictably irrational we really are. We are irrational in the sense that we make illogical decisions due to our cognitive biases[3]. Behavioural economics has incorporated these research findings into its own field and then applied them to economic models of decision making.[4]

1. 1 The human mind

Cognitive psychology seeks to explore human cognition and its processes by following a path of ideas. Its premise is that our thoughts determine our feelings, which influence our decisions and actions.
Our inner world, formed by our thoughts, is our own reality, which takes on individual meaning through social interactions. How we use the knowledge we acquire, the experience we have, is up to us. The meaning we attach to each situation greatly influences the way we feel. We have all experienced that when a dark thought knocks at the door of our mind, in a moment the darkness manifests itself in emotion and we despair. In the same way, when the image of a loved one flashes into our minds, our lips twitch into a smile and we are enveloped in happiness[5].
The thought-feeling-action balance is largely determined by our ability to think adaptively[6] about a situation, or whether we are dominated by a maladaptive

[1] An abstract discipline dealing with rational choice. This theory has paradoxically been able to prove that in some cases the only rational choice is irrationality.
[2] Piroska Komlósi, and Orsolya Antal. "Válni? Miért? Hogyan?," *Glossa Iuridica* 3, no. 3-4 (2016): 96.
[3] Cognitive bias: Systematic deviations from norms or rationality in the way we think, which are present in each of our minds through external influences, our own experiences and our individual perceptions. These lead us to see certain things in a way that is different from the rational, according to our own subjective reality ("Schema therapy") https://mandulapszicho.hu/blog/55-maladaptiv-jelentese-a-sematerapiaban).
[4] Radha Pull ter Gunne, "Manipulation or Assistance? An outline of skills and techniques from behavioural economics for mediation and the ethical considerations for a neutral mediator," *UNSWLawJlStuS* 14; University of New South Wales Law Journal Student Series, no. 20–14. (2020).
http://classic.austlii.edu.au/au/journals/UNSWLawJlStuS/2020/14.html.
[5] Valéria Csépe, Miklós Győri and Anett Ragó, *Általános pszichológia 1–3 – 3. Nyelv, tudat, gondolkodás* (Budapest: Osiris Kiadó, 2007–2008), 488–496.
[6] Thinking adaptively; the term adaptive basically describes the way people adapt and respond to their environment. In a broader sense, it refers to the activities people and

spiral[7] where automatic negative thoughts take over. Between these cognitive biases[8], disharmony can easily take over, which can then manifest in psychosomatic symptoms[9].

1. 2 The role of schemas[10] in human thinking

Our schemas, born out of our past experiences, emerge as obstacles that distort our perceptions as basic cognitive beliefs, thus limiting our coping. Schemas are born from unmet emotional needs rooted in childhood. Schema Therapy identifies 5 basic emotional needs: secure attachment; autonomy, competence, sense of self-identity; freedom to express legitimate needs; spontaneity and play; realistic boundaries and self-control. A healthy personality will be one who can adaptively fill these gaps. A schema can go in one of two directions: consolidation or healing[11].
Maladaptive coping style, which can take three forms - similarly to the way organisms respond to danger - works in the direction of consolidation. Fighting is manifested as overcompensation, flight as avoidance, and freeze as subordination. Change can be achieved by altering cognitive re-framing and

groups invest in, the opportunities and pathways they seek that help them grow and nurture themselves while trying to avoid stress, injury and risk ("Schema therapy" https://mandulapszicho.hu/blog/55-maladaptiv-jelentese-a-sematerapiaban).

[7] Maladaptive Spiral: Maladaptive thinking in psychotherapy describes a situation where a person's emotional problems are caused and maintained by erroneous and irrational beliefs, where a person's response to their environment does not lead to beneficial outcomes. These patterns of adaptation often become rigid and are deeply rooted in a person's actions, feelings, thinking and attitudes towards others ("Schema therapy" https://mandulapszicho.hu/blog/55-maladaptiv-jelentese-a-sematerapiaban).

[8] Cognitive bias: Also known as thinking or reasoning errors. They result in spontaneous, automatic negative thoughts that occur in current life situations, resulting in misinterpretation and negative emotional states ("Cognitive biases in thinking" https://onlinepszichologus.net/blog/kognitiv-torzitasok-a-gondolkodasban/).

[9] Aaon Beck, John Rush, Brian Shaw, and Gary Emery, *A depresszió kognitív terápiája* (Budapest: Animula, 2001), 121–128.

[10] Schema: the data structure stored in memory that determines our conceptual knowledge. The concept was introduced into psychology by Bartlett, following Kant and Head, who theorised that all information processing processes use schemas to interpret sensory data and retrieve information for goal-directed behavior ("Schema" http://www.hunfi.hu/nyiri/enc/1enciklopedia/fogalmi/pszich_kog/sema.htm).

[11] Jeffrey E. Young, Janet S. Klosko, and Marjorie E. Weishaar, *Sématerápia* (Budapest: VIKOTE, 2017), 25–29., 47–49.

schema-driven behaviour[12] so that the maladaptive schema becomes less and less activated[13].
In cognitive re-framing, it can be helpful to think about what other explanations for a situation might exist beyond cognitive biases. Cognitive rehearsal of certain actions can also be helpful. There are a number of NLP techniques[14] that can help us to imagine how to adapt to the situation at hand in a good and active way, in an adaptive way. Role-playing can also be helpful, just as imagination[15]. Importantly, a myriad of alternative ways of dealing with the problem at hand can be listed. It is also possible to think through a worst-case scenario[16], and in the process experience that the world will not collapse even if you make a particular choice.
When the mediation process is stalled, the BATNA / WATNA question type is used. These questions are asked by the mediator to encourage the parties to consider the consequences of the mediation breakdown and thus to motivate them to participate in the mediation process and to make further efforts to resolve the situation. The BATNA/WATNA question type addresses the weakest points of the parties' positions. BATNA is an acronym formed from the term "Best Alternatives to Negotiated Agreement" and roughly refers to the questions that are asked in order to achieve the best outcome from the negotiation. WATNA is the opposite and is an acronym formed from the phrase "Worst Alternatives To Negotiated Agreement". WATNA, as a way of asking questions, refers to what the parties may lose by failing to reach an agreement or by breaking off the negotiation.[17]

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[12] Schema-driven behaviour: adaptation is essentially a way of adapting and responding to the environment. Adaptive patterns are the adaptation of an individual to a situation in a way that produces valuable outcomes, while inappropriate patterns tend to produce short-term benefits but cause problems in the long term ("Schema therapy" https://mandulapszicho.hu/blog/55-maladaptiv-jelentese-a-sematerapiaban).
[13] Young, Klosko, Marjorie and Weishaar, *Sématerápia*, 49–52.
[14] NLP Technique: neuro-linguistic programming (NLP) is an experiential system of specific psychological, psychotherapeutic and communication techniques that study language use and behaviour. It is considered a pseudoscience, since its effectiveness cannot be proven by scientific methods ("NLP Technique" http://integrativterapiaster.hu/nlp-modszer-a-neurolingvisztikai-programozas-lenyege-es-hatasa/).
[15] Imagination. The term imagination is derived from the Latin word imago, meaning image, likeness, semblance. Imagination is an imagery exercise introduced through relaxation, in which our imagination creates our reality ("Imagination" https://takacsviktoria.hu/mi-a-kulonbseg-a-relaxacio-az-imaginacio-es-a-meditacio-kozott/).
[16] The scripts contain the names or themes of the types of events (e.g. eating in a restaurant) and typical event scenes, which can be used to understand incomplete descriptions of events. According to cognitive psychological theories, our autobiographical memories, which are an important part of the self-schemas that form the basis of our identity, are modelled on general event scenarios ("Schema" http://www.hunfi.hu/nyiri/enc/1enciklopedia/fogalmi/pszich_kog/sema.htm).
[17] Tibor Kertész, *Mediáció a gyakorlatban* (Miskolc: Bíbor, 2010), 85–86., 149.

The types of questions used in mediation relate to the dynamics of the process, the process of empowerment. At the beginning of mediation, we are busy trying to understand what has happened, so we typically ask informational questions. Then, when we want the parties to understand who did what or why, or who thinks what, the proportion of motivational questions increases, and when we deal with the impact of the conflict on the other, reflective questions follow. Circular questions already help the parties to draw conclusions from the discussion togetherand if this process gets stuck, BATNA/WATNA is used.[18]

1. 3 Characteristics of communication

Speech is one of the most basic means of expressing our thoughts. "... we are ourselves in what we say: the way we say it, the words and expressions we use, all tell us something important about ourselves, they can refer to our gender, our social status, our current state of mind, our personality, our attitudes."[19] "Our life is full of conversations."[20] "... it is always through the verbal communication, changing roles, that we achieve what we want, move closer to the other or move away from them. In a certain sense, all human relationships are conversations, and conversation can be seen as the direct reality of language."[21]

We call the hidden logic of conversation a system, after P. Grice, in which the rules of conversation form a general system of conventions. The cooperative principle is the guiding principle by which we assume that the other person plans his actions on the basis of his desire to cooperate with us. Grice breaks it down into 4 further principles: quantity (be informative), quality (aim for the truth), relevance (relate what you say to what has already been said), mode (be clear)[22]. When we converse, we have to coordinate several things: we have to pay attention to order (temporality and causality), but also according to a certain concept, to what the other person might know or think. In the process, the roles of speaker and listener can be distinguished. It is also worth distinguishing several levels regarding the number of people involved in the communication: intra-psychic, interpersonal, group communication and mass communication.[23]

A basic tenet of the Palo Alto school of communication studies is that every communicative act is a two-step process. The communication of information

[18] Tibor Kertész, *Mediáció a gyakorlatban*, 84–86.

[19] Eszter Tisljár-Szabó, "Érzelmek és beszéd," in *Pszicholingvisztika 2*, edited by Csaba Pléh, and Ágnes Lukács (Budapest: Akadémia Kiadó, 2014), 962.

[20] "Text is the immediate reality of language, discourse is in fact the equivalent of speech in its broadest sense. I use the term conversation to refer to this living, interpersonal reality." (Csaba Pléh, "A társalgás pszicholingvisztikája," in *Pszicholoingvisztika* 2, edited by Csaba Pléh, and Ágnes Lukács (Budapest: Akadémia Kiadó, 2014), 988.

[21] Pléh, "A társalgás pszicholingvisztikája," 987.

[22] Csaba Pléh, "A lélek és a nyelv" (Budapest: Akadémia Kiadó, 2013), 79–98.

[23] Pléh, "A társalgás pszicholingvisztikája," 987–1030.

itself takes place at the subject level, where the reality of the content of the communication depends on whether the message is true or false, and even the subjective importance of the content itself is relevant. On the relational level, on the other hand, the communication process takes place between the emotions and qualities associated with the relationship, which depends on the content of the communication, the situation in which it is made, as well as its nature and cultural qualification.[24]

Habermas defines the criteria of an ideal speech situation as follows: formal, cognitive and universal. From the formal point of view, he emphasises normativity, in which we should be able to abstract from our own everyday environment, thus achieving a spatio-temporal transcendence. The cognitive measure is that rationality is expected of those involved in communication, which can thus be weighed as arguments in a given debate. According to the criterion of universality, the norm, the conditionality, the arguments and the procedure itself must mean the same to all concerned.[25]

According to Wiemann and Giles[26], communication is a multi-functional social sequence of events, capable of conveying emotions and performing instrumental actions; however, most of the processes involve a very low degree of awareness and intentionality. Csepeli, using Machiavelli's approach, observes that "there are three kinds of human cognition: one can recognise things by itself, another will do what others recognise, and a third cannot recognise either by itself or by others"[27], and he points out that cognitive inequality must be taken into account, because the majority of people in society are those who do what others recognise.

Hobbes refers to speech as the most useful human invention, but he counts it only at the level of the subject, since he interprets uncooperative communication that promotes understanding as a failure. In his view, there are four ways of misusing speech.[28] "First, by using the direct meaning of words to record our thoughts incorrectly, because then we record as perception something we never perceived, and in this way, we mislead ourselves. Second, if we use words in a figurative sense - that is, not in the sense in which they are intended - we have deceived others. Thirdly, when we use words to express a will that does not exist in reality. Fourth, when we use them to hurt each

[24] György Csepeli, *Szociálpszichológia* (Budapest: Osiris Kiadó, 2001); György Csepeli, *A hatalom anatómiája* (Budapest: Kossuth Kiadó, 2013), chap 14.

[25] Jürgen Habermas, *A kommunikatív cselekvés elmélete* (Budapest: Gondolat Kiadó, 2011). Cited in Gabriella Szabó, "Politikai kommunikáció és közösség," *Politikatudományi Szemle XXV,* no. 1 (2016): 29–47.

[26] John M. Wiemann and Howard Giles, „Az interperszonális kommunikáció," in *Szociálpszichológia* eds. Hewstone, Stroebe, Codol, and Stevenson (Budapest: Osiris Kiadó, 1995). Cited in Csepeli, *Szociálpszichológia*, 2001.

[27] Niccolò Machiavelli, *A fejedelem* (Budapest: Európa Kiadó, 1978), 76. cited by Csepeli, *A hatalom anatómiája*.

[28] Csepeli, *A hatalom anatómiája*, chap 14.

other."[29] In the mediation process we experience this abusive communication countless times.
This approach can be paralleled with Grice's system of maxims that describe the conditions for successful communication: (1) focus on the subject, (2) do not use more or fewer words than necessary, (3) avoid words that are ambiguous or have vague meanings, (4) do not say anything you are not sure is true. In contrast, the reverse application of the maxims can often be seen in communication between people in conflict with each other.[30]

	Grice maxims	**inverse Grice maxims**
quantity be informative	do not use more or fewer words than necessary	use many more words than necessary or significantly fewer words than necessary
quality strive for the truth	do not say something you are not convinced is true	do not say something you sincerely believe
relevance your communication should be relevant	focus on the subject	never talk about the subject itself
manners be clear	avoid ambiguous words with obscure meanings	feel free to use words with obscure meanings, ambiguous expressions and clichés

Own table based on Csepeli (2013) and Pléh (2013)

In the mediation process, the key to successful communication is not at the object level, but at the relational level, where information affects emotions, with the aim of creating an emotional relationship between the speaker and the addressee that lies between love and hate.

[29] Thomas Hobbes, *Leviatán I* (Budapest: Kossuth Kiadó, 1999), 90. cited by Csepeli, *A hatalom anatómiája*.
[30] Ildikó Bencze M., "Kísérleti pragmatika," in *Pszicholingvisztika 2,* eds. Csaba Pléh, and Ágnes Lukács (Budapest: Akadémia Kiadó, 2014). 813–854.

2. Characteristics of social behaviour

One of the basic motivations of human beings is that they want to save face. They want to believe that as objective beings they can resist influence, but at the same time they desire to be able to influence others. To understand people's social behaviour, social psychology provides a starting point to see that, despite our best efforts, we are still influenced by certain phenomena. Due to the effects of social and cognitive processes on individuals, we can see that we are significantly influenced by physical presence, by a perceived and mediated opinion, by feelings about ourselves or our group, and by our perceptions, memories and motivations.[31]

According to social psychology, the diversity of social behaviour can be understood through two basic axioms, three motivational principles and three processing principles. The two most important principles are that we construct our own reality and that social influence affects everything. By construction of reality, we mean that for each individual, the idea of reality is "merely" a construction, shaped by both cognitive and social processes, the effects of which cannot be separated. In contrast, the pervasiveness of social influence implies that even if we are not physically present, our thoughts, feelings and behaviour are almost always influenced by other people.[32] "Our perceptions of others' reactions and our identification with social groups shape our most intimate perceptions, thoughts, feelings, motivations, and even our perceptions of the self (...) social influence is strongest when it is least obvious: when it shapes our most basic assumptions and beliefs about the world in ways that we do not even notice."[33] This also has a powerful impact on the way we construct our own reality, through which we clearly influence our thoughts, feelings and behaviour.

In relation to the two basic axioms detailed in the previous paragraph, people are driven by three motivations: the desire to control situations, the search for connection, and the valuation of ourselves and those we belong to. Striving for mastery motivational force implies the need to understand the world around us and to be able to control it in order to gain rewards for ourselves. Seeking connectedness implies the need to be able to show reciprocity in the individuals and groups we value, which manifests itself in supporting, liking and accepting each other. The motivational principle of valuing "me and mine" satisfies our need to see ourselves in a positive light, as well as those connected to us.[34]

The three processing principles are: 1) The conservatism principle is the processing concept that existing beliefs, both for individuals and groups, change slowly, but that this established knowledge tends to maintain itself. 2) According to the accessibility principle, the most accessible information has the

[31] Eliot R. Smith, Diane M. Mackie and Heather M. Claypool, *Szociálpszichológia* (Budapest: Eötvös Kiadó, 2016), 65.
[32] Smith, Mackie, and Claypool, *Szociálpszichológia*, 55-58.
[33] Smith, Mackie, and Claypool, *Szociálpszichológia*, 57.
[34] Smith, Mackie, and Claypool, *Szociálpszichológia*, 58-59.

greatest impact on our thoughts, feelings and behaviour. 3) The superficiality versus depth principle distinguishes the extent to which information is processed. People typically live their lives on autopilot, where they put little effort into processing information and make decisions based on this superficial picture. Sometimes, however, they become motivated to look more closely at the circumstances of the case and thus make a more considered decision.[35]
Different combinations explain all social situations, whether they are valuable or destructive. "Even when information has been considered as thoroughly as possible, it is not always guaranteed that the right decision will be reached. Sometimes even thinking about things can distort our interpretation and lead us to make mistakes without being aware of the problem."[36]

2. 1 Competition or cooperation

The question of taking responsibility for personal behaviour, for the way situations develop and for our decisions will determine to a large extent whether we choose to cooperate or compete. The freedom of choice carries with it a burden of responsibility from which many would like to escape. A sense of responsibility includes individual morality, norms of social coexistence and respect for the rights of others. It embodies on the one hand a willingness to accept the consequences of one's actions, and on the other hand a willingness to assess the outcome of one's future actions. Alongside freedom, a sense of control is a distinctive element of responsibility. According to Schlenker (1994), the assumption of responsibility requires that the person involved in it knows the content of the event in question - which is relevant to him or her, and in the meantime they also possess a sense of control. We therefore judge responsible people those who make decisions of their own free will, in the knowledge of the consequences.[37]
Following Bandura (1977), the belief in one's own competence is presented in psychology as general self-efficacy. This perceived ability influences people's thinking, feelings, behaviour and motivations. These efficacy beliefs guide and regulate human behaviour through motivational, cognitive, emotional and decision-making processes.[38] According to Bandura, the defining element of adaptive functioning[39] is

[35] Smith, Mackie, and Claypool, *Szociálpszichológia*, 60–61.
[36] Smith, Mackie, and Claypool, *Szociálpszichológia*, 62.
[37] Éva Szabó, and Márk Kékesi, "A felelősségérzet koncentrikus szerkezetének vizsgálata középiskolások körében," *Alkalmazott Pszichológia* 16, no. 2 (2016): 53–68.
[38] Anita Nagyné Hegedűs, *Énhatékonyság – iskola – teljesítmény* (2014) https://gradus.kefo.hu/archive/2014-1/2014_1_ART_001_Hegedus.pdf.
[39] Adaptive behaviour is defined as the ability to perform effectively in terms of social and community expectations appropriate to one's age and cultural group, personal

self-efficacy, which implies an increased sense of responsibility. Research has identified a strong correlation between dimensions of self-efficacy and responsibility. They suggest that the more self-efficacy one feels in a particular area, the more likely one will take responsibility in that area than in areas where one lacks this feeling.[40]
It is easy to see that in a conflictual situation, which involves taking a case to court and hardening it into a lawsuit, one is often unable to see the possibilities of an alternative route. In contrast to the zero-sum outcome of litigation, cooperation in conciliation, which is the highest gain, requires a very different attitude from the parties. The formalisation of the procedure - along the axes of negotiation, mediation, arbitration, adjudication - will gradually increase, as the settlement of the dispute becomes more and more norm-oriented. All this means that the chances for resolving the dispute are increasingly out of the hands of the parties, while the scope for discretion in the negotiating position is also diminishing.[41]

3. The impact of behavioural economics on mediation

Knowing ourselves is a key task for our whole lives. Knowledge is formed through different mirrors. Observing ourselves, observing the signs of others, and comparing ourselves with others can all serve as a starting point for getting to know and understand ourselves better. The initial observation and interpretation of thoughts, feelings and behaviours can also help us later to be able to bring about change in these areas. The components of the 'self' are therefore the sum of our knowledge about ourselves (self-concept) and our feelings about ourselves (self-esteem).[42] We are people first and litigants second.

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independence, physical needs and interpersonal relationships. (Behaviour that interferes with daily activities is called maladaptive behaviour, or more commonly problem behaviour. Maladaptive behaviours are undesirable, socially unacceptable, or interfere with the acquisition of desired skills or knowledge). Problems with the acquisition of adaptive skills can occur at any age - in young children, in the development and acquisition of basic maturational skills (e.g. walking or performing self-help skills), the acquisition of academic skills and concepts (e.g. basic reading, writing and maths skills) in school-age children, or in social and occupational adaptation (e.g. working with others, developing basic workplace skills) in older children. https://us.humankinetics.com/blogs/excerpt/adaptive-and-maladaptive-behavior.

[40] Szabó, and Kékesi, "A felelősségérzet koncentrikus szerkezetének vizsgálata középiskolások körében".

[41] Béla Pokol, "A jog elkerülésének útjai. Mediáció, egyezségkötés" *Jogelméleti Szemle*, no. 1 (2002), https://jesz.ajk.elte.hu/pokol9.html.

[42] Smith, Mackie, and Claypool, *Szociálpszichológia*, 155–161., 170.

A number of studies on the impact of behavioural economics on mediation have been carried out, which bring us closer to understanding irrational behaviour in negotiations and offer useful tools for dealing with it. The research on behavioural economics and mediation provides a comprehensive picture of the possible biases and heuristics that can arise in negotiations, but also identifies a number of techniques for the mediator to overcome these obstacles in his or her work. The question is 'merely' to what extent a mediator who uses these techniques to deal with the biases and heuristics encountered in a negotiation process can be considered neutral and ethical.[43]

Mediation is a form of dispute resolution in which a neutral third party facilitates the resolution of a dispute. The mediator may take on a facilitative, evaluative or transformative role in the negotiation. Regardless of the model used in the process, mediation focuses on the parties and on reaching a favourable agreement through negotiated decision-making. The central element of mediation is the decision-making power of the parties. Decision-making in mediation is linked to the dominant social paradigm, derived from microeconomic theory, that individuals make decisions based on rationality and self-interest. Such individuals have been termed Homo Economicus, namely who make their decisions with a focus on maximising profit by considering relevant costs and benefits. Research in the field of behavioural economics suggests that Homo Economicus does not exist, given that people are irrational and make countless cognitive errors in their decisions.[44]

Irrationality is in contrast to rational thinking based on the objective functioning of logic, reasoning and the brain's operations of linear thinking. Thus, if one is irrational, one's decisions will be determined by one's emotional responses to external stimuli triggered by visceral reactions and internal biases. In this case, attention to his direction must also be based on a different foundation, since it is the emotions and perception that influence negotiations. Cognitive biases, prejudices andheuristics are systematic errors in thinking that need to be corrected in the decision-making process.

Pull ter Gunne's paper outlines nine different tools drawn from the behavioural economics literature on how the mediator can mitigate certain types of biases and heuristics of the parties in negotiations: (1) Accounting for concessions made by the parties during negotiations, which can serve as a tool to eliminate emerging biases where appropriate.[45] (2) Re-framing,[46] which can help with

[43] Pull ter Gunne, "Manipulation or Assistance? An outline of skills and techniques from behavioural economics for mediation and the ethical considerations for a neutral mediator".

[44] Ibid.

[45] According to the theory, the parties' decisions are not driven solely by self-interest and profit-seeking, but rather by the relationship of their own gains and losses to the gains or losses of others. If it appears that the other party is in a better position, the proposal may be rejected by the other party even if it is economically advantageous. (Pull ter Gunne, "Behavioural economics," part A)

[46] Re-framing: The placing of arguments and proposals in a new perspective by the mediator. It is well known that parties make their decisions based on whether a given

loss, endowment effect[47] and reactive devaluation;[48] (3) Making the choice relative by outlining several alternatives, which can make certain choices appear better;[49] (4) Reality testing, which can help change the parties' perspective by outlining the worst and best outcomes, so that they are able to interpret reality from more than just their own perspective.[50] This can help to address confirmation bias,[51] optimism bias,[52] inverse fallacy,[53] and effect bias.[54] (5) Understanding the causes of conflict and the parties' histories is important to eliminate attribution bias,[55] availability heuristics,[56] and self- serving bias.[57] (6)

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choice is framed as a loss or a gain. Studies show that a proposal framed as a loss is more likely to be rejected by the parties than something framed as an equivalent gain. (Pull ter Gunne, "Behavioural economics," part B).

[47] Endowment effect: parties will place a higher value on something if they perceive it as their own. Over-valuation of an object in their possession, manifested by emotional and subjective appreciation, can also be helped by reframing, which can bring objective and subjective value closer together (Pull ter Gunne, "Behavioural economics," part B).

[48] Reactive devaluation: the recipient irrationally devalues a proposal from the other party because it is perceived as less advantageous. The proposal from the intermediary reduces bias (Pull ter Gunne, "Behavioural economics," part B).

[49] When multiple options are provided, even those that may be considered extreme, proposals may appear more attractive. For example, in deferred payment arrangements, a party is more likely to accept an arrangement with a longer payment option if the final amount is larger (Pull ter Gunne, "Behavioural economics," part C).

[50] Parties usually find it difficult to separate themselves from their role in the dispute, which means that the parties' perspective determines how they experience the dispute. However, by reframing the parties' positions, the mediator can change the parties' perspectives, which can be either negative or positive illusions (e.g. perspective bias), and help overcome different biases (Pull ter Gunne, "Behavioural economics," part D).

[51] Confirmation bias: another type of positive illusion, which refers to people accepting only evidence that supports their current position and ignoring evidence to the contrary (Pull ter Gunne, "Behavioural economics," part D).

[52] Optimism bias: A type of positive illusion that refers to people's tendency to overestimate their abilities and to make overly optimistic predictions about future events. Positive outcomes for themselves are also seen as preferable to statistical predictions (Pull ter Gunne, "Behavioural economics," part D).

[53] Inverse fallacy: also known as affect heuristics, which induce parties to base their decisions on their feelings and emotions rather than on logic and firmness. With its "help" people tend to ignore the importance of statistics. By eliminating these mental short-circuits and decision-making errors, parties will be able to make decisions that appear more rational (Pull ter Gunne, "Behavioural economics," part D).

[54] Impact bias: This bias refers to the overestimation by parties of the impact of a future uncertainty and therefore, for example, they continue litigation because the future uncertainty is overestimated relative to a fixed amount offer (Pull ter Gunne, "Behavioural economics," part D).

[55] Attribution bias: People tend to attribute their bad experiences to inappropriate causes and may interpret situations differently in terms of whether they are controllable or uncontrollable. When they judge it to be controllable, they attribute the negative outcome to the other person; when they judge it to be uncontrollable, they attribute it to circumstances (Pull ter Gunne, "Behavioural economics," part E).

Irrational devaluations can be reduced through expressing opinions about the reasonableness of the proposal. (7) By questioning certain assumptions, anchoring bias[58] can be unleashed. (8) Educating the parties about their biases and heuristics[59] in a constructive way can help to put the negotiation in a different light. (9) Through changes in the structure of the mediation, the mediator can act as a buffer in the mediation of information and settlement proposals. Since the offer does not come directly from the other party, the chances that the receiving party will irrationally devalue it can be reduced.

The main question is: can a mediator who uses the practical skills and techniques described above to deal with the biases and heuristics that arise in the negotiation process be considered neutral and ethical?

In the traditional framework of mediation, the mediator is considered a neutral third party where the parties are solely responsible for reaching an agreement in the process. In practice, however, a closer look at the role of the mediator, particularly in the use of this type of instrument, suggests that the theory of a neutral mediator does not correspond to the actual role of a mediator. In practice, a mediator actively seeks to eliminate the parties' bias, which means that a mediator must use his or her opinion of the parties and apply biases that he or she believes will ensure equality and impartiality, but this does not correspond to the theoretical expectations of the role of a neutral and ethical mediator however it is often necessary to reach an agreement. Therefore, the answer to the question of whether a mediator can be considered neutral and ethical when using the tools identified by behavioural economics is not a clear yes or no. However, it creates further complications that not only the parties but also the intermediary itself have cognitive biases and prejudices. A mediator using these tools may therefore be unethical in certain circumstances without

[56] Availability heuristics: when a situation is judged by the parties on the basis of direct experience or recent information and is given too much weight in decision-making. In these cases, as a mediator, you can draw attention to these disproportionalities and help the parties to consider the history (Pull ter Gunne, "Behavioural economics," part E).

[57] Self-serving bias: Refers to the tendency of humans to remember and consider the side of certain events that is more favourable to our own point of view than the opposing party's point of view. As a mediator, it is therefore also very important to understand both sides' positions and to present them equally to the parties.

[58] Anchoring bias: It refers to the possibility that a completely unrelated element on which a person's mind is focused can influence the outcome of a situation. This acts as a mental shortcut. By questioning this assumption, the party may find that he or she is fixated on something that is not necessarily related to the situation (Pull ter Gunne, "Behavioural economics," part E).

[59] Heuristic: According to Aronson (2008), heuristics are how we make sense of the information that surrounds us. "Judgmental heuristics are nothing more than mental short-circuiting: simple, often merely approximate rules or strategies for solving some problem". The use of heuristics reduces the need for thinking, for more detailed cognition. Heuristics are opposed to systematic thinking (Gábor Hollósy-Vadász, "Heurisztikák" https://pszichologuskereso.hu/pszichologia-blog/pszichologia-blog/heurisztikák.

being aware of it and may try to influence the outcome on the basis of his or her personal beliefs. This is why self-awareness is particularly important in mediator training, because just as the mediator is aware of the biases and heuristics of the parties, he must also be aware of those of his own.

4. Summary

As we have seen, our reality, constructed by our thoughts and our perceptions as real, is endowed - also due to social influence - with an individual meaning, which is interpreted and shaped through the grip of numerous cognitive distortions, despite our best efforts. This is an unavoidable process, but it is also a process that can be made conscious and cognised. It is important because, in our experience, it is present in all intra-psychic and interpersonal interactions.
Conflicts are a natural part of human relations, and in many cases they are legal in nature. Whether the parties concerned choose to resolve their dispute through the ordinary judicial route or through an alternative dispute resolution procedure depends to a large extent on the nature of the dispute, the individual's responsibility and sense of control. We see that the legislator also keeps pushing citizens towards personal responsibility and encourages, and in some cases requires, personal conciliation between the parties to a conflict as a condition for initiating proceedings which should lead to an appreciation of mediation.

Philosophical Questions of the Relation to Goods in Antiquity and Scholastic Philosophy

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ABSTRACT *This paper explores the early issues of the relation to goods in ancient and medieval philosophy trends. As an introduction to the topic, I examine the conditions for the emergence of Greek philosophical thinking. The paper is divided into two major sections: the first section introduces the ideas of ancient Greek philosophy on property and wealth, while the second one considers the development of the ideas of early medieval philosophy on the same topic. It should be pointed out that in ancient philosophy the subject was not given much prominence, since the concept of existence and virtue preceded the problems of property, wealth and distribution. Yet it is worth examining this period from this point of view, too, because regarding the relationship to wealth, we can find several important philosophical principles. I will present primarily the relevant medieval thoughts after discussing the relevant works of great figures of scholasticism. I will also discuss in detail the teachings of Duns Scotus, since it is primarily to him that we owe the most of his statements relevant to our subject of scholasticism.*

There is no doubt that the questions examined in this study are taking us closer to the definition of the content of common good. This is particularly true about Aristotle and St. Thomas, based on whose work these doctrines are also examined with distinguished attention. To sumup, we can say that questions on wealth distribution and the distribution of goods, in other words the ownership structure between the state and the individual are very much essential, since through them the content of the common good becomes tangible. The aim of my study is to support this assertion.

KEYWORDS *philosophical periodization, theories of property, distribution of wealth, redistribution, justice*

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1. Philosophical questions on the relation to goods in antiquity and scholastic philosophy

1. 1 The conditions for the development of Greek philosophical thought

Before reviewing the periods of Greek philosophy and the views of the thinkers of these periods on property and wealth and on the distribution of wealth, it is important to explore some of the determining circumstances that created the conditions for ancient Greek philosophical thought.
When discussing the achievements of ancient Greek philosophy, it is important to note that we are looking at an intellectual heritage that is the foundation of Western philosophy[1] and its results are much easier to examine than those of the worldviews that emerged in earlier periods of the history of ideas.[2]
Greek culture was fertilized by the geographical openness of the region and by maritime trade, which both created prosperity and provided opportunities for relations with other peoples. The meeting of different groups of people with different ways of thinking also had a liberating effect on intellectual life.
The city states of ancient Hellas and Italy provided the right conditions for the development of philosophical thought, the study of science and, as a result, a climate of freedom, free thought and free speech.[3] [4]
The beginnings of philosophical thought as we know it today date back to around 550 BC, when the need arose to explain the world using the tools of rational thought, in the direction of the search for natural causes.[5]

1. 2 Ideas on property in ancient Greek philosophy

1. 2. 1 The age of the Pre-Socratics

Looking through the early stages of Hellenic philosophy, we can conclude that the thinkers of the pre-Socratic era, in opposition to religious teachings, focused their work on identifying a primordial substance that could explain the origin and functioning of the world. For this reason, the great thinkers of this period

[1] Hans Joachim Störig, *A filozófia világtörténete* (Budapest: Helikon Kiadó, 1997), 91.
[2] The great systems of Eastern thought, such as ancient Indian and ancient Chinese philosophy, were developed in a way that was close to the Western world, and their results were therefore known to Westerners much later. It is also difficult to draw any conclusions on the philosophy of the great Mediterranean cultures (Babylon, Egypt), because no such sources survived after the destruction of these cultures.
[3] Störig, *A filozófia világtörténete,* 92.
[4] But here it is important to note that in Athens, for example, tradition and religious rigidity led to Anaxogoras being banished and Socrates being condemned.
[5] Störig, *A filozófia világtörténete,* 93.

excluded from the main focus of their investigations the problems that determine the functioning of society, such as property and wealth.
The first thinker of the period to touch upon the problem of property was Heraclitus (VI Cret.). In his conception, the great law that determines the functioning of society and the world is the unity of opposites.[6] In his view, those who believe that eternal peace is attainable are mistaken. He claims that it does not benefit man if all his desires are fulfilled. Wealth can only be enjoyed after experiencing poverty.[7]
Democritus, a philosopher of the 5th century (BC), created the classical materialist system of antiquity by defining the cornerstones of atomic theory. In his view, the measure of happiness attainable by man is serene contentment, which is attained through self-restraint. According to his philosophy, therefore, wealth and possessions do not bring us closer to happiness, the primary source of which, in his view, is the possession of spiritual goods.[8]

1. 2. 2 The Sophists

The philosophical movement that emerged in the 6th to 5th centuries BC is called sophist philosophy, which focuses on doubt about human cognition. The thinkers of this period became convinced that objective cognition was impossible. From this basis of thought they derived the claim that, if we accept that there is no objective standard of truth the only valid truth or the only valid law is the law of the strongest.[9]
The Sophist view of the distribution of legal order and wealth is vividly exemplified by the following quote: "…I consider the weak people and the masses to be the authors of the laws. They want to frighten the stronger and more powerful people from aspiring to more than others; hence they say that the desire for power is ugly and unjust." The Sophist view of the distribution of law and wealth is distinctly illustrated in the following quote: "… I consider the weak men and the masses to be the authors of the law. They want to frighten the stronger and more powerful people from striving for more than others; hence they say that the desire for power is ugly and unjust."
They themselves, being more base, are happy to be content with equal measure. Nature, on the other hand, shows in my opinion that it is just that the more valiant should have more than the more base, the powerful should have more than the weak. Why did Xerxes attack Greece? A thousand such examples could be cited. Thus, I believe, all act according to nature, and by God, according to the laws of nature. Only not according to our own made-up laws, for we bring the stronger and better into the fold from childhood, like lion cubs,

6 This idea was identified in the history of philosophy as the first model of the dialectical theory of development, which was then revived in the work of Hegel and the Marxists.
7 Störig, *A filozófia világtörténete,* 103.
8 Störig, *A filozófia világtörténete,* 107.
9 Störig, *A filozófia világtörténete,* 110.

and make them slaves by bewitching and charming them, and unceasingly preaching to them that equality must be respected, for that is the way of justice and fairness.
Nevertheless, if a great man comes along and shakes off our doctrines, tears up, evades, or tramples underfoot our ordinances, our readings, our incantations, our laws against nature, all of them, and rebels from our slave that was to our master: then the law of nature shines forth."[10]

1. 2. 3 Socrates

To understand Socrates's understanding of property and wealth, we must start from what he taught about morality. The following logic is used to critique the earlier achievements of Greek philosophy in moral thought. The thinkers of earlier ages defined goodness (agathon), aptness, virtue (araté) and happiness (eudaimoné) as values. They valued as goodness what was expedient, what was useful and, what was in accordance with inclination and pleasure. Socrates, however, held that since both utility and wealth serve an objective above themselves, neither naturalism nor utilitarianism provides an answer to the question of what is good.
Socrates, however, held that since both utility and wealth serve an objective above themselves, neither naturalism nor utilitarianism provides an answer to the question of what is good. By this logic, hedonism remains the conceptual framework in which the good can be assumed, but Socrates rejects it on the grounds that the pleasurable cannot define the content of the morally good. Socrates thus rejects the idea that desire and inclination are moral categories. According to his teaching external goods are not necessary for happiness, virtue (autarchy) is sufficient.[11]

1. 2. 4 Plato

Plato's The State deals with the questions of politics and of the exercise of power and the resulting distribution of wealth. His work is divided into two parts, the first of which is a critique of the existing political system, and the second of which is a portrait of the ideal state that he envisaged.[12]
He critically analyses what he calls the oligarchic state, in which the wealthy have the exclusive right to lead and the poor are excluded from the governance. Plato's criticism of this system is that it lacks competence at the level of leadership, that it involves the conflict of constant class conflict, finally, that a person who has lost their property is not accepted by any class. Thus, they can easily become criminals. In this system, the accumulation of wealth without

[10] Plato, *Gorgias.*
[11] Tamás Nyíri, *A filozófiai gondolkodás fejlődése* (Budapest: Szent István Társulat, 1973), 64–66.
[12] Störig, *A filozófia világtörténete,* 127.

moral considerations becomes the goal of the people, which therefore leads to counter-selection.[13]

The system examined with the next critical approach is democracy. Plato writes: "I think that democracy arises when the poor prevail, and their opponents are partly killed and partly exiled, and the rest equally share constitutional rights and leading positions, and the leaders are chosen mostly by lot."[14]

In addition, the other important element in Plato's conception of democracy is freedom, which the work describes as follows: "First, citizens are free, the state is full of freedom and free speech, and anyone can do what they want." He is also critical of the distribution of wealth, since "Democracy offers such and other similar achievements, so I think it is a sweet constitution, anarchic, motley, a nice equality for equals and not for equals!"[15]

Plato, through his critical view of democracy, goes so far as to say that democracy is followed by tyranny (türannisz) and he predicts the end of tyranny with the following prophecy: "The same will not be fulfilled with the leader of the people, who, dragging down the masses who follow him mindlessly, does not restrain himself from shedding the blood of his own tribe, but summons them before the judges on false charges, as is his custom, defiling himself with blood, killing men, tasting his kinsman's blood with his shameless tongue and mouth, banishing and murdering men, insidiously promising debt forgiveness and land division - will not such a one be doomed to be devoured by his adversary, or to become a tyrant (türannisz) - a wolf from man?"[16]

The ideal state in Platonic thought rests on three pillars: the provision of food, the protection of territory and the enforcement of rational management. These three tasks also imply three distinct social orders: artisans, warriors andrulers. The main characteristic of the ideal state is that it is governed by reason and is therefore just. The leaders, after a selection that follows a protracted training which ensures the equal acquisition and measurement of abilities, and after acquiring the necessary experiential skills, attain by the age of fifty the human quality of becoming members of the ruling class. Both the leader and the warrior are expected to be free of private property. A soldier should receive only a salary for his services and should not have any private property, as this would risk him abandoning his military service. Craftsmen, however, may retain private property, but in return they may not have political influence.[17]

1. 2. 5 Aristotle

Aristotle in his works on politics and ethics deals with the issues of wealth, property and distribution. In his work entitled Politics, he writes extensively

[13] Störig, *A filozófia világtörténete,* 128.
[14] Plato, *The State.*
[15] Ibid.
[16] Ibid.
[17] Störig, *A filozófia világtörténete,* 129–131.

about property. He mainly examines the question of whether the acquisition of property can be identified with the other functions of the head of the family in the 'government of the household' or whether it is only a part of it. As a result of this analysis, he concludes that family governance and property acquisition are not the same thing, since one implies the acquisition of property and the other the use of it. It distinguishes between the different ways of life according to the way in which each person obtains their wealth, and in this way, it identifies as the main category the group of people who obtain their foodstuffs from primeval nature, and within this category, it distinguishes nomads (pastoralists), farmers, hunters and fishermen, and those who live by plunder. Separate from this category is the group of people who obtain food by barter or trade. It makes clear, however, that these categories do not coexist entirely side by side, but are often intermingled. Goods are present in nature in the form in which we experience them because this is what makes it possible for all living beings to have access to them in the quantities that meet their needs. He sees wars between people as acquisitive enterprises, which are necessarily part of human nature, and therefore legitimate. He considers the accumulation of material wealth as a useful part of the duties of statesmen and heads of families.[18]

In addition to the above, the division of property is based on the assumption that society should be divided into two groups, one of which should be the warriors and the other the peasants. The division of wealth must also comply with this social division. The land must be divided into two parts, one of which is common property and the other is private property. These two groups should be further separated into two-two categories: part of the common property should be used to provide services to the gods, and the other part for the purposes of public catering. Private property is divided according to the fact that everyone must own both land close to a town and land on the border of a town. According to Aristotle, this form of property distribution is just and equal.[19]

What is more, we must also turn to Aristotle's doctrines on the question of fairness, including the principle of distributive justice. According to this principle, the essential content of justice is that the order of distribution in the community should be right. This is called distributive justice, which involves not only the satisfaction of needs but also the attempt to optimise material inequalities. According to the principle of distributive justice, each person is entitled to what they deserve according to the excellence they have received from nature. At the same time, if the principle of distributive justice cannot be fully applied, corrective justice must be applied to ensure that services and compensation, damages and reparations are in proportion to value. Distributive justice has the effect of levelling out social inequalities, so that excessive wealth and excessive poverty balance each other out, thereby strengthening the middle class.[20]

[18] Aristotle, *Politics.*

[19] Ibid.

[20] Mihály Samu, "Az igazságosság – az alkotmányos irányítás és a társadalmi elit erkölcsi-jogi felelőssége," *Polgári Szemle* 9, no. 3–6 (2013): 190.

2. Questions of property in medieval philosophy

2. 1 Saint Augustine

In his work on the City of God (which is also considered his main work), Augustine deals with the earthly state, which he contrasts with the kingdom of God incarnate in the Church of Christ.[21] In this work there is only a passing reference to property, but two passages which make Augustine'attitude to property presentable are worth highlighting.

One such part of the work is entitled "The Saints would lose nothing by losing their earthly possessions" in Book One, Chapter X: "Having considered all this, can it be said that the zealous believers have suffered anything that has not been for their good, unless perhaps we take the apostolic saying, 'Everything works for the good of those who love God.' as empty words. They have lost everything. But have they lost faith? Or he that is rich in the sight of God, have they lost the goods of the inward man? These are the treasures of Christians, of which the apostle, who abounds in them, says: "But great is the commerce of godliness with contentment. We have brought nothing into the world, nor can we take anything out. But having food and raiment, let us be content with these things.

For they that desire to be rich fall into temptation and into many evil desires, which lead a man to destruction and death. For the root of all evil is desire, after which they have gone astray from the faith and are entangled in sorrows."

"They therefore that lost their earthly treasures in that destruction, if they had borne them as this outwardly poor and inwardly rich apostle taught them to bear; that is, if they had lived with the world as if they had not lived with it, they might have said what Job, who was sorely tempted, but not defeated, said: "Naked came I out of my mother's womb, naked shall I return to the earth. The Lord gave, the Lord hath taken away; as it hath pleased the Lord, so shall it be, blessed be the name of the Lord."[22]

The second reference on property is found in Chapter XV of Book Five, "On the earthly reward of the Romans, which they obtained from God for their good morals", which reads as follows: "For of those who do good works only that men may glorify them, thus saith our Lord Christ: "Verily I say unto you, They have taken away their rewards." And the passage concerning the second remark on property is found in chapter XV of the Fifth Book, "On the earthly rewards of the Romans, which they obtained from God for their good morals," as follows: "For of those who do good works only that men may glorify them, our Lord Christ says, 'Verily I say unto you, they have received rewards." They therefore despised their possessions for the common good, that is, for the republic and its treasury, and repressed avarice in themselves, and willingly helped their countrymen, and did not transgress the laws either by lusts of the

[21] Störig, *A filozófia világtörténete,* 177.
[22] St. Augustine, *The City of God*.

flesh or by crime: and thus by these lawful means alone have they obtained respect, glory, and a vast empire, have been praised by almost all nations, have given laws to countless nations, and even to this day occupy a glorious place in the history of nations. Hence they have no cause to complain of the righteousness of the supreme and true God: "they have taken away their rewards."[23]

2. 2 St. Thomas

In St. Thomas Aquinas's thought, justice can be assumed to be general because the virtues practised by human beings are aimed at achieving the common good, and justice enforces this. In St Thomas's thought, according to the Aristotelian tradition, the supreme virtue is justice, thesupreme end of which is the attainment of the common good.[24]

It is necessary that the ends of the community coincide with the ends of the individual, and the shortest way to achieve this is for the society to be able to promote the good and virtuous life for individuals, which must also be the end of the political community. However, Thomas also allows room for a different interpretation when he approaches the problem from the perspective of individual goal-setting and comes to the conclusion that the right conduct of life requires that the individual himself sets himself the goal of achieving a good and virtuous life, through which the level of the common good can be raised. Whichever approach one adopts, it is easy to see that justice materialises as an intrinsic relation between the common good of the community and the good of the individual. One focus of Thomas's analysis is therefore to identify the obligations of the political community that are recognised as rights on the part of individuals.[25]

In St. Thomas's system of thought, the above field of interpretation opens the door to the analysis of political justice as distributive justice. In the realization of justice according to the first idea, the distribution of property is affected in such a way that each member receives a share of what belongs to the community, i.e., a property distribution is made for the benefit of each person at the expense of the community property. In the realisation of justice according to the second idea, the individual's belonging to the community is emphasised in that it becomes the individual's task to consider what is good for him from the point of view of what is good for the community and, on this basis, to carry out the weighing which is directed towards determining the relation of the part to the whole. In Thames's philosophy, it is the universal justice that corresponds to the content of legal justice.[26]

[23] Ibid.

[24] János Frivaldszky, *A jog- és politikai filozófia erkölcsi alapjai* (Budapest: Pázmány Press, 2014), 203.

[25] Frivaldszky, *A jog- és politikai filozófia erkölcsi alapjai*, 204.

[26] Frivaldszky, *A jog- és politikai filozófia erkölcsi alapjai*, 205.

Legal justice is a virtue in itself, namely, the virtue by which the individual owes a debt to the political community, and the immanent conceptual element of this debt is that it is directed to the common good. Legal justice is a specific virtue that the individual owes to the political community under the law, the conceptual element of which is an orientation towards the common good. As a result of grasping the content of the common good, we can say from the other side that the common good is what the state owes to the community in its law-making. We can therefore conclude from this that the "specific object of legal justice is the common good", which must be pursued in the distribution of wealth.

However, the concept of legal justice has further nuances beyond the above. The additional function of legal justice is to guide the definition of the content and the way in which the individual, as a member of the community, is bound to fulfil his obligations in the spirit of the collective common good, in order to help the community as a whole to achieve its essential purpose, that is, the realisation of the common good. The common good therefore implies, in its content, the right of collectivity towards the individuals who constitute it, and in this sense, it defines the latter's obligation towards collectivity. To sum up, the content of the individual's contribution to the common good is the individual's debt to the community, the extent of which is the law that exhausts the concept of the common good in its content. The measure of the legal justice achieved by the individual is the level at which the individual obeys the law, and this level is the level of equality.[27]

In addition to legal justice, which focuses on the common good, there is also partial justice, but it is applied in the relations between individuals. Partial justice, as we shall see shortly, therefore operates in the relation between the part and the whole. For two relations of the part are conceivable: on the one hand, the relation of the part to the part, and on the other hand, the relation of the part to the whole. In the relation between the part and the part, mutual justice prevails, while in the relation between the part and the whole, distributive justice exerts its influence. We can experience distributive justice in practice in the behaviour that takes place when an individual fulfils his obligation to pay taxes, for example. The other realm where distributive justice is realised is in the reality where individuals benefit from the distribution of public goods. In Thomas' teaching, distributive justice is equitably realized when money, offices and all other things are distributed in proportion to the social dignity of the individual.[28]

[27] Ibid.

[28] Frivaldszky, *A jog- és politikai filozófia erkölcsi alapjai*, 206.

2. 3 Duns Scotus[29]

Duns Scotus, in his Opus Oxoniense, examined a number of issues relating to property, wealth and trade. It is perhaps not too much to say that Scotus is the originator of scholastic economic philosophy. Scotus is often referred to as 'the best Franciscan answer to Thomas'. Due to his early death, he wrote only one work, the Opus Oxoniense, already cited.

The text is presumably based on lectures given at Oxford in 1301, and the format follows the usual format of the period, i.e. a series of questions followed by answers which are shown to be unsatisfactory. The Ordinatio deals mainly with theology and philosophy.

Scotus introduces his own theory of property by asking the question, "Is the repentant thief obliged to return the stolen property to its owner?" This may seem a rather technical question, and not a very promising basis for a broad discussion of economic analysis. Nevertheless, Duns Scotus builds his theory of property rights on this basis.[30] [31]

Scotus begins by listing a number of arguments against the need to return stolen property. His first argument is purely theological: restitution is not part of repentance, so that the repentance of the thief does not require that the thief atone for his sin by returning the stolen property. He then goes on to mention a number of largely economic considerations, such as the impossibility of restitution (if the victim is dead) or the high costs of compensation, which he considers unnecessary. Here, however, the logic of the argumentation followed so far is broken, since it does not continue to argue that the recovery is unjustified but starts to explain the origin of the property right. The usual starting point in the philosophical thinking of the period was that the natural and divine law which prevailed in a state of innocence made it possible for the goods to serve as objects of joint ownership. Accordingly, it was agreed that in this state of humanity private property as such did not exist.

Duns Scotus argues that good common sense dictates that human behaviour is to use things in ways that they contribute to a peaceful and decent life and ensure that the necessities of life are met. In Scotus's mind, this goal is more easily achieved through the common use of things than through the individual possession of property by each person. He then turns to the argument, familiar

[29] Robert I. Mochrie, "Justice in Exchange: The Economic Philosophy of John Duns Scotus," *Journal of Markets & Morality* 9, no. 1 (2006): 35–56.

[30] In his Scotus Oxoniense, besides outlining the theory of property rights, he briefly discusses the nature of exchange, justifies the prohibition of usury, and makes a considerable achievement in expounding his own theory of sovereignty and social contract theory.

[31] It is also worth noting that in Scotus's time there was a fruitful debate about the exchange of goods, which raised the question of how a Christian merchant could be saved. This was problematic since St Augustine used the authority of Scripture to condemn all merchants. Yet, the activities of traders were clearly beneficial to societies. However, the growing prosperity over the century made it impossible to question the usefulness of trade.

from Aristotle's Politics, that property rights are essential to prevent the oppression of the weak. He argues that without such rights, evil and greedy people could take more than they need and use violence to gain control over the common goods.

Scotus's second conclusion, however, is an important innovation: after the Fall, private property becomes permissible because the Fall means that the natural law is revoked.[32]

Duns Scotus makes the important point that, following the repeal of the law of natural law (which also provides an opportunity for the acquisition and sharing of communal property), there has been no distribution of wealth either through divine or natural law. From this he deduces the claim that private property is rooted exclusively in positive law. This idea is entirely consistent with the Franciscan rejection of private property and with the claim that the enjoyment of property sufficient to satisfy needs is the only good. Moreover, from this argument and the subsequent arguments dealing with the source of the fairness of exchange, it follows that if we accept the premise that the initial allocation of property was not equitable - in the sense that it was not approved by some community agreement - then the conclusion that the allocation of property is not equitable must follow from this proposition.

Duns Scotus takes the view that property rights should be defined as traditional rather than innate rights, which in turn raises the question of the authority of positive law. Scotus argues that for positive law to be just, it must be promulgated by a legislator who is capable of applying the law, that is, who has both prudence and authority. Prudence consists in the legislator's taking into account, when applying the law, the fact that he himself is not independent of the law he has made and applies, while authority consists in the capacity to oblige the community to obey the law. This seems to be a traditional scholastic argument, which closely follows the teaching of Aristotle.

Duns Scotus then distinguishes authority according to whether it is paternal (if it is only within the family) or political (if it is within the whole city), and political authority is either for an individual or for a community.

As one of the forerunners of social contract theory, Scotus argues that political power to distribute wealth can only be legitimately acquired by common consent or choice, and that this power can only be just if people voluntarily submit to it.

At this point, Scotus once again breaks with the logic of his argument, for he does not carry this idea further by continuing to weave the social contract theory, but takes a new direction and continues to develop the theme by exploring the conditions that must exist for the transfer of property to be just.

He introduces the line of thought he takes here by assuming an initial just distribution of property. This assumption is only satisfactory as long as it is understood as rooted in historical experience. He argues, for example, that Noah

[32] In the minds of earlier scholastic writers, however, private property is either the result of a transformation of natural law or, as St Thomas Aquinas saw it, it exists as a complement to natural law.

used his patriarchal authority to divide the land among his sons, and that Abraham and Lot agreed to divide the property. Scotus thus argues that any state or community would seek an initial division of property, which would probably take the form of 'everything that is not claimed goes to the first possessor'.[33]

At the beginning of his treatise on the possible ways of transferring property rights, Duns Scotus claims that there are cases in which the public authority can transfer property rights by applying a just law. Such transfers will be fair if the initial and final distribution of property is fair. From this point of view, and relying on ecclesiastical law, Duns Scotus argues in favour of a prescription of the right of ownership of abandoned property, if only to avoid disputes between the original owner and the putative owner who has taken possession of it. Perhaps the important point here is that Scotus takes the position that one who abandons their property is culpable because such abandonment "hinders peace". The rationale for such transfers, moreover, is that the ruler then acts with the authority of the wider community, so that the granting of rights in this direction can be seen as being assumed by the community and as such can be attributed to the community's consent to the original property division. Such an argument seems completely unacceptable, however, if we accept that dominion is not an absolute right, but only a conditional right when exercised with the consent of the community. The exercise of property rights with the consent of the wider community can only be considered just if it is accompanied by the articulation of an obligation to the right grantor that such property should be used in such a way as to bring both private and social benefits.

[33] It should be noted that similar reasons were used by European colonialists in the conquest of the United States of America until the 19th century, when land ownership (dominium) was established by various informal and formal means. These reasons, however, do not take away from the usurpations exercised against indigenous peoples. However, as we shall see, Duns Scotus understood dominium to mean responsibility for use and not simply the taking possession of a property.

Principles of European Family Law Regarding the Divorce by the Public Notary in Hungary

BÉLDI-TURÁNYI, NOÉMI*

ABSTRACT *Thanks to the principles of the Commission on European Family Law on divorce law, extrajudicial divorce by mutual consent is becoming increasingly widespread in many European countries. The possibility of introducing this legal institution was also raised in Hungary in 2012 during the codification of the new Civil Code, but was ultimately rejected. The aim of this study is to examine the possibility of introducing divorce by the public notary as a possible alternative to divorce by mutual consent, in the light of the principles of European Union divorce law as well as the arguments and counter-arguments raised during the codification process.*

KEYWORDS *extrajudicial, (administrative) divorce; divorce by the public notary, Hungarian codification*

Introduction

Over the past few decades, divorce has been on the rise across Europe, especially divorce by mutual consent.[1] This is due to the fact that, as a result of the codification wave of the 21st century, an increasing number of EU Member States have decided to introduce the possibility of extrajudicial divorce by mutual consent (administrative divorce) into their national legal systems. The advantage of divorce by mutual consent is that it simplifies the procedural rules, since if the parties agree on all the issues related to the divorce, the court eliminates the need to conduct the time-consuming, energy-intensive and very costly evidentiary proceedings related to the breakdown of the marriage.
Looking at the legislation of the Member States, the legislature has provided for the possibility of extrajudicial divorce through two additional forums: the administrative procedure of the civil registry office and the procedure of a notary. In the following, I intend to examine specifically the introduction of the possibility of divorce by the public notary in the Hungarian context.

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[1] Emilia Weiss, "A családjogi kodifikáció elvi kérdései," *Közjegyzők Közlönye*, no. 1 (2007): 7–8.

1. The spread of divorce by mutual consent in the European Union

Divorce at the request of one or both parties is now recognised in all Member States, but this was not always the case. Until the late 1940s in Central and Eastern European countries and until the late 1960s in Western European countries, the principle of the indissolubility of marriage was maintained, allowing divorce only in a limited number of severe cases. Today, the right to divorce applies in all EU countries. Malta was the last country to abolish the principle of indissolubility, in 2011.[2]

2. Principles of the Commission on European Family Law on the law of divorce

The Commission on European Family Law was set up to elaborate, on the basis of an in-depth analysis of the legal practices of the Member States, the "Principles of European Family Law" which, on the one hand, promote the harmonisation of European law and, on the other hand, assist the legislatures of the Member States in the process of codifying family law.[3] In 2004, the Commission drafted the so-called principles on divorce,[4] which are structured in three main chapters: the first chapter contains the general principles, followed by chapters two and three, which deal with the two types of divorce: divorce by mutual consent and divorce without the consent of one of the spouses.

2. 1 The basis for divorce and the competent body

The general principles include the following: "divorce should be granted by the competent authority which can either be a judicial or an administrative body."[5] The Commission on Family Law has left it to the legislatures of the Member States to lay down procedural rules on divorce and to decide whether a body other than the judicial body should have the power to deal with divorce. The Commission justified its position by pointing out that in some exceptional cases the judicial body acts as a quasi-administrative body in the proceedings, in

[2] Orsolya Szeibert, *A házasság Európában a jogegységesítő törekvések tükrében* (Budapest: ELTE Eötvös Kiadó, 2014), 96.

[3] Szeibert, *A házasság Európában a jogegységesítő törekvések tükrében,* 15.

[4] The principles are available in Hungarian: https://ceflonline.net/wp-content/uploads/Hungarian-translation-of-CEFL-Principles-on-parental-responsibilities.pdf and in English: https://ceflonline.net/wp-content/uploads/Principles-English.pdf

[5] Principles of divorce law: Articles (2) and (3) of Principle 1:2.

particular when it approves the parties' consent to the divorce and the settlement of ancillary matters.[6]

2. 2 Divorce by mutual consent

The Commission on Family Law included divorce by mutual consent in the first place in order to emphasise the primacy of the parties' right of disposal and to facilitate an amicable settlement between the spouses.[7] Divorce is based on mutual consent. The Commission has defined the concept of mutual consent and its framework, but has left it to the legislatures of the Member States to work out the details. Mutual consent refers to: when the spouses jointly apply to the competent authority for a divorce, but it is also mutual consent when one of the spouses applies for the dissolution of the marriage with the acceptance of the other spouse. The Commission has identified two "protective instruments" to protect marriage: a *reflection period* and a specific period of *separation*.
The *reflection period* is intended to make the divorce more considered, but Principle 1:5 states that there is no need to use this protective function if the spouses have no minor children and have agreed on the ancillary matters. Principle 1:4 emphasises that *factual separation* is not a condition for divorce by mutual consent, but if the spouses have been separated for at least six months, no reflection period is required. A longer period of separation is important because it proves the actual and irretrievable breakdown of the marriage.
As a general rule, the judicial or other authority is not obliged to examine the agreement between the spouses, thus ensuring the spouses' right to self-determination. The main reason for including a procedural guarantee was that neither the legislature nor the judicial or other authority administering the law intended to interfere unnecessarily in the everyday life of the spouses. In addition, an official review of the agreement on property matters would also seriously infringe the spouses' right to self-determination. In contrast, if the divorce involves a minor child, the competent body (judicial or other authority) is obliged to review the agreement in the best interests of the child.

3. The emergence of extrajudicial divorce in Europe

As a result of the codification wave of the 21st century, an increasing number of EU Member States have decided to introduce the possibility of extrajudicial divorce by mutual consent into their national legal systems. Looking at the legislation of the Member States, the legislature has provided for the possibility of extrajudicial divorce through two additional forums: the administrative

[6] Katharina Boele-Woelki, Frédérique Ferrand, Cristina González Beilfuss, Maarit Jänterä-Jareborg, Nigel Lowe, Dieter Martiny, and Walter Pintens, *"Principles of European Family Law Regarding Divorce and Maintenance Between Former Spouses,"* (Cambridge – Antwerpen - Portland, 2013), 23.
[7] Szeibert, *A házasság Európában a jogegységesítő törekvések tükrében,* 120.

procedure of the civil registry office and the procedure of a notary. In the following, I present the main provisions of the Romanian, Spanish and French models.

3. 1 The Romanian model

In Romania, the legal institution of extrajudicial dissolution of marriage was introduced by the Civil Code No. 287/2009 (hereinafter: "Codul Civil"), adopted in 2009, and by No. 202/2010 on certain measures to accelerate disputes resolution.[8] The Romanian legislature has provided for the possibility of divorce by mutual consent in three ways: in addition to the judicial procedure, before a notary and in the administrative procedure before the representative of the competent civil registry office.[9] Part of the Romanian legislature's aim was to achieve a faster and more efficient procedure for divorce by mutual consent and to reduce the burden on the courts.[10]

Under Romanian law, spouses may apply for an extrajudicial divorce at the civil registry office or notary public at the place of marriage or the last common place of residence. In the case of a dissolution of marriage before a notary, the spouses may submit the application for divorce jointly and in person, but they must appear again before the notary at a later date set by the notary to confirm the application and declare their intention to dissolve the marriage. The notary is obliged to grant the parties a reflection period of 30 days from the date of receipt of the application, which may not be waived or shortened.[11]

Additional conditions for the procedure before the notary are determined by the involvement of a minor child: if the spouses do not have a minor child, the notary examines the parties' capacity, their free and independent will and their agreement on ancillary matters.[12] In the case of a minor child, another special condition is that there must be a joint agreement on ancillary matters relating to the minor.[13] Provided that the necessary conditions are met, the notary will grant the request for divorce, record the agreement of the parties in a deed[14] in accordance with the legal requirements and issue a certificate of dissolution of the marriage, which has constitutive effect and, once issued, the marriage is

[8] Published in "*Monitorul Oficial*" No. 714, October 26, 2010. https://www.cdep.ro/pls/legis/legis_pck.lista_mof?idp=20356.

[9] 375 § – 376 § of the Codul Civil.

[10] Nicosur Crăciun, "The Divorce by the Public Notary," *Proceedings. Bulletin of the Transilvania University of Braşov, Series VII: Social Sciences and Law*, no. 2 (2014): 189.

[11] Section 376 paragraph (1) of the Codul Civil.

[12] Boglárka Kárándy, "Házasság felbontása közjegyző előtt a román jogban," *Közjegyzők Közlönye*, no. 1 (2020): 79.

[13] Daniela Negrila, *Divortul prin procedura notariala Studii teoretice si practice* (Bucuresti: Universul Juridic, 2014), 60–61.

[14] Section 376 paragraph (4) of the Codul Civil, and 36/1995. s. Act Section 137 paragraph (3).

considered dissolved.[15] If these conditions are not met, the notary will reject the application, against which the parties have no remedy, and they can then apply to the courts for a divorce.[16]

3. 2 The Spanish model

The Spanish legislature, through Law 15/2015 on "non-contentious proceedings", introduced the possibility of dissolution of marriage by mutual consent before a notary, alongside judicial proceedings, in order to reduce the burden on the courts and accelerate proceedings. The parallel jurisdiction of the court and the notary was intended to give the parties a choice of forum. However, the legislature considered it advisable to keep the procedure within certain limits.[17]

Under the Spanish legislation, in order to qualify for the notarial procedure, the spouses must both have legal capacity; they must request the dissolution of the marriage by mutual consent; they have to have agreed on the ancillary matters relating to the dissolution; and they must not have a minor child or an adult child with limited legal capacity.[18] Therefore, if one of these conditions was not fulfilled, the spouses could only resort to the possibility of judicial dissolution.

Under the Spanish Civil Code (hereinafter: "Código Civil") and the Spanish Public Notaries Act, either spouse may apply for a divorce within three months of the marriage[19] to the notary of the last common place of residence or the place of residence or habitual abode of one of the spouses.[20]

The application for dissolution of marriage must be accompanied by an agreement or a draft agreement on the settlement of ancillary matters relating to the marriage, as well as the marriage certificate.[21] The notary must summon the parties within three days of receiving the application submitted in accordance with the law. The parties must appear in person and together before the notary and declare their intention to dissolve their marriage.

In the dissolution procedure, the Spanish legislature imposes serious obligations on the participants in the procedure: it requires the mandatory and active participation of legal representatives, including the facilitation of the conciliation between the parties and the drafting of the agreement[22] while the role of the notary is to control the legality of the parties' agreement, verifying the parties' capacity and their consensual declarations of intent, which is fully

[15] Negrila, *Divortul,* 312.
[16] Section 378 paragraph (2) of the Civil Code.
[17] Tamás Molnár, "Az egyezségi eljárások szerepe a közjegyzői nemperes eljárásokban," *Magyar Jog*, no. 9 (2018): 508.
[18] Article 81 and 86 of the Código Civil.
[19] Article 82 of the Código Civil.
[20] Article 54 of the Spanish Notary Law.
[21] Article 82 of Código Civil.
[22] Diána Klisics, "A házasság felbontása közös megegyezés alapján. A közjegyző lehetséges szerepe," *Családi Jog*, no. 3 (2020): 53.

compatible with the activity required in the context of the drafting of the deed.[23] If the conditions laid down by law are fulfilled, the notary shall record the fact of the dissolution of the marriage in a deed which shall have constitutive effect.
Spanish statistics show that out of a total of 101,294 divorces in 2016, 93.7% were handled by a court, while only 6,381 cases, that is 6.3% of the annual total, were carried out by a notary.[24] Other significant differences can be found in the length of the procedure: while the court procedure took an average of four months, the notarial procedure was completed in an average of one week.[25]

3. 3 The French model

In France, a reform law on the dissolution of marriage came into force in 2017,[26] transferring the procedure for divorce by mutual consent from the jurisdiction of the courts to the exclusive jurisdiction of the notary.[27]
Under the new provisions, the spouses must jointly request the dissolution of the marriage, be of full legal capacity and agree on the ancillary matters, in particular those relating to minor children, in order to initiate proceedings before a notary. The procedure is guaranteed by the obligation for spouses to have their own legal representative, thus ensuring the legality of the procedure and the effective representation of the interests of both parties.[28] If the necessary conditions are fulfilled, the spouses, with the help of their legal representatives, draw up a draft agreement on the dissolution of the marriage.[29]
Under the French legislation, the parties are given a reflection period of 15 days after being served with the draft agreement, so that the spouses may sign it only after this period has elapsed. The agreement, signed by the parties and countersigned by the lawyers, is sent to the competent notary, who may not examine the content of the agreement but must check that the procedural conditions have been met, in particular the reflection period and the parties' capacity to act.[30] If the agreement meets the conditions set out in the law, the

[23] Gábor Juhász, "A házasság felbontása közjegyző előtt Spanyolországban és egyes latin-amerikai országokban," *Közjegyzők Közlönye*, no. 6 (2018): 27.
[24] Szabolcs Szente, "Szekcióülés I. összefoglaló: Közös megegyezésen alapuló bontás közjegyző előtt," *Notarius Hungaricus*, no. 2 (2018): 41.
[25] Molnár, "Az egyezségi eljárások szerepe a közjegyzői nemperes eljárásokban," 508.
[26] Law No. 2016-1547 (November 18, 2016) on the Modernization of the Justice in the 21st Century [Original reference: LOI n° 2016-1547 (du 18 novembre 2016) de modernisation de la justice du XXIe siècle].
[27] Frédérique Ferrand, Laurence Francoz Terminal, "Beträchtliche Neuigkeiten im französischen Familienrecht 2016–2017," *Zeitschrift für das Gesamte Familien Recht*, no. 18 (2017): 1456–1459.
[28] Margaret Ryznar, and Angélique Devaux: "Voila! Taking the Judge Out of Divorce," *42 Seattle University Law Review* 161, (2018): 164.
[29] Article 229 of the French Civil Code (Article 229 du Code Civil).
[30] French Civil Procedure Act. 1144-1148, articles contain the procedural rules for demolition by mutual agreement before the notary [Original reference: Article 1144-1148. du Code de procedure Civile].

notary will issue an enforceable deed or certificate.[31] The agreement has the same legal effect as a court judgement.
The advantages of a French-type dissolution of marriage before a notary include a quick and simple divorce without the need for litigation, the parties only need to sign an agreement prepared by their legal representatives, there is no need to appear in person before a notary and there are no declarations to be made concerning the marriage. However, despite the many advantages of this procedure, some criticisms have been made on the part of the notaries: the absence of a personal hearing of the spouses reduces the notary's role to that of approving or rejecting the agreement, and the notary does not have a broad discretionary power, since the notary dissolves the marriage solely on the basis of the documents presented.[32]
On the basis of the foreign examples cited, it can be concluded that the arguments in favour of the introduction of a dissolution of marriage before a notary have been all in favour of reducing the workload of the courts and ensuring a quick and efficient divorce from the spouses' point of view. As a result of the gradual simplification of procedural rules, national legislatures have given priority to the right of the parties to dissolve the marriage by making it possible to avoid the evidentiary procedures that are typical of the judicial route if they apply for divorce by mutual consent and reach agreement on the ancillary matters. The rules on the dissolution of marriage before a notary provide the parties with a wide scope of discretion, which undoubtedly reinforces the contractual nature of divorce.

4. The law on divorce in Hungary

Upon the enactment of Act V of 2013 on the Civil Code (hereinafter: the Civil Code), which entered into force on 15 March 2014, the Hungarian legislature confirmed the principle that *only a judicial body may dissolve a marriage*, and at the same time, declared two types of divorce: *divorce by mutual consent* and *divorce by non-consensual*, so-called *"factual dissolution"*. Practical experience shows that the vast majority of divorce cases are resolved by mutual consent.

4. 1 Divorce by mutual consent in Hungarian law

According to the Civil Code, the court may dissolve the marriage without examining the grounds and circumstances leading to the breakdown of the marriage, if the parties request it on the basis of their final, voluntary and uncontested mutual agreement.[33] In this way, the regulation expresses the

[31] Orsolya Szeibert, "A gyermek helyzete és jogai a házasság felbontása iránti új típusú eljárásokban," *Családi Jog*, no. 4 (2019): 38.
[32] Kinga Kultsár, "A házasság felbontása közjegyző előtt Franciaországban," *Közjegyzők Közlönye*, no. 3 (2021): 69.
[33] Paragraph (2) of Section 4:21 of the Civil Code.

autonomy of the will of the parties, since the basis for the dissolution of the marriage by mutual consent is the consensual will of the parties. Nevertheless, the legislature has sought to ensure that divorces are more considered by providing various procedural guarantees to ensure the constitutional protection of marriage. The procedural guarantees of divorce law include: *personal hearing* of the parties, the *attempt at reconciliation,* the *judicial discretion*, and providing a *reflection period*.

4. 2 Procedural guarantees in divorce proceedings

As a general rule, in divorce proceedings, the appearance of the parties and their *personal hearing* by the court is mandatory, even if the party is acting through a legal representative or if the court has extensive knowledge of the facts based on the preparatory documents. The personal hearing of the parties is one of the most important parts of the divorce proceedings, as it allows the court to ascertain the actual will of the parties, their true intentions and any other needs they may have in relation to the marriage. The court also attempts to *reconcile the parties* at the hearing.[34]

In the case of divorce by mutual consent, the *judicial discretion* is limited to examining the final and uncontested expression of the parties' will. In order for the court to dissolve the marriage bond, it is essential that the parties reach a consensus on any ancillary matters that may arise.[35] An agreement on ancillary matters confirms that the parties' intention to divorce is serious and deliberate, that a final decision has been reached on the significant issues affecting them,[36] and that there is no suspicion of coercion or threats by either party.

As can be seen, the Hungarian procedural rules give priority to respecting the spouses' autonomy of decision and the court is no longer required to examine whether the spouses' agreement is in the reasonable interest of the parties.[37] In this way, the legislature gives the parties considerable freedom to exercise their right to self-determination and the opportunity to make their own responsible decisions.[38] At the same time, the legislature has made it a requirement for the court "not to support" the conclusion of ill-considered settlements.[39]

A further "brake" on the divorce process was the granting of a *reflection period*, a basic requirement repealed by the legislature as of 1 September 2022.[40] Under

[34] Paragraph (2) of Section 456 of Act CXXX of 2016 on the Code of Civil Procedure (hereinafter: CCP).
[35] BH 1976.6.260.
[36] Orsolya Szeibert, *Családi jog* (Budapest: ELTE Eötvös Kiadó, 2015), 79.
[37] Márta Nagy, "A házasság megszűnése," in *Internetes Jogtudományi Enciklopédia*, eds. András Jakab, and Balázs Fekete. http://ijoten.hu/szocikk/a-hazassag-megszunes (2018) Paragraph [29].
[38] Márta Nagy, "*A házasság megszűnése*," Paragraph [23].
[39] Ottó Csiky, "A házasság felbontása," in A *családjog kézikönyve*, ed. András Kőrös, (Budapest: HVG-ORAC Kiadó, 2007), 83.
[40] Act XXIV of 2022.

the previous legislation, the legislature made at least two hearings compulsory, with the exception of the following cases: when the personal hearing of one of the parties is not compulsory or when the parties do not have minor children.[41] However, the new legislation introduced a general rule of divorce in one hearing, thus eliminating the reflection period in general.

4. 3 Hungarian efforts to introduce divorce by the public notary

According to Hungarian legislation, the dissolution of marriage is exclusively a judicial matter, but both legal literature and the legislature have already raised the idea of introducing divorce by the public notary, and the possibility of doing so was elaborated in the Civil Code No. T/5949 draft proposal, which was adopted during the codification of the Civil Code but did not enter into force.
Under the proposal, marriage could be dissolved by the public notary if three conjunctive conditions were met:

- If the spouses apply for divorce jointly and without any external influence;
- They have no common minor or dependent children, and;
- They have agreed in a notarial deed or in a private deed countersigned by a lawyer on the ancillary matters required by law.[42]

The legislature justified the introduction of this legal institution by stating that the procedure is suitable for facilitating the rapid and conflict-free dissolution of marriages and that the will of the parties is to be guaranteed by the lawyer or notary acting as an intermediary.[43] A number of criticisms have been made of the proposal - which are discussed in more detail in the final chapter of the paper - and the legislature has eventually rejected the introduction of the possibility of divorce by the public notary.
The idea of introducing the procedure was raised again in 2018 in the context of a referendum initiative, although the proposal was rejected by the National Election Commission (NEC).[44] However, in the context of a review procedure, the Curia found that the referendum question complied with the clarity requirement of the law and thus validated the question, which was worded as follows *"Do you agree with the possibility of a public notary to dissolve the marriage?"*[45]
The reason given by the NEC for its negative decision was that the wording of the question was not clear to voters and the legislature and in fact could be misleading to citizens. According to the NEC, it is not clear from the question what kind of regulation the legislature will introduce if the referendum is successful: would only notaries be entitled to carry out the procedure or would

[41] Section 196 of the CCP, Paragraph (5) and (6) of Section 456 of the CCP.
[42] Uniform proposal No. T/5949/414 on the Civil Code: Paragraph (1) of Section 3:25.
[43] Diána Klisics, "A házasság felbontása közös megegyezés alapján. A közjegyző lehetséges szerepe," *Családi Jog*, no. 3 (2020): 52.
[44] Decision No. 1026/2018 of the National Election Commission.
[45] Decision No. Knk.VII. 39.031/2018/2 of the Curia.

there be a parallel competence? Furthermore, the question suggests that it is up to the parties to decide whether to apply to the court or the public notary for the dissolution of their marriage, regardless of whether there is a dispute between them.
In the context of the review, the Curia also examined the fulfilment of the two-way requirement of clarity in referendums, both for the voters and the legislature. In the end, the legislature concluded that the question was clear to the voters as it concerned the introduction of divorce by the public notary, indicating that the initiative did not seek to make this type of divorce exclusive in the future.
From the point of view of legislative clarity, the Curia concluded that a successful referendum presents the legislature with an obvious task: to define the rules for the dissolution of marriage by the public notary, which can be done in several ways, but did not wish to elaborate on these possibilities.
Based on all these reasons, the Curia approved (validated) the referendum initiative. In the end, the initiative had failed because the initiator could not meet the requirements of the legislation in force: to launch the referendum, the initiator was required to collect at least 200,000 signatures within 120 days.

5. Examining the introduction of divorce by the public notary

It is the task of the legislature to decide which body has exclusive or concurrent competence to dissolve a marriage. The Commission on European Family Law has explicitly stated among its principles that a marriage may be dissolved by a judicial or other administrative body.[46] There are two models for dissolving a marriage: the *judicial route*, in which the state courts are empowered to dissolve the marriage bond, and the *extrajudicial route*, in which the dissolution is carried out by a state authority or an administrative body.[47]

5. 1 Reasons for introducing divorce by the public notary

Based on the experience of international legal practice, it can be stated that extrajudicial divorce (by the public notary or registrar) is predominantly used as a subsidiary to the judicial route. However, the question arises as to what criteria were taken into account by the legislatures of the Member States when deciding to introduce extrajudicial divorce? In the following, I intend to examine the arguments in favour of introducing divorce by the public notary into the legal system.

[46] Orsolya Szeibert, "A házasság felbontása: az Európai Családjogi Bizottság bontójogi elvei és a magyar bontójog," in *Európai jogi kultúra: megújulás és hagyomány a Magyar civilisztikában*, eds. Ádám Fuglinszky, and Annamária Klára (Budapest: ELTE Eötvös, 2012), 47–48.
[47] Szeibert, *A házasság Európában a jogegységesítő törekvések tükrében*, 97.

In Europe, the dissolution of the marriage bond has been a major problem in recent decades, and even where national laws have allowed parties to divorce, the process has proved to be lengthy and complicated. The legislature has also recognised the systemic problem, thus by creating mutual consent as an independent sui generis ground for divorce and by gradually simplifying the procedural rules, it has sought to ease the situation of the parties involved in divorce, but there is still an expectation on the part of society to further develop the rules of divorce law and to simplify and speed up divorce by mutual consent.[48]

In addition to the introduction of procedural rules to facilitate divorce, the diversion of divorce proceedings from the judicial route in order to *reduce the burden on courts* has been a relevant aspect of international legal practice. The possibility of regulating divorce by mutual consent through a notarial procedure - by analogy with the dissolution of a registered partnership - has already been raised at a theoretical level in the legal literature.[49] Since the parties are seeking the dissolution of their marriage by mutual consent, the proceedings clearly avoid any adversarial character. In the proceedings, the court only examines the agreement reached by the parties and, if it is in accordance with the law, dissolves the marriage by approving the agreement without an evidentiary hearing.[50]

From the spouses' point of view, an additional requirement is that an approved agreement should have the same legal effects as a court judgment. Among the notarial non-litigious proceedings, one of the main advantages of a mutual agreement approved by the public notary in probate proceedings and in the dissolution of a registered partnership is that it can have the *effect of a judgment* (i.e., substantive res judicata) under the law.[51]

On the basis of the substantive legal force, on the one hand, both the judicial or other authority and the spouses are bound by the decree approving the agreement and, on the other hand, a judgement, "res iudicata", is made, which prevents the same parties from bringing an action against each other on the same right arising from the same facts or from contesting a right already decided in the judgement.[52]

Another argument in favour of the introduction of divorce by the public notary is the *right of the parties to choose the competent forum.* According to the

[48] Diána Klisics, "A házasság felbontása közös megegyezés alapján. A közjegyző lehetséges szerepe," 56.

[49] Mihály Pulinka, "A közjegyzőség új hatáskörei vagy az új közjegyzőség hatáskörei? – Jubileumi visszatekintés a közjegyzői hatáskörök változásaira," *Közjegyzők Közlönye*, no. 4 (2017): 48.

[50] Judit Molnár, "Gondolatok a házasság egyező akaratnyilvánításon alapuló felbontásáról," in *Ami a múltból elkísér. A családjogi törvény ötven éve,* ed. Tamás Gyekiczky (Budapest: Gondolat – Debreceni Egyetem, 2005), 129–132.

[51] Szilvia Csuporné Kukucska, "A közjegyző előtti egyezségi eljárás 1. rész," *Közjegyzők Közlönye*, no. 4 (2018): 63.

[52] Attila Gábor Lerner, "Az új közjegyzői nemperes eljárás: a közjegyző előtti egyezségi eljárás," *Közjegyzők Közlönye,* no. 6 (2018): 55–56.

proposal that emerged during the codification of the Civil Code, the legislature would have left the choice of forum to the discretion of the spouses by creating a parallel jurisdiction, provided that the conditions for divorce by the public notary were fully met. Consequently, the judiciary would continue to have exclusive jurisdiction in cases where the parties do not intend to divorce by mutual consent, namely where there is a dispute between the parties or where the marriage involves a minor child. The parties' choice would therefore be limited to a narrow range of cases where the conditions are met.

5. 2 Arguments in favour of maintaining the exclusivity of the judicial route

In the course of the codification of the Civil Code, the concept of divorce by the public notary gave rise to a great deal of debate among the legislators and legal practitioners, and at the same time several objections were raised against the introduction of this legal institution, which led to the rejection of this possibility in Act CXX of 2009.

The arguments in favour of rejecting this legal institution included the fact that the *judicial route was based on solid legal traditions* which did not justify the elaboration of further alternative options, and that the principle of constitutional protection of marriage and the family implied the *preservation of the exclusive jurisdiction of the judiciary in divorce matters*.[53]

Another objection was that, although the legal institution had proved to be functional and effective in international legal practice,[54] its incorporation into the Hungarian legal system as a non-litigious proceeding was not justified because it was not suitable for reducing the burden on the courts and for further speeding up and simplifying the current procedure.[55]

In criticising the concept of divorce by the public notary, the Expert Proposal specifically highlighted the *lack of a guarantee of broad judicial discretion.* Since only a judicial body is empowered to verify the spouses' declaration of will to dissolve their marriage, to agree on ancillary matters and to determine whether the marriage is in fact irretrievably broken,[56] this judicial discretion is currently not available in the context of notarial non-litigious proceedings.[57]

[53] Diána Klisics, "A házasság felbontása közös megegyezés alapján. A közjegyző lehetséges szerepe," 52.

[54] Taking into account the Spanish, Romanian and French regulations.

[55] Lajos Vékás, "Bírálat és jobbító észrevételek az új Ptk. kormányjavaslatához," *Magyar Jog* (2008), 580–581.; *Szakértői Javaslat az új Polgári Törvénykönyv tervezetéhez*, ed. Lajos Vékás (Budapest: Complex Kiadó, 2008), 414.

[56] Andrea Nagy, "A házassági jog kodifikációi" (PhD diss., University of Miskolc, 2012), 184.

[57] Gábor Jobbágyi, "A Kormány Ptk. tervezetéről," *Magyar Jog*, no. 2 (2009): 100–101.

6. Conclusions

The possibility of bringing divorce by mutual consent under the jurisdiction of the public notary was first raised by the Commission on European Family Law. It justified the alternative of extending jurisdiction by arguing that in simple cases, where the spouses have no minor children and have agreed on both the divorce and the ancillary matters, *the court fulfils an essentially administrative role* in approving the mutual agreement and dissolving the marriage, a role that other administrative or public bodies may be able to perform. It is important to stress that the position on the principles of divorce law, including the extension of jurisdiction, is only a recommendation, since the Commission has left it to the legislatures of the Member States to decide whether they intend to introduce the possibility of extrajudicial divorce and, if so, in what framework and under what procedural rules they would allow it. Similarly, the principles of divorce law do not establish mandatory guarantees to be applied in divorce proceedings in order to protect the institution of marriage and the parties.

The foreign models presented in the study clearly reflect an openness to extrajudicial dissolution of marriage. In order to protect the legal institution of marriage, a number of positive guarantees have been included in the legislation of the Member States. A common feature of the foreign examples were the requirements as preconditions for the procedure, such as the joint agreement on the dissolution of the marriage and ancillary matters, and that the parties should not have any minor children in common. The fact of a mutual agreement between the spouses, which means that there is essentially no dispute between the parties, can undoubtedly be effectively included in the scope of the notarial procedures and the notary's control of the legality is fully equivalent to the activity carried out in the context of the drafting of the deed. In order to ensure a quick and efficient procedure before the notary, foreign legislatures have set very short deadlines, which the notary must strictly control: the notary must give the parties a reflection period of 3 days in Spain, 15 days in France and 30 days in Romania. Similarly, the requirement for a lawyer in the Spanish and French models, which effectively facilitates the awareness of the parties (obligation to provide information by a lawyer) and guarantees the effective exercise of their rights (prior consultation between the parties and preparation of the agreement), also serves to accelerate the procedure. However, the introduction of mandatory legal representation does not mean that the role of the notary is diminished, since the notary still has the obligation to inform the parties and, if necessary, to propose amendments more favourable to the parties.[58] Based on the examination of foreign models, it can be concluded that the introduction of the dissolution of marriage by mutual consent before a notary would offer a simple and quick procedure for the parties and, through the implementation of these procedural guarantees, would adequately protect the legality of divorce cases.

[58] Juan Perez Hereza, "La separación y divorcio notarial," *El notario del signo XXI, revista del Colegio Notarial de Madrid*, no. 63 (Septiembre – Octubre 2015): 36.

The fact that there is a mutual agreement between the spouses, namely that there is no (legal) dispute between the parties, can undoubtedly be effectively incorporated into the scope of the notarial procedure and the control of legality by the public notary is fully equivalent to the activity carried out in the context of the deed drafting procedure. An additional protective instrument is the condition guaranteeing the protection of minor children (which requires exclusively a judicial route), as in this case a wide margin of judicial discretion or, if necessary, the involvement of experts may be justified.

During the codification of the Civil Code, the Hungarian legislature also considered the possibility of introducing divorce by the public notary, but ultimately came to the conclusion that further simplification of the rules of divorce law was not justified and that the joint request and agreement of the parties required judicial control in order to protect marriage.

It is important to emphasise that it is up to the legislature to decide whether it intends to give priority to the protection of the marriage bond or to the autonomy of the spouses in decision-making. Undoubtedly, the legislature's aim was to make things easier for the parties involved in a divorce by gradually simplifying[59] the national procedural rules. However, citizens may continue to demand that the divorce rules should be further developed, simplified and accelerated. In order to prove or disprove this, the most suitable way would be a new referendum initiative.

[59] The repeal of paragraphs (5) and (6) of Section 456 of the CCP ensures the possibility of divorce by negotiated agreement.

Leasehold Payments from the Perspective of the Hungarian Chamber of Agriculture*

FEKETE, KRISTÓF BENEDEK**

ABSTRACT *In this study, the author presents and analyses the proportionality examination of leasehold contracts in the light of recent legislative changes from the viewpoint of the Hungarian Chamber of Agriculture, in this framework, the paper also deals with the practice of the agricultural administrative bodies. Starting from the relevant constitutional and statutory provisions, the study describes, through pragmatic examples, the obligations and possibilities of the Hungarian Chamber of Agriculture regarding the disproportionality of leasehold payments, as well as its emerging practice. The study concludes that the Hungarian Chamber of Agriculture is real support for agricultural administrative bodies in their procedures for determining the disproportionality of leasehold payments and that their decisions can reflect the value and interests of agriculture, as enshrined in law.*

KEYWORDS *leasehold contract, amendment of leasehold contract, disproportionate leasehold payment, preemptive leasehold right, decision of the agricultural administrative body*

1. Introduction

According to Paragraph (2) of Article P) of the Fundamental Law of Hungary, the use of arable land – which as a natural resource constitutes the common heritage of the nation, and the protection, maintenance, and preservation of which for future generations is the duty of the state and of all[1] – shall only be laid down based on limits and conditions set out in a cardinal Act. Accordingly, Act CXXII of 2013 on Transactions in Agricultural and Forestry Land (hereinafter: the Land Act), taking Act V of 2013 on the Civil Code (hereinafter: the Civil Code) as background provision, incorporates these

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[1] See Paragraph (1) of Article P) of the Fundamental Law of Hungary.

requirements, in which process the Hungarian Chamber of Agriculture, Food and Rural Development (shortly: Hungarian Chamber of Agriculture, hereinafter: HCA or Chamber) has a prominent role.
As a result of the amendment[2] to the Land Act, from 1 July 2022, the Chamber shall make a declaration to the Agricultural Administrative Body (hereinafter: AAB) during its proceedings in connection with the non-proportionality of leasehold contracts. In the event of such a declaration, the Chamber will have the status of a client in the said procedure and will have the right to bring an action in an administrative lawsuit against a decision of the AAB approving or refusing a leasehold contract.[3]
This paper aims to present the practice of the Chamber and the AAB concerning the assessment of the lack of value of the leasehold payments, based on the recent legal environment of the leasehold contracts in Hungary.

2. Examination phases of the leasehold contract

The authority approval of a leasehold contract can be divided into three parts: (i) a preliminary examination phase, (ii) a publication phase, and (iii) a post-publication examination phase.[4]
a) In the case of leasehold of agricultural land, according to the rules in force, the leasehold contract must first be submitted to the AAB, which, in its preliminary examination, will examine it solely on its content and formal requirements regarding its compliance with conditions for validity and entry into effect,[5] and will decide within 15 days for the refusal of approval of the leasehold contract, or – adopt a ruling declaring the contract fit for public disclosure and – order the publication of the contract. However, if the leasehold

[2] See Subsection (3) of Section 90 of Act CL of 2021.
[3] See Subsection (2b) of Section 53 of the Land Act.
[4] The Land Act does not use these terms, here they are used according to the criteria of each procedural phase, for easier distinction. Cf. Zoltán Szilvás, Diána Farkas, and Zoltán Gósz, *Földügyi szabályok változása* (Budapest: Nemzeti Agrárgazdasági Kamara, 2022), 27.
[5] For test criteria see Paragraph (2) of Article 51 of the Land Act, and Paragraph (2a) of Article 53 of Act CCXII of 2013 on Certain Provisions and Transitional Arrangements related to Act CXXII of 2013 on Transactions in Agricultural and Forestry Land (hereinafter: the Land Act2). It should be noted that, according to the wording of the Land Act, there is no question of "*entry into effect"*: not only ex-post but also ex-ante. The entry into effect means that the legal effect of the regulations of the law in question has been or is having a legal effect. The examination of compliance with the conditions laid down in the act is not an entry into effect because it does not yet have legal effect. Sociologically, it is possible to examine how many contracts have been submitted that have not complied with the requirements, which of these requirements have not been met, etc., but this is not the issue here, but whether the contract has been submitted under the legal requirements. If not, there is no approval. This is a formal legal control, not the entry into effect of the legislation.

contract is not one of the contracts subject to approval by the AAB, it must be sent only to the notary of the municipality competent.[6]

b) The AAB communicates its interim decision to the lessor and the lessee under the leasehold contract and sends the leasehold contract to the notary of the municipality competent where the land is located. The notary then publishes the leasehold contract through a notice on the government portal (www.hirdetmenyek.gov.hu) to the holders of the right of first refusal for lease. Compared to the previous practice, the notary will only communicate the leasehold contract to the holders of the right of first refusal for lease after the suitability for publication has been established by the AAB. The holder of the right of first refusal may be, within a preclusive period of fifteen days from the first day of disclosure, entitled to declare whether to accept the leasehold contract or waive his right of first refusal for lease.[7] The notary prepares a list of the legal statements received, within eight days after the deadline prescribed for the submission of statements, and sends it to the AAB together with the original of the leasehold contract and with the legal statements, accompanied by a notice of confirmation sent by the body operating the government portal concerning publication and removal.[8]

c) From among the documents sent by the notary, the AAB concerned examines and verifies the declaration(s) of acceptance first of all, solely based on content and formal requirements, and if it detects a problem of compliance with the legal requirements, it considers that the holder of the right of first refusal for lease has not exercised his preemptive leasehold right.[9] Once again, the AAB has 15 days to examine the documents sent by the notary upon receipt and to decide whether to refuse the leasehold contract. If it does not refuse to approve the pre-leasehold contract and several holders of the right of first refusal for lease have submitted a statement of acceptance, the AAB will rank the holders

[6] An improvement compared to the previous requirements is that only the documents proving the holders of the right of first refusal for lease, which are not contained in a public register, need to be attached to the statement of acceptance submitted. See Szilvás, and Farkas, and Gósz, "Földügyi szabályok változása," 29.

[7] See Subsection (3) of Section 49 of the Land Act.

[8] See Section 50 of the Land Act.

[9] See Subsection (3)-(4) of Section 51 of the Land Act. Such, if the AAB considers that the statement of acceptance (i) does not comply with the requirements relating to formalities; (ii) is not that of the holder of the right of first refusal for lease; (iii) is that of the holder of the right of first refusal for lease, however, it does not support the legal basis for the right of first refusal for lease, or it contains no information as to the act underlying the right of first refusal for lease, the documents underlying the right of first refusal for lease have not been attached, or that the right of first refusal for lease is not based on the act indicated, or on the ranking determined by law, it does not contain the statutory commitments and statements prescribed by law relating to the ranking for the right of first refusal for lease designated by the holder of the right of first refusal; or (iv) is that of the holder of the right of first refusal for lease, however, it does not contain the statements of the holder of the right of first refusal with the required content.See Subsection (5) of Section 51 of the Land Act.

of the right of first refusal for lease in the order established by the act and draw up a list of them.[10] If more than one lessee is in the same ranking, it is the lessor who decides with whom he wishes to contract.

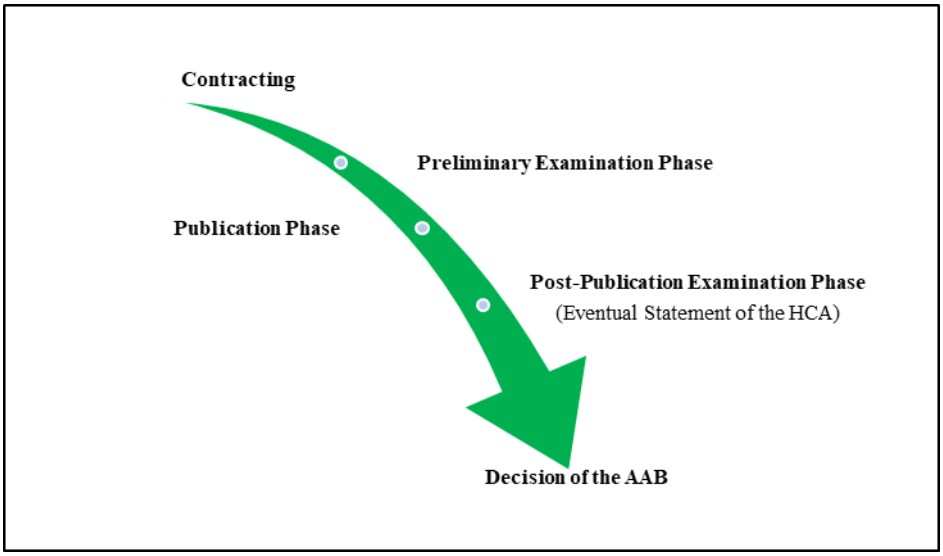

Figure 1 – Examination phases of the leasehold contracts (own ed.)

Under the new rules, as can be seen from Figure 1, the Chamber can make a statement on the disproportionality of the leasehold payments at the post-publication examination phase, but before the decision of the AAB, and if it considers that there is a disproportionality, it can indicate it to the AAB, which must take note of this indication.

3. Examination of the disproportion of the leasehold payment

The examination of leasehold contracts is in principle a matter for the competent AAB, which may be supplemented by any declaration by the HCA that it considers certain leasehold payments to be disproportionate. To establish this, the Chamber will conduct an ex officio interim procedure and will then take a statement, which it will communicate to the AAB. Thus, based on a teleological interpretation, the Land Act itself imposes an objective obligation on the Chamber to notify the AAB of all disproportionate leasehold contracts. However, the practical implementation of this may be problematic for several reasons.

[10] See Subsection (6)-(7) of Section 51 of the Land Act.

3. 1 Detection of disproportionate leasehold payments

The first issue to be addressed is the detection of the contracts in question. On the one hand, the Chamber's objective internal information provides an approximation of the average municipal/district leasehold payments, which of the so-called contract monitoring software categories according to the leasehold payment, depending on the leasehold payments may be of concern, i.e., excessive.[11] On the other hand, in practice, it is the farmers themselves who report to the Chamber that they have observed an excessive level of leasehold contract, as they know and understand the local conditions best. The Chamber can therefore intervene accordingly.

3. 2 Aspects of the examination of a leasehold contract considered to be disproportionate

According to an earlier amendment[12] of the Land Act, it is no longer necessary to examine whether the disproportionate value of the consideration under the leasehold contract was such as to keep the pre-lessee away since *ipso iure the disproportionality in value is in itself a ground for refusal*. Under the Paragraph g) of Subsection (1) of Section 53 of the Land Act, from 1 January 2022, the AAB will refuse to approve a leasehold contract if the consideration fixed in the leasehold contract (leasehold payment) and the value of other forms of charges fixed in the leasehold contract is disproportionate.
Accordingly, the amount of the leasehold payment shall be considered disproportionate if the land in question offers no advantageous characteristics that would justify any deviation from locally customary leasehold payment. Such advantageous characteristics are named in Paragraph (2a) of Section 53 of the Land Act as

a) the location of the land,
b) the quality of the land [gold crown (hereinafter: GC) value],
c) possibility of irrigation,
d) capacity of the soil to be cultivated, and
e) whether it can be accessed from public roads.

a) When the land is inspected by the Chamber, its geographical location (within or outside the limits of a settlement, and allotment garden), its type of land registered, and the shape of the parcel of land (e.g. wide slab or so-called narrow belt) must be determined. The relationship of the parcel of land to other parcels of land whether the cropland is adjacent to other cropland or bordered

[11] The program shows the leasehold contracts in three bands. A green band shows the lowest contracts, a *yellow band* shows the medium-high contracts, and a *red band* shows the high, exaggerated contracts. Note that the program differentiates based on information provided by the Chamber, which is updated periodically.
[12] See Subsection (1) of Section 90 of Act CL of 2021.

by forest land or stream) and its distance from the nearest settlements should be considered.
b) The quality of the land is primarily defined in terms of its GC value, which is accordingly emphasized by the act. Consequently, it is useful to compare the GC value per hectare of land as recorded in the real estate register with the values of the usual land in the area and to decide whether the land value is the same as the usual land values in the area or, if different, in what direction.
c) In terms of the possibility of irrigation, the land is considered to be above average if it is connected to a ditch, a canal, a river, or other water abstraction system that provides direct irrigation and, given its size, can be economically supplied with water, hence the irrigability of the land is feasible. In my view, if an area has a direct connection to an irrigation facility in terms of irrigability, this can only be taken into account if it is effectively feasible (e.g. in many cases this could not be taken into account in the 2022 drought period, as water supply to some areas was not guaranteed).
d) The aspects of the capacity of the soil to be cultivated show a very rich image. Accordingly, the cultivability of the land is essentially determined by its topography and slope, as well as by the quality of the soil and its attributes (nutrient content). At this point, it is also necessary to consider what crops can be grown on the land and whether, given the size and location of the parcel of land, it is viable to practice precision farming[13] or whether the land can only be cultivated conventionally.
e) The accessibility of the land by public road does not require further explanation. It is necessary to examine the length and quality of the road that is necessary to reach the land (e.g. the land can be reached from Pécs by the 1200 m long road called "X"), which means that the accessibility of the real estate can be classified as average or not, depending on this and of course considering the characteristics of the area.
On the grounds that the second sentence of Subsection (2a) of Section 53 of the Land Act uses the phrase "may", the Chamber may also examine a broader scope (e.g. it may take into account, on the basis of the facts known to the public and its best knowledge, the locally or peripherally customary leasehold payment concerned, or statements made by those holders of the right of first refusal for lease who would otherwise have taken a statement of acceptance for the contract advertised but have been deterred from exercising that right by the

[13] Precision farming is "[a] set of technical, informatical, information technology and cultivation technology applications that make production and farm machinery management more efficient", and, like conventional farming, aims to produce high-quality and safe food by making most efficient use of available resources (inputs, water, fuel, etc.) through the application of digital technologies. See Szilvia Erdeiné Késmárki–Gally, "A precíziós gazdálkodás jelentősége a mezőgazdaság versenyképességében," *Multidiszciplináris kihívások, sokszínű válaszok,* no. 2 (2020): 44-45.; Tímea Gál, Lajos Nagy, Lóránt Dávid, László Vasa, and Péter Balogh, "Technology Planning System as a Decision Support Tool for Dairy Farms in Hungary," *Acta Polytechnica Hungarica* 10, no. 8 (2013), 231–244.

unrealistically high rent), although in my view, it must address these points in its statement. It should also be pointed out that in the case of a deviation from the average leasehold payment, the reason for this must always be justified in the contract, with the burden of proof of the proportionality of the rent being on the lessor, at the request of the AAB, during the procedure for the approval of the leasehold contract.[14]

Under the Land Act, uncertain future events and circumstances within the lessee's discretion and contingent upon his or her willingness to undertake risks may not be taken into account.[15] Thus, for instance, it is not possible to take into account in this context the fact that the road network development plans foresee an improvement in the accessibility of the land concerned in two years, or a possible change in the type of land registered.[16] It must be stressed that the above lists are not exhaustive but illustrative, i.e. it was not possible or appropriate to lay down all the cases in the act, and the various examples will be gradually developed in practice.

3. 3 "Accepted leasehold payment"

a) In examining the disproportionality of the leasehold contract, the Chamber may take the opinion that the leasehold payment is proportionate. In such a case, it will inform the AAB, which, if it considers that the content and formal requirements of the leasehold contract are in order, will establish a ranking in the light of any statements of acceptance and approve the leasehold contract with the one which is higher in ranking. In the event of equal ranking, the lessor shall approve the leasehold contract at his discretion.

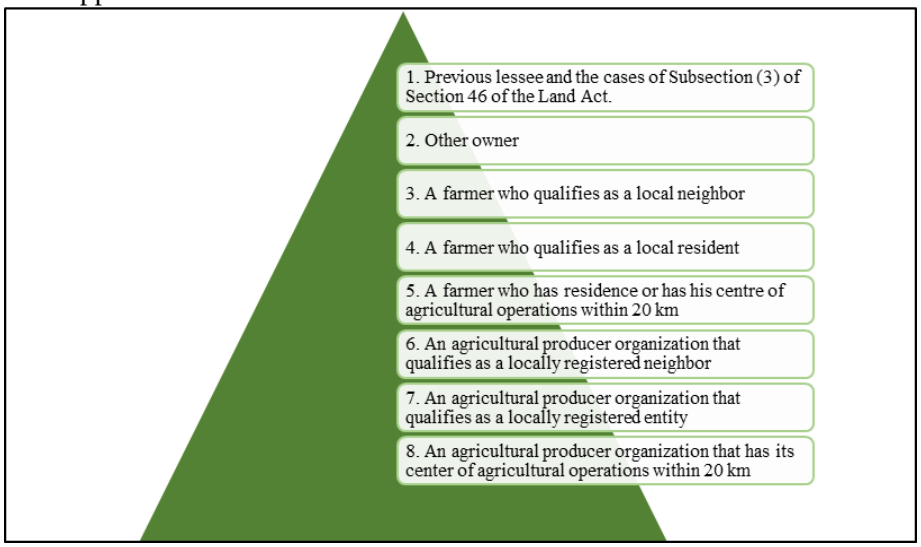

Figure 2 – Ranking of holders of the right of first refusal for lease (own ed.)

[14] See the third and fourth sentences of Subsection (2a) of Section 53 of the Land Act.
[15] See Subsection (2a) of Section 53 of the Land Act.
[16] See Szilvás, Farkas, and Gósz, "Földügyi szabályok változása," 31.

b) Pertaining to the disproportionality of the leasehold payment, in the event that the Chamber takes the opinion that the leasehold payment is disproportionate, several situations may arise.
ba) In the most obvious case, the AAB will find the Chamber's statement to be well-founded and, after reviewing it, will also conclude that the leasehold payment is disproportionate. In such cases, it refuses to approve the leasehold contract. [However, in a possible remedy procedure, the judge, after consulting the forensic expert, may decide to consider the refusal of the leasehold contract on the ground of leasehold payment as unjustified interference with the freedom of contract, since the lessor has an interest in being able to leasehold the land at the highest possible price. This can occur in particular where the Chamber interferes "impersonally" with the freedom of contract because of a leasehold contract that is perceived to be high, where, for example, there is not even an opposing party (e.g., a holder of the right of first refusal for lease who is kept out by the high price).[17]]
bb) In case the Chamber observes a higher price than the locally customary (average) lease charges, it will contact the AAB to await the Chamber's statement in the leasehold contract approval procedure. It is important to note, however, that if a statement of acceptance of the leasehold contract is submitted in the posting procedure (either alone or in several persons), the leasehold payment will not be considered disproportionate. The practice that seems to emerge from the examination of leasehold contracts is that if a contract is suspended but is considered to be excessive, but is applied for, the local farmers are accepting and legitimizing the price. What is more, if they have made a statement of acceptance and the AAB has approved it with the holder of the right of first refusal for lease, it does not even examine the merits of the Chamber's sign. This, moreover, would not be reasonable or justified in the light of the previous points.
bc) It may also be the case that the parties have entered into a leasehold contract for a disproportionate amount for which there are other applicants, so that it is not considered disproportionate in the light of the above, but, for instance, the lessee under the contract reaches the land acquisition limit. In such a case, it is considered as if the contract had not been concluded, and consequently, no further application can have any legal effect.[18] Similarly, a leasehold contract where the leasehold payment is paid in advance is null and void, as the

[17] This also includes the practice whereby, as in the case of a contract of sale, a statement may be made by someone who is prevented from making a statement of acceptance by the disproportionately high leasehold payment, but who would, in each case, have already made a statement at the normal market price in the locality. This is particularly relevant where no statement of acceptance is made for a contract, as an additional aspect is the absence of the pre-lessee, which is "proven" to be caused by the disproportionate value.
[18] Cf. Decision No. 2.K.700.739/2021/6. of the Pécs Regional Court.

provisions of Subsection (2) of Section 50 of the Land Act2 exclude this.[19] Without giving further examples, it must be seen that the material defect in the contract "overshadows" the position of the Chamber (the client's statement) by "merely" indicating to the contracting parties that they will, in addition to the leasehold payment, most probably be rejected.

c) It may be added that to agree on or to continue to apply for a high leasehold payment is not "without risk" for the following reasons. It is perfectly natural for the lessor to want to leasehold payment his land at the highest possible price, but it may be the case that, for example, two or three times the local average (e.g., HUF 300 000-450 000/ha instead of HUF 150 000/ha for arable land). In such a case, it is reasonable to think that this high leasehold payment is intended to keep out those with the holders of the right of first refusal for lease, as there is little chance that even an above-average property can be farmed profitably. It is much more likely that a high price is agreed 'on paper', with a much lower leasehold payment being met in the background. In addition to being illegal, this is risky because, on the one hand, the lessor may demand contractual performance, which would break the background agreement, and on the other hand, it would distort the reputation of the real management, or the agreed leasehold payment would be included in the locally customary lease charges. It should be noted, thus, that a leasehold payment can only be accepted if it is verily paid, otherwise, it will be merely hypothetical.

3. 4 Changing the leasehold payment by amendment of the contract

There are two ways of changing the leasehold payment by amending the contract, so generally, there are two cases to be discussed.

a) If the contract amendment is to increase the leasehold payment, there are also two options. The first is for contracts of not more than 10 years, and the second is for contracts of 10 years or more.

aa) If the leasehold contract has been concluded for a period not exceeding 10 years, the change of the leasehold payment makes the leasehold contract subject to publication, therefore all the procedures described above apply, meaning that the holders of the right of first refusal for lease may also apply for it.[20]

ab) If, however, the leasehold contract is concluded for a period of 10 years or more, Section 50/A of the Land Act2 provides for a procedure for amending the leasehold payment without publication.

[19] In the official approval of the leasehold contract, the AAB must primarily decide based on the provisions of the Land Act and the Land Act2 on a leasehold contract, the provisions of the Civil Code are only secondary. Thus, if the contract contains cogent provisions on a contractual term, an agreement by the parties to the contrary is liable to circumvent the provisions of the Land Act2. See Point [36]–[37] in the Reasoning of Decision No. Kfv.II.37.695/2021/6. of the Curia of Hungary.

[20] See Section 39 of the Land Act.

Under the Land Act2, either party may request an amendment of the leasehold contract after 5 years from the conclusion of the contract, and every 5 years thereafter, in order to adjust the leasehold payment to the locally customary lease charge applicable at the time of the initiation, provided that at least 5 years of the leasehold term remain.[21] In any such request, the market leasehold payment must be determined on the basis of a forensic expert's opinion.[22] Furthermore, if the leasehold payment established differs by 20% or more from the leasehold payment under the leasehold contract, the opposing party is entitled to terminate the leasehold contract by the end of the marketing year within a time limit of 30 days from the date of receipt of the request.[23] In event that the opposing party does not agree with the request, but there is no possibility of termination or does not wish to terminate the contract, it may, within 30 days of receipt of the request, ask the court to determine the market leasehold payment; otherwise the leasehold payment is considered to be amended to the extent indicated in the request.[24] If the court also takes the view that the leasehold payment differs by at least 20% from the previous leasehold payment, the opposing party is entitled, mutatis mutandis, to 30 days' notice of termination from the date on which the court's decision becomes final.[25]

b) If the amendment to the contract is aimed at reducing the leasehold payment, it must be approved by the AAB,[26] unless the reduction is based on a court decision.[27] With the focus on reducing the leasehold payment, a substantial change in market conditions must be credibly demonstrated, except in the case of a reduction based on a court decision.[28] It should be stressed that, in the case of a reduction in the rate of the leasehold payment, the AAB will only examine the legal conformity of the newly established rate.[29] The question may be raised whether a subsequent reduction of a rate which may appear excessive but which, because of further applications, is nevertheless deemed acceptable, does not circumvent the act. In such a case, the AAB may refuse to approve the contract amendment if it considers that the subsequent reduction of the leasehold payment would result in an imbalance in value because the original, much higher leasehold payment was only agreed to keep other holders of the

[21] However, this is conditional on at least 5 years remaining on the leasehold contract. See Subsection (1) of Section 50/A of the Land Act2.
[22] See Subsection (2) of Section 50/A of the Land Act2.
[23] See Subsection (3) of Section 50/A of the Land Act2.
[24] The court determines the market leasehold payment for the starting date indicated in the request. See Subsection (4) of Section 50/A of the Land Act2.
[25] See Subsection (3) of Section 50/A of the Land Act2.
[26] The contract amending the leasehold contract, or the leasehold contract consolidated with the amendments (hereinafter: amended contract) shall be sent to the lessee for approval by the MISZ within 8 days of its signature. See Subsection (2) of Section 50/A of the Land Act2.
[27] See Subsection (1) of Section 58 of the Land Act.
[28] See Subsection (1a) of Section 58 of the Land Act.
[29] See Subsection (3b) of Section 58 of the Land Act.

right of first refusal for lease away.[30] The principle of administrative silence should also be highlighted here, meaning that if the AAB does not take a decision within 30 days of receipt of the amended contract or does not notify the contracting parties of the extension of the deadline, in such a case, the approval of the amended contract shall be deemed to have been approved on the day following the expiry of the said deadline.[31] Provided that the AAB refuses to approve the amended contract within that period, it shall, in its decision to that effect, specify the deadline, the provisions and the legal provision by which the parties must amend the contract to obtain approval. [32]

c) The specific case of amendment of the leasehold contract is laid down in Subsection (7) of Section 50/A of the Land Act2, according to which, where the leasehold contract has been concluded with the previous pre-lessee replacing the lessee under the leasehold contract, the new lessee may take the initiative previously expressed, irrespective of the duration of the leasehold contract and for the first time within 6 months of contracting. In such a case, the court fixes the market leasehold payment retroactively from the date of entry into force of the contract.

4. Summary

It should be stressed that the starting point for the examination of leasehold contracts is that the Chamber is not involved in the procedure as a public authority but as a client. Accordingly, it may make a client statement, as described above, but the AAB must take this into account in any event, although it may depart from the Chamber's position in its decision. Based on what is known so far, the AAB has in all cases taken into account the statement of the Chamber, but there may be exciting lessons to be learned in the future if the AAB takes a different position from the Chamber or if its decision is "tested" in court. Important lessons may be drawn in the future from the related judicial practice, which is also still to be clarified and which, in time, will be evaluated in the light of what has already been said.

[30] Cf. Zsolt Orlovits, László Kovács, Tibor Csegődi, Márton Balázs Battay, István Cseszlai, and Balázs Győrffy, *Földforgalmi szabályozás* (Budapest: Nemzeti Agrárgazdasági Kamara, 2015), 69.

[31] In this case, the AAB shall, at the request of the lessee, endorse the amended contract by Subsection (2) Section 55 of the Land Act. See Subsection (3)-(4) of Section 58 of the Land Act.

[32] The decision must contain a warning that, in the event of the expiry of the time limit without a result, the leasehold contract shall continue to have the same content as the original contract between the contracting parties. See Subsection (5) of Section 58 of the Land Act.

Messages of Personal Identity Attempt in Foreign Criminal Rules

FENYVESI, CSABA*

ABSTRACT *Research worldwide and in our country (Hungary) have revealed that false personal identities play a prominent role in "justizmord" cases.*
That is why it is worthwhile having a closer look at identity rules and methodologies of other countries in this respect as well. In this study, the author examines the Slovenian, Austrian, Swiss, Serbian, Croatian, and distant (but, as it turns out, much the same) Turkish norms, all embedded in the continental legal system just like the Hungarian ones. Based on the legal details and implementation recommendations there, the researcher formulates at the end of his study the lessons learned from the models, the legal and forensic development opportunities available to us, the conclusions for efficiency and fairness, and the current and future messages to legislators and practitioners.

KEYWORDS *errors, false identification, identity parade, investigation, justizmord, line-up, miscarriage of justice, prevention*

1. Introduction

The criminal justice system of all rules of law seeks to avoid the worst possible outcome, namely a miscarriage of justice. Unfortunately, it still does happen sometimes. I will present some Hungarian examples in this study in order to support my statement.

In 1957, the court sentenced János K. to death for a sexually motivated homicide in Martfű (a town), who was then given a lifetime sentence. He had already served 11 years in prison, when it turned out that the crime had been committed by Peter K., who was prosecuted, then sentenced to death, and executed in 1968.

In 1984, the public prosecutor's office charged János M., a resident of Szolnok County (Hungary), with the murder of a little girl. He was not legally sentenced to death, however, in the lengthy criminal proceedings, the case went through several forums and he was finally acquitted in 1986.

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In 1995, Dénes P. was sentenced by a court in Heves County to 6 years imprisonment for attempted personal injury and robbery. Along with his arrest, the accused had already spent 26 months in prison when it turned out that the perpetrator of the crime against the elderly woman had been someone else and who was then held accountable for the crime.

On May 9 2002, the court sentenced Ede K. to life imprisonment as the perpetrator of a robbery at the Erste Bank branch in Mór (a town), claiming 8 lives. A few years later, exactly in 2007, it turned out that the crime had been committed by two other persons.

I present all this in order to make it clear in my introduction: miscarriage of justice does exists in our days as a phenomena, and its danger persists in Hungary as well. Therefore, it is in our elementary interest to develop prevention methods in this field and to explore what the cause of such fatal mistakes may be.

Both foreign and Hungarian research (and the real cases above) have revealed that the presentation behind recognition plays a prominent role in "justizmord" cases.[1]
That is why it is worthwhile looking at identity rules and methodologies in other countries as well. In this paper, I examine the Slovenian, Austrian, Swiss, Serbian, Croatian, and distant (but, as it turns out, much the same) Turkish norms based upon the continental legal system like ours. Based on the legal details and implementation recommendations there, I formulate at the end of my study the lessons learned from the models, the legal and forensic development opportunities available to us, the conclusions for efficiency and fairness, and the current and future messages to legislators and law enforcements.

2. Personal identification procedure in Slovenia

The Criminal Procedure Code of our neighbouring country also names and specifies the main rules of identification (identity parade). These are the following:[2]

242 Art
(1) Where it is possible for a witness to identify a person or object, they shall first be asked to describe them and to identify them. Only then can the witness be shown the person, together with persons unknown to others, or the object, preferably with other objects of the same kind. The same procedure should be followed for identification with other senses (hearing, touch, smell, etc.).

[1] See more about these in: Csaba Fenyvesi, A *kriminalisztika tendenciái* (Budapest – Pécs: Dialóg Campus Publishing House, 2017), Chapter VII.
[2] Criminal Procedure Act 2007 (7 September) Official Journal of the JMSZ 4/77, 14/85, 74/87, 57/89 and 3/90. (In translation from English.)

(2) Prior to identification, the witness shall be warned in accordance with Section 240 (2).
(3) The judge conducting the investigation, who ensures the identification process, must make sure that the witness does not see the person or object he / she will identify.
(4) A record of the identification shall be made and a group photograph of all persons examined shall be attached.

242 / a. If the life or physical integrity of the person carrying out the identification or a close family member (Article 236 § 1 (1) to (3)) is seriously endangered or it is possible that the identified person may influence the identification process, the identification shall be carried out in such a way that the person carrying out the identification must not be seen by the person to be identified.

80. Art
(3) In case of searching for an inspection, place or person, or identifying a person or object (Article 242), the document shall contain the relevant data of the act. In case of identification of separate objects, the description of the objects, the size of the traces must be contained. If sketches, drawings, drafts, audio or video recordings have been made, they must be included and attached to the file.

178 Art
(4) The prosecutor, the accused and his or her counsel may participate in the examination of witnesses. The judge conducting the identification may order that the accused be removed from the interrogation if the witness refuses to testify in his presence or if the circumstances show that the witness would not be able to tell the truth in his presence. Or in cases where an appearance will be required after the witness has been questioned. The accused may not be present at the examination of witnesses if they are under the age of 15 and have been the victims of any of the offenses under Article 65 § 3. The injured party may be present at the hearing of witnesses if he or she does not attend the main hearing.

230. Art
The accused must first describe the objects that can be linked to the crime or use it as evidence, and only then can it be presented to him as identification. If the objects cannot be delivered to the defendant, the defendant must be transported to the place where the objects are.

We can read the following points in the regulations on the tasks and powers of the police:[3]

Article 46
(Identifying a person from a photo)
(1) Police officers may act to identify a person on the basis of a photograph in order to locate the perpetrator in a criminal or offence case in order to establish the identity of an unknown person.

(2) Before carrying out the identification procedure, the police shall warn the person about the rules for the protection of personal data. That person shall protect the confidentiality of the data which come to his or her knowledge during the identification procedure.

(3) Police officers shall first request the person who carries out the identification to record and present the physical characteristics that distinguish the person from other persons during the identification procedure.

Only then can they show images along with other similar images to the ID of people who are unknown to the person performing the identification.
The police officer who conducts the identification must make sure that the identifier does not see a picture of the person in question or does not see that person before identification.

(4) The police officer shall make an official record of the identification procedure, which shall include which images the identifier has seen.

(5) Police officers may use photographs taken from other files of the persons photographed or in other lawful ways. Photos of individuals that are shown during identification must be selected based on the previously provided description of the person.

(6) When several persons participate in the identification procedure, it shall be conducted separately for each person.

3. Personal identification procedure in Austria

The Austrian Code of Criminal Procedure also recognizes the recognition procedure, and its provisions can be found in § 163.[4]

§ 163. (1) A witness may compare several persons - openly or secretly - with each other, from which he or she may select the suspect. Prior to this, the

[3] Police Tasks and Powers Act: Official Gazette of the RS, No. 15/2013.
[4] Österreichische Strafprozessordnung (StPO) Criminal Procedure Act 1975. StF: BGBl. No. 631/1975 (WV).

witness should be asked to describe the distinguishing features of the suspect: this description should be as close as possible to the person being compared. The witness should then be asked to make a statement as to whether he or she recognizes the person and what he or she recognizes. This process should be recorded and assisted by appropriate imaging techniques.
(2) The same shall apply to the examination of photographs and the hearing of sound samples. Even if a witness recognizes an important object that serves as evidence, he or she should first be asked to describe that object and, if necessary, its distinctive features.
(3) In addition, the accused or witness may be confronted with other witnesses or tribunals if the relevant allegations differ in material circumstances and it is presumed that the contradictions can be clarified. People who stand side by side and have certain circumstances that are different or have conflicting statements should record the response from both sides.
(4) If the accused is summoned for comparison, his or her counsel shall be given the opportunity to participate.

4. Personal identification procedure in Switzerland

According to the Swiss Code of Criminal Procedure:[5]

Rule 146: Interrogation and comparison of several persons

(1) Interviewers shall be interviewed separately.
(2) Criminal authorities can compare individuals, including those who have the right to refuse to testify. The special rights of the victim are reserved.
(3) The authority may summon the interrogated persons who, after the completion of the interrogation, are likely to face other persons, to remain in the place of the proceedings until the confrontation.
(4) A person may be temporarily excluded from the proceedings if:
(a) there is a conflict of interest, or
(b) that person shall be heard during the proceedings as a witness, information officer or expert.

Article 152: General measures to protect victims
(4) A comparison may be ordered if
(a) the interests of the injured party so require

(b) it is mandatory due to a significant law enforcement interest.

Article 154: Special provisions for the protection of children as victims:
(1) A child within the meaning of this Article who is under the age of 18 at the time of the questioning or comparison shall be the victim.

[5] Schweizerische Strafprozessordnung: SR 312. (Effective from 5 October 2007).

(2) The first hearing of the child shall take place as soon as possible.
(3) The authority may exclude a confidential participant from the proceedings if it may exercise decisive influence over the child.
(4) If it is apparent that the interrogation or comparison is likely to cause severe psychological distress to the child, the following rules shall apply:
a) A report involving the suspect may only be ordered if the child expressly requests it.
(b) As a general rule, a child may not be questioned more than twice throughout the proceedings.
(c) The second hearing shall take place only if the parties have not been able to exercise their rights at the first hearing or if this is unavoidable in the interests of the investigation or the child. Where possible, recognition will be done by the same person who conducted the first interview.
(d) Interrogations shall be carried out in the presence of a specialist: a detective trained for that purpose. If no comparison is made (recognition), the interrogation is recorded with images and sound.
e) The parties shall exercise their rights through the interrogator.
f) The interviewer (interviewers) and the trained professional record their own observations in a report.

5. Personal identification procedure in Serbia

The Serbian Criminal Procedure Code provides the following guidelines.[6]

VII. Chapter 1 (Basic Guidelines. Evidence Procedure 2. Presentation for Recognition. Face or Object Recognition)

§ 90. If it is necessary to determine whether the interrogated person recognizes the given object or person, or the properties thereof, which he or she has previously described, the object or person in question shall be shown together with other objects and persons whose properties are unknown to him or her. These are similar to those described above. The interrogated must then state whether he or she is certain to recognize the object or person, or if he or she has a certain degree of probability that he or she will recognize it. If the answer is positive, they should point to the subject or person.
If the person or object is not available in Method 1, the suspect must be shown an image of the object or person, along with several similar objects or persons unknown to him, whose main characteristics are similar to those described by the interrogator.
Nos. 1 and 3 recognitions may also be made by sound in accordance with the provisions.

[6] Serbian Criminal Procedure Code: "Official Gazette of the Republic of Serbia," 72/2011, 101/2011, 121/2012, 32/2013, 45/2013 and 55/2014 (based on a raw translation by Andrea Dernik).

6. Personal identification procedure in Croatia

Article XVI of the Croatian Code of Criminal Procedure Chapter deals with acts of recognition.[7]

XVI. Chapter Investigation Phase (Interrogation of Suspect 3 and Presentation for Recognition 5)
Article 301
(1) Recognition is the recognition by a suspect or witness of a person, object, place, sound, mode of movement or other characteristic based on a comparison with another person, object, place, sound or mode of movement. The objects that help to clarify the case are presented to the suspect and, if necessary, to witnesses and experts.

(2) Before being presented for recognition, the person shall be asked whether the person or object in question has been shown live or in images, on a computer, in the form of data collected or otherwise, or is aware of circumstances which may affect him or her in the course of the recognition. The answers must be recorded.

(3) The recognizing person shall describe the object and person in question in as much detail as possible, as well as the features that distinguish it from other objects and persons. At the same time, he or she should describe the circumstances in which he or she has perceived it and give a rich description of what he or she would recognize.

(4) The recognizer shall then be shown the person or object, the objects presented for recognition, together with any person or object unknown to him or her. Location recognition is done by the person first describing the location in detail and then pointing out or showing it on a recording and live.

(5) With the written consent of the person, the presentation for recognition may be performed by appropriate technical means. With programs that allow him or her to present simultaneous photo or audio-video recordings, see (3) in accordance with the paragraph. This type of recognition presentation can also be recorded with an audio-video device.

(6) If the suspect is the confessor, Articles 273 and 275 of the Act rule, but if the suspect is presented for identification, he or she will be warned of the right to be assigned a defence lawyer. A defence attorney may be present at the

[7] Consolidated text of the Croatian Code of Criminal Procedure, published in the Official Gazette 152/08, 76/09, 80/11, 91/12) and Decisions of the Croatian Constitutional Court 143/12, 56/13, 145/13, 152/14, 70/17 and 126/19) (based on a raw translation by Andrea Dernik).

presentation for recognition. In that case, the provisions of Article 273, including paragraphs 2, 3 and 5, shall apply mutatis mutandis.
If the recognizer is a witness, the description of the recognition is given in No. 288 and it shall be governed by the provisions of Article 2 thereof. (3) and (4) pursuant to paragraph.

(7) A report shall be prepared on the presentation for recognition and an appropriate record shall be made of all persons, objects and places presented. The recordings are made by an expert assistant.

7. Personal identification procedure in Turkey

There are two law enforcement forces in the country bordering Europe and Asia: the police and the gendarmerie. Their jurisdiction is divided on the basis of geographical separation. The police have jurisdiction in all provinces and districts, and outside the provincial and district municipal boundaries, it is the gendarmerie that have jurisdiction. In other words, places that are outside the purview of the police are within the purview of the gendarmerie. The investigative (evidence) actions of both organizations are based on the same legislation.
Article 6 of the Code (Law No. 2559), adopted on 4 July 1934 on law enforcement duties and competencies, provides guidance on identification.[8]

According to the content of this and related interpretations:

(a) A 6/11. "Before initiating the identification procedure, the statement of the person who will identify the offender shall be recorded as a notification."
(b) The victim or witness is asked about the offender's gender, age, colour, height, weight, physical disability, eye colour, hair, beard. In doing so, the law enforcement officer should not ask directed questions.
(c) It must also be ensured that the characteristics of the description are objective, for example, descriptions that "the perpetrator was handsome" should be avoided.
(d) If there is more than one suspect, the identification procedure must be carried out separately for each suspect.
(e) The identification shall be repeated at least twice. Although not required by law, the persons subject to identification must be the same as in the first identification procedure. Because if the people exposed to identification change, it can negatively affect the person identifying them. There is also no statutory minimum time frame between the two identification procedures, but at least the first identification procedure must be completed and the second formula

[8] The original Police Duties and Competences Codex was supplemented on 16 June 1985 by Regulation 3233/7. with article number. On 02/06/2007, the 5681/5. amended by Article. (Translated from Turkish into English: Ahmet Murat.)

established. By doubling, the identifying person is given the opportunity to think twice and remember the event he or she witnessed.
(f) In general, a suspect has the right to a lawyer (authorized or seconded) before, during and after the identification procedure. (Rule 150 (1)) However, the absence of a defence counsel does not render proof of identification inadmissible.
(g) In the most common "live line-up" identification in practice, not only the suspect but also other people are introduced to the witness (victim) and asked to choose from among them. (The photo identification method is exceptional.)
(h) A 6/12. An additional point states that: There must be more than one participant in the identification procedure, they must be of the same sex and similar in appearance. For example, their age, height, weight, dress. If necessary, changes can be made to the identification procedure regarding the appearance of the suspect. During the identification process, each person holds a number in their hand.
(i) The "line-up" method can be performed in two ways: simultaneously or sequentially. Simultaneous setup is the traditional (and almost exclusively used) method of identification. In this method, the people who are identified (or the photos taken of them) are presented side by side. In the sequential (allowed but not really applied) setup method, the persons (or photographs) are presented one after the other to the active subject, who, if he identifies the person or photograph presented to him, the other people (or additional photographs) do not appear.
(j) There is also a so-called "show-up" method, where the authorities present only the suspect as a witness to the incident or a victim of the crime. Here you cannot choose from more than one person, but only to decide whether to identify the person presented to him or her as the perpetrator or to state that he or she is not the perpetrator.
(k) If the suspect is personally unable to participate in the identification procedure for any reason, the photographic identification method may be used (Article 6/16). The victim or witness is shown a photograph of the suspect along with photographs of similar people and asked if: Is the perpetrator among the people in the photographs? (Consecutive photo shows are not excluded either, but the former is used in Turkish practice.)
(l) There is also video identification, in which case the victim or witness is shown the videos of the persons being identified and asked: Is the actual perpetrator of the incident in the video? In this identification method, the suspect under identification is asked to look at the camera so that the face and shoulders are visible first. They are then asked to slowly turn from left to right and show their side profile to the camera, and finally they are asked to turn and show their backs to the camera. The video recording of the suspect's face, side and back profile is recorded in this way and combined with videos of other people whose appearance, gender, age, etc. are similar and made by the same

method. Video identification is performed as a "sequential identification" method because each video can only be displayed one after the other.[9]
(m) Acoustic (voice) identification may occur if the witness or victim of the incident did not (could not) see the face or characteristic external features of the perpetrator but heard his voice. (For example, the perpetrator covered his own face with a mask or covered the victim's eyes. It is also possible that the crime was committed over the phone or that the victim / witness is visually impaired. In voice-based identification, it has to be decided whether any of them has recognized the voice of the perpetrator.
(n) The most common form in life is listed as "Covered Identification". (Article 6/13).[10]
In this case, those to be identified will not see the victim or witness. It is solved with a mirror that provides one-way vision. Persons subject to identification are in one room, while victims and witnesses are in another one. Between the two rooms there is a built-in (so-called Venetian) mirror that allows the victim and witness to see the persons exposed for identification while preventing them from seeing him / her in turn. (In contrast, open identification exists, but is hardly used, in which the people subject to identification see the victim, the witnesses. There is no one-sided mirror or similar device here, and both sides can see each other.)
(o) "Natural identification" means the method by which a suspect is identified in his / her natural habitat. For example, walking down the street, shopping, or sitting in a coffee shop. Natural identification should be considered as covert identification, as the suspect subject to identification does not know who identifies him / her. Legally, however, this method should not be used because the Code of Police Duties and Powers (indicated above) states that a suspect who has been identified must always be aware of the identification procedure.
(p) A "non-blind line-up" is a method in which the identified victim or witness and the law enforcement officer involved in the proceedings know only who the suspect is being identified.
(q) The "single blind line-up" refers to a method in which the victim or witness does not know who the suspect, who is being identified, is aware of only the law enforcement officer involved in the proceedings.
(r) The "double blind line-up" refers to a method in which the victim or witness and the law enforcement officer involved in the proceedings do not know which of the suspects is being identified. The advantage of the double-blind method is that it is aimed at finding the truth, because when the law enforcement officer involved in the identification procedure does not know the suspect, there is no

[9] Article 81/1 of the Code. If the offense is punishable by two years' imprisonment or more, the prosecutor shall, on the order of the public prosecutor, take a picture of the suspect and measure his / her height, take his / her fingerprints, palm prints and / or the recognition of the accused; as well as a sound sample and video film must be prepared and inserted into the file.
[10] 6/13. "The identification person and the persons subject to identification shall not see each other."

danger of manipulating the victim emotionally or unconsciously with his / her words, behaviour and gestures, or the witness.
(s) "Blank identification" is used to check the reliability of the victim or witness. In it, they are introduced to people who are not among the suspects, and this information is not shared with them, they are only warned that "the actual perpetrator may not be in the group."
(t) In the case of a method of identification by testimony, the victim or witness may be asked to tell what he or she knows about the incident during the identification procedure. In this case, there is both an "identification" and a "statement" on the side of the victim or witness. These two separate actions are combined to produce a single report called "identification with testimony".
(u) Article 6/15 of the Law on Law Enforcement and 17: a report on the identification procedure shall be drawn up. Also, a visual note should be written and photos and videos of identified individuals attached.
(v) The most important thing that should be clearly stated in the identification report is whether the identifying person has identified someone as the perpetrator. For example, "Person 4 was identified as the perpetrator by the victim or witness." If the identifying person did not identify anyone or was unsure, this should also be clearly mentioned in the identification report.
(w) Those who choose not to testify as a victim or witness shall not be compelled to identify.
(x) The identifying person should be warned that "the perpetrator is not necessarily among the people being identified."
(y) For photographic identification, several photographs must always be presented together or separately. Multiple (different) photos of the same person cannot be shown. Photos of different people should be the same size and have the same characteristics.

8. Conclusions, suggestions, messages

Before noting the conclusions and development suggestions arising from the above, I will only cite the XC. of 2017 on Criminal Procedure as a reminder and as a basis for comparison. (hereinafter referred to as Cp.). These are in particular:

§ 210. (1) A court, public prosecutor's office or investigative authority shall order and hold a presentation for recognition if it is necessary for the purpose of recognizing the person or object. At least three persons or objects shall be presented to the accused or witness for identification. The person or object may be presented to the accused person or witness by image, sound or video and audio recording, unless otherwise available.
(2) Before being presented for recognition, the person from whom recognition is expected shall be heard in detail about the circumstances in which he or she perceived the person or object in question, his or her relationship with him or her, and his or her characteristics.

(3) In the case of the presentation of persons, persons who are independent of the case and who are unknown to the recognizer and who have the same characteristics as the person in question in the main characteristics, in particular of the same sex, body shape, skin colour, care and clothing are put in a group with the person in question. In the case of objects, the object in question must be placed among similar objects. The location of the person or object in question within the group must not differ significantly from any other and must not be conspicuous.
(4) The presentation shall be carried out separately in the absence of each other in the case of several recognizable persons.
(5) If the protection of a witness so requires, the presentation for recognition shall be made in such a way that the witness presented for recognition cannot recognize or perceive him or her. If the personal data of a witness has been ordered to be kept private, this must also be ensured at the time of presentation.

§ 213. (1) The rules of the inspection shall apply mutatis mutandis to the demonstration experiment and the presentation.
(2) The court and the prosecutor's office may also use the investigating authority to conduct an inspection, an attempt to prove evidence and a presentation for recognition.
(3) The accused, witness, victim and other persons, in particular those who have or possess the object of the inspection, shall submit to the inspection, the attempt to prove it and the presentation for recognition, if the object in their possession shall be subject to inspection, it must be made available for the purpose of an attempt at proof or presentation for recognition. In order to fulfil these obligations, the accused may be coerced, the victim, witness and other persons may be coerced or fined.
(4) As far as possible, video and audio recordings shall be made of the inspection, the test of evidence and the presentation for recognition.[11]

A) Despite the fact that in the history of Hungarian criminal procedure we can read the most detailed (Pc.) legal regulation on the recognition named separately, it does not state that it is necessary to keep the recognition in the original circumstances of detection.

B) Also, as a suggestion “de lege ferenda”, I would suggest that it would be expedient to state in the legal wording that the person performing the recognition should call the recognizer (he or she should instruct):
(a) the perpetrator may not be among the persons to be identified;
b) there is no obligation to choose (selection at all costs);
(c) the investigation shall continue even if no one is selected;

[11] Sections 383 and 393 of the Criminal Procedure also refer to the possibility of the presence of a defence counsel. 100/2018 (VI. 8.) (Government order) on the detailed rules of the investigation and preparatory procedure prescribes further detailed disclosure rules for the investigating authorities.

d) you will not receive feedback on whether your choice was "correct", if at all; (e) the warnings applicable to the recognition of objects and photographs shall be those set out in points (a) to (d) and that the offender's appearance (hair colour, hair length, hair shape, facial hair, skin) may change over time or look slightly different in the photographs.

C) In my view, both the words "recognition" and "presentation" (individually and together) encourage the recognizer, who often wishes to comply with the authority and is, most often the injured witness of the crime, to chooses from among the persons presented (objects, sounds, etc.) and it is important to make sure that he or she really does decide to recognize someone. And the coercion of conformity can have the erroneous consequence that the recognizer responds even when he or she is not sure when he or she has only perceived a similarity, or simply infers from external signs that he or she thinks he or she is recognizing the real perpetrator. However, his or her mistake can even lead to a court order, as it is difficult to refute his or her selection in theory, and in practice it is almost impossible if the chosen one does not have a substantive alibi justification. Therefore, in the following example of an attempt at proof, it would be more appropriate to speak of an "attempt at recognition", that is, an attempt at recognition rather than a demonstration.

D) In the field of criminal tactics, it would be worth considering the so-called ecological recognition method. In essence, it differs from the traditional procedure in that the witness is led, more or less randomly, alongside the defendant in the natural environment. In this case, the target person who may be identified is asked to be in a place where more than one person is present, e.g. in a department store in a busy street. There, the witness is accompanied with the intention of trying to recognize and, select the perpetrator he or she has seen before. The fact that the persons to be compared are not chosen in a targeted manner is usually offset by the large number and variety of those present. However, it is also possible that passers-by will be "enriched" by the authorities with targeted persons for comparison. The advantage of this method is that it is more relaxed, more dissolved than the presentation for classical recognition, and the risk of the target person - due to his or her internal tension or the involuntary attention of the persons selected for comparison ("cotton wool", "stuffing") is minimized – it stands out from the group.[12]

E) I also propose a method that can be implemented in practice as a crime tactical, pre-influenced proposal. In doing so, instead of forensic experts familiar with the case, so-called "blind" bailiffs who have not dealt with the

[12] See G. L.Wells, and R. Lindsay, "Improving Eyewitness Identifications from Line-ups: Simultaneous versus Sequential Line-up Presentation," *Journal of Applied Pshychology* 70, no. 3 (1985): 556–563.; A. M. Levi, "Some Facts Lawyers Need to Know about the Police Line-up," *Criminal Law Quaterly*, no. 4 (2002); A. Schäfer, "Sequenzielle Video-Gegenüberstellungen," *Kriminalistik*, no. 12 (2001): 797–798.

case so far are employed. (As we have read above under Turkish rules.) These are law enforcement officers (police, customs, prosecutors) who do not know the identity of the (potential) suspect in the case, i.e. they do not even know which version is aimed at. The line itself is put together by forensicists who know the suspect and the case. But their role here stops for now, they leave the process. It is taken over by the non-compliant employee, who must also communicate this fact to the recognizer. By this, I mean, he or she is just doing the task of recognition and he or she does not know the case, nor the participants. After all this, he or she conducts - in a measured, distant way, without influence, because he or she does not know, does not guess who-why-what he or she should focus on - organizing the recognition experiment in accordance with the tactical-technical recommendations. He or she then passes the report containing the "result" to the forensic scientists. With no record of history, it is not difficult for a "pop-up" to recommend that he or she should not reveal anything to recognizers, neither affirmation nor contradiction, either verbally, or with a gesture or any kind of metacommunication. And one cannot do that even after being recognized, just as investigators who know the case cannot do it.

F) The recognizer should strive for as little communication as possible during the presentation. The instructions should be short, understandable, and accurate.

G) It is advisable to provide the witness' or victim's personal description to the (potential) suspect's legal representative before the search. In this way, there is the opportunity to comment on the remarkably different, suggestive setting and, if necessary, complain.

H) It may be of tactical significance to accurately mention and correctly record how the recognizing witness expresses which of the several persons he or she has recognized is the person who was perceived in connection with the crime. Whether he or she points out, states openly, firmly, surely, or even repeatedly, or, conversely, is uncertain, indeterminate.

I) In the case of uncertain or anxious identification of a person, repetition based on another grouping of the same person has no effect, instead the so-called "empty" formation is desirable. At this point, the (potential) suspect is not included in the group either (only individuals above all suspicions) and thus the witness is asked to be identified.

J) It is an important criterion to check in advance that none of the people in line are familiar with the recognizer (most often the victim).

K) In the case of photographic identification, several photographs must always be presented to the recognizer and this must be done during the preliminary investigation data collection. (Even during the suspect's earning period.)

L) Multiple (different) photographs of the same person cannot be shown.

M) Photographs of different people should be the same size and have the same characteristics. Each should only be presented to the recognizer for the same amount of time.

N) Immediately after the presentation, the recognizer (often the eyewitness) should be given the opportunity to explain what he or she has to say about the identification in his or her own words.

O) There is no place for recognition of any percentage, especially in the evaluation of an attempt at recognition. There can be no question of identification even if the recognizer indicates a percentage of similarity.

P) Especially if the selection is based on (partly) functional characteristics (e.g. walking, running, speech, sound), it is advisable to use more modern technical devices than photography (e.g. video, digital camera, electronic data recorder).

Q) When recognizing a corpse, it must be recorded separately if it is not the body or face that the active subject has recognized, but, for example, his or her clothing or jewellery. In this case, we cannot speak for sure of (dead) personal identification.

R) Consider whether the questioner should be asked repeatedly at the negotiation stage whether he or she recognizes the person he or she has previously seen selected. Reproduction of a reproduction may not really have probative value.

S) It is not only a witness (victim) protection reason, but also a forensic (investigative interest) reason why passive subjects (to be recognized) do not see the active subject, the recognizer (e.g. witness, victim, suspect).

9. Closing thought

We can hope that the improvement proposals put forward by legal theory and scientific publications will have a significant impact on legislation and the application of law in the future. If not in the coming months, but over several years, we can achieve that the identity attempt, which appears as a very “dangerous” Achilles heel of criminal proceedings, will indeed be in its rightful place, both in law and enforcement, and will not give rise to erroneous court decision, to justizmord.

A Review of the MFS Regulatory Framework to Control IFF in Bangladesh

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ABSTRACT *Mobile financial services (MFS), with their focus on technology and ease of use, have emerged as a novel approach for developing countries to address the problem of adopting best practices to promote financial inclusivity. However, if there are no effective regulations or guidelines in place on a national and international level, the purpose of achieving full financial inclusion and the Sustainable Development Goals might go in vain. For instance, to prevent illicit financial flow (IFF) and ensure that this financial system operates properly, the central bank of Bangladesh, one of the world's fastest-developing nations, implemented the most recent MFS rule. However, a number of MFS-related fraud incidents have prompted scholars to critically assess the Bangladesh Bank's (BB) MFS regulatory system with a focus on the efficiency of IFF prevention. This study has demonstrated that the current regulatory system has a weak KYC verification system using a comparative methodology. Following that, if someone has access to someone's personal information, they also have access to their MFS accounts. In general, the current MFS adheres to a risk-based regulatory paradigm that forces regulators to wait until a hazard occurs and limits them to this legal framework. Policy makers would then be advised by this study to implement a smart regulatory approach in order to establish a climate that is anti-IFF.*

KEYWORDS *Mobile finance, MFS, Financial policy, Illegal finance, Bangladesh*

1. Introduction

The advent of Mobile Financiale Services (MFS) as a type of digital banking in financial transactions over the past ten years has significantly impacted plans for financial inclusion and resilience-building in both developed and developing nations. Since such services encourage rapid contactless financial relationships, they have played a critical role in reducing the financial shock in formal

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financial services in the fight against pandemics like Covid-19.[1] Particularly since the second wave of the COVID-19 pandemic, there has been a significant shift in the way money is transacted around the globe, which Hasan and Sony (2023)[2] refer to as "digital revolutions in the financial sectors".

In line with such development, the World Bank estimates that by 2021, 76% of young people worldwide would have bank accounts with mobile services, up from 68% in 2017 and 51% in 2015. 40% of individuals in low- and middle-income nations (with the exception of China) only began trading in the physical or online market after the epidemic by using a card, phone, or other similar electronic device.[3] Online bill payment is becoming more common with MFS accounts.

Accordingly, the statistics reveals that getting a payment into an account rather than cash can encourage people to use the formalized banking system, as 83% of those who received digital payments subsequently used their accounts to send digital payments[4]. The banking ecology was expanded as nearly two-thirds of users utilized their accounts for managing their cash flow and roughly 40% for saving.[5] Likewise, in developing countries, 36% of people currently receive a wage, a public payment, a payment from the sale of farm products, or a domestic remittance through an MFS account.[6]

In contrast to other regions, South Asia has experienced long-term stability in the region's adult account ownership rate (68%) since 2017.[7] Digital literacy was a crucial factor in early pandemic culture, according to Afroze and Rista (2022) [8], as customers felt more at ease with traditional financial systems than MFS. The situation has changed, nevertheless, as a result of the pandemic's initial shock and widespread ICT adoption. For instance, between September 2022 and October 2022, compared to conventional transactions, 8.74% new users of MFS have been listed by the Bangladesh Bank (BB) (2022) in all kinds of transactions in Bangladesh.[9] Likewise, the inward remittance flow, Utility Bill Payment (P2B), Merchant Payment, Government Payment via MFS have

[1] Md Kamrul Hasan, and M. M. Abdullah Al Mamun Sony, "Covid-19, Social Change, and Society 5.0," in *The Palgrave Handbook of Global Social Change*, eds. Rajendra Baikady, S.M. Sajid, Varoshini Nadesan, Jaroslaw Przeperski, M. Rezaul Islam, and Jianguo Gao (Cham: Palgrave Macmillan, 2023), 1–19.

[2] Ibid.

[3] The World Bank Group, "COVID-19 Drives Global Surge in use of Digital Payments," https://www.worldbank.org/en/news/press-release/2022/06/29/covid-19-drives-global-surge-in-use-of-digital-payments.

[4] Ibid.

[5] Ibid.

[6] Ibid.

[7] Ibid.

[8] Dilruba Afroze, and Faria Islam Rista, "Mobile financial services (MFS) and digital inclusion–a study on customers' retention and perceptions," *Qualitative Research in Financial Markets* 14, no. 5 (2022): 768-785.

[9] Bangladesh Bank, "Mobile Financial Services," *Bangladesh Bank*, https://www.bb.org.bd/en/index.php/financialactivity/mfsdata.

increased by 4.95%, 4.82%, 7.56%, and 6704.41% respectively.[10] Observing such growth Statista (2023)[11] projected the market value of digital finance would be worth $10.85 billion and $ 20.73 billion by the end of 2023 and 2027 respectively with the annual growth rate of 17.57%.

Nonetheless, over the past few years, several scholars and financial investigators (i.e., Childs et al. (2020)[12]; Goldman et al. (2017)[13]; Herkenrath (2014)[14]; Tropina (2016a, 2016b)[15, 16]) have expressed suspicion about this development by speculating on the likelihood of illicit financial flow (IFF) facilitation via this digital platform. For illustration, focusing on the connection between IFF and digital transformation (DT), Tropina (2016a)[17] highlighted certain aspects of the strong relationship between these two overarching concepts in a World Bank fact sheet. One of the most significant areas of the IFF and DT link observed by Tropina (2016a)[18] is illegal money procurement, which is produced and perpetuated via fraudulent online platforms and due to the weak legislative measures.

Further, Tropina (2016a)[19] speculated that if digital financial transactions like m-banking, crypto-currencies, electronic transfers, e-commerce services, and digital gambling services functioned together, then a number of potential windows would be accessible for illicit financial sources and for the unauthorized transmission of money from legal sources. According to this perspective, Joveda et al. (2019)[20] questioned if Bangladeshi banking industries could combat cyber laundering under the current regulatory framework. In light

[10] Bangladesh Bank. "Mobile Financial Services," https://www.bb.org.bd/en/index.php/financialactivity/mfsdata.

[11] Statista. "Digital Payments – Bangladesh," https://www.statista.com/outlook/dmo/fintech/digital-payments/bangladesh#key-market-indicators.

[12] Andrew Childs, Coomber Ross, Melissa Bull, and Monica J. Barratt, "Evolving and Diversifying Selling Practices on Drug Cryptomarkets: An Exploration of Off-Platform 'Direct Dealing'," *Journal of Drug Issues* 50, no. 2 (SAGE 2020): 173–190.

[13] Zachary K Goldman, Ellie Maruyama, Elizabeth Rosenberg, Edoardo Saravalle, and Julia Solomon-Strauss, "Terrorist use of virtual currencies," *Center for a New American Security*, https://www.cnas.org/publications/reports/terrorist-use-of-virtual-currencies.

[14] Marc Herkenrath, "Illicit financial flows and their developmental impacts: An overview," *International Development Policy Revue international de politique de développement* 5, no. 3 (2014): 1–17.

[15] Tatiana Tropina, "Do digital technologies facilitate illicit financial flows?," Washington, DC: World Bank, 2016a. http://dx.doi.org/10.1596/23803.

[16] Tatiana Tropina, "The nexus of information technologies and illicit financial flows: phenomenon and legal challenges," *ERA Forum* 17, no. 3 (2016): 369–384.

[17] Ibid.

[18] Ibid.

[19] Ibid.

[20] Nahid Joveda, Md Tarek Khan, and Abhijit Pathak, "Cyber laundering: a threat to banking industries in Bangladesh: in quest of effective legal framework and cyber security of financial information," *International Journal of Economics and Finance* 11, no. 10 (2019): 54–65.

of this new industrial growth, such considerations therefore typically encourage policymakers in third world countries to reconsider their current strategies.
Moreover, many risks exist for the safe and effective deployment of MFS, including operational risks related to security, system design, implementation, and maintenance, legal risks, strategic risks, branding risks, credit risks, market risks, and liquidity concerns.[21] Among these issues, the legal concerns that are the focus of this study are still being thoroughly researched, since inadequate legal protection may make money laundering easier.[22] For example, despite BB introducing a new MFS regulation policy in February 2022, one in ten MFS customers in Bangladesh was found to be a victim of MFS fraud.[23]
Alongside, Mithu (2022)[24] has projected that each individual generally suffers losses of between 9000 and 10000 BDT, or from 84.33 to 93.70 USD (based on the currency rate as of February 1, 2023) via MFS, which is likely to be siphoned off from Bangladesh. As substantiation, the Criminal Investigation Department (CID) of Bangladesh stated in a press briefing that during the course of the previous year, utilizing only MFS, BDT 75,000cr, or eight billion USD, were laundered from Bangladesh through Hundi operators.[25] Mohammed Ali, the head of the CID, remarked during the same briefing:

> …the 16 arrestees laundered Tk 20.70 crore in the past four months, and with the estimate some 5,000 MFS agents might have laundered Tk 25,000 crore through hundi, thereby amounting to Tk 75,000 crore in a year.

Along the same lines, it has also been estimated that between 2015 and 2020 about 49.65 billion USD was siphoned off overseas from Bangladesh through commercial illicit financial flows.[26] Similarly, about 66 cases of IFF have been listed by CID only in the last year, whereas over the past 20 years, 752 cases

[21] Mahbub Rahman, Nilanjan Kumar Saha, Md Nazirul Islam Sarker, Arifin Sultana, and Prodhan AZMS, "Problems and prospects of electronic banking in Bangladesh: A case study on Dutch-Bangla Bank Limited," *American Journal of Operations Management Information Systems* 2, no. 1 (2017): 42–53.
[22] Ibid.
[23] Ariful Islam Mithu, "Rate of MFS fraud victims is higher among the highly educated," *The Business Standard*, https://www.tbsnews.net/features/panorama/rate-mfs-fraud-victims-higher-among-highly-educated-401222.
[24] Ibid.
[25] TBS Report, "Hundi traders laundered Tk75,000cr in a year via MFS: CID," *The Business Standard*, https://www.tbsnews.net/bangladesh/crime/hundi-traders-laundered-some-tk25000-crore-past-4-months-thru-mfs-cid-492410.
[26] The Financial Express, "$49.65b siphoned off from Bangladesh in six years: GFI," *The Financial Express*, Trade, https://thefinancialexpress.com.bd/trade/4965b-siphoned-off-from-bangladesh-in-six-years-gfi1639797327#:~:text=Over%20US%2449.65%20billion%20has,laundering%20between%202009%20and%202015.

have been listed by law enforcement agencies.[27] The MFS regulatory framework (MFS RF) in Bangladesh ought to be re-evaluated in light of this circumstance.

A regulatory framework can be understood as a legal instrument to regulate any system to ensure the proper functioning of that system.[28] The importance of regulatory frameworks as a safeguard for a nation has long been recognized. The effectiveness of the state-owned digital regulating system has been stressed by academics from a wide range of disciplines. A regulatory framework, for instance, has been underlined by Larionova and Shelepov (2021)[29] as being important for international public policy; nevertheless, it is equally important at the national level, notably for IFF protection. The regulatory framework in the context of MFS generally maintains stability from formal non-banking agents to banking actors, securing a formal financial channel in a non-formal manner.

MFS regulations have evolved in a distinctive manner; in some, regulators have proactively defined e-money operating restrictions, while in others, they have responded to belatedly emergent risks in the new economic structure.[30, 31, 32] A difficulty, for instance, which a regulator faces in every case is adjusting to a new financial service system that is unrelated to traditional financial institutions and generates potential dangers to both customers and financial stakeholders with a wider flow of cash throughout the MFS ecosystem.[33, 34, 35]

However, over the past couple of years several researchers (e.g., Kim et al. (2018)[36]; Lee et al. (2012)[37]; Mpofu (2022)[38]; Ouma Shem et al. (2017)[39];

[27] Asaduzzaman, "Investigations into money laundering cases drag on," *Prothomalo*, 22 January 2023, Cime, https://en.prothomalo.com/bangladesh/crime-and-law/rw0oqq2ppk.

[28] Ambareen Beebeejaun, and Dulloo Lubnaa, "A critical analysis of the anti-money laundering legal and regulatory framework of Mauritius: a comparative study with South Africa," *Journal of Money Laundering Control* 26, no. 2 (2023.): 401–417.

[29] Marina Larionova, and Andrey Shelepov, "Emerging Regulation for Digital Economy: Challenges and Opportunities for Multilateral Global Governance," *International Organisations Research Journal* 16, no. 1 (2021): 29–63.

[30] Ross Buckley, Jonathan Greenacre, and Louise Malady, "The regulation of mobile money in Malawi," *Washington University Global Studies Law Review* 14, no. 3 (2015): 435–497.

[31] Ceyla Pazarbasioglu, Alfonso Garcia Mora, Mahesh Uttamchandani, Harish Natarajan, Erik Feyen, and Mathew Saal, "Digital financial services," *World Bank Group*: 1–54. Last modified August 2020.

[32] Upkar Varshney, "The regulatory issues affecting mobile financial systems: Promises, challenges, and a research agenda," *Communications of the Association for Information Systems* 34, no 1. (2014): 1457–1480.

[33] Buckley, Greenacre, and Malady, "The regulation of mobile money in Malawi," 435–497.

[34] Pazarbasioglu, Mora, Uttamchandani, Natarajan, Feyen, and Saal, "Digital financial services," 1–54.

[35] Varshney, "The regulatory issues affecting mobile financial systems," 1457–1480.

[36] Minjin Kim, Hanah Zoo, Heejin Lee, and Juhee Kang. "Mobile financial services, financial inclusion, and development: A systematic review of academic literature," *The*

Shaikh et al. (2023)[40]) have contributed to the advancement of scholarship on financial inclusion, exploring different dimensions of MFS, like the delivery, environmental factors, and the socio-economic impact of MFS. Similarly, some studies, including Weber (2010)[41], Andiva (2015)[42], Bara (2013)[43] and Ahmad et al. (2020),[44] have highlighted the legal measures relating to MFS, but mostly in African and Indian contexts, which provide a limited scope for application in the context of Bangladesh. Subsequently, fraud and money laundering issues associated with Bangladesh MFS have remained relatively unspoken of in academia.

On the other hand, undoubtedly, this existing statute could be vulnerable to accelerating IFF in Bangladesh. In relation to these views, Reuter (2017)[45] has emphasized that good governance is important to control IFF. Though a series of papers in literature (e.g., Collin (2020)[46]; Herkenrath (2014)[47]; Reuter (2017)[48]) have highlighted different dimensions of IFF, they addressed the

Electronic Journal Of Information Systems In Developing Countries 84, no. 5 (2018): e12044.

[37] Yong-Ki Lee, Jong-Hyun Park, Namho Chung, and Alisha Blakeney. "A unified perspective on the factors influencing usage intention toward mobile financial services," *Journal of Business Research* 65, no. 11 (2012): 1590–1599.

[38] Favourate Y. Mpofu, "Industry 4.0 in Financial Services: Mobile Money Taxes, Revenue Mobilisation, Financial Inclusion, and the Realisation of Sustainable Development Goals (SDGs) in Africa," *Sustainability* 14, no. 14 (2022): 8667.

[39] Shem Alfred Ouma, Teresa Maureen Odongo, and Maureen Were, "Mobile financial services and financial inclusion: is it a boon for savings mobilization?" *Review of Development Finance* 7, no. 1 (2017): 29–35.

[40] Aijaz A. Shaikh, Hawazen Alamoudi, Majed Alharthi, and Richard Glavee-Geo, "Advances in mobile financial services: a review of the literature and future research directions," *International Journal of Bank Marketing* 41, no. 1 (2023): 1–33.

[41] Rolf H. Weber, "Regulatory framework for mobile financial services," in *Telekom Regulatory Authority of India. Mobile applications of inclusive growth and sustainable development* (New Delhi: Telekom Regulatory Authority of India, 2010), 87–93.

[42] Barnabas Andiva, "Mobile financial services and regulation in Kenya," 1st Annual Competition and Economic Regulation (ACER) Conference, 2015.

[43] Alex Bara, "Mobile money for financial inclusion: policy and regulatory perspective in Zimbabwe," *African Journal of Science, Technology, Innovation and Development* 5, no. 5 (2013): 345–354.

[44] Ahmad Hassan Ahmad, Christopher Green, and Fei Jiang, "Mobile money, Financial inclusion and Development: a review with reference to african experience," *Journal of Economic Surveys* 34, no. 4 (2020): 753–792.

[45] Peter Reuter, "Illicit Financial Flows and Governance: The Importance of Disaggregation," (Governance the Law: Background paper for World Development Report, 2017): 1–33. https://www.oecd-ilibrary.org/africa-s-development-dynamics-2018_5j8qzq8zswbv.pdf?itemId=%2Fcontent%2Fpublication%2F9789264302501-en&mimeType=pdf.

[46] Matthew Collin, "Illicit Financial Flows: Concepts, Measurement, and Evidence," *The World Bank Research Observer* 35, no. 1 (2020): 44–86.

[47] Marc Herkenrath, "Illicit financial flows," 1–17.

[48] Reuter, "Illicit Financial Flows," 1–33.

relationship of IFF and MFS RF only partly. Consequently, a demand arises for a systematic study about the effectiveness of the Bangladesh MFS RF to minimize IFF. Targeting civil society development organizations as well as financial policymakers as a primary audience, in a line with the earlier statement, this study has been designed to seek an answer to the following questions.

RQ 1: What is the strength and weakness of the existing MFS RF in Bangladesh to control IFF?
RQ 2: How could MFS RF in Bangladesh be improved to control IFF?

1. 1 Conceptual argument: Illicit financial flows (IFF)

In this section, the authors have been dealing with understanding the function of IFF, since earlier discussions paid less attention to these concepts. A post-modern concept of illicit financial flows (IFF) has emerged as a key development challenge in relation to illegal procurement of money and the outer flow of this money between developing countries and developed countries. Although the practice relating to this concept is not new, and even if it is very popular in political and international relationships, in academia the widespread attention to IFF is missing. Subsequently, to meet the future development challenge, such as Industry 4.0 as well as Society 5.0 (suggested reading, Hasan and Sony (2023)[49]; Mpofu (2022)[50]), the advancement of multidisciplinary erudition has been neglected due to the lack of a rigorous scientific explanation of the term IFF. In line with this perception, the novel contribution of this study would be the critical examination of the MFS RF associated with IFF.

In such a way, the capital management scholarship will gain special attention from the legal point of view, while most earlier scholars have placed an emphasis on defining, characterizing, and exploring the consequences of IFF. A complete characterization of IFF, for instance, can be seen in the study of Herkenrath (2014)[51], and Chowla and Falcao (2016)[52]. Out of them, Herkenrath (2014) defines IFF by characterizing it as "cross-border capital movements for the purposes of concealing illegal activities and evading taxes".[53] Moreover, Chowla and Falcao (2016) have added another characteristic to the definition of IFF to include financial benefits gained within a country unlawfully, such as tax evasion, criminal activity and corruption.[54] Nonetheless, both Herkenrath (2014)[55], and Chowla and Falcao (2016)[56] have agreed that the consequences of

[49] Hasan, and Sony, "Covid-19, Social Change, and Society 5.0," 1–19.
[50] Mpofu, "Industry 4.0 in Financial Services," 8667.
[51] Herkenrath, "Illicit financial flows," 1–17.
[52] Peter Chowla, and Tatiana Falcao. "Illicit Financial Flows: concepts and scope." *Interagency Task Force* (2016):1–20.
[53] Herkenrath, "Illicit financial flows," 1–17.
[54] Chowla, and Falcao, "Illicit Financial Flows," 1–20.
[55] Herkenrath, "Illicit financial flows," 1–17.

IFF have a direct influence on weakening countries' capacity to raise the necessary funds for investments in sustainable development.

IFFs have always remained in the centre of attention of international development organizations, such as the IMF, OECD, WB, and UN, wishing to address the development challenge via exploring the source of this financial movement. Similarly to the earlier definitions, the IMF (2021) demarks the term IFF as, "…the movement of money across borders that is illegal in its source (e.g. corruption, smuggling), its transfer (e.g. tax evasion), or its use (e.g. terrorist financing)".[57] In a similar manner, Reuter (2017) identified five major IFF contributors from a micro perspective, including bribes, tax evasion, criminal enterprise profits, corporate profit shifting, and currency regulation evasion.[58] Then, as a broader concept of IFF, the WB (2017) added cash smuggling, shell corporations, informal value transfer systems, and trade-based money laundering as some other sources of IFF.[59]

Moreover, the WB (2017) asserts that a cash flow can only be IFF if it was obtained unlawfully (e.g., through corruption or tax fraud), was the result of criminal conduct (e.g., the smuggling and trafficking of minerals, wildlife, drugs, and people), or was used for malicious ends (e.g., financing of organized crime).[60] For the purposes of this study, IFF can be defined as within-border or cross-border economic transactions that encourage illicit activity or provide support to illegal actions and pose a risk to sustainable development.

1. 2 Conceptual relations: IFF and MFS RF

Returning to the subject of the link between the MFS RF and IFF, it should be noted that since the beginning of the postmodern era, IFFs have been a major policy issue for all countries.[61] These policy issues at a national level generally do not lie in a single instrumental or organizational effort. Instead, to create an anti-IFF environment, a government needs a complex structure consisting of different policy departments, like the central bank, finance ministry, justice

[56] Chowla, and Falcao, "Illicit Financial Flows," 1–20.

[57] International Monitary Fund, "The IMF and the Fight Against Illicit and Tax Avoidance related Financial Flows," https://www.imf.org/en/About/Factsheets/Sheets/2018/10/07/imf-and-the-fight-against-illicit-financial-flows.

[58] Reuter, "Illicit Financial Flows," 1–33.

[59] WB, "Illicit Financial Flows (IFFs)," *The World Bank*, Last modified June 2. 2017. https://www.worldbank.org/en/topic/financialsector/brief/illicit-financial-flows-iffs.

[60] Ibid.

[61] OECD, Coherent policies for combatting Illicit Financial Flows, *Framework for Policy Coherence for Sustainable Development: Thematic Module on Illicit Financial Flows [SG/PCD(2016)3]*. Last modified February 25 2016. https://www.chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://one.oecd.org/document/SG/PCD(2016)2/En/pdf.

ministry, the foreign ministry, which guide a series of operational agencies and have links with civil organizations (Figure 1).[62]

This is therefore a challenging endeavour to prevent these financial flights involving numerous distinct stakeholders, several of whom have identical or equivalent mandates and obligations. However, a successful strategy of policy measures, according to Dohlman and Neylan (2020), generally remains under

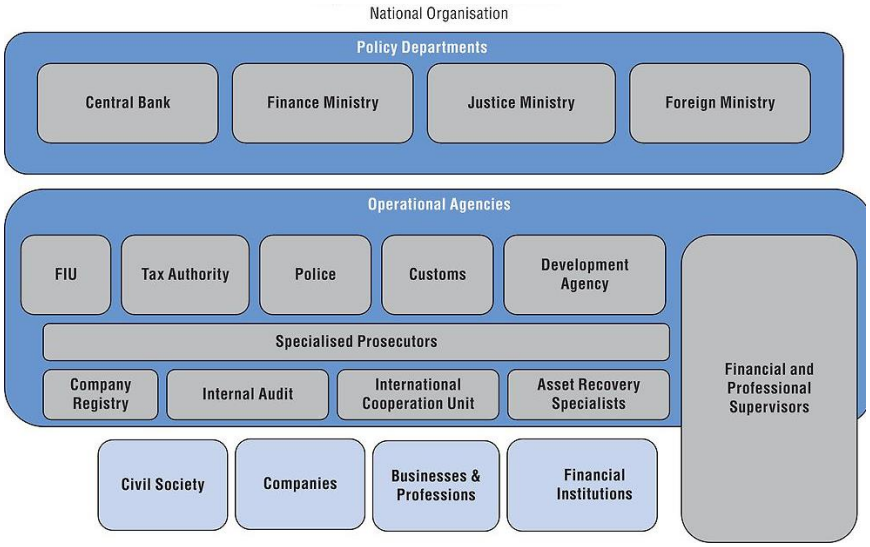

FIGURE 1. KEY ACTORS INVOLVED IN COMBATING ILLICIT FINANCIAL FLOWS.
FIGURE SOURCE: OECD (2016)

the scope of five key interlinked legal initiatives, such as criminal justice, regulation and supervision of financial institutions and professions, the tax system, the government and public administration, and company and trust law.[63] The relationship between IFFs and "the regulation and supervision" of financial institutions and professions has been taken into consideration in this part in accordance with the study's objective. Yet, in order to counteract illicit finance, experts have placed a strong emphasis on the reasonable regulation of financial institutions, their business models, customer behaviour, and data security.[64, 65] Dohlman and Neylan (2020) contend that these regulations need to cover a broader spectrum of subjects and employ a variety of strategies in various contexts.[66] In some cases, the supervisory structure and the involved agencies

[62] Ebba Dohlman, and Tom Neylan, "Policy Coherence in Combating Illicit Financial Flows: Pcsd Thematic Module," Paris 2020, https://www.oecd.org/gov/pcsd/IFFs%20thematic%20module%20v12cl_for%20web.pdf.
[63] Ibid.
[64] Ibid.
[65] Dev Kar, and Joseph Spanjers, *Illicit financial flows from developing countries: 2004-2013*, Washington, DC: Global Financial Integrity. Last modified December 8 2015, https://gfintegrity.org/report/illicit-financial-flows-from-developing-countries-2004-2013/.
[66] Dohlman, and Neylan, "Policy Coherence in Combating Illicit Financial Flows".

can vary, which can help to construct a filtering net against illegal money and procuring financial institutions. To continue, Dohlman and Neylan (2020) have further highlighted those who are responsible for the supervision of financial entities.[67] The Financial Stability Board (FSB), the Basel Committee on Banking Supervision (BCBS), the International Organization of Securities Commissions (IOSCO), and the International Association of Insurance Supervisors (IAIS) are a few of the standard-setters that can collaborate to promote financial sector standards and links across global boundaries in order to regulate IFFs.[68, 69,70]

Nationally these congruence concerns have an impact on how supervision is set up at the national level. As an illustration, some countries have a single financial sector supervisor in charge of all forms of supervision, while others separate prudential supervision from other types, and still, other countries have a system of separate supervisors for every sector, including the financial services, insurance, and securities sectors as well as regulated businesses and professions.[71,72] The standards nevertheless may differ from one nation to another.

Coming to MFS RF issues, mobile finance evolved as a key financial inclusion tool all over the world and opened a novel passage for achieving sustainable development goals (SDG) for developing countries. Risks and tensions, however, related to money laundering remain an integral part of the adaptation of this new development, especially not only in developing countries but also in developed countries. Verifying a customer's identity by the financial institution could be one of the potential solutions to such tension. But in most developing countries, several people are lacking proper identity documentation and, in such a context, financial inclusion could be difficult.[73]

MFS also requires an advance technological infrastructure along with sophisticated technical skills, but without effective regulation it remains a challenge to bring all people in the same line. For instance, Dohlman and Neylan (2020) believed that this was not only a challenge for developing

[67] Ibid.
[68] Ibid.
[69] Dev Kar, and Brian LeBlanc, *Illicit financial flows from developing countries: 2002-2011*, Washington, DC: Global Financial Integrity. Last modified Dec 11, 2013, https://gfintegrity.org/report/2013-global-report-illicit-financial-flows-from-developing-countries-2002-2011/.
[70] Ibid.
[71] Dohlman, and Neylan, "Policy Coherence in Combating Illicit Financial Flows".
[72] Dev Kar, and Joseph Spanjers, *Illicit financial flows from developing countries: 2004-2013*.
[73] Ibrahim Niankara, "The impact of financial inclusion on digital payment solution uptake within the Gulf Cooperation Council Economies," *International Journal of Innovation Studies* 7, no. 1 (2023): 1–17.

countries but also a challenge for OECD members[74]. Thereafter, Dohlman and Neylan (2020)[75] suggested,

> In order to manage the tensions between financial inclusion and anti-IFF measures, the FATF has developed guidance on financial inclusion, which sets out how countries can pursue the objective of financial inclusion without compromising measures to combat crime – for example by relaxing identification requirements or using alternative means of identification in low-risk situations, or by using thresholds and ongoing monitoring to mitigate the risks of reduced customer due diligence. This guidance should be mainstreamed into development planning in low-income countries to improve policy coherence at the national level.

After the foregoing discussion, it is obvious that adequate regulation, supported by an efficient regulatory framework, and sophisticated policy measures are the keys to successful MFS adaptation by producing an anti-IFF environment. However, over the past few years, law enforcement agencies in Bangladesh have identified various fraud cases involving MFS (as stated in the opening section). At the same time, a sizeable sum of money used to be transferred annually from Bangladesh to foreign countries. Hence it makes sense to examine whether the MFS RF is successful in Bangladesh.

1. 3 Theoretical framework of the MFS regulatory framework

Regulation, in any circumstances, remains an integral part of good governance, while a regulatory framework is a product of best policy practices both in the public and private realms. However, in order to address people's actions at all three levels – global, national, and local – on a single platform, both state and private actors, with the growth of the fourth industrial revolution (Industry 4.0), must cope with an increasingly complex array of RFs. Additionally, while "building better" and "finding the best one" are key policymakers' concerns and legislative steps for various stakeholders, respectively, understanding and applying an effective RF is left to a multidisciplinary endeavour. The nature of RF has then been widely determined to be critical and complex. However, from this perspective, Bluff (2018) has identified five distinct regulation theories that are widely used throughout the world (Table 1).[76] It is crucial to comprehend which theory will best explain the current Bangladeshi MFS RF in this phase of the study and which theory can help advance this structure.

[74] Dohlman, and Neylan, "Policy Coherence in Combating Illicit Financial Flows".
[75] Ibid.
[76] Elizabeth Bluff, "Regulatory Theories and Frameworks," in *Hybrid Public Policy Innovations*, eds. Mark Fabian, and Robert Breunig (New York: Routledge, 2018), 46–62.

Table 1 five different regulation theories

	Theories	Description	Example
	The Risk-based regulation	The regulator uses systematized decision-making to allocate resources and set priorities for regulatory actions based on an assessment of threats to its goals.	Food safety policy in different countries
	The Regulatory craft	Regulators conduct systematic analyses of particular issues, dangers, or concentrations of risks and then take appropriate action.	The Australian Skills Quality Authority (ASQA)
	The Responsive regulation	Uses a pyramid of supports to gradually build up regulator capacity and reinforce strengths, and if that does not work, a pyramid of increasingly harsh punishments until a change is achieved, in an effort to strike a balance between cooperative and deterrent regulatory approaches.	Work place Safety and Insurance Board (WSIB) in Ontario Canada
	The Smart regulation	Builds on responsive regulation by putting in place a three-sided pyramid wherein the government, industry, and third-party regulators all collaborate to adopt complementary measures in a coordinated manner.	The Dutch Inspectorate of Environment adopted such regulation to regulate their hazards electronic equipment.
	The Strategic enforcement	In order to plan and focus actions, regulators use supply chains, branding, franchising, third-party management, and other commercial systems.	The Working Hour Division (WHD) of the Department of Labor in the United States

(Source: Bluff, 2018)[77]

The application of each of the theories highlighted in Table 1 depends on their own subject matter. Bluff (2018) believed that while in the responsive and intelligent regulation the regulator is responsive to reform (or not) with the regulations, the regulatory reaction in the risk-based regulation is appropriate to the risk[78]. Developing strategies or taking steps to accomplish a specific goal is more in line with the regulatory craft and strategic enforcement regulator tactics.[79] Further, Bluff (2018) mentions risks or regulations that are more likely

[77] Ibid.
[78] Ibid.
[79] Ibid.

to endanger the regulator's aims are given priority under the risk-based regulation. The regulatory craft theory, in contrast, requires prioritization based on an evaluation of documented harms.[80] At the same time, "strategic enforcement" takes a different tack, since it places a higher priority on key players in supply chains and corporate structures that contribute to systematic non-compliance. Priority setting receives little insight from the responsive and smart regulation[81]. In line with this viewpoint, UNODC and the OECD (2016)[82] have suggested four comprehensive frameworks to address IFF including,

> …identifying and raising awareness of the types, magnitudes, and risks of IFFs (particularly at the political and policy-making level); considering the contextual factors that allow IFFs to thrive; supporting coherence within and between national and international normative frameworks (vertical coherence); Identifying critical, prioritized interactions across economic, social and environmental areas to address IFFs (horizontal coherence). (p. 5)

The offered theories will be employed in this study to clarify the nature of Bangladesh's MFS regulatory framework and to determine which theory would be most effective in reducing IFFs.

1. 4 Approaches to MFS RF

In the context of MFS RF, two most popular lines of actions can be seen in most of the countries, though each of the nations has their own approach based on their political as well as legal structure and interest. The first trend generally includes those systems that are explicitly specified in the supply of financial services and, therefore, subject to regulation and expert supervision from the state, particularly when it comes to accepting deposits from consumers. Furthermore, in cases where mobile phones are regarded as a medium for the delivery of such services, financial services may only be delivered by organizations that have been specifically granted permission to do so. Further, in this line MFS is viewed as an extra channel for conducting financial transactions in the regulatory framework now in place, alongside branches or agent banks, ATMs, and POS. Mexico, Colombia and Guatemala's MFS RFs are examples for such kind of trends.[83]

Another approach is to view MFS as a form of payment that enables regulation of payment systems under the Central Bank Law. This creates a legal

[80] Ibid.

[81] Ibid.

[82] OECD. Coherent policies for combatting Illicit Financial Flows. *Framework for Policy Coherence for Sustainable Development: Thematic Module on Illicit Financial Flows [SG/PCD(2016)3]*. Last modified February 25 2016, https://www.chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://one.oecd.org/document/SG/PCD(2016)2/En/pdf.

[83] AFI. "Regulatory Approaches to Mobile Financial Services in Latin America." Kuala Lumpur: Alliance for Financial Inclusion. Last modified August 2014.

framework that permits new operators to offer such services while being subject to specialized state oversight. Additionally, MFS is a novel operation that includes the issuing of electronic money that may be held on cards or mobile devices. It is not just a way for traditional financial services to be delivered. An example for the practice of such regulation could be found in the Bolivian system.[84] The following section will provide further analysis to classify Bangladesh's MFS RF approach.

2. Methodology

To determine the efficacy of the current regulatory framework for the mobile finance system in Bangladesh in reducing IFF, a comparative study method, following the study of Sony (2023)[85], with a qualitative approach has been used. The entire study is divided into three sections. The elements of the comparative evaluation and relevant assessment criteria, together with the study questions and objectives, have all been described in the introduction. The impact of the newly developed processes and instruments on the equilibrium of the national financial flow has been investigated in the second section. Finally, a conclusion has been reached with suggestions to strengthen the regulatory framework in order to counter the influence of new platforms and safeguard the national economy.

The policies of several organizations and nations, as well as a variety of secondary sources, served as the primary source of information. The comparative discussion has been presented utilizing contentment analysis and the most recent BB MFS RF policies. These data have then been used to address the study question, "What are the strengths and weaknesses of the existing MFS RF in Bangladesh to control IFF and how could MFS RF in Bangladesh be improved to control IFF?" The researcher presents a number of examples of successful international policy initiatives as support for the conclusion.

3. Bangladesh MFS and their regulatory framework

Over the past couple of years, MFS have been expanding and becoming more well-liked by consumers in Bangladesh. Since consumers may efficiently access those banking services, a growing number of people currently unbanked are coming within these mobile financial services. There are now thirteen organizations offering MFS across the nation, among them Nagad, a state-owned company that is run by the Bangladesh Post Office, an agency linked to the Ministry of Post and Telecommunication.[86, 87] Other companies offering

[84] Ibid.

[85] M. M. Abdullah Al Mamun Sony, "A review of online business regulatory framework to reduce IFF in Bangladesh," *Essays of Faculty of Law University of Pécs, Yearbook of 2021-2022* (2023): 167–182.

[86] BB. 2022b. Mobile Financial Services. Dhaka: Bangladesh Bank.

MFS include bKash, Rocket, mCash, Upay, and Rocket. According to BB data, at the end of January 2023, there were more than 1941 Lac active MFS consumers and approximately 1569111 active agents. By January 2023, these services had processed more than BDT 3244.95 crore in transactions.[88] The number of customers increased by around 1.75 percent between December 2022 and January 2023.[89] Officially, the BB is in charge of regulating the market for MFS in order to advance both business and society as a whole. However, BB (2022a)[90] has defined MFS as,

> MFS refers to E-money services provided against a particular mobile/cell phone number of a client (termed as Mobile Account), where the record of funds is stored on the electronic general ledger. These services can be draw-down through specific payment instructions to be issued from the bearer's mobile phone or through alternative digital process or device by ensuring authenticity of the transaction. However, unlike e-money products, 'cash-in' and 'cash-out' and other services as permitted by BB (Bangladesh Bank) at agent locations are allowed for MFS accounts. (p. 2)

Like a regulatory model presented by Dohlman and Neylan (2020)[91], Bangladesh Bank (BB) plays the role of the sector-specific regulator in the regulatory arrangements for the regulation and oversight of MFS in Bangladesh (Bangladesh Bank, 1972, 2011, 2018). Whereas several political authorities, including the Finance Division of the Ministry of Finance, the Parliamentary Standing Committee on the Ministry of Finance, and some co-regulators, including the Bangladesh Telecommunications Regulatory Commission (BTRC), the Directorate of National Consumer Rights Protection (DNCRP), and the Bangladesh Competition Commission (BCC) as general competition authority, are also directly and indirectly involved with the regulatory process (Governance).[92] In addition to co-regulatory actors, the Association of Mobile Telecom Operators (AMTOB), the Association of Bankers, Bangladesh Limited (ABB), and the Consumers Association of Bangladesh (CAB) as a national interest group of consumers and Consumers International have a connection with the regulations that pertain to the sector, and all of them have interactions

[87] Nagad. "About Us." *Nagad.com*. https://nagad.com.bd/pg/?n=about-nagad.
[88] Bangladesh Bank. "Mobile Financial Services," https://www.bb.org.bd/en/index.php/financialactivity/mfsdata.
[89] Ibid.
[90] Bangladesh Bank. Bangladesh Mobile Financial Services (MFS) Regulations, Edited by *Payment Systems Department*. Dhaka: Bangladesh Bank. 2022a. https://www.bb.org.bd/en/index.php/about/guidelist.
[91] Dohlman, and Neylan, "Policy Coherence in Combating Illicit Financial Flows".
[92] Dr. Md. Nurul Amin, "Regulation of Mobile Financial Services in Bangladesh: Constraints and Prospects." *International Journal of Research and Innovation in Social Science* V, no. VI (2021): 565–570.

with the primary regulatory actors and co-regulators throughout the oversight layouts.[93]

A new regulation has been adopted by BB to replace the "Bangladesh Mobile Financial Services (MFS) Regulations, 2018" by 2022, since having some core limitations, the earlier MFS RF (2018) has failed to integrate all people in the same line and minimize fraud cases. For instance, four major limitations of the MFS RF (2018) have been identified by Amin (2021).[94] First, the study has concluded that the service cost was too high.[95] In comparison to similar services in other developing nations like Kenya, clients or users must pay extra to use mobile banking services. The second issue was fixing transaction selling[96]. New guidelines for improving transaction selling were published by Bangladesh Bank. Third, the use of mobile money transaction services by criminals poses a threat to this industry due to many significant fraud cases. Lastly, according to Amin (2021), in the Bangladesh mobile banking services sector, the service provider's responsiveness was deemed to be inadequate, whereas the monopoly of service providers was another limitation, since a single operator, bKash, has a substantial market share.[97] However, in the following section the authors have briefly presented the features of the latest MFS RF of Bangladesh and its efficiency in controlling IFFs.

3. 1 Bangladesh MFS Regulations, 2022

To overcome the limitations of earlier MFS RFs, the new regulation has adopted three core objectives, such as "...to cater cost efficient and prompt MFS"; "Promote convenient access to formal financial services at an affordable cost especially for the poor and unbanked population segments"; and "Ensure compliance with Anti Money Laundering and Combating Financing of Terrorism (AML/CFT) standards set by AML/CFT rules, regulations, guidelines and instructions issued by Bangladesh Financial Intelligence Unit (BFIU)".[98] Though for the legislative structure of the latest MFS RF, BB (2022a)[99] has followed the earlier one,

> … the Board of Directors of Bangladesh Bank (BB), in terms of Section 7A(e) and section 82 of the Bangladesh Bank Order, 1972 and in terms of Section 26 (cha) of Bank Companies Act, 1991 has decided to issue Bangladesh Mobile Financial Services (MFS) Regulations, 2022 replacing the Bangladesh Mobile Financial Services (MFS) Regulations, 2018 issued in July 2018 and its

[93] Ibid.
[94] Ibid.
[95] Ibid.
[96] Ibid.
[97] Ibid.
[98] Bangladesh Bank. Bangladesh Mobile Financial Services (MFS) Regulations, Edited by *Payment Systems Department*. Dhaka: Bangladesh Bank. 2022a. https://www.bb.org.bd/en/index.php/about/guidelist .
[99] Ibid.

> subsequent amendments. Bangladesh Mobile Financial Services (MFS) Regulations, 2022 will be in effect along with the Bangladesh Payment and Settlement Systems Regulations, 2014, Guidelines for Trust Fund Management for Payment and Settlement Services or any other law(s) shall come into effect regarding these regulations. (p. 1)

This is due to the fact that a financial inclusion via MFS greatly depends on complete integration between banks and MNOs, which represents multiple ownership models. In keeping with the prior RF, the most recent BB MFS typically operated as an affiliate of a bank where one bank or financial institution was required to hold at least 51% of the market, opening the door for monopoly. Although there have been some significant changes brought about by the most recent MFS RF, MNO participation and interoperability are still crucial ownership channels. Interoperability is defined as "the set of arrangements/procedures that enable participants in different systems to conduct and settle payments or securities transactions across systems while continuing to operate only in their respective systems" by BB (2022a: 2). Here, the BB MFS fails to connect with the national payment switch, in contrast to the regular banking channel. A single user formerly had numerous MFS accounts, and of those, one is still active while the others have, up until this point, remained inactive, or all of them are still active. However, there is a chance that one or all accounts could be lost, which opens the door for fraud.

Regarding the research questions, however, which examine the effectiveness and limitations of the current MFS RF in Bangladesh to regulate IFFs, the most recent BB MFS RF has incorporated a number of additional provisions to stop unauthorized cross-border money transfers. For instance, section 7.6 of BB (2022a: 8) states that "MFS providers will only handle foreign inward remittances if received through credits in Nostro Accounts of scheduled commercial banks in Bangladesh and pay out the same exclusively in Bangladeshi Taka (BDT) to MFS accounts of the beneficiaries. MFS providers are not allowed to conduct outgoing or international payment transactions, because only Bangladesh's scheduled banks' AD offices can do so".[100] This legal initiative may be very helpful in preventing external economic flow.

In addition to the aforementioned paragraph, the most recent MFS RF includes a risk-based regulation approach to fight financial terrorism (CFT) and anti-money laundering (AML). For instance, clause 11.1 states that "MFS providers shall comply with the provisions of the existing Anti-Terrorism Act and Money Laundering Prevention Act and respective Rules issued thereunder, instructions and guidelines issued by Bangladesh Financial Intelligence Unit (BFIU) from time to time." AML/CFT and know your customer (KYC) compliance clause 11.2 of the MFS RF further states that "MFS providers shall remain responsible

[100] Ibid.

for authenticity and timely updating of the KYC records as per the instructions of BFIU as and when required".[101]

The current MFS RF's clause 12, in which the authentication procedure for MFS transactions and security have been addressed clearly, is its strongest point. In order to prevent unauthorized parties from reading transaction information, for instance, confidentiality has been secured as a property. Similarly, integrity is another important property, ensuring that the transactional data is transferred in its original, undisturbed form. Regarding authorization, it has been emphasized that the rightful user is qualified to execute the given transaction. It ensures the method through which the system decides what actions users are allowed to take. However, it is still unclear how these legitimate users could be identified. Additionally, a user who initiates a transaction cannot later withdraw their consent, as stated in section 12.2 (iv). This sentence looks too problematic from the perspective of a legitimate user if an account is compromised.[102]

The MFS RF has included two more clauses to address this uncertainty. First, the requirement in section 12.3 that "All transactions shall be authenticated by the account holders using their respective Personal Identification Numbers (PINs) or similar other secured mechanism." MFS suppliers need to make sure that the PINs and other secured procedures are issued and authenticated with the correct protection and security features. Second, according to section 12.4: MFS providers shall guarantee that suitable procedures are in place for identifying consumers while the service is enabled/executed. An appropriately selected second authentication factor would be suggested for inclusion as additional security in addition to the PIN.[103]

Another crucial tool for preventing IFF is the "Complaint and Grievance Redressal." However, section 17.3 of the BB MFS (2022a)[104] can be criticized because it states that "[T]he MFS Provider shall maintain a call centre to receive and process disputes 24 hours a day via telephone, SMS, IVR and mail." The centre has ten (10) working days to settle every claim it receives. The MFS supplier must make sure they have the tools necessary to keep track of all disagreements, log them, and assess the progress of each one toward a speedy resolution. Ten working days in this case could potentially pave the way for a financial crime to develop.

Although the most recent MFS RF in Bangladesh contains extensive guidelines and a monitoring process, unlike conventional banking, the Bangladesh mobile finance system can be seen as a techno-centric mechanism that is unrelated to the USSD and other conventional channels' exchange problems. Even though the MFS is easily accessible due to its technological focus, fraud is a risk that it poses. The trustworthiness of the MNOs' KYC is particularly still under question. The main cause is the difficulty in accessing KYC verification. If law

[101] Ibid.
[102] Ibid.
[103] Ibid.
[104] Ibid.

enforcement merely has access to demographic data, it will be challenging to actually catch a criminal.

The national identity card cannot be verified through the banking channel. Since the service providers are unable to verify whether the identity card is real or fraudulent, there is limited opportunity to challenge individuals who arrive at the registration station with an NID. Therefore, if access to verify NIDs is available, the specific demographic data provided by the consumer may one day be used to help identify a criminal. This problem should be a priority for Bangladesh Bank.

The most recent legal framework must place more emphasis on the service's security features in order to avoid illicit usage of MFS. BB will be able to keep track of every transaction if it becomes necessary for every MFS user to have comprehensive KYC. In Bangladesh, using a national identity card (NID) is still an optional practice. In order to quickly manipulate the system, fraudsters might use fake NIDs. Tracking illegal transactions is not a topic that is covered in great detail in the guideline. The study strongly advises Bangladesh Bank to concentrate on the Payment System Act in order to achieve a successful anti-IFF regulation. Though the legislation has a section on establishing a payment system platform, but its action plan is not clearly highlighted. Concerns about the cash transaction verification process have been raised by the researchers. Another crucial challenge is obtaining MNO collaboration since they charge a high price and provide a slow USSD service.

4. Concluding remarks

The objective of this essay is to critically evaluate the most recent regulatory framework for Bangladesh's mobile finance system, as established by Bangladesh Bank, the country's central bank, in consideration of its effectiveness in establishing an anti-IFF ecosystem. According to the Basel Institute on Governance, Bangladesh has seen a slight improvement in terms of money laundering and terrorist financing, moving back to position 41 from 38 between 2021 and 2022.[105] However, the Bangladesh Financial Intelligence Unit reports that suspicious transactions and operations related to money laundering increased by 62.33% in the fiscal year 2021–2022 due to an increase in fraudulent activities in the field of e-commerce and multi-lender lending.[106] Due to the scope of rapid transactions and contactless financial transactions, the MFS remains a popular method for e-commerce and other online transactions.

[105] BI. "Bangladesh improves in anti-money laundering index." *Business Insider*, Economy. Last modified 5 October 2022. https://www.businessinsiderbd.com/economy/news/29294/bangladesh-improves-in-anti-money-laundering-index.

[106] Mostafizur Rahman, "Suspicious transactions of money go up by 62pc.," *New Age*, Last modified October 31 2022. https://www.newagebd.net/article/185163/suspicious-transactions-of-money-go-up-by-62pc.

Thereafter, a doubt could be raised concerning the existing MFS legal structure as to whether the Bangladeshi MFS RF is strong enough to control IFFs.

From such a background, after a critical examination, researchers have noticed a similarity between the Mexican MFS regulatory approach and the latest BB MFS regulation. The common feature of such models is that the MFS works as a subsidiary to conventional banks along with MNOs. Such a framework's strength lies in its capacity to be interoperable and simple to access because of its techno-centric operation, which also makes it vulnerable to criminal activities. The latest BB MFS RF's access to KYC verification is where the vulnerability may be detected. Despite having certain essential AML and CFT components, the system takes a weak approach to confirming KYC as it cannot access the national identity card. Because of this, it is challenging for law enforcement authorities to successfully locate a criminal if they simply have access to a beneficiary's details.

Other factors that render this policy less prone to combating IFFs include the absence of a precise definition of cross-border and illicit financial transactions and the paucity of standards and guidelines for e-commerce payment systems. Then, in order to decrease the IFF, it is urged to reconsider these recent policies' shortcomings. To control these diversified and continuously changing financial transactions, it is likewise advisable to use the Smart regulatory strategy. By employing a three-sided pyramid where government agencies, companies, and third-party regulators all work together to adopt complementary mechanisms in a coordinated manner, a regulatory body can use this technique to establish a regulatory net based on flexible regulation. The current BB policy, however, adheres to the risk-based supervision paradigm, whereby measures are only taken if a hazard has been recognized. Since creating an anti-IFF environment requires a multi-governmental effort and this study only reviewed one governmental stakeholder's strategies, it would be recommended to future researchers to review other legislative structures in developing countries by using this study's framework.

The Principle of Protecting the Best Interests of the Child in Vietnamese Divorce Law

HUỲNH THỊ TRÚC, GIANG*

ABSTRACT *Divorce can have adverse effects on children in many ways, which has been extensively studied and demonstrated in scientific literature worldwide. Therefore, policymakers around the world, including Vietnam, have incorporated the principle of protecting the best interests of the child into their approach to addressing issues related to children during the process of their parents' divorce.*
This incorporation aims to reduce the negative impact of divorce on children and create a favorable environment for their comprehensive development. This article approaches the subject from the perspective of children's rights. Its objective is to introduce the application of the principle of safeguarding the best interests of children in the enactment and enforcement of divorce laws in Vietnam. It focuses on aspects such as determining the custodial parent, child visitation, child support, and changing the custodial parent.

KEYWORDS *children's rights, child's support, child's visitation, divorce law, the child's best interest, Vietnam*

1. Introduction

Living with both parents can give children a sense of emotional security and support. When surrounded by family members, children feel loved and cared for, which can help them develop a strong sense of self-worth and confidence. Indeed, it is natural for a child to desire a peaceful and accepting atmosphere of affection between their parents, which is crucial for their healthy personality development.[1]

However, living with both parents has become more complicated in recent years due to the increasing divorce rate caused by a multitude of reasons. This has had a significant negative impact on children both in the short and long term, leading to emotional distress, behavioral problems, and poor academic performance, among other issues.[2] Therefore, it is essential for parents and

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[1] Herger Csabáné, and Katonáné Pehr Erika, *Magyar Családjog* (Budapest: Novissima Kiadó, 2021), 65.

[2] See: Hyun Sil Kim, "Consequences of Parental Divorce for Child Development," *American Sociological Review* 76, no. 3 (June 2011): 487–511.; Ängarne-Lindberg T,

authorities to prioritize the welfare of children, particularly during the process of divorce.

In International law, the principle of safeguarding the best interests of the child is established as one of the core principles in all decisions related to children. This principle has been instrumental in protecting children and has yielded positive results.[3] Vietnamese law is not exempt from the global development trend, as it includes regulations to ensure the best interests of children in matters related to children from birth to adulthood. However, in order to highlight the state's concern for this vulnerable group, this article focuses on relevant regulations when parents of children divorce.

This article will elucidate the following research questions: (1) What is the origin of the principle of safeguarding the best interests of children? (2) When was this principle recognized in Vietnamese law? (3) How is this principle understood? (4) How is the application of this principle recognized and enforced in Vietnamese divorce laws?

The article will employ methods such as electronic reasoning, search, collection, and analysis of legal documents on the internet and related databases to understand and evaluate legal information, analyze the content of legal documents to comprehend the principles and regulations related to the research topic.

2. Background to the principle of children's best interests in the Vietnamese legal system and Vietnamese divorce law

2. 1 The principle of children's best interests in Vietnamese legal system

The principle of the best interests of the child has a long history, but it was not until the late 20th century that it was formally recognized and codified in international legal instruments.

Several documents recognize this principle, such as the Geneva Declaration on the Rights of the Child, which was adopted by the League of Nations in 1924. Later on, the Declaration on the Rights of the Child was

Wadsby M, "Psychiatric and somatic health in relation to experience of parental divorce in childhood," *International Journal of Social Psychiatry* 58 no. 1 (2012): 16–25.; Lansford, J. E, "Parental Divorce and Children's Adjustment," *Perspectives on Psychological Science* 4, no. 2 (2009): 140–152.

[3] See: Leonora Bakarbessy dan Dian Purnama Anugerah, "Implementation of the Best Interests of the Child Principles in Intercountry Adoption in Indonesia," *Yuridika – Fakultas Hukum Universitas Airlangga* 33, no. 1 (January 2018); Vincenzo Lorubbio, *The Best Interests of the Child More than 'a Right, a Principle, a Rule of Procedure of International Law* (Deditoriale Scientifica, 2022), 77–132; Nadjma Yassari and Lena-Maria Möller, and Imen Gallala-Arndt, *Parental Care and the Best Interests of the Child in Muslim Countries* (Asser Press – Springer, 2017), 18–20.

adopted by the United Nations General Assembly in 1959. The most notable document is the United Nations Convention on the Rights of the Child, which was adopted in 1989. It recognizes the principle of protecting the best interests of the child in Article 3.

Vietnam signed the UNCRC on February 26, 1990. Being a member of the United Nations Convention on the Rights of the Child (UNCRC) means that Vietnam has ratified this international treaty on human rights and is committed to ensuring the protection and promotion of children's rights and interests within the country. One of them is the protection of the best interests of the child in decision-making processes that involve children.

The principle of the child's best interests first appeared in Vietnam's legal system in the Law on Protection, Care, and Education of Children in 1991 and was further developed and incorporated into the current Children Law, which was issued in 2016. According to Article 3, Clause 5 of this law, all parties are responsible for ensuring the best interests of children are considered in decisions relating to them. The principle of the child's best interests is also reflected in other laws related to children, such as the Law on Marriage and Family and the Law on Foster Care.

2. 2 Background to Vietnamese divorce law

In Vietnam, there is no separate law on divorce; instead, the regulations regarding divorce are stipulated in the Law on Marriage and Family. This law was enacted in 2014, and in Chapter IV, it recognizes two forms of terminating marriage: death and divorce. In regards to divorce, the regulations include the right of the parties to request divorce, the rights and obligations of parents and children after divorce, and the division of marital property.

The subsequent analyses of this research study will concentrate on elucidating the application of the best interests of the child principle in issues pertaining to the rights and obligations of parents towards their children in the context of divorce. It encompasses the determination of the custodial parent, visitation rights, child support, and changes in custodial arrangements.

3. The concept of the best interest of the child

Authors Marit Skivenes and Line Marie Sørsdal asserted that: “There are many competing and legitimate ways of bringing up children and as such defining what is good or best for them. Thus, there is not one “best interest value” that can be expected to be valid and accepted as right for all children”. Indeed, evaluating whether a decision protects the best interests of children is not a straightforward matter. Therefore, it is crucial for courts and relevant authorities to carefully consider all possible outcomes of a decision and strive to minimize any negative impacts on children and their families.

Upon examining Article 3(1) of the CRC it can be observed that there is no specific explanation of what constitutes the best interests of the child.

Instead, it establishes a principle that "the best interests of the child shall be a primary consideration".[4] "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

Thus, the concept of "best interests of the child" is a legal concept that is not clearly defined in International law. This can be seen as an "open rule" that provides flexibility for countries in the process of applying the law. Therefore, depending on the specific situation of each country in terms of space and time, as well as the context of their legal system, political order, and welfare model, the application of the principle of protecting the best interests of the child is recognized in legislative activities and implemented in practice through different methods and degrees.

4. Protecting the best interests of children in matters related to children according to Vietnam's divorce laws

After divorce, the legal relationship between the husband and wife will end, however, their relationship with their children will not end, neither emotionally nor legally. Nonetheless, due to the particular circumstances the children will only receive direct care from one parent.

Therefore, the responsibilities of parents towards their children during this period, in addition to basic responsibilities as when their marital relationship still existed, include ensuring the safety of the children, providing care, education for comprehensive physical and mental development. Vietnamese law stipulates additional responsibilities for parents towards their children and towards the other parent to ensure the best interests of the children in the new circumstances. For example, the parent who directly cares for the children, has the right to care for and nurture the children and the obligation to respect the other parent's visitation rights; the parent who does not directly care for the children, has the right to visit the children and the obligation to provide financial support.

This section will examine the issue of ensuring the best interests of children when resolving issues related to children during the process of their parents' divorce, including: (1) deciding who will directly care for the children, (2) visitation rights, (3) providing financial support for the children, and (4) changing the person who directly cares for the children.

[4] Jean Zermatten, *The Conventuon on the Rights of the Child from The Perspective of the Child's Best Interest and Children's View* (Bellamy & Zermatten, 2017), 36–52.

4. 1 Determining the person who will directly care for the children

Pursuant to the provisions stated in Article 81 of the 2014 Law on Marriage and Family, there are certain criteria that the Court must uphold when deciding on the custodial parent in divorce cases. These criteria encompass the following: (1) respecting the mutual agreement of the spouses, (2) taking into account the opinions of children who are at least seven years old, and (3) giving priority to the wife in the care of children under 36 months of age.

4. 1. 1 Respecting the mutual agreement of the spouses

In divorce cases, the question of who should be granted custody over the children is a crucial matter that has a significant impact on their lives and future. This is because the parent who is awarded custody will be the one who lives with the child under the same roof and has a substantial impact on the child's personality, intellectual, and physical development.[5] Therefore, the court always carefully considers and evaluates the full scope of factors involved in deciding who will directly care for, nurture and educate the child, in order to ensure the best interests of the child are protected.

The Law on Marriage and Family 2014 specifies in Clause 2, Article 81 the regulations for the care, nurturing, and education of children following a divorce as follows: “Husband and wife shall reach agreement on the person who directly raises their children and on their obligations and rights toward their children after divorce. If they fail to reach agreement, the court shall appoint either of them to directly raise the children, taking into account the children’s benefits in all aspects.”

This regulation indicates that the person who will directly care for and nurture the child following a divorce will primarily be determined through agreement between the spouses. This is because they are the ones who understand the situation, as well as their own conditions and abilities to care for, nurture, and educate the child.[6]

In other words, this regulation stems from the Vietnamese lawmakers' belief in the role of parents in making decisions related to their children's lives. Furthermore, this can also help reduce conflicts and promote cooperation among parties, especially in cases where divorce is being disputed.

This rule is widely applied by the courts in Vietnam when resolving divorce cases. For instance, in the divorce case of Mr. Bui Xuan T and Mrs. Nguyen Thi H,[7] the couple has a common child named Bui Thi Thanh T (born

[5] Lê Thị Hòa, and Nguyễn Thị Lệ Hương, “Bảo vệ quyền và lợi ích nhân thân của con trong các vụ án ly hôn,” *Tạp chí Khoa học & Công nghệ*, no. 14 (June 2017): 125–128.
[6] Tô Đạt Chác, “Pháp luật Việt Nam về Bảo vệ quyền lợi của con khi cha, mẹ ly hôn” (Master diss., Tra Vinh University, 2020), 13–14.
[7] “Judgment No. 279/2020/HNGD-ST regarding divorce issued by the People's Court of Tho Xuan District,” Thanh Hoa Province, Thuvienphapluat,

in 2018). After the divorce, due to the need to work far away and the busy nature of her job, Mrs. H was unable to directly care for the child. Therefore, Mrs. H and Mr. T reached an agreement that Mr. T would be the primary caretaker, responsible for the upbringing of the child. Considering the conditions and circumstances of Mrs. H and Mr. T, the court acknowledged their agreement.

However, it is important to note that the law also provides for the court to make decisions about custody and care if the parties are unable to reach an agreement, or if the agreement is not in the best interests of the child. In these cases, the court will consider a range of factors, including the child's age, health, and education needs, as well as the ability of each parent to provide for the child's physical, emotional, and social well-being. Based on that consideration, the court decides to award custody to the spouse who is better able to provide practical care, nurturing, and education for the child.[8]

4. 1. 2 Taking into account the opinions of children who are at least seven years old

Vietnamese law also stipulates that the wishes of children aged 7 and older must be taken into consideration when reaching an agreement on who the primary caregiver will be. This is because at this age, a child is recognized as having sufficient awareness to express their views on their life after their parents' divorce.[9]

On the other hand, considering children's desires in custody arrangements can have positive impacts on their well-being. Specifically, children's participation in decisions about custody can give them a sense of autonomy and control over their lives, which can be beneficial for their psychological and emotional health. Some studies have also found that when children's wishes are taken into account in custody decisions, they may have more positive relationships with both parents and experience fewer conflicts.[10]

In her study, author, Le Thi Man, concludes that, "This is also a humane mechanism, significant from both theoretical and practical perspectives. When parents divorce, children lose a crucial support system provided by a complete

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https://thuvienphapluat.vn/banan/ban-an/ban-an-2792020hngdst-ngay-18122020-ve-ly-hon-tranh-chap-nuoi-con-210568.

[8] Trường Đại học Luật TP. Hồ Chí Minh, *Giáo trình Luật Hôn nhân và gia đình Việt Nam* (Hồng Đức – Hội Luật Gia Việt Nam, 2019), 453.

[9] In the 2000 Law on Marriage and Family, which was the preceding adjacent legislation to the 2014 Law on Marriage and Family, the age at which Vietnamese legislators recognized a child's ability to express their opinions in this matter was 9 years old.

[10] Rachel Birnbaum, and Nicholas Bala, "Child Participation in Custody and Access Issues: A Review of the Literature," *Journal of divorce & remarriage* 57, no. 5 (2016): 335–356. See also: Irwin N. Sandler, Sharlene A. Wolchik, and Heather L. Storer, "The impact of children's involvement on post-divorce family relationships: A review," *Journal of divorce* 9, no. 1–2 (1986): 43–66.

family with both a father and a mother. Therefore, creating a mechanism for children to express their thoughts and desires, for the sake of their own interests, is absolutely necessary".[11]

However, the opinion of a child is not a binding decision that the court must adhere to, but rather serves as a reference when making the final decision.[12] The reason for this is that while the child's wishes and preferences are important, they may not always be in their best interests. In some cases, the child may express a preference based on incomplete or biased information or may be under the influence of one parent or another. The court must carefully weigh the child's wishes against other factors such as their safety, welfare, and best interests, which may require a different custody arrangement.

Furthermore, the ability of the parents to provide care, support, and stability for the child is also an important factor to be considered. It is possible that the parent who the child wishes to live with may not be the one who is best able to provide for their needs.

The practical resolution of cases in Vietnam has shown that the consideration of children's opinions regarding living arrangements with their parents after divorce is taken quite seriously by local courts.[13] For instance, in the divorce case of Mr. Pham Van N and Mrs. Thach Thi Ng, who have a common child named Pham Ngoc M (born in 2009), during the process of resolving the divorce matter, M expressed the desire to live together with Mrs. Ng. After evaluating the relevant factors, the court determined that, "Following the separation of Mr. N and Mrs. Ng, M has been living with Mrs. Ng. During their cohabitation, Mrs. Ng has provided all necessary conditions for M's well-being and development. Additionally, M has expressed the desire to continue living with Mrs. Ng in order to ensure stability in M's life. Therefore, in order to safeguard M's best interests, the court has determined that Mrs. Ng shall continue as the primary caregiver, providing care and nurturing for M until the child reaches adulthood."

[11] Lê Thị Mận, "Bàn về việc xét nguyện vọng con khi cha mẹ ly hôn," *Tạp chí Tòa án,* no. 16 (2017): 33–35.

[12] Trường Đại học Luật TP. Hồ Chí Minh, *Giáo trình Luật Hôn nhân và gia đình Việt Nam* (Hồng Đức – Hội Luật Gia Việt Nam, 2019), 453.

[13] See: "Judgment No 217/2021/HNGD-ST regarding divorce issued by the Prople's Court of Tam Ky city, Quang Nam Province," Thuvienphapluat, https://thuvienphapluat.vn/banan/ban-an/ban-an-ve-ly-hon-tranh-chap-con-chung-so-2172021hngdst-233636; See also: "Judgment No 02/2021/HNGD-ST issued by the People's Court of Đon Duong District, Lam Dong Province, regarding divorce," Thuvienphapluat, https://thuvienphapluat.vn/banan/ban-an/ban-an-ve-ly-hon-va-tranh-chap-con-chung-so-022021hngdst-217280.

4. 1. 3 Giving priority to the wife in the care of children under 36 months of age

Regarding the decision of who will directly take care of the child when parents divorce, Article 81 of the 2014 Law on Marriage and Family has the following provision in paragraph 3: A child under 36 months of age shall be directly raised by the mother, unless the mother cannot afford to directly look after, care for, raise and educate the child or otherwise agreed by the parents in the interests of the child.

This provision demonstrates that Vietnamese law gives precedence to mothers who can care for children under the age of 36 months. This is based on the belief that during this time, the mother is considered the primary caregiver for the child, as she typically assumes the responsibility of caring for the child since birth. Moreover, the practice of assigning young children to their mothers to directly raise them aligns with traditional gender roles and expectations in Vietnamese society, where women are often expected to prioritize their roles as caregivers and homemakers.[14]

However, the law also has exceptions that when the mother is not qualified to take care of the child or when placing the child with the mother is not in the best interests of the child. Some related cases may include: the mother is seriously ill and not physically capable of taking care of the child; the mother's unhealthy lifestyle harms the child's development; the mother is temporarily detained, wanted, punished criminally or prosecuted; the mother's parental rights concerning the child are restricted.

4. 2 The visitation rights of non-custodial individuals

In order to protect the rights and best interests of the child, Vietnamese law stipulates the right of non-custodial parents to visit their children. This regulation allows children to have contact with both parents, creating an environment of love and care for them, as mentioned. In addition, it also helps to strengthen the responsibility of parents in caring for and nurturing their children.[15]

Clause 3 of Article 82 of the Law on Marriage and Family of 2014 stipulates the right of non-custodial parents to visit their children as follows: “After divorce, the person who does not directly raise a child has the right and obligation to visit and care for this child without being obstructed by any person”.

[14] T. T. T. Nga, N. T. T. Binh, and N. T. K. Anh, “Gender roles and family dynamics in Vietnam: The case of the Kinh ethnic group,” *Asian Journal of Women's Studies* 25, no. 1 (2019): 58–78.

[15] Nguyen Duc Chinh and Tran Thi Ngoc Thuy, “Child visitation rights of parents in Vietnam: Legal issues and practical experiences,” *Journal of Social Sciences and Humanities* 1, no. 2 (2015): 60–69.

From this regulation it can be seen that the emphasis on "without being obstructed by any person" when a non-custodial parent exercises their right to visit their child is not only to protect the rights of that parent, but also to protect the interests of the child. Preventing contact between a child and a parent who does not live with them can have many negative impacts on the child's mental and physical health, making them feel unloved, abandoned, and having low self-esteem.[16]

In addition, to ensure that the person directly raising the child fulfils their responsibilities to the best of their ability, the Law on Marriage and Family of 2014 also stipulates in Article 83, paragraph 2,[17] as follows: The parent directly raising a child and family members may not obstruct the person not directly raising the child from visiting, caring for, raising and educating this child.

This is a new provision added to the Law on Marriage and Family in 2014. Practical resolution of marriage and family cases has shown that there are many cases where the person who directly raises the child has obstructed the non-direct custodian's right to visit, care for and educate the child. The verdict regarding the termination of the act of obstructing visitation of the shared child between Mr. Ly Du D and Mr. Nguyen Van D and Ms. Lam Thi T[18] can be considered as one of the empirical evidences for this provision.

In 2013, Mr. D and Mr. Nguyen Van D's daughter, Ms. Lam Thi T, got married to Mr. Nguyen Thi H, and in 2015 Mr. D and Ms. H divorced. The couple has a shared child named Nguyen Lam K (born in 2015). The Court determined that Ms. H would be the custodial parent for K. After the divorce, Mr. D made several attempts to visit his child, but he was consistently obstructed and verbally insulted by Mr. D and Ms. T. Local authorities were present as witnesses to these incidents.

The Court determined that, "According to the provisions of the Law on Marriage and Family, Mr. Ly Du D has the right and obligation to visit, care for, and educate the shared child, and no one is entitled to obstruct these rights." Therefore, Ms. H and her family must facilitate Mr. D's visitation with his child, Nguyen Lam K. However, in reality Ms. H and her family were engaged in actions that obstructed Mr. D. This behavior is violates the law. Therefore, the Court requires Ms. H and her family to cease these actions and create conditions for Mr. D to exercise his visitation rights.

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[16] Amy J. L. Baker, "The Long-Term Effects of Parental Alienation on Adult Children: A Qualitative Research Study," *The American Journal of Family Therapy* 33, no. 4 (2005): 289–302.

[17] This is a legal provision that delineates the obligations and rights of custodial parents towards non-custodial individuals following divorce, concerning the care of the children.

[18] "Judgment No. 09/2019/HNGD-ST regarding divorce rendered by the People's Court of Tho Xuan District," Thanh Hoa Province, Thuvienphapluat, https://thuvienphapluat.vn/banan/ban-an/ban-an-092019hngdst-ngay-16042019-ve-cham-dut-hanh-vi-ngan-can-viec-tham-nom-con-chung-105925.

Nevetheless, the reality also shows another aspect in the exercise of the right to visit children, which is that the non-parental person visiting the child has caused many obstacles and difficulties for the person who directly takes care of the child during the visit. For example, they intentionally create inconvenience, pressure, and discord for the person who directly takes care of the child, or intentionally have a negative impact on the emotional relationship between the person who directly takes care of the child and the child. Therefore, to ensure the harmony of the interests of both parents in taking care, nurturing and educating the child, Article 82, Section 3 of the Law on Marriage and Family 2014 provides that: The parent who directly raises a child has the right to request a court to restrict the right of the other parent who does not directly raise this child if the latter takes advantage of his/her visit to and care for the child to obstruct or adversely affect the looking after, care for, raising and education of this child.

The case regarding the restriction of visitation rights between Mr. Le Thanh T and Ms. Bach Thi My N[19] will contribute to further clarifying the application of the aforementioned provision in practice. Mr. Le Thanh T and Ms. Bach Thi My N got married in 2014 and divorced in 2017. Mr. T was determined by the Court to be the custodial parent of their shared child, Le Bach Kha H (born in 2015). After the divorce, Mr. T provided favorable conditions for Ms. N to visit their child. However, according to the evidence provided by Mr. T, "every time Ms. N comes to visit the child, she creates conflicts and disturbances, which disrupt the household activities of Mr. T. The local authorities have also educated her multiple times, but she has not shown any change in behavior." Therefore, Mr. T requested the Court to restrict Ms. N's visitation rights, specifically allowing her to visit the child only once a year. The Court determined that, "Although Ms. N's behavior has had an impact on Mr. T's child-rearing, Mr. T's request to allow Ms. N to visit the child only once a year is not reasonable. Considering that the child is still young, they also need the care, attention, and education from Ms. N. Therefore, to ensure the rights of the child, the Court agrees to allow Ms. N to visit the child once a month. The specific time and place will be agreed upon by Mr. T and Ms. N."

4. 3 The obligation to provide child support for the offspring of non-custodial individuals

"When parents divorce, according to Article 82 Section 2 of the Law on Marriage and Family 2014, whoever does not directly raise the child must provide support for the child. Support means the obligation of the person to

[19] Judgment No. 06/2018/HNGD-on the Dispute Concerning the Request for Restriction of Custodial Visitation Rights, issued by the People's Court of Chau Thanh District, Đồng Thap Province, Thuvienphapluat, https://thuvienphapluat.vn/banan/ban-an/ban-an-ve-tranh-chap-yeu-cau-han-che-quyen-tham-nom-con-so-062018hngdst-38421.

contribute money or other assets to meet the essential needs of the person who is not residing with them."[20]

It is easily discernible that this regulation is designed to safeguard the lawful rights of children following a divorce. Children have the right to receive support from both parents, and thus, when parents divorce, the parent who does not have physical custody of the child must fulfil their obligation to support their child by providing them with financial assistance.

According to Article 116, Clause 1 of the Law on Marriage and Family in Vietnam, the amount of child support is based on the agreement between the obligated party, the recipient, or the legal guardian of the recipient, taking into account the income, actual ability to pay of the obligated party, and the essential needs of the recipient. If no agreement can be reached, the court shall be requested to resolve the matter. Therefore, instead of specifying a fixed amount of money or specific assets that the obligated person must provide to the supported person, the Law on Marriage and Family has opted for a very progressive solution, which is to allow the parties involved to negotiate themselves. This demonstrates flexibility and suitability to actual circumstances, since because the needs of different subjects regarding age, health status, and living conditions cannot be met by a single support amount. Moreover, the amount of support that the obligated person must provide depends heavily on their financial ability.[21]

There are cases where the needs of children remain unchanged after divorce, but due to the decreased financial ability of the non-custodial parent, the initial child support amount may be modified. The dispute over child support between Mr. Nguyen Van T and Mrs. Duong Thi Yen H[22] is an example for this. According to the decision to recognize their mutual divorce in 2018, Mr. T and Mrs. H agreed that Mrs. H would be the custodial parent of their two shared children, Nguyen Nhu Q (born in 2014) and Nguyen Moc K (born in 2017). Mr. T has the obligation to provide a monthly child support payment of 5,200,000 VND[23] for both children. After fulfiling this child support obligation for two years, Mr. T wishes to modify the child support amount to 3,000,000 VND[24], stating that "currently, his job is not stable, and his income is only about 4,700,000 VND[25] per month, making it impossible for him to continue providing support for both children at the previous level." After reviewing the documentary evidence provided by Mr. T, the Court accepted the reduction of child support from 5,200,000 VND to 3,000,000 VND.

[20] Khoản 24 Điều 3 Luật hôn nhân và gia đình năm 2014.
[21] Khoa Luật Đại học Cần Thơ, *Giáo trình Luật hôn nhân và gia đình Việt Nam* (Cần Thơ: Nxb Chính trị quốc gia – Sự thật, 2023), 213.
[22] Thuvienphapluat, "Judgment No. 23/2019/HNGD-ST regarding Dispute Over Child Support issued by the People's Court of Bac Giang Province," https://thuvienphapluat.vn/banan/ban-an/ban-an-232019hngdpt-ngay-25072019-ve-tranh-chap-hon-nhan-va-gia-dinh-99358.
[23] Equivalent to 75,000 Hungarian Forints.
[24] Equivalent to 43,000 Hungarian Forints.
[25] Equivalent to 68,000 Hungarian Forints.

4. 4 Alteration of the custodial guardian post-divorce

In order to ensure the rights of children and provide them with a healthy, safe environment, Vietnam's laws on marriage and family have regulations regarding changing the person responsible for directly caring for the child. Specifically, Section 2 of Article 84 of the Law on Marriage and Family in 2014 outlines the grounds for changing the person responsible for directly caring for the child, including, "a) The father and mother have an agreement on changing the person responsible for directly caring for the child that is in the best interest of the child; b) The person directly responsible for caring for the child is no longer capable of directly supervising, caring for, nurturing, and educating the child."

It can be seen that the grounds for changing the person responsible for directly caring for the child are necessary measures to ensure the rights of the child related to the changing of the person responsible. Specifically, the law stipulates that not all agreements between parents regarding changing the person responsible for directly caring for the child are recognized by law. Instead, the parents' agreement must be "in the best interest of the child." The regulation is concise but clearly reflects the principle of protecting the best interests of children in all decisions related to children.

However, as discussed above, the issue of custodial parent determination after divorce is rarely a matter of agreement between both spouses in Vietnam. One of the few cases in Vietnam that addresses the change of custodial parent through the agreement of the former spouses can only be found in the dispute over visitation rights. Specifically, in the request for visitation rights restriction concerning Ms. Bach Thi My Th and Mr. Le Thanh T, Mr. Le Thanh T stated that when they divorced in 2017, the Court granted custodial rights to Ms. Bach Thi My Th. However, subsequently, Ms. Bach Thi My Th wanted to change the custodial parent and Mr. Le Thanh T agreed to it.[26]

The second ground for changing the child's caregiver is directly related to the caregiver's conditions. Specifically, it must be a person who is not capable of directly supervising, caring for, nurturing, and educating the child. In fact, to assess and determine the caregiver's lack of conditions as stipulated by law is not a simple process. It requires a comprehensive assessment of many factors from financial capacity, health status to the attitude and behavior of the caregiver.

In addition, as changing the person responsible for directly caring for the child also affects the child's life and psychology, Section 3 of Article 84 of the Law on Marriage and Family also stipulates that the wishes of the child from 7 years of age and above must be considered when deciding to change the person responsible for directly caring for the child.

[26] Thuvienphapluat, "Judgment No. 06/2018/HNGD-PT regarding divorce issued by the People's Court of Đồng Thap Province," https://thuvienphapluat.vn/banan/ban-an/ban-an-ve-tranh-chap-yeu-cau-han-che-quyen-tham-nom-con-so-062018hngdst-3842.

Compared to the first basis, the practical resolution of the issue of changing the custodial parent in divorce cases in Vietnam demonstrates that the application of the second basis is much more prevalent in reality. A series of disputes regarding the change of custodial parent can be found on the official website of the Supreme People's Court of Vietnam when announcing judgments on marriage and family matters.[27]

5. Conclusion

While marriage typically yields positive impacts for both male and female participants, divorce has the potential to affect entities beyond the immediate couple – specifically, the offspring born from their prior union of affection. The parents hold the pivotal authority in determining the birth or non-birth of children, yet paradoxically, they also possess the power to dissolve the existence of a family – the initial and sole point of reference for a child during their formative years. Consequently, to mitigate the adverse repercussions of parental divorce, both psychologically and physically, particularly for vulnerable and susceptible children, Vietnam has implemented a notably humanitarian approach to safeguarding the best interests of minors within its divorce legislation.

Although a universally standardized conception of the “best interests” of children remains absent in international jurisprudence, this vacuum has engendered a framework for the adaptable and efficacious application of the principle safeguarding children's best interests contingent upon the legal systems of individual nations. Fundamentally, Vietnam has proficiently undertaken this endeavor through the enactment and enforcement of divorce legislation. This article endeavors to underscore this principle while dissecting various facets of Vietnam's divorce law, such as determinations of custodial responsibility, childcare arrangements, financial support provisions, and custodial changes. By marshalling legal stipulations and court judgments as evidentiary support, this article demonstrates that Vietnam has essentially taken commendable strides in safeguarding the best interests of children. Nevertheless, in order to sustain and amplify the efficacy of these efforts in the foreseeable future, consistent monitoring and oversight of the judicial application of legislation, coupled with enhanced legal education efforts targeting individuals and families within society, are imperative.

[27] Using the search keyword “change of custodial guardian,” a total of 14,472 legal cases were identified on June 23, 2023, from the website: https://thuvienphapluat.vn.

Digital Contract in the Emerging Economy of the 21st Century: A Comparative Study

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ABSTRACT *In business processes or even our everyday life, the law of contract and proper enforcement of such law play a very significant role. The emerging economy, which is now dependent on the digital world phenomenon, is becoming electronic-based. The era of the internet and social networking is making people decentralized and self-regulated, which attracts online selling and purchasing. So, this is actually the sign of expanding electronic commerce, which makes products more available to the consumers. In this situation, the E-Contract is an aid to drafting and negotiating successful contracts for consumers, businesses, and other related services. It is designed to assist people in formulating and implementing commercial contract policies within e-businesses. As the electronic contract is not a paper-based contract but rather related to cyberspace, there must be specification provisions about such contracts. But in reality, there is a lack of provisions on the formation and regulation of electronic contracts. In developing economies, in countries like Bangladesh, the computerized generation needs more protection, but in many, judgments do not allow computerized documents and even the Information Technology Act, Contract Act, and Evidence Act do not wholly justify electronic contracts. In this paper the legal challenges of electronic contracts will be in focus. The real situation of contract law regarding the electronic contract in the context of Bangladesh compared to other countries will be focused on. The main purpose of this paper is to explore more possible functionalities of e-contracts and ascertain the legal implications.*

KEYWORDS *E-contracts, digital world, cyberspace, e-business, legal aspect, consumer*

1. Introduction

Electronic contracts are designed to assist people in formulating and implementing commercial contract policies within e-businesses. They include model contracts for the sale of products and supply of digital products and services to both consumers and businesses. An e-contract is a contract modeled, executed, and enacted by a software system. Computer programs are used to automate business processes that govern e-contracts. E-contracts can be mapped

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to inter-related programs, which have to be specified carefully to satisfy the contract requirements. Particularly on the internet, such contracts have put on a flexibility of contract, and the suitability and multiplication of standard type of agreements.[1] With the growth of E-commerce, there is rapid advancement in the use of e-contracts. But the deployment of e-contracts poses lots of challenges, namely, conceptual, logistic and implementation challenges. It is more and more unlikely for internet users that a day has passed dealing with computers or other devices where they have not manifested their assent to some terms. As, in case of installing any software there is only an icon "I Agree" for their assent. These types of action also form e-contracts in day-to-day life.

An e-contract is an agreement demonstrated, executed and established by a product framework. E-contracts can be settled between related projects, which must be indicated specifically to fulfill the contract requirements. Electronic trade can be characterized as "Electronic purchasing"[2] and offering on the Internet and involves a firm performing or offering and purchasing administrations and items utilizing computers and correspondence advancements. Virtual or electronic contracts open the door for all the users to enter into an agreement over the web. E-commerce is the practice of buying and selling goods and services through online consumer services on the internet[3].

Electronic transactions are fast emerging as an alternative means of carrying out transactions instead of paper-based transactions. However, with the increase of transactions on the internet the issue of authenticity and legality turns into an important issue. Contracts involving huge sums of money are being entered into without ensuring validity and authenticity of the parties.[4] In a number of countries existing legislation governing communication and storage of information is inadequate or outdated in that it does not contemplate the use of electronic messages in commerce. Although the use of electronic mail for the conclusion of contracts is widespread, the need for legal certainty is also felt in many countries when they face forms of old paper-based communication techniques in this modern era.

2. What is a Valid Contract?

A contract is a voluntary arrangement between two or more parties that is enforceable at law. It is a legally binding agreement that obligates two or more parties to complete certain tasks. It creates rights and obligations for the parties

[1] Abdulhadi Alghamdi, *The Law of E-Commerce: E-Contracts, E-Business* (United States of America: Author House, 2011).

[2] S. R. Subaashini, and Shaji. M., "Legal Issues Arising in E-contracts in India: An Analysis,*" International Journal of Pure and Applied Mathematics* 120, no. 5 (2018): 4601–4618.

[3] Simon Blount, *Electronic Contracts: Principles from the Common Law* (New York: Chatswood, 2015).

[4] Timo Siemer, *Formation of Electronic Contracts Under Traditional Common Law Principles: Offer and Acceptance in E-Commerce* (US: GRIN Verlag, 2011).

to the contract. A contract is a promise or set of promises made between two or more parties and a breach of such promises allows the courts to impose a punishment.[5]

A contract is an agreement between two or more competent parties, based on mutual promises, to do or to refrain from doing a particular thing that is neither illegal nor impossible. The agreement results in an obligation or a duty that can be enforced in a court of law. Both of the agreements in this case result in legally enforceable contracts because the parties agree mutually to their satisfaction.[6]

Basically, a contract is a bundle of rights and obligations binding parties to one another by an exchange of promises with a consideration. The Contract Act, 1872 defines "contract" as follows: "an agreement which is enforceable by law is a contract."[7]This means that all agreements are not contracts. Only those agreements which can be enforced by law are contracts. A contract is a promise or set of promises for the breach of which the law gives a remedy or the performance of which the law in some way recognizes as a duty.[8]

A valid contract is a legally binding agreement which recognizes and governs the rights and duties of the parties.[9] A valid contract is legally enforceable against both of the parties because its formation meets the requirements and approval of the law.

It is a common misconception that a contract may only be in written form, as oral agreements or agreements implied by conduct can be just as credible in contract formation. A contract is unique in that unless certain exceptions apply, parties are free to agree to whatever terms they choose.[10] In our everyday life we unknowingly form contracts. A contract can be described as a legally binding oral or written agreement that exchanges any combination of goods, services, money and property. If the main elements are not present in a contract, it would be an invalid contract.[11]

2. 1 Essential Elements for a Valid Contract

In Anglo-American common law, the formation of a contract generally requires an offer, acceptance, consideration, and a mutual intent to be bound. Each party

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[5] G. H. Treitel, and Edwin Peel, *Treitel on the Law of Contract* (London: Sweet & Maxwell, 2011).

[6] Gordon W. Brown, and Paul A. Sukys, *Business Law* (New York: Mcraw-Hill, 2001), 95.

[7] Section 2, Contract Act, 1872. Act No. IX of 1872.

[8] Sir Jack Beatson FBA, Andrew Burrows FBA, and John Cartwright, *Anson's Law of Contract* (Oxford: Oxford University Press, 2020).

[9] Fergus Ryan, *Contract Law: Nutshell* (Ireland: Roundhall Ltd, 2006).

[10] *Contract Law. Lectures - An Introduction*, https://www.lawteacher.net/lectures/contract-law/?vref=1.

[11] *Main Elements constituting A Valid Contract*, https://www.lawteacher.net/free-lawessays/contract-law/all-the-main-elements-constituting-valid-contract-contract-law-ess.

must have capacity to enter the contract.[12] The characterization of a party's communication as an offer or acceptance can determine the exact moment when the contract is made and which party assumes certain risks.[13] Furthermore, it can also determine where the contract is deemed to have been made, and where the parties are located in different jurisdictions, what laws will apply, and which courts will have jurisdiction. As such, it is important to examine whether there has been an event that constitutes a valid offer and acceptance, and whether and when communication of such an event took place. In order for an agreement to become a valid contract which is enforceable at law, it must possess the following elements:

2. 1. 1 Offer

"The offer is an expression of willingness to contract made with the intention (actual or apparent) that it is to become binding on the person making it as soon as it is accepted by the person to whom it is addressed."[14] The first element in a valid contract would be the offer. If there is no offer, then no valid contract can be made.

The making of the offer is actually the first step in creating the contractual relationship between the two parties. Because of this position of importance, the offer must be seriously intended, clear and definite and freely communicated to the offeree. If these requirements are met, it is then up to the offeree to accept or to reject the offer.[15]

An offer must be clear and made with the intention to make a contract that should be binding. It follows that if an individual is not willing to implement the terms of his promise, but is merely seeking to initiate negotiations, then this cannot amount to an offer, rather, such statements can be called an "invitation to treat". These invitations to treat would be restricted to statements made in the course of negotiations towards a contract indicating one's willingness to receive offers.[16]

2. 1. 2 Acceptance

An acceptance is a final and unqualified expression of assent to the terms of an offer. It turns a specific and comprehensive offer into an agreement. The acceptance must be unconditional and unequivocal. This means the offeree's expression of intention and assent must be made in response to, and must exactly match, the terms of the offer. Any attempt to introduce a new term will

[12] Handbook Home (n.d.), https://www.lawhandbook.sa.gov.au.

[13] Christian Campbell, and Dennis Campbell, *Law of International Online Business: Global Perspective* (London: Sweet & Maxwell, 1998).

[14] Maryke Silalahi Nuth, *Electronic Contracting in Europe* (London: Sweet & Maxwell, 2001).

[15] W. Brown, and A. Sukys, *Business Law*, 97

[16] Jill Poole, *Text Book on Contract Law* (Oxford: Blackstone Press, 2001), 32.

itself become a counter-offer that destroys the original offer and operates as a rejection of the original offer.[17]

2. 1. 3 Communication

Acceptance has no effect until it is communicated to the offeror because it could cause hardship to an offeror if he was bound without knowing that his offer had been accepted. When the acceptance is sent by post there are three basic rules that can be applied to decide when acceptance is actually communicated: (i) when the acceptance is posted (ii) when the acceptance is received or arrives at the address of the offeror or (iii) when the acceptance comes to the knowledge of the offeror.

2. 1. 4 Consideration

"No consideration, no contract" is a fundamental principle of contract law. Consideration means to get something in exchange or something in return. Consideration is the essential element of a valid contract.[18] Consideration in a contract would mean the other person would be giving back something in return. It would be considered as an exchange which would be made between the promisee and promisor. There should be consideration in a contract for it to be legally valid.

2. 1. 5 Legal Intention

It is a general rule that an agreement made without any intention of creating legal relations is not binding as a contract.[19] For example, when two friends agree to see a musical concert whereby one promises to pay for the concert ticket if the other pays for the drinks after the concert, consideration is present in this relation, but there is no intention to create legal obligations.

2. 1. 6 Competency of the Parties

Capacity to contract usually refers to a natural person's legal competence to enter independently into a valid transaction. Parties who are entering into a contract must have the mental ability to understand the consequence of such contract. Under the Contract Act 1872, minors, insane people or people with unsound minds also cannot enter into a valid contract.[20]

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[17] Reinhard Zimmermann, and Simon Whittaker, *Good Faith in European Contract Law* (Cambridge: Cambridge University Press, 2000).
[18] Act No. IX of 1872.
[19] Hein Kotz, and Axel Flessner, *European contract law: Formation, validity, and content of contracts: contract and third parties* (Oxford: Oxford University Press, 1997).
[20] Act No. IX of 1872.

2. 1. 7 Free Consent

Mer“e consent is not enough for a contract to be enforceable; the consent given must be free and voluntary. A Consent that is free from Coercion, Undue Influence, Fraud, and Misrepresentation. The consent might be about entering into a contract or it might be consent to accepting the offer, in any case, any type of consent must be free and voluntary.

2. 2 Types of Contracts

Contracts which are enforceable in a court of law are called Valid Contracts. If one party to the contract has the option of enforcing a contract by law, but not at the option for the other party, such contract is known as a voidable contract. A void contract is not void from its initiation, rather, an agreement may be enforceable at the time of initiation, but later on, due to certain reasons like impossibility or illegality of the contract, it may become void and unenforceable. If the contract has an unlawful object or intention, it is called an Illegal Contract. A contract which has not properly fulfilled legal formalities is called an unenforceable contract. That means an unenforceable contract suffers from some technical defect like an insufficient stamp etc. After rectification of that technical defect an unenforceable contract can become an enforceable or valid contract.

In an express contract, where the offer or acceptance of any promise is made in words, the promise is said to be express. For example: A has offered to sell his house and B has given acceptance. It is an Express Contract. An implied contract is one which is inferred from the acts of the parties or course of dealings between them.

Written contracts are those contracts which are materialized on paper and signed by both parties with all of the formalities. But sometimes there can also be merely oral contracts. There is a big misconception that valid contracts must take a written form. But orally formed contracts can also have the same legal validity as written contracts.

3. Electronic Contracts

The invention of electronic technology and the internet has changed the way we communicate, learn, work, and do business. It has brought the world’s people closer in time and space; businesses now work more efficiently with suppliers and consumers; consumers now have a greater choice and can shop from the comfort of their homes, offices, or even while travelling, from a wide variety of products, from sellers all over the world. The marketability of products is no longer confined to the boundaries of their countries. With a couple of clicks one can buy and sell from any part of the world and the desired product will be delivered to the doorstep of consumers.

An electronic contract is an agreement that is drafted, negotiated, and executed completely online. Electronic contracts can eliminate many costs associated with traditional pen-and-paper contracts and have countless other advantages. Every day, knowingly or unknowingly, we become parties to such contracts. In recent times we are surrounded with the web of the internet and take technological support in every minute. With the idea of e-commerce, e-contracts become a necessity.[21]

3. 1 Essentials of an Electronic Contract

An electronic contract is an understanding made in electronic form as no paper or other printed copies are utilized. For instance, you compose an agreement on your computer and send it through the internet to a business partner and the business partner sends it back in a message with an electronic mark demonstrating acknowledgment. An e-contract can likewise be as a contract generally utilized with downloaded programming. Although an electronic contract is nothing like the general idea of a paper-based contract, it must also contain some essentials in order to be a valid contract. Those are as follows:

3. 1. 1 The offer

An offer has to be made even in the case of E-Contracts. In many online or electronic transactions, the offer may not be made directly one-to-one but rather to the whole community of consumers. Consumers can browse all the available goods and services displayed on the company's website. But the invitation to treat is not a valid offer to form a contract.

3. 1. 2 The Acceptance

It would be convenient to mention that the statutes of various countries consider that any consent through electronic means falls within the category of expressed declarations of intent.[22] Basically, the same requirements apply to acceptance through an electronic agent in the case of e-contracts.
In regard to acceptance that must take place between the parties, there must be a timeframe, and the means of accepting may be through the physical presence of the parties or through electronic means. In case of a physical or paper-based contract acceptance can be made immediately, but in an electronic contract it is not considered as an immediate one.

[21] Stefan Grundmann, *European Contract Law in the Digital Age*. *European Contract law and Theory* (Cambridge: Intersentia press, 2018).
[22] Randy E. Barnet, "Contract is not Promise: Contract is Consent," Georgetown University Law Center, https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1614&context=facpub.

3. 1. 3 Lawful Consideration

In a contract for the sale of goods, the money paid is the consideration for the vendor, and the item sold is the consideration for the purchaser.[23] In case of electronic transactions or e-contracts the consideration must be there for any benefit or service of the user and also for the company who is actually offering the benefit to the user.

3. 2 Forms of Electronic Contract

A commercial transaction can be divided into three main stages: the advertising and searching stage, the ordering and payment stage, and the delivery stage. Electronic commerce encompasses all kinds of commercial transactions that are concluded over an electronic medium or network, essentially, the Internet.
E-contracts are most commonly entered into when purchases are made via websites, but they can also be formed by the exchange of emails representing the offer and acceptance stages required to form a contract. The supplier will usually attach their terms and conditions to their email and these will form the basis of the contract between the parties. There are three main forms of e-contract over the internet:
• E-mail/ Browse Wrap
• Clickwrap
• Shrink wrap agreement

3. 2. 1 Email/Browse Wrap

Any formal letter or official function, even academic contacting sources, are mainly carried out through e-mail. Via e-mail, electronic contracts can also be formed. The text of an e-mail message is simply the digital equivalent of the letter. One may attach things to it, it needs to be addressed, and it needs to be sent to the desired recipient. An e-mail is capable of performing all the functions of normal mail. An e-mail can be used to send advertisements as well as to make offers and acceptances.
In Partridge v. Crittenden [1968] it was held that an e-mail is the digital equivalent of a letter sent through the post. All normal functions of postal mail transpire through an email. This includes not only the ability to send advertisements or invitations to treat but also offers and acceptances.[24]
In case of browse-wrap, the seller gives the opportunity to look at the terms of the sale but does not require the user to click on anything to assent to these terms before paying for the product. For example, the website may contain a

[23] "Consideration," Britannica, The Editors of Encyclopaedia. https://www.britannica.com/topic/consideration.
[24] Partridge v. Crittenden [1968], 1 WLR 1204, 2 AII ER 421.

button saying "click here for legal terms", which the purchaser may click on or ignore.[25]

3. 2. 2 Click Wrap

Click wrap contracts are most commonly found in the workings of the World Wide Web. These types of contracts are mainly used for placing information about a product on the web. This information could be in the form of an advertisement like a web advertisement, an invitation to treat or an offer of a product or service for a sum of money. In this process, there is a button labeled 'I Accept', 'Submit', 'Purchase', or some other phrase. When the consumer clicks on this button, the order is sent to the seller who usually reserves the right to proceed or not to proceed with the transaction.
In Hotmail Corporation v. Van Money Pie Inc., the court was asked to rule on the validity of the 'click wrap' contract that the users of the Hotmail service were required to execute. The court upheld the validity of click wrap contracts stating that by clicking on the 'I agree' button on the page where the details of the contract are listed, the parties bind themselves to a contract under the terms contained in that web page.[26]

3. 2. 3 Shrink-wrap agreement

Shrink-wrap agreementsare those, which are acknowledged by a client when programming is introduced from a CD-ROM as Microsoft Office programming. Shrink wrap agreements have derived their name from the 'shrink-wrap' packaging that usually contains the CD-ROM of the Software. The terms and conditions of accessing the particular software are printed on the shrink wrap cover of the CD that must be removed to access the CD-ROM. At times, supplementary terms are also imposed in such licenses which appear on the screen only when the CD is loaded in the computer.
In ProCD, Inc. v. Zeidenberg, Judge Easterbrook held that contracts concluded electronically over the internet may still be valid provided that the party has been given sufficient notice that the transaction they are about to make is governed by the terms that are contained in a separate page on the web site and that they are bound by the terms of such contract. They cannot subsequently claim that they are not bound by the terms of the agreement on the grounds that they did not read the same when agreeing to the terms.[27]

[25] Blount, *Electronic Contracts: Principles from the Common Law*.
[26] Hotmail Corporation v. Van Money Pie Inc., et al, C98-20064, 1998 WL 388389.
[27] ProCD, Inc. v. Zeidenberg, 86 F. 1996.

4. Comparative Study About E-Contracts and Traditional Contracts

In response to recent and anticipated future growth in long-distance commerce using electronic media such as the Internet, some commentators have suggested that legal and economic institutions will have to change substantially in response to new technologies of trade, in the same way that they did in response to the major technological and organizational innovations of the 18th and 19th centuries.[28] Others have taken a more skeptical position, arguing that recent developments are better viewed as changes of degree rather than of kind, and that they can be accommodated by extending and modifying existing arrangements in a more evolutionary fashion.[29] The growth of electronic commerce reflects changes in the relative importance of various institutional transaction costs such as the costs of information and of searching for contractual partners. Accordingly, arrangements that were optimal or at least satisfactory under previous configurations of transaction costs may no longer be so under configurations that will develop in the future. Such cost changes may or may not require adjustment of legal doctrine or statutory provisions, which in most cases merely set default rules around which contracting parties negotiate.[30]
The comparative study of traditional contracts and electronic contracts has a different perspective, namely, a regulatory perspective that asks what rules the state should set to regulate private contracting.[31]
In internet business, the significance and part of agreements and contracts will never be changed, but its type experiences incredible changes day by day with the development in the digital world. Some differences between traditional contracts and electronic contracts can be pointed out. Some of them are as follows:
Firstly, conventional contracts occur in reality, the two sides can bargain face to face, but electronic contracts occur in the virtual space. The two organizations or parties would not in any case meet each other when all is done, the whole process happens as an electronic robotized exchange, or individuals cannot even decide if the exchange is moderated. Their character depends on secret key confirmation distinguishing proof or accreditation body as like the traditional contract use to do.

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[28] David R. Johnson, and David Post, "Law and Borders. The Rise of Law in Cyberspace," *First Monday* no. 1 (1996).
[29] Frank H. Easterbrook, "Cyberspace and the Law of the Horse," *University of Chicago Legal Forum* (1996), https://chicagounbound.uchicago.edu/uclf/vol1996/iss1/7.
[30] Jane K. Winn, and Benjamin Wright, *The Law of Electronic Commerce* (Aspen: Aspen Law & Business, 2001).
[31] Avery W. Katz, "The Economics of Form and Substance in Contract Interpretation," *Columbia Law School*, 2004, https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=1107&context=faculty_scholarship.

Secondly, in case of availability of templates depending on the different needs and uses of the industry, templates of various kinds of contracts are available online. Parties entering into an agreement need to choose a template, fill in details and then attach their e-signatures to it. Whereas in a traditional contract, the whole content of the contract is written by a person according to what the parties want. The subject along with the terms and conditions of both parties involved is drafted, and for every change, a new draft is created. It could take days and weeks to draft a paper contract.

Thirdly, electronic contracts are easy to use. As readymade templates are available for various kinds of contracts online, parties are only required to fill in the basic details such as name, address, terms and conditions and afterwards the parties digitally sign it and the contract is completed. But in case of a traditional contract, parties need to meet face-to-face to inform each other, discuss about the terms and conditions of the agreement. Then, after the repeated modifications or drafting, the final contract is prepared, and parties meet again in order to sign the document. The whole process requires time from both parties.

Fourthly, a Digital Contract helps the user by giving them a low transaction cost option. Here, the cost of paper, printing, ink, etc. all get excluded as the process only requires an electronic medium at both ends. But in traditional contracts the cost of labor and material such as paper, printing etc. are involved, which increases the cost in the implementation of the agreement. The transactional cost of a contract is also added in such a kind of contract.

Fifthly, traditional contracts are time consuming compared to electronic contracts. In traditional contracts parties need to meet face-to-face to agree with the terms and sign the document. But in case of electronic contracts all the process happens through technological means and is done in the blink of an eye.

In spite of e-contracts having so many benefits compared to traditional ones, e-contracts have been facing so many legal challenges in recent days. The parties who enter into a contract must have the capacity to do so. If a person does not have legal competence, then the contract stands void. The problem of identifying capacity to e-contract arises because often there are nameless individuals who enter into contracts and there is a possibility that these individuals who agree to the terms and conditions of an e-contract might be minors.

Another vital point is free consent. E-contracts do not allow any party to negotiate about the existing offer as the parties are not aware of each other and there is no chance to modify the offer or the terms and conditions. The user cannot use any system or software without accepting the terms and conditions. Thus, an e-contract only provides a “take it or leave it” offer and no negotiation for ensuring free consent.

5. Legal Challenges of E-contracts under the Law of Bangladesh

To keep pace with the digital world and the present situation, most countries over the globe have actualized laws to adopt electronic contacts, in spite of the underlying worries in regard to the same. In the context of Bangladesh, contracts are regulated under the customary contract law[32] which is very unequipped to manage the issue of Electronic Contracts. Around the whole world, computer-based transactions set the tone even in everyday life. Financial matters related to computers or internet-based transactions, which depend mostly on electronic contracts, have perplexed market analysts around the world.[33]

As a developing nation, Bangladesh is on its way to becoming a digital country. In this circumstance, the advantage of internet technology to grow E-commerce has the potential to promote every industry and thereby contribute considerably to the country's macro-economy. However, the country has yet to achieve its E-commerce potential and one of the vital barriers in the way of it is a lack of a specific legal framework.

The term E-commerce stems from electronic commerce, where the whole transaction is conducted through the internet. Daraz, Evaly, Foodpanda etc. are popular E-commerce websites in Bangladesh nowadays. Generally, an internet business in Bangladesh starts with the creation of a website or a public page on a social media network. In the E-commerce sector, Bangladesh lacks a unified legal framework to oversee and monitor the rights of consumers and sellers or service providers.

The Contract Act of 1872, the Sale of Goods Act of 1930, the Consumer Rights Protection Act 2009 and the Competition Act of 2012 provide the regulatory framework for commercial matters, but they all need to be updated to accommodate the various aspects of E-commerce. In the case of online shopping, the buyer and seller enter into a contract before purchasing the goods. The nature of such a contract is virtual. Electronic contracting raises a number of valid questions, such as whether an electronic contract is legally binding and to what extent, or whether it can be used as evidence in the event of a breach. However, under Bangladeshi contract law, there is no specific solution relating to such form of contract. The Consumer Rights Protection Act 2009 prohibits misleading people with false advertisements in order to sell a product or service and makes it an infringement of consumer rights, but there is no provision that specifies how such a claim may be established. The Sale of Goods Act of 1930 acknowledges that inspecting goods before purchasing them is one of the consumer's rights, but does not specify how this can be done online. The Penal

[32] Avtar Singh, *Text book on Law of Contract and Specific Relief* (Lalbagh: Eastern Book Company, 2006).

[33] C. M. Abhilash, "E Commerce laws in Developing countries: An Indian Perspective," *Information & Communication Technology Law* 11, no. 3 (2002): 269–281.

Code of 1860 provides for some remedy in general under sections 264 to 267 in the case of offences relating to fraudulent use of a false instrument, the making or using of false weights or measures for selling goods. But there is no provision for fraudulent customers when they refuse to take delivery of the goods in case of the cash on delivery method. As a result, the sellers have to face loss in business, at the same time it demotivates them from pursuing online business. The Special Powers Act of 1974 does not deal with deception during virtual selling but in order to penalize for adulterated food, drinks, drugs or cosmetics this law can be a stringent option. However, cyber threats do exist in online shopping systems. When customers shop online, websites collect their personal data and that poses a risk to their privacy. The shopping website, on the other hand, can be hacked. In this regard, the Information and Communication Technology Act, 2006 can be applied indirectly. Ironically, none of the law applies to online shopping specifically. In 2018, the Bangladesh National Parliament also passed the Digital Security Act 2018. This act was passed with the aim to give more protection regarding social media, print media or any other electronic media.[34] But there is no specific provision about the contracting method based on the electronic system.

Despite all the irregularities, the most sanguine step by Bangladesh is the National Digital Commerce Policy, 2018 at the initiative of the e-Commerce Association of Bangladesh (e-CAB), which was approved by the cabinet for development of the e-commerce sector. It has enormous potentiality to progress the sector but the implementation will take a long time.

The main trouble with internet jurisdiction is the presence of multiple parties in various parts of the world who have a virtual nexus with each other. The Civil Procedure Code 1908 allows a party to choose the jurisdiction either based on the cause of action or the place of business of the defendant. However, S.13 of the Information Technology Act provides that an electronic record is deemed to be dispatched at the place where the originator has his place of business and is deemed to be received at the place where the addressee has his place of business.

Indian contract act incapacitates a minor, a lunatic, a person with unsound mind, and a person in a drunken state of mind from entering into a valid contract. The difficulty in an online contract is that the competence of one party is unknown to the other. The complex nature of e-contracts makes it impossible for one party to figure out whether the other party behind the computer screen is competent to contract or not.

It becomes crucial for an online business portal to keep such possibility in consideration and qualify its website or form stating whether the individual with whom it is trading or entering into a contract is a major or not.

[34] Article 19, Bangladesh Digital Security Act 2018, Cyber Security Act; Act No 46 of 2018.

5. 1 Status of Electronic Contracts in the International Arena

It is important to note that the internet with all its technological developments gives us an opportunity to act as a global community, advertise and operate transactions all over the world from country to country. For the making of this kind of global community, the adoption of e-contracts through technological equipment is most important. Many more countries cordially adopted e-contracts as media of transaction for expanding their business or advertisement. The development of electronic trade has relatively expanded the utilization of electronic contracts as a quicker and imaginative approach to do business i.e. e-commerce. Most nations adjusted their domestic business legislation to recognize electronic contracts and consider them as lawfully legitimate instruments.

5. 1. 1 Electronic Contracts in the USA

The laws pertaining to electronic contracts constitute the essential legal structure in the United States. The Uniform Electronic Transactions Act (UETA)[35] is an imperative enactment material regarding electronic contracts in the USA. Articles 3 and 4 of this Act are only applicable to transactions relating to business and government matters that are made by electronic means. The Electronic Signatures in Global and National Commerce Act (E-Sign Act) 2001 recognizes the legitimacy of agreements entered electronically and provides the general rules of validity for electronic records and signatures for transactions in interstate or foreign commerce. The Uniform Computer Information Transaction Act (UCITA) is an important U.S. setup for the proposed display rules relevant to the development of electronic contracts, particularly to that of e-contracts on electronic materials or computer data exchanges.[36] Along these lines, for managing, permitting or the exchange of computer programming inside the United States, it is imperative to check whether the rules of UCITA have been received by the state administrator.

5. 1. 2 Electronic Contracts in Germany

The German approach to giving legal effect to electronic contracting is based on the use of a rigid regime. The German Digital Signature Act (DSA) 2014 entered into force as Article 3 of the Information and Communication Services Act. This act supported the legal validity of digital signatures in electronic commerce. Further technical regulations followed later that year in the Digital Signature Ordinance.

[35] United Nations Commission on International Trade Law. UNCITRAL Model Law on Electronic Commerce, with Guide to Enactment, 1996: with Additional Article 5 Bis as Adopted in 1998. New York: United Nations, 1999.

[36] H. Auinger, "Contracts and Orders," *Power Engineering Journal* 15, no. 1 (2001).

5. 1. 3 Electronic Contracts in France

As a European Union (EU) Member State, France is governed by Regulation No. 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market. The use of electronic signatures in electronic contracts is increasing in France, especially in the context of e-commerce. Certificate-based digital signatures, such as qualified electronic signatures (QES), are mainly reserved for specific regulated business activities such as those involving notaries, lawyers, banking institutions, and bailiffs, where the evidential nature of the signature has a significant importance.[37]

6. Conclusion

Even though our existing contract laws are predicated upon the traditional paper-based contracts, they have been able to accommodate evolutions in communication and the way contracts are formed, for instance, the development of telephones, faxes, and telex. Hence, the emergence of electronic communication is not entirely different from other modes of communication and can also be accommodated by the existing contract law.

Electronic commerce, by its nature, goes beyond borders and so it is important to harmonize the laws that regulate electronic commerce. The United Nations has taken a commendable step in that direction. However, it should have gone further to make provisions addressing the issue of who makes the offer and who accepts the offer in electronic commerce, and when an acceptance becomes effective.

Though some countries like Bangladesh are lagging behind in taking definitive steps to remove the obstacles to the facilitation of electronic commerce. But day to day developments in the digital world make them realize the importance of making e-contracts more included in state law. This way businesses and electronic consumers can benefit from this fast and highly convenient means of transacting business.

[37] Electronic Signature Laws & Regulations in the EU (910/2014), EU Trust Services Dashboard, https://webgate.ec.europa.eu/tl-browser/#/tl/FR.

A Comparative Analysis of Child Custody and Access Rights After Divorce or Separation in Kenya and England

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ABSTRACT *This study examines the laws and practices surrounding child custody and access rights in Kenya and England following divorce or separation. Its goal is to identify similarities and differences in both countries' legal frameworks and social practices governing these issues. The research methodology employed for this study includes reviewing existing literature such as statutes, case law, and academic papers. The study has discovered that while there are some similarities in the legal frameworks governing child custody and access rights in Kenya and England, there are also significant differences in the legal principles and social practices that inform these frameworks. Various factors, including cultural norms, socioeconomic status, and the role of the family in society, influence these differences. In conclusion, the study suggests that further research is necessary to understand how these differences affect parents and children in both jurisdictions. Additionally, it recommends developing more effective legal and social policies to support families after divorce or separation.*

KEYWORDS *divorce, separation, child's welfare, England, Kenya*

1. Introduction

The notion of family has existed for as long as humans have and typically refers to individuals who are related by blood or united through marriage.[1] The significance of marriage in establishing a family cannot be overstated and is particularly integral to family law. In Kenya, marriage is defined as the willing union of a man and a woman, whether in a monogamous or polygamous arrangement. Historically, many cultures have regarded marriage as a lifelong bond, exemplified by the common Judeo-Christian marriage vows that pledge commitment "until death do us part."[2]

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[1] Mary Jo Maynes, and Ann Waltner, "Family History and World History: From Domestication to Biopolitics," in *The Cambridge World History: Volume 1: Introducing World History, to 10,000 BCE*, ed. David Christian (Cambridge: Cambridge University Press, 2015), 208–233.

[2] Gwen J. Broude, *Marriage, Family, and Relationships: A Cross-Cultural Encyclopedia*, Encyclopedias of the Human Experience (Santa Barbara, Calif.: ABC-CLIO, 1994).

In Islam, the Quran recognizes both monogamous and polygamous marriages. The Quran promotes marriage as a means of finding companionship, and moral support, and a means of realizing the duties religion bestows on a person. Surah An-Nisa (4:3) a verse in the Quran, promotes monogamous marriage by directing Muslims to marry just one woman if they think they are not capable of taking care of multiple women; the same verse promotes polygamous marriages and permits Muslims to marry up to four wives with a condition that they must be just and fair to all of them and if they are not capable of doing that, then they should just have one wife, since it is not compulsory for a Muslim to have multiple wives.[3]

Throughout history, marriage has been considered a sacred and lifelong bond involving a man and woman, however, there have been situations where this ideal has not been attainable.[4] Family law has had to adapt to include different grounds and reasons for divorce. Divorce law is a vital part of family law, since it changes the legal status of partners and affects other aspects of family life, such as child custody and marital property contracts/agreements or prenuptial agreements.[5] Society is interested in regulating marriage because it creates rights and obligations for the people involved, which sometimes continue even after the marriage has ended. This article looks at current English and Kenyan laws on divorce, particularly the recognized reasons for divorce, and the difference between the newly introduced reason of irretrievable breakdown and the more traditional fault-based reasons for divorce, it also covers the rights parents have to access their children after the divorce.

Divorce or separation is a complex and emotional process that can be challenging for any couple, regardless of nationality or location. In Kenya and England, divorce and separation proceedings are governed by specific laws and regulations that must be followed. Divorce is the legal dissolution of a marriage, while separation is the legal termination of a civil union.[6] In Kenya, the law that governs divorce and separation is the Marriage Act of 2014 and the Matrimonial Causes Act of 2015.[7] Section 3 of the Act provides for the grounds for divorce, including adultery, cruelty, desertion, and irretrievable marriage breakdown. Divorce or separation involves filing a petition with the court, and the court may then issue a decree nisi (a decree nisi is a preliminary court order that grants a divorce or dissolution of marriage, subject to certain conditions or waiting periods. It is not yet final, but it allows the parties to begin living apart

[3] Avdullah Robaj, "Marriage According to the Islamic Law (Sharia) and the Secular Law," *Perspectives of Law and Public Administration* 10, no. 2 (2021): 19–24.

[4] Christopher Lasch, "The Suppression of Clandestine Marriage in England: The Marriage Act of 1753," *Salmagundi*, no. 26 (1974): 90–109.

[5] James S. Read, "Marriage and Divorce: A New Look for the Law in Kenya," *East African Law Journal* 5, no. 1 and 2 (1969): 107–40.

[6] Joanna Miles, "'Cohabitants' in the Law of England and Wales: A Brief Introduction," in *Cohabitation and Religious Marriage* (Bristol University Press, 2020), 27–38, https://bristoluniversitypressdigital.com/display/book/9781529210842/ch003.xml.

[7] Marriage Act, No. 4 2014. http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.%204%20of%202014.

while they wait for the final order).[8] If there are no objections or appeals, the court will issue an absolute decree, which legally ends the marriage.[9] Divorce or separation in Kenya can be particularly challenging due to cultural and societal factors. For example, divorce is still stigmatized in many Kenyan communities, and women face challenges if they initiate it.[10] In addition, child custody and support can be complex issues, especially if there are disagreements between the parents about what is in the child's best interests, however, Article 3 of the UN Convention on the Rights of the Child 1989 provided direction to the courts and decision-makers to always consider the rights of the child and their best interest in the matter of their upkeep.[11]

In England, divorce and separation are governed by the Matrimonial Causes Act of 1973.[12] Section 1(2) of the Act provides for the grounds for divorce, which include adultery, unreasonable behavior, desertion, and separation for at least two years (collectively referred to as fault-based reasons). Divorce involves filing a petition with the court, and the court may then issue a decree nisi. If there are no objections or appeals, the court issues a decree absolute, which legally ends the marriage. Divorce, which is a full and legal termination of marriage, is different from separation, in which parties live apart but are still legally married, however, both cases are emotionally challenging to the parties, and the children involved.[13] Therefore, the courts consider various factors when making decisions about financial settlements, including the length of the marriage, the parties' earning capacity, and the standard of living they enjoyed during the marriage.

Similarly, decisions about child custody and support are made based on the child's best interests, and the courts consider a range of factors, including the child's age, living arrangements, and relationship with each parent.[14] It is

[8] Mary Welstead, "Divorce in England and Wales: Time for Reform," *Denning Law Journal* 24 (2012): 21–38.

[9] Welstead, "Divorce in England and Wales: Time for Reform," 21–38.

[10] Jessica Penwell Barnett, Eleanor Maticka-Tyndale, and Trócaire Kenya, "Stigma as Social Control: Gender-Based Violence Stigma, Life Chances, and Moral Order in Kenya," *Social Problems* 63, no. 3 (2016): 447–462.

[11] Michael Nyongesa Wabwile, "Child Support Rights in Kenya and in the UN Convention on the Rights of the Child 1989 Kenya," *International Survey of Family Law* 2001 (2001): 267–284.

[12] Matrimonial Causes Act of 1973. https://www.legislation.gov.uk/ukpga/1973/18/contents.

[13] Catherine Fairbairn, "Commons Library Analysis: Divorce, Dissolution and Separation Bill [HL] 2019-21," July 16, 2023, https://commonslibrary.parliament.uk/research-briefings/cbp-8697/.&House of Commons Library, "Divorce in England and Wales: An Overview," briefing paper 8375 (London: House of Commons Library, 2021), 2.

[14] Athena D. Mutua, "Gender Equality and Women's Solidarity across Religious, Ethnic, and Class Differences in the Kenyan Constitutional Review Process," *William and Mary Journal of Women and the Law* 13, no. 1 (2006-2007): 1–128.

essential to prioritize the well-being of any children involved and work towards an outcome in their best interests.
Divorce or separation is a complex and emotional experience for any couple, but it becomes even more complicated when children are involved. The question of child custody and access rights becomes critical in these situations. This article compares Kenya's and England's child custody and access rights laws and practices.

2. Why compare Kenya and England

English law has had a very significant impact on the development of family laws in Kenya, it began with the advent of colonialization, and it persists to modern times since Kenya was colonized by England and during that time several pieces of legislation were introduced in Kenya. The family law dealing with the rights associated with the child and parties to marriage upon divorce or separation were brought to Kenya by English colonizers.[15] British laws, including the marriage and divorce laws, were among other laws enacted in Kenya during the colonization and were retained after Kenya gained its independence, replacing the customary laws that were in place to govern the social lives of various tribes and communities that called Kenya their homes; the need for consolidation of laws was to bring everyone living in Kenya under the same law.[16] A comparison between Kenya's and England's approach to child custody and access rights following a divorce or separation has been conducted; since Kenya was an English colony. This analysis is vital because the two jurisdictions have differing legal systems and family law approaches that impact such cases' outcomes. By identifying these differences, a better understanding can be gained of how each legal system affects the issue of child custody and access rights.
Due to their diverse cultural and societal norms, child custody and access rights are viewed and enforced differently in Kenya and England. In Kenya, extended family members often play a significant role in child-rearing.[17] On the other hand, individualism is emphasized in England.[18] Cultural differences can impact

[15] A. N. Allott, "What Is to Be Done with African Customary Law? The Experience of Problems and Reforms in Anglophone Africa from 1950," *Journal of African Law* 28, no. 1/2 (1984): 56–71.
[16] Eugene Cotran, "The Development and Reform of the Law in Kenya," *Journal of African Law* 27, no. 1 (1983): 42–61.
[17] Shelley Clark et al., "Who Helps Single Mothers in Nairobi? The Role of Kin Support," *Journal of Marriage and Family* 79, no. 4 (2017): 1186–1204.
[18] Douglas B. Downey, James W. Ainsworth-Darnell, and Mikaela J. Dufur, "Sex of Parent and Children's Well-Being in Single-Parent Households," *Journal of Marriage and Family* 60, no. 4 (1998): 878–893.

how custody and access cases are resolved.[19] Conducting a comparative analysis helps in identifying these differences.

This approach to child custody and access rights in different jurisdictions offers valuable insights into their strengths and weaknesses, which help lawmakers in making informed decisions in both countries.[20] It also helps policymakers to amend the laws and systems by identifying effective policies and practices in individual jurisdictions. A comparative study of child custody and access rights post-divorce or separation in Kenya and England provides perspectives on how each jurisdiction tackles this crucial matter and how they could learn from each other to enhance their laws.[21]

3. Overview of Child Custody and Access Rights

Child custody and access rights are two important legal concepts in the divorce or separation of a couple with children. Child custody refers to the legal right to decide about a child's upbringing, including their education, medical care, and religion.[22] In Kenya, child custody is governed by the Children Act of 2001, while in England matters relating to child custody are governed by the Children Act of 1989.[23] Access rights, on the other hand, refer to the right of a non-custodial parent to spend time with their child. When parents decide to separate or divorce, they must decide on their children's care and upbringing.[24] This can be done through negotiations between the parents or court proceedings, depending on their conflict level. In most cases, it is in the child's best interests for both parents to have a meaningful relationship with them. However, there are cases where one parent may be considered unfit to care for the child or pose a risk to their safety, in which case sole custody may be granted to the other parent.[25]

[19] H. W. O. Okoth-Ogendo, and S. B. O. Gutto, "The Legal Status of the Child in Kenya's Political Economy," *Columbia Human Rights Law Review* 13, no. 2 (1982 1981): 495–536.

[20] Vianney Sebayiga, "The Arbitrability of Family Disputes in Kenya: A Case Study of the Court of Appeal Decision in TSJ v SHSR (2019) eKLR," SSRN Scholarly Paper (Rochester, NY, February 5, 2022).

[21] Patricia Kameri-Mbote, "Custody and the Rights of Children," n.d.

[22] Okoth-Ogendo, and Gutto, "The Legal Status of the Child in Kenya's Political Economy."

[23] Danaya C. Wright, "The Crisis of Child Custody: A History of the Birth of Family Law in England," *Columbia Journal of Gender and Law* 11, no. 2 (2002): 175–270.

[24] Jo-Ellen Paradise, "The Disparity between Men and Women in Custody Disputes: Is Joint Custody the Answer to Everyone's Problems Note," *St. John's Law Review* 72, no. 2 (1998): 517–580.

[25] Bruce Smyth et al., "Legislating for Shared-Time Parenting After Parental Separation: Insights from Australia?," *Law and Contemporary Problems* 77, no. 1 (2014): 109–149.

3. 1 The types of custody arrangements that can be made include

Kenya has embraced Western laws and, in matters dealing with children's rights and parental access to children after divorce or separation,[26] the following are recognized types of custody arrangements in both countries, by the Children Act of 2001 in Kenya and the Children Act of 1989 in England.

3. 1. 1 Sole custody

Sole custody refers to a custody arrangement where one parent is granted legal and physical custody of the child (to have the child live with him or her), and the other has access rights. The parent with sole custody has the legal right to make all decisions regarding the child's upbringing, such as education, healthcare, religion, and extracurricular activities, without the other parent's input or approval. In this arrangement, the non-custodial parent may have limited or supervised access to the child. In addition, the non-custodial parent may be allowed visitation rights or scheduled times to spend with the child. However, the custodial parent has the final say in all significant child welfare decisions.[27]

Sole custody is usually awarded when one parent is deemed unfit or unable to care for the child. For example, if one parent has a history of drug or alcohol abuse, mental illness, or a criminal record, the court may grant sole custody to the other parent. In addition, in some cases, the court may award sole custody to one parent if the other parent is absent or has abandoned the child.

3. 1. 2 Joint custody

Joint custody is where both parents share legal custody and decision-making responsibilities. Still, the child may live primarily with one parent, or the parents may have equal time with the child. In this arrangement, parents have the right to participate in all major decisions affecting the child's welfare, such as education, healthcare, religion, and extracurricular activities.[28]

Joint custody can take several forms, including joint legal custody, joint physical custody, or a combination of the two. Joint legal custody means that both parents share the decision-making responsibilities, but the child lives primarily with one parent. Joint physical custody means that the child spends equal time with both parents. In a joint custody arrangement, the child's well-being is the top priority, and both parents must work together to make decisions

[26] Michael Nyongesa Wabwile, "The Place of English Law in Kenya," *Oxford University Commonwealth Law Journal* 3, no. 1 (2003): 51–80.

[27] Linda Nielsen, "Shared Physical Custody: Does It Benefit Most Children," *Journal of the American Academy of Matrimonial Lawyers* 28, no. 1 (2015-2016): 79–138.

[28] Michael Benjamin, and Howard H. Irving, "Shared Parenting: Critical Review of the Research Literature," *Family and Conciliation Courts Review* 27, no. 2 (1989): 21–36.

that are in the child's best interests. This arrangement is generally preferred when both parents are deemed fit and able to care for the child and are willing to cooperate and communicate effectively.[29]

3. 1. 3 Split custody

This is a custody agreement in which each parent has custody of one or more children rather than sharing joint custody of all children. This arrangement is relatively rare and typically only occurs when there are multiple children, and each parent is better suited to care for different children. For example, if there are two children and one child has a closer bond with one parent, while the other child has a closer bond with the other parent, then the court may award split custody. In this case, each parent has legal and physical custody of one child, and the children may have visitation rights with the other parent. Split custody can be challenging for children, as it can be difficult to be separated from siblings and parents. However, the court may award split custody if it is in the children's best interests.[30]

3. 1. 4 Bird's nest custody

Bird's nest custody is a type of custody arrangement where the child resides in one home, and the parents alternate living with the child while maintaining separate residences. This arrangement provides stability for the child, as they remain in the same home and attend the same school. However, the parents must coordinate their schedules to ensure equal time with the child, which can be challenging. Bird's nest custody is usually utilized when the parents are on good terms and committed to working together for the child's benefit.[31] Bird's nest custody can be a helpful solution for younger children who struggle with constant changes in living situations. However, it can also be expensive since both parents need to maintain multiple homes. Moreover, this arrangement may not be possible if the parents live far away from each other or have logistical difficulties in coordinating schedules.

3. 1. 5 Third-party custody

In cases where neither parent is considered capable of caring for a child or when the child is in danger due to parental abuse or neglect, third-party custody may be granted. This type of custody allows a non-parent to have legal and physical custody of the child. The third-party caregiver can be a grandparent, other

[29] Benjamin, and Irving, "Shared Parenting," 21–36.
[30] Michael Lanci, "In the Child's Best Interests? Rethinking Consideration of Physical Disability in Child Custody Disputes," *Columbia Law Review* 118, no. 3 (2018): 875–914.
[31] Michael T. Flannery, "Is Bird Nesting in the Best Interest of Children," *SMU Law Review* 57, no. 2 (2004): 295–352.

family members, or a non-relative, like a foster parent. Before granting custody, the court will evaluate the fitness of the caregiver and determine what is in the child's best interest.[32] It can be difficult to adjust when a child is placed in the custody of someone who is not their parent. However, if deemed in the child's best interest, the court may grant third-party custody to ensure the child's safety and well-being. Depending on the situation, the child's parents may be given supervised or limited access to the child.

When deciding about custody, the court considers various factors, including the child's age, their relationship with each parent, the parents' ability to care for the child, and the child's wishes if they are old enough to express them. [33]Access rights, also called visitation rights, allow a non-custodial parent to spend time with their child. These rights can be established through an agreement between the parents or a court order. Access can include regular visits, holiday time, and communication through phone or video calls. The distance between the parents' homes, the child's age and needs, and safety concerns can impact the access arrangements. Moreover, the court may consider the non-custodial parent's involvement in the child's life before the separation when determining the extent of their access.[34]

Child custody and access rights become crucial legal matters during a divorce or separation. Parents have to prioritize their child's well-being and collaborate to determine what is best for them. If an agreement cannot be reached, the court will decide based on assessing the child's best interests.

4. Child Custody and Access Rights in England

This section provides an analysis of child custody and access rights in England. It covers relevant laws, legal standards, and court practices regarding custody and access rights. It also discusses the challenges English parents face seeking custody or access to their children following divorce or separation.

The country's laws and legal standards determine divorce, child custody, and access rights in England. The Matrimonial Causes Act 1973 is the governing legislation for divorce in England. Section 1 of the Act outlines the grounds for divorce, including adultery, unreasonable behavior, desertion, two years of separation with the other spouse's consent, or five years' separation without the other spouse's consent. The divorce process typically involves submitting a divorce petition to the court, followed by a period of negotiation or mediation to reach an agreement on issues such as property division, financial support, and

[32] Elizabeth S. Scott, "Pluralism, Parental Preference, and Child Custody," *California Law Review* 80, no. 3 (1992): 615–672.

[33] Lanci, "In the Child's Best Interests?".

[34] Lisa V. Martin, "Securing Access to Justice for Children," *Harvard Civil Rights-Civil Liberties Law Review* 57, no. 2 (2022): 615–656.

child custody arrangements. A judge may make a ruling if these issues cannot be resolved through negotiation.[35]

Child custody and access in England are regulated by the Children Act 1989. Section 1(1) of this Act states that the child's welfare is the court's top priority. This means that custody and access determinations are made based on the child's best interests rather than the desires of the parents. The court may consider various factors when making these decisions, such as the child's age, health, and educational requirements, as well as each parent's capacity to care for the child's needs.[36] When parents cannot agree regarding custody and access arrangements for their child, section 12 of the Children Act allows the court to appoint a Children and Family Court Advisory and Support Service (CAFCASS) officer. The CAFCASS officer assesses the child's needs and provides recommendations to the court.[37] The CAFCASS officer can assist parents in reaching an agreement regarding custody and visitation arrangements. In situations where one parent has been abusive or violent towards the child or the other parent, the court may order supervised contact or limit access to the child to ensure their safety and welfare.

When determining custody and visitation rights, the court utilizes a set of legal guidelines called the "welfare checklist." This list considers various factors such as the child's physical, emotional, and educational requirements, the potential impact on the child if there are any changes in their situation, and the child's age, gender, and background.[38] When deciding custody and access arrangements for a child, the court considers the "no order" principle. This principle states that the court should only make an order for the child's welfare if necessary. This encourages parents to agree on their own without involving the court.

The family court system in England follows the principle of open justice, which allows the public to attend court proceedings.[39] In situations involving minors, the court has the authority to limit disclosure of the legal proceedings to safeguard the child's confidentiality. Additionally, the court promotes alternative dispute resolution approaches, such as mediation or collaborative law, to reach agreements on custody and visitation arrangements. These

[35] Herbert Jacob, "Another Look at No-Fault Divorce and the Post-Divorce Finances of Women," *Law & Society Review* 23, no. 1 (1989): 95–115.

[36] Enne Mae Guerrero, "A Necessary Job: Protecting the Rights of Parents with Disabilities in Child Welfare Systems," *Hastings Race and Poverty Law Journal* 18, no. 1 (2021): 91–112.

[37] Allison M. Nichols, "Toward a Child-Centered Approach to Evaluating Claims of Alienation in High-Conflict Custody Disputes," *Michigan Law Review* 112, no. 4 (2014): 663–688.

[38] Andrew Bainham, and Stephen Gilmore, "The English Children and Families Act 2014," *Victoria University of Wellington Law Review* 46, no. 3 (2015): 627–648.

[39] Luigi Lonardo, "The Best Interests of the Child in the Case Law of the Court of Justice of the European Union," *Maastricht Journal of European and Comparative Law* 29, no. 5 (October 2022): 596–614.

approaches are typically less confrontational and concentrate on discovering mutually agreeable solutions.[40]
As discussed above, the Matrimonial Causes Act of 1973, Children Act of 1989, and Family Act of 1996 are some of the laws that regulate divorce, child custody, and access rights in England. The court prioritizes the child's well-being and decides based on their best interests. Additionally, parents are encouraged to utilize alternative dispute resolution methods to agree on custody and access arrangements whenever feasible.

4. 1 Children and Family Court Advisory and Support Service (CAFCASS)

The Children and Family Court Advisory and Support Service (CAFCASS) is an independent organization in England responsible for providing support and advice to family courts concerning children's welfare.[41]

4. 1. 1 Role of CAFCASS

CAFCASS was established in 2001 under the Criminal Justice and Court Services Act 2000. Its primary role is to advise family courts on matters relating to children's welfare, including child custody, access rights, and other issues related to the welfare of children involved in family court proceedings. CAFCASS is an independent organization whose officers are not affiliated with any party in a case. Instead, they work closely with the courts, local authorities, and other agencies involved in children's welfare to ensure that the child's best interests are always prioritized.
The primary law governing the functions of CAFCASS is the Children Act 1989. Section 12 of the Act specifies that CAFCASS officers must safeguard and promote the welfare of children involved in family court proceedings. This includes advising the court on matters related to the child's welfare and recommending the best course of action in the child's best interests.[42] In addition to the Children Act, CAFCASS operates under the Family Procedure Rules 2010, which set out the procedures for family court proceedings in England and Wales. Rule 16.4 specifies that CAFCASS officers must prepare a

[40] Marit Skivenes, "Judging the Child's Best Interests: Rational Reasoning or Subjective Presumptions?," *Acta Sociologica* 53, no. 4 (2010): 339–353.
[41] Joan Small, "Parents and Children: Welfare, Liberty, and Charter Rights 2005 John and Mary A. Yaremko Programme on Multiculturalism and Human Rights Symposium: Equality and the Family: Decisional Authority," *Journal of Law & Equality* 4, no. 1 (2005): 103–116.
[42] Ann Buchanan, and Victoria Bream, "Do Some Separated Parents Who Cannot Agree Arrangements for Their Children Need a More Therapeutic Rather than Forensic Service Special Issue: Seminar at All Souls College, Oxford: 2 July 2001," *Child and Family Law Quarterly* 13, no. 4 (2001): 353–360.

report for the court in cases involving children, including assessing the child's welfare and recommending any necessary interventions.[43]
In *Re W (Children) [2016] EWCA Civ 113 - Family Law* (Care Proceedings: Child's Wishes), the court considered the importance of having regard to a child's wishes and feelings when making decisions about their welfare.[44] In this case, CAFCASS was instrumental in ensuring that the child's voice was heard and that the court considered their wishes and feelings. Another notable case involving CAFCASS is *Re C (Children)* (Care Proceedings: Assessment of Kinship Carers), in which the court considered the importance of assessing potential kinship carers in care proceedings. In this case, CAFCASS was responsible for assessing potential kinship carers and advising the court on the suitability of each option.[45] CAFCASS prioritizes children's welfare in family court proceedings. Its officers are responsible for providing advice and making recommendations to the court on matters related to children's welfare, and they work closely with other agencies to ensure that the child's best interests are always at the forefront of decision-making.

4. 2 Divorce and Separation in Kenya

Divorce or separation in Kenya can be particularly challenging due to cultural and societal factors. In Kenyan culture and the practiced customs among various communities, marriage is not just a union between two individuals but a union between two families, and divorce or separation can have significant social and cultural consequences.[46] I will further explain this statement by citing examples, case laws, and legislation that illustrate the obstacles faced during divorce or separation in Kenya due to cultural and societal influences.
In Kenya, divorce or separation can be difficult due to cultural, religious, and societal differences factors, such as the stigma attached to it. It is often seen as a personal or marital failure when a couple ends their marriage.[47] This belief is widely held in Kenyan society and can have severe repercussions for those involved, especially women. Women who choose to file for divorce are often

[43] Judith Masson, "Representation of Children in England: Protecting Children in Child Protection Proceedings New Perspectives on Child Protection," *Family Law Quarterly* 34, no. 3 (2000-2001): 467–496.
[44] Felicity Bell, "Meetings between Children's Lawyers and Children Involved in Private Family Law Disputes," *Child and Family Law Quarterly* 28, no. 1 (2016): 5–24.
[45] Stuart Bedston et al., "Data Resource: Children and Family Court Advisory and Support Service (Cafcass) Public Family Law Administrative Records in England," *International Journal of Population Data Science* 5, no. 1 (March 26, 2020).
[46] Marguerite Johnston, "Review of Report of the Kenya Commission on the Law of Marriage and Divorce," *University of Pennsylvania Law Review* 119, no. 6 (1971): 1075–1079.
[47] Elin Henrysson, and Sandra F. Joireman, "On the Edge of the Law: Women's Property Rights and Dispute Resolution in Kisii, Kenya," *Law & Society Review* 43, no. 1 (2009): 39–60.

met with stigma and social exclusion from their families and communities, resulting in significant social and economic ramifications.

In Kenya, several tribes customarily emphasize the communal ownership of land and it is taken as the property of the entire community rather than an individual asset.[48] When a couple divorces or separates, the property is usually divided between the two families rather than the individuals involved.[49] This can make it difficult for individuals, particularly women, to retain their property after a divorce or separation. In the case of ***S J O vs. J O O [2002] eKLR***,[50] the court acknowledged the obstacles women encounter during divorce or separation proceedings due to cultural and societal influences. The court held that women should be entitled to equal property rights in divorce or separation, regardless of cultural or societal norms. In the case of ***YN v MMK (Divorce Cause E010 of 2021) [2023] KEKC 7 (KLR) (23 February 2023) (Judgment),***[51] the court recognized the stigma associated with divorce in Kenya and its impact on women. The court ruled that seeking a divorce should not result in stigmatization or ostracism for women. They should be treated with dignity and respect.[52]

4. 2. 1 Legislation in Kenya

The 2010 Kenyan Constitution protects women's rights, particularly in cases of divorce or separation due to cultural and societal issues. Article 45(3) of the Constitution ensures that both parties involved in a marriage have equal rights during the marriage, at the time of the marriage, and even after the dissolution of the marriage.[53] In 2013, the Matrimonial Property Act was adopted to acknowledge the difficulties women face during property division in cases of divorce or separation. The Act ensures that both spouses have equal rights to the matrimonial property and recognizes women's significant contributions to acquiring and managing the property.[54]

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[48] Amelia Hopkins, "Law, Land and Identity: Property and Belonging in Colonial Kenya," *SOAS Law Journal* 1, no. 1 (2014): 139–172.

[49] Njeri Kagotho, and Michael G. Vaughn, "Women's Agency in Household Economic Decision Making in Kenya," *International Social Work* 61, no. 6 (2018): 767–780.

[50] "Divorce Cause 39 of 98 - Kenya Law," accessed August 13, 2023, http://kenyalaw.org/caselaw/cases/view/6255.

[51] "Divorce Cause E010 of 2021 - Kenya Law," accessed August 13, 2023, http://kenyalaw.org/caselaw/cases/view/255655/.

[52] Chinenye Joy Mgbeokwere, "Discriminatory Cultural Practices of Property Rights of African Women despite Legal Framework: A Call for More Proactive Measures," *African Customary and Religious Law Review* 3 (2022): 23–30.

[53] Elizabeth Muli, "Rethinking Access to Justice: Enforcing Women's Rights in Cases of Domestic Violence in Kenya Feature," *East African Journal of Human Rights and Democracy* 2, no. 3 (2004): 222–253.

[54] Winifred Kamau, "Law, Pluralism and the Family in Kenya: Beyond Bifurcation of Formal Law and Custom," *International Journal of Law, Policy and the Family* 23, no. 2 (2009): 133–144.

Getting a divorce or separating in Kenya can be tough, primarily because of cultural and social factors. Divorce is often viewed negatively; splitting up property can be complicated, and people see marriage as joining two families. These factors make it difficult for those seeking divorce or separation in Kenya.[55] According to the Kenya National Bureau of Statistics, the divorce rate has risen to 5.5% from the earlier 4% in 2019.[56] In Kenya, there are ongoing efforts through case laws and legislation to safeguard women's rights and tackle the obstacles those seeking divorce or separation face.

4. 2. 2 Child Custody and Access Rights in Kenya

Child custody and access rights in Kenya are governed by the Children Act No. 8 of 2001, which according to section 5, is a uniform law governing everyone within the country regardless of their religion, race, nationality, or tribe. This law aims to protect children's rights and welfare and outlines custody and access procedures. The child's welfare and best interests are prioritized when determining custody or access. The law recognizes that both parents have equal rights and responsibilities towards their children and that the child has the right to maintain regular contact with both parents. Custody refers to the right to decide about the child's upbringing, education, religion, and health. There are two types of custody under Kenyan law: sole and joint. Under sole custody, one parent has the right to make all decisions about the child's upbringing, while in the case of joint custody, both parents share this responsibility. Access refers to the right of a non-custodial parent to spend time with their child. Section 23 of the Children Act provides that a parent without custody has the right to reasonable access to their child unless it is deemed not in the child's best interests.

When deciding on custody and visitation arrangements, Kenyan courts consider various factors. These may include the child's age, preferences, emotions, the parent's capacity to care for the child's well-being, and any past domestic violence or abuse. One notable case in Kenya concerning child custody and access is the case of ***K W M v R N [2015] eKLR***[57]. The court ruled that the well-being and best interests of the child take precedence and that both parents share equal rights and obligations towards their offspring.[58] The court stressed the significance of maintaining consistent communication between the child and both parents unless it is not in the child's best interest. Another critical case is the case of ***AG v MAW [2017] eKLR***, ***Jeneby Mawira v Annwhiller Mwende***

[55] Henrysson, and Joireman, "On the Edge of the Law."

[56] "Number of Homes Headed by Divorcees Rises by 16pc," Nation, January 23, 2023, https://nation.africa/kenya/news/number-of-homes-headed-by-divorcees-rises-by-16pc-4095180.

[57] "Civil Appeal 16 of 2015 - Kenya Law," accessed August 13, 2023, http://kenyalaw.org/caselaw/cases/view/111883.

[58] Lucyline Nkatha Murungi, "Consolidating Family Law in Kenya Special Issue on Family Law," *European Journal of Law Reform* 17, no. 2 (2015): 317–328.

Rugendo & another [2017] eKLR.[59] The court ruled that the right to access is not unlimited and must be weighed against the child's well-being. Consequently, the father's request for access was denied due to his behavior harming the child's welfare.

The Children Act is designed to safeguard children's rights, welfare, and protection. It outlines the custody and access procedures and prioritizes the child's best interests in any decision-making process. Both parents have equal rights and responsibilities towards their children. When deciding on custody and access matters, the court considers several factors, such as the child's age, preferences, and the parent's capacity to provide for their welfare.

In Kenya, divorce can be granted if one of the parties commits adultery, is cruel, deserts their spouse, or if the marriage has irretrievably broken down. According to Section 3 of the Matrimonial Property Act, marriage is a voluntary union between a man and a woman, whether monogamous or polygamous. The High Court of Kenya ruled in the case of **Caroline Atieno Onyango v. Albert Ochieng Onyango (2012)** that if one spouse abandons the matrimonial home for at least three continuous years without justification, this is considered desertion and can be grounds for divorce.[60]

In Kenya, the Children Act provides that the child's best interests shall be paramount in any matter concerning the child. Section 24 of the Act states that the father and mother of a child have equal parental responsibilities and rights. In the case of ***FGC v PGN [2021] eKLR,***[61] the Court of Appeal of Kenya held that custody of a child should be awarded to the parent who can provide the best care and protection for the child, considering the child's welfare and best interests. The court also emphasized that the decision should not be based on the parent's gender. In cases where one parent is denied access to the child, the aggrieved parent may seek a court order for access. In the case of ***Noordin v Karim[1990]eKLR***,[62] the High Court of Kenya held that a parent has a right to reasonable access to a child unless it is not in the child's best interests. The court noted that the primary consideration in such cases is the child's welfare.[63]

To summarize, various laws and regulations in Kenya govern divorce, child custody, and access rights. The legal system in Kenya acknowledges the significance of safeguarding the child's best interests regarding their welfare. As

[59] "Civil Appeal 28 of 2016 - Kenya Law," accessed August 13, 2023, http://kenyalaw.org/caselaw/cases/view/137206.

[60] Gibson Kamau Kuria, "Christianity and Family Law in Kenya," *East African Law Journal* 12, no. 1 (1976): 33–82.

[61] "Civil Appeal 73 of 2020 - Kenya Law," accessed August 14, 2023, http://kenyalaw.org/caselaw/cases/view/224154/.

[62] "Misc Civ Case 58 of 85 - Kenya Law," accessed August 14, 2023, http://kenyalaw.org/caselaw/cases/view/7650/.

[63] James Forole Jarso, "Implementing the Children's Rights Agenda in Kenya: Taking Stock of the Progress, Hurdles and Prospects Academy on Human Rights and Humanitarian Law Articles and Essays Analyzing the Rights of Children and International Human Rights Law," *American University International Law Review* 27, no. 3 (2012 2011): 673–718.

a result, individuals need to seek legal advice and representation to ensure their rights are protected.

5. Comparative Analysis

This section aims to examine the child custody and access laws and practices in Kenya and England. It will identify the similarities and differences between the two countries' legal systems, including the standards used to determine custody and access, court procedures, and the obstacles faced by parents seeking custody or access. The legal frameworks for divorce, child custody, and access rights in Kenya and England differ considerably, owing to the differences in the legal systems, cultural norms, and socioeconomic factors.

5. 1 Divorce Laws and Practices in Kenya and England

In Kenya, the Marriage Act is the main law that regulates divorce. It allows for both fault-based and no-fault divorce. For fault-based divorce, one party must provide evidence that the other has engaged in adultery, cruelty, or left them for a minimum of three years. However, no-fault divorce can be granted if the marriage has irretrievably broken down, which can be proven by living apart for at least a year or through mutual agreement.[64]
Divorce in England is regulated by the Matrimonial Causes Act of 1973. However, unlike in Kenya, only no-fault divorce is permitted in England. One spouse may file for divorce citing the irretrievable breakdown of the marriage, which can be established by showing that the parties have lived separately for a minimum of two years (if both parties agree to the divorce) or five years (if one party does not consent).[65]

5. 2 Child Custody and Access Rights Laws and Practices in Kenya and England

Child custody laws in Kenya are regulated by the Children Act 2001. The Act prioritizes the child's welfare in all custody-related decisions. It also acknowledges joint custody as a principle where both parents share responsibility for the child's upbringing and make decisions together.[66]
Child custody laws in England are guided by the principle of the welfare of the child, as stated in the Children Act 1989. According to the Act, parents have equal parental responsibility for their children, and decisions about their

[64] Eugene Cotran, "Marriage, Divorce and Succession Laws in Kenya: Is Integration or Unification Possible?," *Journal of African Law* 40, no. 2 (1996): 194–204.
[65] Madelene De Jong, "A Pragmatic Look at Mediation as an Alternative to Divorce Litigation," *Journal of South African Law* 2010, no. 3 (2010): 515–531.
[66] George (I) Brown, "The Children Act 1989," *Law & Justice - The Christian Law Review* 146 (2001): 57–66.

upbringing should be made jointly. However, in reality, custody is frequently awarded to the primary caregiver, who is often the mother.[67]

In both Kenya and England, non-custodial parents have the right to access their child. However, in Kenya, the court has the power to grant access rights based on their discretion, which may result in either reasonable access or specific access rights. Similarly, in England, access rights are also granted at the court's discretion, with the potential for either reasonable contact or specific contact rights to be ordered.[68]

In Kenya, in the case of ***HOO v MGO [2021] eKLR***[69] The principle was established that the child's best interests should be the primary concern in any decision regarding child custody. Based on this principle, the court granted joint custody to the parents as it was deemed to be in the child's best interests. In England, the case of *Re D (Children) [2016] EWCA Civ 89*[70] established that the well-being of the child should be the top priority in any decision regarding child custody and access. In this particular case, the court awarded custody to the father, who was previously the non-custodial parent, as it was deemed to be in the children's best interest.

In Kenya and England, the laws regarding child custody and access rights following a divorce or separation vary greatly. These differences are impacted by a variety of factors, including cultural norms, socioeconomic status, and the family's role within society.

In Kenya, child custody and access rights after divorce or separation are largely influenced by traditional cultural norms and values. The family holds great importance in Kenyan society, and it is typical for extended family members to have a significant role in raising children. Therefore, following a divorce or separation, custody is typically granted to the parent who is seen as more capable of providing for the child, with the expectation that the extended family will also be involved in the child's upbringing.[71] It is uncommon for a father to be granted custody, while in England, the child's best interests are the primary focus for determining child custody and access rights.[72] When determining custody, various factors are considered, such as the child's emotional, physical, and educational needs, as well as each parent's capability to fulfill those requirements. Unlike in Kenya, the family's role in the child's upbringing is not

[67] Michael Nyongesa Wabwile, "Rights Brought Home: Human Rights in Kenya's Children Act 2001 Kenya," *International Survey of Family Law* 2005 (2005): 393–416.

[68] "Cases," *Law Times Reports: Containing All the Cases Argued and Determined in the House of Lords* 154 (1936): 1–728.; Okoth-Ogendo and Gutto, "The Legal Status of the Child in Kenya's Political Economy."

[69] "Civil Appeal E026 of 2021 - Kenya Law," http://kenyalaw.org/caselaw/cases/view/220815.

[70] "Re D (Children) [2016] EWCA Civ 89," accessed August 19, 2023, https://www.familylaw.co.uk/news_and_comment/re-d-children-2016-ewca-civ-89.

[71] Wabwile, "Rights Brought Home."

[72] Harold Niman, "Custody, Access and Parental Mobility Rights," *Advocates' Quarterly* 10, no. 1 (1988-1989): 117–126.

so crucial. The spotlight is on the parent's capacity to provide for the child's necessities and establish a favorable relationship with the child.[73]
Both in Kenya and England, the socioeconomic status of parents plays a crucial role in determining child custody and access rights. In Kenya, for instance, wealthier parents may have an edge in custody disputes because they are better equipped to meet the needs of the child.[74] On the other hand, in England, the court takes into account the influence of socioeconomic status on the child's welfare and may grant custody to the parent who can offer a more dependable and safe setting for the child, irrespective of their financial status.[75]

6. Conclusion

In conclusion, when it comes to child custody and access rights after divorce, Kenya and England have both similarities and differences in their legal frameworks. Both countries place a high value on the child's well-being, but their approaches may differ. The legal systems in Kenya and England are not the same, and this affects how custody and access rights are determined. In Kenya, customary and Islamic laws significantly impact disputes over child custody; Kenya is a diverse country with over 45 ethnic groups, each having its customs and culture and they determine the social lives of the members of the community regarding marriage, divorce, children's rights and the rights of an unmarried daughter.[76] These customs define the roles and responsibilities of family members, including the right of a parent to have access to the child, and who is to have the custody of the child upon the divorce. Customary laws in most communities in Kenya bestow responsibilities on the relatives of the child to help take care of them if the biological parents are not available and define the way property should be dealt with, which gives a lot of power to the father rather than the mother on dealing with a minor child.[77] In regards to Muslim law, Kenyans who profess the Islamic faith heavily rely on the Quran and the teaching of the prophet Mohamed to govern their private lives, especially on matters dealing with divorce, rights of an unmarried daughter, succession etc .

[73] Mafuku Matadi, and Desan Iyer, "The Realisation of Children's Survival Rights in South Africa, Kenya and the Democratic Republic of the Congo: A Comparative," *Comparative and International Law Journal of Southern Africa* 52, no. 3 (2019): 352–388.
[74] Amanda Barratt, and Sandra Burman, "Deciding the Best Interests of the Child: An International Perspective on Custody Decision-Making," *South African Law Journal* 118, no. 3 (2001): 556–573.
[75] B. Rwezaura, "The Concept of the Child's Best Interests in the Changing Economic and Social Context of Sub-Saharan Africa Social Issue: Part One: The Best Interests of the Child: Conceptual Issues," *International Journal of Law and the Family* 8, no. 1 (1994): 82–116.
[76] Mgbeokwere, "Discriminatory Cultural Practices of Property Rights of African Women despite Legal Framework."
[77] Richard L. Abel, "A Bibliography of the Customary Laws of Kenya (with Special Reference to the Laws of Wrongs) Bibliography," *African Law Studies* 2 (1969): 1–48.

The Islamic faith promotes the best interest of the child.[78] Conversely, in England, the courts have considerable discretionary powers to decide what is best for the child. This means that when legal matters related to children, such as custody, visitation, or other matters, come before the court, the judges have the authority to make decisions based on their judgement and consideration of various factors, rather than being bound by strict, rigid rules or guidelines.[79]

There is a significant difference between the accessibility of legal aid in Kenya and England. In Kenya, legal aid is limited, but in England, a more comprehensive legal aid system assists low-income individuals in child custody disputes. This ensures that the welfare of children is protected, regardless of their parent's financial circumstances. Despite the differences in the legal systems, both countries have taken significant steps to protect children's rights. However, the comparative analysis demonstrates the need for continuous efforts to enhance both countries' legal frameworks governing child custody and access rights.

To sum up, the well-being of the child should always be the top priority in disputes over custody or visitation. The analysis of similarities and differences between the child custody and access systems in Kenya and England can offer valuable information to enhance the legal frameworks and result in better outcomes for families and children.

[78] M. A. Vahed, "Should the Question: What Is in a Child's Best Interest Be Judged According to the Child's Own Cultural and Religious Perspectives - The Case of the Muslim Child," *Comparative and International Law Journal of Southern Africa* 32, no. 3 (1999): 364–375.

[79] Wright, "The Crisis of Child Custody".

Home Birth from a Comparative Legal Perspective

NAGY, ZSÓFIA*

ABSTRACT *The reproductive rights of women touch upon healthcare provided during childbirth, which involve freedom of choice of the place of childbirth. Thus, the issue of home birth is of interest among the legislators, which may be interpreted as part of an "obligation" posed by international legal documents to ensure that respectful care is provided to women during the whole time of pregnancy. However, currently, there is no evident European consensus on how home birth shall be regulated thus, the legal approach is different among European states. The decision-making of the European Court on Human Rights has influenced domestic legislation, especially in Hungary (Ternovszky v. Hungary case), however, there was a completely different outcome in the Czech Republic in a factually very similar case (Dubská and Krejzová v. Czech Republic). Accurately, what is the woman's role during childbirth? One model suggests that she is the passive side, and the physician has the main role in successfully conducting the birth. The other model follows the ideal, that childbirth is centred around the woman, and her competency in her body and mind makes her the one in control. Nevertheless, alternative birthing methods are not newfangled in some countries such as the Netherlands, where traditional midwife-supervised home birth can be carried out if a woman chooses so, unlike in Slovakia where this freedom of choice is not evident and discouraged by the legislators. This study tries to shed light on why legislation on this issue is so different in these European states.*

KEYWORDS *home birth, woman's rights in maternity care, alternative birth, right to choose the place of birth*

1. Introduction

The issue of home birth from a legal perspective concerns women's reproductive rights, especially their right to decide on the place of childbirth. The current legal regulation on home birth varies in each European country. Some states prefer a more liberal approach, others are more conservative, while each of them has referred to valid arguments for reasoning their permissive or restrictive regulation. On the other hand, from a non-legal approach, international health organizations, based on current scientific findings, argue that home birth can be a good and safe alternative in obstetric care. Since the

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area of legal regulation of home birth is controversial, it is important to highlight the permissive and restrictive legal approaches of different states, and to presentthe international legal standards, as well as societal expectations in this regard.

The reproductive rights of women, especially the rights which arise during obstetric care have been listed and touched upon in many international legal documents. Moreover, the case-law of the European Court of Human Rights (ECtHR), within the scope of Article 8, namely the right to respect private and family life, is relevant when examining the human rights disposition of reproductive rights, as well as when we review domestic legislation. Nevertheless, the case law of the ECtHR provides important guidance in interpreting individual fundamental human rights and freedoms that are relevant to childbirth.

There is an evident controversy stemming from the issue of birth in a home setting, as two healthcare approaches[1] "compete" here with each other. On the one hand, there is no doubt that maternity care in hospitals often involves unnecessary, medically not indicated medical interventions. However, professional care is obvious if an emergency situation arises, as they have all the necessary medical equipment in reach. On the other hand, the undeniable medicalization of birth, based on the technocratic childbirth model is the general approach, as society has accepted the view that the place of birth shall be the hospital, and childbirth shall be exclusively conducted by a physician.[2]

Planned birth in a home setting or outside an institutional healthcare facility, supervised by a midwife follows the holistic childbirth model. It focuses on the involvement and competency of the woman who gives birth while making this a natural and family event. The presumption that a woman knows best what is good for her body and the child, ensures her capacity to be deeply involved in the decision-making.[3]

Irrespectively of which system the given state follows and favours, women during childbirth are in a very sensitive situation both physically and mentally. In order to ensure respectful healthcare during this time, a special personalized human-rights-based approach shall be practised by the medical personnel as the WHO suggests in many of its guidelines, with special regards to respecting human dignity, also women's right to self-determination in this setting.

[1] Namely the biomedical and the alternative healthcare system, which we will define and explain in a later chapter.

[2] Barbara Kisdi, "Bevezető – a szülés és születés mint társadalomtudományi téma," in *Létkérdések a születés körül. Társadalomtudományi vizsgálatok a szülés és születés témakörében*, ed. Barbara Kisdi (Budapest: L'Harmattan Kiadó – Könyvpont Kiadó, 2015), 7–17.

[3] Ibid.

2. Reproductive rights of women in international legal documents

Women during childbirth are in a special position where they are offered and simultaneously given healthcare, whereas in this setting various rights are involved. In these interpersonal relationships, legal questions arise, particularly in the realm of human rights related to reproductive health and reproductive rights.

The individual rights of women during childbirth are encompassed by multiple legal provisions in both domestic legislation (likely in the Constitution, the acts on healthcare or the anti-discrimination act, as well as in other legal sources such as ministry decrees) and in international conventions[4] concerning human rights, by which the given state is bound and which take precedence over domestic laws.

The responsibility for upholding the human rights of women in relation to childbirth lies with individual healthcare providers, and healthcare professionals, but the primary bearer of responsibility is the state, which must respect, protect, and fulfil these rights.[5] These specific obligations are outlined in General Recommendation No. 28 of the Committee on the Elimination of Discrimination against Women (CEDAW). It governs the fundamental obligations of contracting states according to Article 2, paragraph 9 of the Convention on the Elimination of All Forms of Discrimination against Women from the year 2010. These documents are of the most relevance in connection with the reproductive rights of women, from where we can deduce how the

[4] We are referring to the following conventions:
UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), 18 December 1979
UN International Covenant on Civil and Political Rights (ICCPR), 16 December 1966
UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), 10 December 1984
UN International Convention on the Elimination of All Forms of Racial Discrimination (CERD), 21 December 1965
UN Convention on the Rights of Persons with Disabilities (CRPD), 12 December 2006
UN Convention on the Rights of the Child (CRC), 20 November 1989
European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), 4 November 1950
The Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine (Oviedo Convention), 4 April 1997
European Social Charter revised (ESC), 22 October 1991

[5] Janka Debrecéniová, "Ľudské práva ako normatívne východisko, želaný stav a interpretačný rámec pre poskytovanie pôrodnej starostlivosti," in *Ženy - Matky – Telá II, Systémové aspekty porušovania ľudských práv žien pri pôrodnej starostlivosti v zdravotníckych zariadeniach na Slovensku*, ed. Janka Debrecéniová (Bratislava: Občan, demokracia a zodpovednosť, 2016), 92.

issue of the right to choose the place of birth can be interpreted and regulated in a member state.

Nevertheless, the CEDAW shall be considered as a primary international legal document, which highlights women's right to health and is specifically connected to their sexual and reproductive health. In order for a state to pursue the objectives outlined by the CEDAW Convention, it has an obligation to refrain from enacting laws, policies, regulations, programs, administrative procedures, and institutional structures that directly or indirectly deny women's equal enjoyment of their rights. Furthermore, the protection of women's rights by the state entails that contracting states must ensure equal treatment for women by private actors through adopting measures directly aimed at eliminating entrenched and any other practices that lead to biases and the perpetuation of the notion of subordination or superiority of either gender and the stereotyping of roles of men and women.

The obligation to fulfil these rights requires states to undertake a variety of measures to ensure the equal exercise of rights for women and men, both de jure and de facto, including, if necessary, through temporary special measures in accordance with Article 4(1) of the Convention and General Recommendation No. 25. This establishes the duty to apply appropriate means or procedures and the obligation to achieve required results. Member states should take into consideration that they must grant and fulfil their legal commitments to all women, through the preparation of such public policies, programs, and institutional frameworks that are aimed at satisfying the specific needs of women, leading to the full development of their potential based on equality.[6] The state cannot exempt itself from these obligations.

It can be stated that the state has a primary role in ensuring women's reproductive rights, within which it should establish an institutional system for providing healthcare during childbirth. This system should cover the following areas: appropriate training of healthcare workers, oversight of compliance with human rights standards during childbirth, ensuring an effective procedure in case of violations, as well as continuous reassessment and development of the system.

In providing maternity care, the woman's legal status shall be of the greatest concern, since she is the holder of specific rights and entitlements. Moreover, individual rights during childbirth are applied simultaneously and cannot be separated from each other. We are primarily referring to the following human rights: the right to life, the right to human dignity, the right to health and healthcare, the right to protection of private and family life, the right to information and informed consent, and the right to equality and non-discrimination.

[6] UN Committee on the Elimination of Discrimination Against Women (CEDAW), General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, 16 December 2010, CEDAW/C/GC/28, https://www.refworld.org/docid/4d467ea72.html

Women during childbirth due to their physical and mental exertion are in a specifically sensitive position. Thus they can be easily exposed to potential violation in their reproductive rights, if the medical staff overviewing and assisting the childbirth is not prudent enough.
The key component and the core of reproductive and sexual rights, which is of utmost importance, is the respect for human dignity while giving medical assistance in childbirth which all the more concrete and specific rights can derive from, serves as an interpretative framework for them. To illustrate, the denial of the right to information and informed consent, or informed decision-making during labour and childbirth, is also a violation of the woman's right to human dignity, as this denial presupposes that she cannot autonomously, with full capacity, make decisions about healthcare service for herself, as she becomes an object instead of remaining an active engaging subject of such services. Personal integrity can be jeopardized even through not respecting the patient's right to privacy, which similarly results in the violation of human dignity, as childbirth and labour in a very sensitive, intimate circumstance and by its nature make the woman ,"helpless" and physically and emotionally drained.[7]
In a practical sense, these violations can be embodied in the following routine practices provided by healthcare assistants: birthing women are not informed about individual medical procedures performed during childbirth or when these procedures are carried out even against their will and consent, arranging the space where health care is provided in a way that does not guarantee the most basic protection of privacy and intimacy (examination or birthing chairs facing the door), and not allowing the free choice of birthing position etc.[8]

3. The interpretation of home birth

In order to understand the concept of home birth, we need to keep in mind that healthcare systems are fundamentally characterized by plurality, where various approaches are simultaneously present and used within different cultures. The basic healthcare systems encompass the popular sector, the biomedical sector, and alternative systems.[9]
Within the popular system, there are methods of treatment carried out in a narrower family circle. This involves self-treatment through family members and other individuals whose positive energies affect our feelings and "heal" our "ailments", many times applying mixed methods of biomedical and alternative

[7] Sue Kruske, Kate Young, Bec Jenkinson, and Ann Catchlove, "Maternity care providers' perceptions of women's autonomy and the law," *BMC Pregnancy Childbirth* 13, no. 84 (2013).
[8] Debrecéniová, "Ľudské práva ako normatívne východisko," 53.
[9] Barbara Kisdi, "Az Otthonszülés Mint Társadalmi Kórjelző Tünet," *KAPOCS*, no. 58 (2016): 35.

systems.[10] The biomedical approach is part of the modern Western healthcare sector. This method of treatment is rooted in various specialized medical disciplines such as biochemistry, biophysics, microbiology, and so on.[11] Alternative systems involve techniques from natural and alternative medicine that are based on old, traditional healing procedures and are subsequently integrated into modern treatments.

Home birth is considered as one of the alternative birthing methods and is associated with a holistic approach that conflicts with the technocratic medicalized interpretation of maternity healthcare in various aspects. The medicalized approach views childbirth as a medical event. A holistic understanding of childbirth means that the process is seen as a complete event carried out between the mother and the fetus, minimizing medical interventions and the presence of a doctor.[12]

The alternative approach to childbirth assumes that every woman possesses fundamental natural knowledge and strength, which manifest specifically during the process of childbirth. Furthermore, the holistic childbirth model presupposes that a woman instinctively knows how her fetus is growing within her body and how it should be born. Strengthening her trust in these instincts is considered the primary role, achieved through providing appropriate information and emotional empowerment. This model emphasizes that the childbirth process is significantly influenced by the mental and emotional approach and expressions of the mother.[13]

Home birth, based on the above-mentioned information, is not restricted solely to choosing a specific birthing location, but it highly encourages the utilization of domestic and alternative healing practices that contribute to ensuring that childbirth does not resemble a medical procedure. It represents a gentle way of giving birth, where various practices come into play: water births, alternative pain relief methods, avoiding and replacing pain medications, active labour where the mother's physical and psychological expressions are not restricted, rooming-in practices where the newborn is placed in the same room as the mother, and the presence of additional individuals during childbirth.[14]

These concepts and obstetric techniques originate from the French obstetrician Frédérick Leboyer, who popularized gentle birthing methods, which facilitated the smoother adaptation of the newborn to entirely new conditions. Such an approach to childbirth holds significance in ensuring that the newborn does not encounter drastic physical changes upon arriving in the birthing environment

[10] Susan Reynolds Whyte, Sjaak van der Geest, and Anita Hardon, *Social lives of medicines*. (Cambridge: Cambridge University Press, 2002), 11.

[11] Arthur Kleinman, "Concepts and a Model for the Comparison of Medical Systems as Cultural Systems," *Social Science & Medicine. Part B: Medical Anthropology*, no. 12 (January 1978): 85–93.

[12] Lucia Mazúchová, Simona Kelcíkova, Patrícia Vasilková, and Ján Buchanec, "Bonding support after child birth," *Podpora bondingu po pôrode. Československá pediatrie* 71 (2016): 198.

[13] Kisdi, "Az Otthonszülés Mint Társadalmi Kórjelző Tünet," 35.

[14] Ibid.

and that the welcoming setting shall resemble conditions in the womb. Therefore, he favoured dim lighting, increased temperature in the delivery room, slower movements, immersing newborns in a small tub of warm water - known as the "Leboyer bath," avoiding routine quick measurements and other interventions recommended to be performed later, as he considered it most important for the newborn to be brought to the mother for breastfeeding.[15]

A conceptual distinction has to be made to differentiate and to specify the circumstances of home birth as an ,"alternative" way of childbirth that is further discussed in this paper, in contrast to,"general" childbirth in medical system, that is in hospitals.

1. Planned home birth can be defined as childbirth taken place outside a medical facility, at home or in a birth centre, that was consciously chosen by the pregnant woman, who intended to perform this way from the beginning of the pregnancy. In countries where planned home birth is regulated, the pregnant woman and the pregnancy itself have to meet the specific circumstances and the woman can choose the option beforehand to avail herself to childbirth care outside the medical facility.

Moreover, the definition of planned home birth also includes a mother's plan to give birth at home. According to this interpretation, even a pregnant woman who prepares for a home birth but, due to unexpected complications, ends up giving birth in a hospital, falls under the category of a home birth.

2. Home birth can also refer to unplanned childbirth taking place outside a medical facility, due to unexpected, incidental or abrupt beginning of the labour. Furthermore, occasions when the pregnant woman intends to birth at home without actually resorting to any assistance from a medical professional or a midwife fall under this scope. These instances can be referred to as, "unassisted childbirth" or "free birth".[16]

3. 1 The WHO on maternity care

In the preamble of the WHO Constitution, health is defined as a *state of complete physical, mental, and social well-being, and not merely the absence of disease or infirmity*.

In the context of maternity and obstetric health care, the WHO has issued various publications, recommendations, checklists, and implementation guidelines, aiming to establish universal standards that doctors and midwives can apply in practice. Some of the significant documents include the following:

1. *WHO Recommendations: Intrapartum Care for a Positive Childbirth Experience* (7 February 2018). This guideline provides recommendations on various aspects of childbirth care, including the role of skilled birth attendants, birth settings, and the importance of respectful maternity care. The up-to-date guideline comprehensively lists the existing WHO recommendations in one

[15] Conley Olivia, "Birth without Violence (1975), by Frederick Leboyer," Embryo Project Encyclopedia (2010-06-30), http://embryo.asu.edu/handle/10776/2032.

[16] Kisdi, "Az Otthonszülés Mint Társadalmi Kórjelző Tünet," 30.

document, which aims to ensure positive pregnancy and birth experience, based on a woman-centred, holistic, human rights-based approach.

2. *WHO Recommendations: Home-Based Records for Maternal, Newborn, and Child Health* (1 January 2018), is not specifically related to home births. The document highlights the necessity and importance of providing accurate information from home-based records for the care of pregnant women. The guideline focuses on the free and accessible flow of information between healthcare providers and patients in maternity care, primarily by addressing various decision-making tools and activities that are deemed useful in planning a home birth.

3. *WHO recommendations on antenatal care for a positive pregnancy experience* (28 November 2016) targets to give recommendations on antenatal care. The guidance acknowledges the complexity of the territory of antenatal care and tries to shift the focus of healthcare providers to person-centred approach, which shall align with a human rights-oriented perspective, focusing not solely on preventing mortality and health issues but also on promoting human dignity.

The WHO in the Recommendations: Intrapartum Care for a Positive Childbirth Experience, pays special attention to ensuring and defying respectful maternity care, which every woman should enjoy. Respectful maternity care means that the human dignity of women is preserved during labour and childbirth, while their right to privacy and confidentiality, and the opportunity for informed decision-making are ensured and are exempt from harm and ill-treatment in their care.[17]

Concerning the place of birth, this WHO guideline does not specifically recommend either. The WHO recommendation highlights that within institutional frameworks of care, the practical implementation of the principles stated in the recommendation requires interventions both on the level of interaction between birthing women and professionals and on the institutional level, encompassing the entire healthcare system. Over the past two decades, women have been primarily encouraged to give birth within institutional settings, namely in a hospital. However, the fact that prenatal care and childbirth take place in a hospital does not necessarily guarantee adequate quality of care. Disrespectful and undignified treatment, as indicated by the WHO recommendation, is prevalent in numerous healthcare institutions worldwide. The recommendation underscores that under the prevailing model of maternity care, the healthcare service provider (obstetrician-gynaecologist) takes the lead in the birthing process, which can result in unnecessary medical interventions being imposed on healthy pregnant women. These interventions could potentially disrupt the physiological process of childbirth.[18]

A positive childbirth experience is defined here, as a childbirth that fulfils or exceeds their prior personal and sociocultural beliefs and expectations. This

[17] WHO recommendations: intrapartum care for a positive childbirth experience. Geneva: World Health Organization; 2018. Licence: CC BY-NC-SA 3.0 IGO, 19.
[18] WHO recommendations, 8.

encompasses delivering a healthy baby in a safe environment from a clinical and psychological viewpoint, where the woman receives all the practical and emotional support from the competent healthcare professional and its staff. The woman shall feel that she is involved in the decision-making process and that she is in control.[19]

The WHO does not provide a definitive answer favouring home birth over hospital birth or vice versa; however, it does acknowledge this alternative form of childbirth as safe and feasible, considering the positive practices observed in developed countries. WHO generally supports the idea that birth at home led by a trained and competent midwife can be a safe and suitable choice for women with uncomplicated pregnancies who prefer a home setting for childbirth. However, this should be within a well-functioning health system that ensures timely and appropriate referral to a hospital in case of complications or emergencies. As scientific discussions in this field are ongoing, the approach accepted by the WHO holds significance for advocates of alternative birthing methods, supporters of home births, and midwives.

4. The regulation of home birth in Slovakia

The issue of home birth is not directly and specifically regulated in the Slovak legislation, but a certain legal framework can be derived from the existing law. Home birth is generally a subject to civil, criminal and administrative regulations, nevetheless most importantly, it falls under a specific legal category of Healthcare law, within the broader spectrum of Medical law. However, neither Healthcare law nor Medical law exist as officially distinct and comprehensive branches of law. Healthcare law deals with establishing a healthcare system in which individuals can exercise their right to healthcare. On the other hand, Medical law encompasses the legal framework for the practice of medical activities, applying to human beings and their health, interpersonal relationships in providing healthcare, legal conditions for providing healthcare, and care for human embryos and fetuses before birth, as well as care for the human body after death, disposal of such deceased bodies and their parts.

Regarding the national legal sources, we can include primarily the Constitution of the Slovak Republic[20], the Healthcare Act[21], and the Anti-Discrimination Act[22], all of which contain the reproductive rights of women. Within these legal sources, it is necessary to thoroughly examine the Healthcare Act, which also regulates issues related to childbirth and maternity healthcare. Additionally, we will reference certain decrees, methodological guidelines, and orders issued by the Ministry of Health of the Slovak Republic.

[19] Ibid.

[20] Act no. 460/1992 on the Constitution of the Slovak Republic.

[21] Act no. 576/2004 on Healthcare, Services Related to Healthcare Provision.

[22] Act no. 365/2004 on Equal Treatment in certain areas and Protection against Discrimination.

According to the Healthcare Act, the term healthcare includes nursing care as well as maternity assistance[23] provided by healthcare professionals. Furthermore, according to § (section) 2 point 3 of this Act, urgent healthcare is defined as "healthcare provided to a person in the event of a sudden change in their health condition that immediately endangers their life or any of their basic life functions; without prompt healthcare provision, it could seriously jeopardize their health, cause sudden and unbearable pain, or lead to sudden changes in their behaviour and actions, under the influence of which they immediately endanger themselves or their surroundings."

This definition also includes healthcare provided during childbirth. Based on its phrasing, we can come to the conclusion that a woman can give birth anywhere, even outside a healthcare facility, including her home, if it falls under the category of urgent healthcare. However, such an unplanned and sudden childbirth does not fall within the definition of home birth.

Therefore, prohibition of home birth is neither regulated, nor expressed in the legislation. It is not stipulated that a woman must give birth exclusively in a healthcare facility as part of institutional healthcare. Nevertheless, the Healthcare Act also envisions the possibility that a child may be born outside a healthcare facility. However, in such cases, it does not constitute a planned official home birth.

Maternity assistance is defined in the law as follows: "healthcare provided by a qualified maternity assistant according to specific regulations to women and infants during phyziological pregnancy, childbirth, and postpartum period, healthcare related to reproductive health, and provision of nursing care for gyneacological and obstetric conditions. Maternity assistance is provided through the nursing process within the scope of maternity assistance practice."[24]

The scope of such practice encompasses nursing and maternity care, determining patient needs, ensuring these needs are met, maintaining health documentation, caring for reproductive health, and more. Nursing practice is a distinct form of healthcare provision characterized by a systematic, rational, and individualized method for planning and documenting maternity care. We can conclude that a maternity assistant has limited capabilities in providing healthcare during childbirth, as their role primarily focuses on supporting the mother and assisting the doctor.

Decree No. 95/2018 of the Ministry of Health[25] further defines the competencies and the execution of nursing practice of maternity assistants.

[23] In Slovak it is, "pôrodná asistencia", it refers to *midwifery*, the care carried out by midwives. In the context of the Slovak legislation, we will use the term maternity assistance.

[24] Healthcare Act § 2, 17.

[25] Decree No. 95/2018 issued by the Ministry of Health of the Slovak Republic, which defines the scope of nursing practice provided by nurses independently, independently based on a doctor's indication, and in cooperation with a doctor, and the scope of maternity assistance practice provided by maternity assistants independently, independently based on a doctor's indication, and in cooperation with a doctor.

Pursuant to this, a maternity assistant can independently manage by themselves phyziological childbirth in the scope of care during childbirth[26]. However, this is not her primary role. In the previous, now ineffective version of this decree, it was directly stipulated that a maternity assistant could independently manage phyziological childbirth in a healthcare facility within institutional care. In the currently effective version of the decree, the criterion for the place of childbirth management is not included, but it can be assumed that the absence is due to the fact that the Healthcare Act does not account for planned home births.

It is evident that the regulation of home birth lacks a clear legal framework in Slovakia, which may result in the absence of a network of adequately qualified maternity assistants with the necessary competence and practical experience to independently assist home births, which is currently not legally possible except in cases of urgent healthcare.

In order for planned home births to become a genuine option for women, a desirable legislative regulation is needed. This regulation should define planned home birth, establish the necessary qualifications for maternity assistants to independently practice, and specify the required equipment and other provisions— essentially, the conditions under which a home birth can take place. Additionally, the development of protocols for procedures in case of unexpected complications during birth and the need for a transfer to a hospital should also be considered. These changes would prevent insufficiently qualified maternity assistants from unsupervised participation in home births with inadequate technical resources and from taking unauthorized actions during the birth process. In the author's opinion, developing and enacting these conditions are essential to ensure women's genuine right to freely choose the place of childbirth.

5. The regulation of home birth in Hungary

The legal regulation regarding home birth in Hungary is more advanced compared to that of Slovakia. Home birth is positively regulated by the Government Decree no. 35/2011 on professional rules, conditions, and reasons for excluding childbirth outside an institution. Prior to the issuance of this decree, several domestic civil and criminal court proceedings, proceedings before the ECtHR, and pressure from civil society were involved.

The practices and methods of planned natural childbirth at home were popularized by the prominent gynaecologist and maternity assistant, Dr. Ágnes Geréb, who attended and assisted in several unofficial home births and thus popularized and institutionalized natural childbirth methods. Alongside other maternity assistants, she developed a binding protocol for home births, which emphasized the conscious preparation of parents for such sort of childbirth.[27]

[26] Decree No. 95/2018 issued by the Ministry of Health § 5, 3 letter f).

[27] Barbara Kisdi, *Mint a földbe hullott mag. Otthon szülés Magyarországon – egy antropológiai vizsgálat tanulságai* (Budapest: L'Harmattan Kiadó, 2013), 17–20.

However, the legal regulation of home childbirth at that time was insufficiently regulated similarly to Slovakia, where it was not directly prohibited, making these births potentially illegal. The legal regulation was eventually "forced" by some cases where home births had fatal consequences. According to expert opinions and professional views of obstetricians, these fatalities were linked to the fact that the births took place in a home setting. Based on the established facts from an appellate criminal proceeding in 2012, Dr. Ágnes Geréb was sentenced to two years imprisonment and a ten-year professional ban due to the identified circumstances. In 2018, she was pardoned by the President for her prison sentence, but the 10-year-long suspension from practising her profession still remains.

Based on the judgement of the ECtHR in the case of Ternovszky v. Hungary[28], the current government regulation in force on the regulation of home childbirth

[28] The factual background of the case is that the Applicant was pregnant with her second child at the time of submitting the application to the ECtHR. She claimed that domestic legislation prevented her from exercising the option of home birth that she was considering, and therefore, she is discriminated against in the exercise of her right to private and family life under Article 8 of the Convention. This is because adequate maternity health care is guaranteed only to women who intend to give birth in a hospital. She supported her argument by stating that the regulation from the Hungarian government warns against the provision of health care by midwives outside of medical facilities under the threat of a monetary penalty.

Furthermore, she presented recommendations from the World Health Organization, according to which giving birth at home and in a hospital are equivalent alternatives. In this context, the mother should be informed about both options and should be respected if she chooses either of these alternatives after consideration.

The argumentation of the Hungarian government emphasized that there is no positive obligation derived from Article 8 of the ECHR for the state to expand the choice of services within the healthcare system and that the limitation on the right to self-determination is permissible under the principle of the margin of appreciation granted to the legislator of member states. In general, home birth is not regulated in several member states due to the lack of consensus on how to strike a balance between the mother's right to give birth at home and the child's right to life. The court stated that since Hungarian law does not expressly prohibit home birth, the legal framework clearly discourages healthcare workers from providing maternity care in a home setting. The state thus prevents the exercise of the right to freely choose the place of childbirth, which constitutes an interference with the complainant's rights. The court further acknowledged the ambiguity in countries' approaches to the issue of home birth and that an ongoing professional discussion about its safety is still underway.

The court emphasized that it is desirable for a woman to choose the place of birth with certainty and the knowledge that her choice will not be subjected to any sanction. Given that there was no clear and explicit legal provision allowing healthcare workers to assist in home births, but on the other hand, the law imposed a monetary fine for providing such healthcare service, it was evident that the absence of positive legal regulation prevented healthcare workers from performing such service. The lack of direct legal regulation and the existence of a financial penalty clearly restricted the complainant's free choice.

has been developed. The regulation defines the prerequisites for conducting home childbirth, the qualification of midwives, the necessary equipment and technical facilities, health conditions, and reasons for excluding the possibility of home childbirth, as well as the details and form of agreement between the healthcare provider and the woman, and the procedures in case of complications, etc.[29]

Despite the extensive and direct legal regulation, the option of home childbirth is not guaranteed to all women. The regulation includes strict conditions and prerequisites for both the woman and the fetus that must be fulfilled simultaneously for childbirth in a home setting. In order to minimize complications, a woman who is over 18 years old but younger than 40 years old can give birth at home if the delivery occurs between the 37th and 41st week of pregnancy and if her fetus is in an optimal position. Women who have already had a Caesarean section, experienced shoulder dystocia, have certain medical conditions or are expecting twins are excluded, and the fetus must not weigh more than 4000 grams etc.[30] In addition to the subjective requirements, it is necessary to ensure that the place of childbirth is located within a maximum distance of 20 minutes from a hospital and a specialist responsible for the course of childbirth should be designated.[31]

These conditions were established to minimize potential complications and risks during childbirth and thus ensure the safety of such obstetric care. It can be said that some of the assumptions are discriminatory and therefore criticized by experts as well. However, in spite of this, it can be stated that the legislation is sufficient for performing safe homebirths, which could be improved in the future according to the development of practices and societal expectations.

6. The regulation of homebirth in the Czech Republic

Homebirth in the Czech legal system is not specifically regulated, but it is to some extent addressed by general legal provisions. The issue of home birth has been a topic of discussion in the Czech Republic for several years, influenced partly by judgments of the ECtHR against the Czech Republic.

According to current law, midwives are qualified to assist at childbirth. More precisely, in the course of their profession, they provide “health care in midwifery assistance, which includes overseeing, providing care and advice to women during pregnancy, childbirth, and the postpartum period if these

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The mentioned ambiguity did not meet the requirement of the principle of legitimate expectation, predictability, and legality. Based on these arguments, the court concluded that there had been a violation of Article 8 of the Convention. The court alerted the Hungarian government to the need for providing adequate legal regulation, according to which women's choice would not be implicitly limited.

[29] Government Decree 35/2011 (III. 21.)

[30] Attachment 1 to Government Decree No. 35/2011 (III. 21.) on the health conditions and exclusion criteria for receiving care.

[31] Government Decree 35/2011 (III. 21.) § 5 l. b)

processes are phyziological. This involves guiding phyziological childbirth, providing care to newborns, and also providing nursing care to women in the gynaecological field. Furthermore, midwives, in collaboration with physicians, participate in preventive, therapeutic, diagnostic, rehabilitative, palliative, urgent, or dispensary care."[32] Despite midwifery not being a concrete medical profession, midwives have the capability to attend births according to these provisions, as they deliver healthcare and nursing services.

The issue of where a midwife can perform her profession was addressed by the ECtHR in the case of Dubská and Krejzová v. Czech Republic (Applications no. 28859/11 a 28473/12). The applicants wished to give birth at home, but due to the Czech legal provisions at that time, namely they that did not allow midwives to accompany home births, they were unable to find a midwife to assist them. Ultimately, the applicant Mrs. Dubská gave birth at home alone, and Mrs. Krejzová gave birth in a hospital. The applicants argued that the Czech Republic violated their right to private life under Article 8 of the Convention by preventing them from giving birth at home in the presence of a qualified midwife.

The Grand Chamber of the ECtHR ruled that there was no violation of Art. 8. Nevertheless, the Court acknowledged that determining and deciding on the circumstances of childbirth falls within the scope of Article 8 and that Czech laws constituted an interference with the complainants' right to private life, this interference met the criteria of permissible interference. This was because it pursued a legitimate aim (the protection of health and the rights of others as per Article 8 paragraph 2) and aimed to safeguard the health and safety of the newborn during and after childbirth, while indirectly ensuring the mother's health.[33]

Regarding the proportionality and necessity of the intervention in a democratic society, the Court argued that the issue of safety in providing healthcare during home births is a highly complex issue. Therefore, national legislation should take scientific and expert opinions on such healthcare services into account. Given the lack of a unified European consensus on whether home births should be allowed or not and considering that this matter involves general aspects of social and economic policy, states have a broad margin of discretion in their legislation.[34] The Court concluded its reasoning by stating that the interference with the complainants' right to respect for their private life was not disproportionate. Therefore, the state did not exceed the margin of appreciation provided to it, and the Court found no violation of Article 8.[35]

[32] Act no. 96/2004 Coll. on Non-Medical Health Professions, as amended by later regulations, § 6, 2.

[33] Dubská a Krejzová v Czech Republic, 172, 173.

[34] Dubská a Krejzová v Czech Republic, 184.

[35] Dubská a Krejzová v Czech Republic, 190, 191.

Currently, the Czech law on healthcare services[36] distinguishes between the provision of healthcare services within healthcare facilities and outside of them, in one's own social environment. One of the conditions for granting authorization to provide healthcare services is the obligation to be authorized to use healthcare facilities.[37] Furthermore, according to § (section) 10 of this Act, the provision of healthcare services in one's own social environment is allowed, when the performance of which is not contingent on the technical and material equipment necessary for the execution of care in a healthcare facility. Such healthcare services include outpatient services or home nursing, rehabilitation, or palliative care.[38]

7. The regulation of homebirth in the Netherlands

The Netherlands is a country where homebirth is a common practice in the field of maternity care, and therefore, the legal framework is advanced in this area. Their system supports homebirth, which is why 16.3% of women choose the option of giving birth at home. In 2004, this proportion exceeded 30%[39]. Women in the Netherlands also have the option to give birth in maternity facilities that offer a homely atmosphere. The unique birthing system in the Netherlands can be justified by their view of childbirth as a natural phyziological process and a family event that historically took place in a home setting with the assistance of midwives. Medicalization of childbirth has not progressed as significantly there as in other European countries, which is why the role and competencies of midwives have not been questioned.[40]
Ensuring a high level of education for midwives is crucial to provide them with broader competencies in the field of maternity healthcare. Births are carried out either in a hospital or at home in the presence of a midwife or a doctor. In the Netherlands, there is a well-developed system that allows determining which women are eligible for a homebirth. A midwife has the authority to assess whether home birth is recommended for a woman or not. Home birth is recommended for women with low-risk pregnancies, where complications are unlikely to occur. This categorization of pregnant women also ensures that unnecessary interventions and interventions during childbirth are avoided.[41]
Specialized birth facilities are known as birth centres, and they serve as a good alternative for pregnant women who, based on medical assessment, do not

[36] Act no. 372/2011 Coll. on Health Services and Conditions for Their Provision (Health Services Act).
[37] Ibid, § 16, 1 l. f).
[38] Ibid, § 10, 1 letters a) b).
[39] Stephanie van den Berg, "Homebirth in the Netherlands: why the Dutch cherish them," June 13, 2023, Expectica, https://www.expatica.com/nl/healthcare/womens-health/home-births-in-the-netherlands-100749/
[40] Miroslava Rašmanová "Holandsko: Krajina, kde je pôrod doma normálna vec," 2016, zenskekruhy.sk, https://zenskekruhy.sk/holandsko-ked-je-porod-rodinna-udalost/
[41] Ibid.

require hospital birth but do not wish to give birth at home either. Birth centres provide supervision by a midwife or a childbirth specialist. These facilities offer a homely environment, the option of providing pain-relieving anaesthesia, and the staff accommodates personal preferences (such as playing music, using candles, etc.). A woman also has the option to request a transfer to a hospital at any stage of childbirth.[42]

Not all options for maternity healthcare are covered by insurance. For example, if a woman with a low-risk pregnancy does not have medical reasons to give birth in a hospital, she might have to pay extra. During a home birth, medical pain relief methods are usually not provided (as it is considered a low-risk birth). However, if desired, this is considered a medical reason for transfer to a healthcare facility, and the woman does not have to pay extra for that.[43]

From the above-mentioned practices, it is evident that the Netherlands does not exhibit nor pursue a strong medicalization of childbirth. Lawmakers ensure that the home birthing system remains a realistic, professional, and safe option for pregnant women.

8. Concluding remarks on the regulation of home birth of selected states

In the above mentioned chapters, we have addressed the legal regulations on home birth in Slovakia, Hungary, the Czech Republic and the Netherlands. By focusing on some Central European countries which offer various legal solutions to the issue of home birth, we can see the cultural and societal differences, regardless of the historic connection these countries share. The positive regulation and a shifted societal acceptance on home birth in the Netherlands points out how modern and liberal values on childbirth, pregnancy, maternity and obstetric care can be incorporated. Overall, these countries are member states of the European Union, thus we can derive whether there is or not a common inclination for the creation of a European standard.

The classical medicalization of childbirth and pregnancy is characteristic of the Slovak legislation as it is silent on the matter of planned home birth. Basically, a woman can freely give birth wherever she wants, with the condition that she will be provided with urgent healthcare. Overall, the legal provisions do not oblige a woman to give birth exclusively in a healthcare facility, however if some complications arise during planned home birth, the midwife and others cooperating in the process could be held even criminally liable. Nevertheless, the holistic approach to childbirth and pregnancy is present as there are several associations of doulas[44], however their practical attendance during childbirth at the hospital is up to the decisionmaking authority of the given medical staff.

[42] Van den Berg, "Homebirth in the Netherlands: why the Dutch cherish them."

[43] Rašmanová, "Holandsko: Krajina."

[44] In comparison with midwives, doulas have no formal obstetric training. Their role is to be an active emotional, informational and physical support to the woman during the whole period of pregnancy and childbirth. A trusted and trained individual, companion

The Czech Republic has somewhat of a paradoxical attitude and regulation regarding planned home births, as the legislation allows and authorizes midwives to assist and supervise phyziological births in a home environment which may not meet the technical and material equipment of a medical facility where only specific type of healthcare could be provided (patient's own social environment). It is questionable whether medical assistance during home birth fits into this category or not. What is more, an additional insecurity for midwives to assist home births is the potential that a fine can be imposed for the violation of obligations arising from this law.

The regulatory framework permits home births, but simultaneously prohibits midwives from assisting them as they could be subjected to a fine. The free choice of a woman to decide on the place of birth is formally present but practically not realistic to be carried out. Moreover, the ECHR decision on Dubská and Krejzová v Czech Republic gave a green light to a mixed and ,"hidden discouraging" legal framework on the issue.

The circumstances in Hungary have been similar to that of the Czech Republic, however due to the decision of the ECHR in the case Ternovszky v. Hungary, the Hungarian legislators enacted a specific government decree[45], persuent to which rules were established regarding planned home birth. The original legal environment on the matter echoes the background and conditions presented in the case of Dubská and Krejzová v Czech Republic. What can be the reason for the different decision of the court?

On the one hand, the state's interest in limiting access to home birth is driven by the will to protect the health of women and children, and on the other hand individuals would like to exercise their right to autonomy and a choice to freely exercise informed consent concerning their reproductive health. Article 8 of the Convention establishes both positive and negative obligations the state shall incorporate into their legislation in order to protect the right to respect private and family life. In both cases the legislation interfered with the exercise of these rights, as in one way or another dissuaded professional midwives from assisting home births (potential of imposing a fine). In the Ternovsky case the legal uncertainty was of paramount importance in identifying the violation of Art. 8, however in the Dubská and Krejzová case lack of foreseeability was not an issue, as the applicants could reasonably deduct that assisted home birth was not in accordance with the law.[46] The Czech law within a negative obligatory framework definitely was approved by the Court, as they choose to follow

to the pregnant woman, who creates a comfortable safe environment during pregnancy and childbirth. For more information see: Kisdi Barbara, "A dúlaság intézménye Magyarországon," in *Társadalomtudományi gondolatok a harmadik évezred elején*, ed. Karlovitz János Tibor (Komárno, 2013), 145. https://docplayer.hu/1035333-A-dulasag-intezmenye-magyarorszagon.html.

[45] Government Decree no. 35/2011 on professional rules, conditions, and reasons for excluding childbirth outside an institution.

[46] Caitlin McCartney, "Childbirth Rights: Legal Uncertainties under the European Convention after T ention after Ternovsky v. Hungary," *North Caroline Journal of International Law* 40, no. 2 (2014): 576.

a narrower interpretation of state interference.[47] By this the Czech Republic explicitly outlaws medical assistance during home birth, which actually was the intentin of the legislator in order to encourage hospital births where the health of the mother and child in cases of risky child delivery could be more efficiently protected. This argument was acknowledged by the Court.[48] The freedom of choice of the circumstances of childbirth was maintained as home births are not excluded, but is made unfeasible and prevented to be a real safe option. Nevertheless, the Court did not examine the Czech legislation in a broader context to identify whether a woman could authentically make a free choice about safe home births. Ultimately, regardless of the state's action or inaction in the legislative sphere, the focused analysis of the core interest for a woman to exercise her free choice on the circumstances of giving birth was not placed in the centre of the Court's interpretation.

Lastly, a positive example of an effective home birth system was presented by describing the circumstances of medical assistance during childbirth in the Netherlands. We have to focus on the distinctive approach they have in respect of the patients'autonomy as opposed to the heavy medicalisation of childbirth that comes hand in hand with a paternalistic view on healthcare, which in Slovakia and the Czech Republic is based on the discouraging legislation on planned home births. One shall highlight that clear cut qualification requirements for midwives and the precise parameters of the given pregnancy serve as proper assessment measurements for making home births eligible to most woman who meet the criteria. This positive obligation of the state is also present in the Hungarian legislation, which now provides legal certanity to women in their choices connected to circumstances of child delivery. However, it shall be highlighted that these two components may not be necessarily practically feasible to the other countries mentioned, as the Netherlads has a considerable advantage regarding the smaller geographical area and high population density. Therefore, in cases of emergency it is not a problem to transport the mother to the hospital in a very short time. However, these conditions would be impossible to achieve in the Czech Republic and Slovakia, especially in small villages located several tens of kilometres away from urban hospitals.

In the author's opinion in order to make home births a real option for a pregnant woman, a holistic approach to pregnancy and childbirth shall be widespread, both in the sphere of medical professionals and the families involved. The state cannot grant a, "positive childbirth experience" in general, but can create the circumstances in which well-trained, accessible midwife or doula services are available, who could be complementary to the work of the physician and nurses in the preparation and during child delivery. Nevertheless, individual approach

[47] Frank Chervenak, Amos Grünebaum, Birgit Arabin, and Laurence Mccullough, "The European Court of Human Rights on Planned Home Birth: Resolution of a Paradoxical Ruling," *BJOG: An International Journal of Obstetrics & Gynaecology* (2017): 124.

[48] Press Release, Registrar of the Court, Chamber Hearing Concerning Homebirth in the Czech Republic, Eur. Ct. H. R. (Oct. 9, 2013).

to pregnant women and their active, conscious participation shall be of paramount consideration of the medical staff in order to respect their reproductive rights. However, data suggests that maternity care in some Central European countries does not provide respectful care in everyday practice.[49] On the other hand, states shall take responsibility in clearly stating the options for women whether they can or cannot access planned home births through a positive regulatory framework. Hungary with the solution of creating accessible birth houses with a home-like environment and proper midwife services for home births, could be deemed as an inspiring example as the circumstances regarding technical and societal facilitation are similar to those of Slovakia and the Czech Republic. In conclusion, pregnant women shall be aware of the options they have, they shall be informed that they can decide and navigate their birth experience within the circumstances in which they feel most comfortable, let it be a hospital delivery or in a home environment.

9. Conclusion

The reproductive rights of women are protected both on the national and international levels and should be ensured regardless of where a woman chooses to give birth. It is evident why the concept of home birth is controversial from both legal and non-legal perspectives. Different legal regulations in the individual member states of the European Union are justified by varying judgments of the European Court of Human Rights regarding the issue of home birth.

In the case of Hungary, where the Ternovszky v. Hungary complaint was successful, the domestic legal framework permitted home birth. On the other hand, in the Czech Republic, there is still no legal definition of home birth, as the ECtHR in the cases of Dubská and Krejzová v. Czech Republic did not oblige the state to change its legal regulations.

Childbirth as a phyziological process is medicalized to a large extent, despite international healthcare organizations, such as the WHO that advocate for a more friendly and personalized approach persued by healthcare professionals in providing maternity care, incorporating methods of alternative childbirth. The debate is still ongoing as no European consensus on how it should be regulated has been established yet.

[49] See more in: Janka Debrecéniová (ed.), *Ženy - Matky – Telá II, Systémové aspekty porušovania ľudských práv žien pri pôrodnej starostlivosti v zdravotníckych zariadeniach na Slovensku*, https://odz.sk/wp-content/uploads/ZMT2_systemove_apekty_v6_w.pdf.

Comparison of the Provisions of the Austrian and German Criminal Procedure Laws on Victims with the Hungarian Legislation[1]

SOMOGYI, CSILLA*

ABSTRACT *Victims are necessary participants in the criminal process, but until the 20th century they were marginalised. Since then legislators have recognised the importance of victim protection. The Council of Europe and the European Union are also striving to regulate victims' rights and to establish minimum standards, naturally with special emphasis on the rights and protection of the most vulnerable victims. The preamble of the Hungarian Criminal Procedure Act treats the increased protection of victims and the enforcement of their rights as a priority objective. In my study, I will compare the provisions of the Hungarian Criminal Procedure Act with the provisions of the Austrian and German laws on victims. I have chosen these two countries for the comparison because the Hungarian legal system, due to its historical traditions is the closest to them. I believe that it is primarily the practice of these two countries that should be examined and compared with Hungarian legislation.*

KEYWORDS *Criminal Procedural law, victim's rights, Austrian - German - Hungarian law, comparative law*

1. Introduction

With the abolition of private revenge, the state has taken over the task of justice and law enforcement. At the same time, the rights of the victim were gradually pushed into the background, and Criminal law, which had become a public law, no longer approached its proceedings from the point of view of the injured party, but rather aimed to punish the perpetrator and set an example.
In the 20th century, it was recognised that the participation of the victim was necessary for the success of criminal proceedings, and the need to codify and extend their rights was expressed. Particular attention must be paid to the interests of victims in the legislative process, since their representatives are unable to sit on codification committees, even though it is their rights that

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require justice. The focus on victims' rights is based on the recognition that the active participation of victims in criminal proceedings contributes to their success.
Recommendations and directives have been issued under the auspices of the Council of Europe and the European Union to ensure that victims in different countries are subject to uniform minimum standards. Each country has its own rules governing these rights and therefore the concept of victim is not uniform. In my study, I would like to present the provisions of the Austrian, German and Hungarian Criminal Procedure Acts concerning victims, as well as the directives adopted by the European Union.

2. The rise of victim rights

In the early days, the role of the victim was paramount, as there was no criminal justice, and the era was characterised by private revenge. This meant that those who had been wronged retaliated without restraint.[2] Later, with the development of tribal life, this was transformed into blood revenge, and it was no longer the victim as an individual who retaliated, but the whole tribe or clan, and so the institution of private justice was created.[3] Blood vengeance was later replaced by the talio principle, or 'an eye for an eye, a tooth for a tooth', which led to the institution of redemption.[4] The right of asylum, which developed in canon law, meant that the victim could no longer persecute the perpetrator who had fled to a convent or church.[5]
Under the principle of compositio, initially the victim received property compensation from the offender, and then the king received part of this, marking the transition from Criminal law to Public law.[6] In Greek and Roman law, the victim had the right to bring charges against the alleged offender and the court acted on this basis, a pure principle of accusation. Here, the public nature of the offence was secondary, the primary aim being to obtain satisfaction for the crime committed against the victim.[7] In the case of more serious crimes, the victim was not only representing his or her own interests, but also the interests of the state, i.e. the public interest.[8]

[2] Livia Gergi-Horgos, "A közvád kialakulásának jogtörténeti áttekintése a ius puniendi állami monopóliummá válása folyamatában," *Büntetőjogi Szemle*, 2014, (https://ujbtk.hu/dr-gergi-horgos-livia-a-kozvad-kialakulasanak-jogtorteneti-attekintese-a-ius-puniendi-allami-monopoliumma-valasa-folyamataban.)
[3] Ibid.
[4] Ibid.
[5] Jenő Balogh, *A sértett fél jogköre a büntetőjogban* (Budapest: Pallas Irodalmi és Nyomdai Részvénytársaság, 1887), 31.
[6] Balogh, *A sértett fél jogköre a büntetőjogban*, 12.
[7] Gergi-Horgos, "A közvád kialakulásának jogtörténeti áttekintése a ius puniendi állami monopóliummá válása folyamatában".
[8] Ibid.

With the awakening of the state, the private nature of Criminal law disappeared and turned into Public law. The role of the victims was relegated to the background, and often the criminal proceedings were conducted and justice was served without regard to them.[9]

The protection of victims and the regulation of their rights have a short history.[10] In the 20th century, there was a need to change the role of the victim in criminal proceedings and to develop his rights, since by then the compensation of the victim was no longer the aim of criminal sanctions, the victim appeared as an outsider in the justice system.[11] It was realised that victim participation in criminal proceedings was essential for the successful fulfilment of the role of law enforcement and justice. Victim-centred justice can be successful in reducing crime.[12] It does not pay to look at the victim of crime as a source of evidence.[13] Victims' representatives do not sit on codification committees, still ignoring their interests is dangerous.[14] However, the rights of victims must be safeguarded in such a way that the right of defence of the accused is not unfairly infringed,[15] and there is a risk of weakening the position of the prosecution if there is excessive solidarity with victims.[16]

Directive 2012/29/EU, which replaced Framework Decision 2001/220/IB and was drafted by the European Union and adopted in 2012, aims to ensure that victims of crime receive adequate information, support and protection and are able to participate in criminal proceedings.[17] Nevertheless, it is difficult to verify the objective pursued by the Directive and the effectiveness of the provisions adopted cannot be measured.[18]

[9] Balogh, *A sértett fél jogköre a büntetőjogban,* 11.

[10] Erika Róth, "Position of victims in the criminal procedure in the context with requirements of the European Union," *European Integration Studies* 9, no. 1 (2011): 109.

[11] Károly Bárd, ""Alkalmazott" viktimológia Észak-Amerikában," *Magyar Jog*, no. 1 (1984): 21.

[12] Bárd, ""Alkalmazott" viktimológia Észak-Amerikában," 24.

[13] Anna Kiss, "A sértett jogainak erősítése a hazai és a német büntetőeljárás összehasonlításának tükrében," *Rendészeti Szemle*, no. 6–7 (2006): 114.

[14] Bárd, ""Alkalmazott" viktimológia Észak-Amerikában," 27.

[15] Kiss, "A sértett jogainak erősítése a hazai és a német büntetőeljárás összehasonlításának tükrében," 115.

[16] Károly Bárd, "A vádlottak jogai és az áldozatok érdekei – megteremthető a harmónai?," *Belügyi Szemle*, no. 5 (2014): 15.

[17] Balázs Lencse, "A büntetőeljárási törvény egyes sértettekre vonatkozó rendelkezéseinek módosítása az Európai Unió áldozatvédelmi irányelvének tükrében," *Büntetőjogi Szemle*, no. 1–2 (2016): 52.

[18] Róth, "Position of victims in the criminal procedure in the context with requirements of the European Union," 111.

3. The concept of victim

The Austrian Strafprozeßordnung (hereinafter: StPO.) uses the term "Opfer", while the German StPO. uses the term "Verletzte". The law on the reform of victims' rights adopted by the German Federal Parliament in 2004 uses the term "Opfer", which shows that in Germany, just as in Hungary ("victim" – "victimised"), two different terms are used, separating the two categories, unlike in English.
Both the Austrian and German concepts of victim differ from the Hungarian Criminal Procedure Act, but for different reasons.
According to Section 65 of the Austrian StPO, not only persons whose rights or legitimate interests have been directly violated or endangered by a criminal act are considered victims, but the concept also extends to indirect victims, namely victims under the Hungarian Victim Protection Act. This means that in Austrian law a wider range of persons are granted victim rights in criminal proceedings than in Hungarian proceedings.
The definition of victim in Directive 2019/29/EU is partly narrower than the definition of victim in the Hungarian Criminal Procedure Act, since it excludes legal persons from the scope of victims, and only the natural person is considered as a victim who is the victim of the crime (as in the German and Austrian StPO.). On the other hand, the Directive defines the scope of natural person victims more broadly, since all natural persons who have suffered harm, in particular physical, mental (emotional) or economic loss as a direct consequence of a criminal offence, are considered victims, as is the Austrian concept.[19]
Section 373b of the German StPO. [20] considers the same group of persons to be victims as Section 50. of the Hungarian Code of Criminal Procedure[21], but there is an important difference between the two concepts. The German legislation refers to offences which have been finally adjudicated and presumed with regard to the presumption of innocence. The purpose of this concept is to enable the victim to exercise his rights in criminal proceedings as soon as possible and to ensure that the presumption of innocence is not violated.[22] I find it interesting that of the three laws, only the German one considers it important to create a concept that is also consistent with the presumption of innocence.
Hungarian law explicitly mentions non-natural persons in the concept of victim, while this is not the case in the other two countries.

[19] Vid. Directive 2012/29/EU Article 2(1)(a).
[20] "For the purposes of this Act, injured persons are those who, as a result of the act, its commission imputed or legally established, have been directly impaired in their legal interests or have suffered direct damage."
[21] "The victim is the natural or non-natural person, whose right or legitimate interest was directly violated or endangered by the crime."
[22] Ulrica Hochstätter, *Die Fragen der Opfer im Strafprozess – Bedürfnisse und Erwartungen im Kontext der strafverfahrensrechtlichen Bewältigung* (Wiesbaden: Springer VS Wiesbaden, 2023), 6.

4. Victim positions

Similar victim positions appear in the criminal proceedings of all three countries, however, there are legal institutions that cannot be observed everywhere. At the same time, with regard to all three countries, it can be said that the injured party who participates in the proceedings as a private party has the most rights.

4. 1 Private accuser

All three laws regulate the cases when the victim acts independently without the participation of the prosecutor in his own interest, as a private prosecutor ("Privatankläger"). Laws allow this only for specific offences, typically for those of a less serious and more personal nature. Each law requires the victim to file a so-called private prosecution, which must meet the requirements of an indictment filed by the prosecutor.[23]

Both German and Austrian StPO. regulates the institution of the subsidiary private prosecutor, but this means something different in the two countries. In German law, a victim acting as a subsidiary private prosecutor ("Nebenkläger") can participate in the proceedings alongside the prosecutor, as a quasi-assistant prosecutor.[24] This legal institution, foreign to Hungarian law, is meant to ensure that the victim can actively participate alongside the prosecutor.[25] Furthermore, it gives the victim the opportunity to take personal action against attacks on his person, honour, and reputation, and to contribute to the completion of the procedure.[26] This active participation means that you can make evidentiary motions, ask both the defendant and the experts participating in the procedure questions, and raise objections to questions.[27]

In Austrian law, the subsidiary private prosecution ("Subsidiarankläger") means that the victim can maintain the indictment withdrawn by the prosecutor, but this is only possible if he participates in the proceedings as a private party[28]. This legal institution is equivalent to the Hungarian substitute private prosecution procedure. This legal institution seeks to counterbalance the prosecutor's overriding powers [29], and its goal is to eliminate mistakes that

[23] Vid. German StPO. Section 374-394.; Austrian StPO. Section 71.; Hungarian Criminal Procedure Act Section 53., Section 767-782.

[24] Vid. German StPO. Section 395.

[25] Anna Kiss, "A sértett eljárásjogi helyzete néhány európai államban," *Kriminológiai Tanulmányok,* no. 44, (2007): 230.

[26] Károly Bárd, "Az áldozatok jogállása a nemzeti es a nemzetközi büntetőeljárásban," in: *Gályapadból laboratóriumot,* eds. Péter Hack, Eszter Király, Korinek László, and Paty András (Budapest: ELTE Eötvös Kiadó, 2015), 6.

[27] Hochstätter, *Die Fragen der Opfer im Strafprozess – Bedürfnisse und Erwartungen im Kontext der strafverfahrensrechtlichen Bewältigung,* 89.

[28] Vid. Austrian StPO. Section 72.

[29] 42/2005. (XI. 14.) AB decision.

adversely affect the interests of the injured party.[30] It creates a basis for the victim to go to court if he or she disagrees with the prosecutor, even though he or she has no constitutional right to have a criminal act that violates or threatens his or her rights or legitimate interests judged by a court. On this point, the Hungarian Constitutional Court refers to the German practice, according to which, even in private criminal proceedings, the victim has no fundamental right to assert a claim for criminal prosecution by the State.[31] As it is necessary that the indictment and the motions are prepared in a professional manner, Section 788 of the Code of Criminal Procedure makes legal representation mandatory in the proceedings of a supplementary private prosecution. In several decisions, the Hungarian Constitutional Court has addressed the question of who can be a substitute private prosecutor. The starting point for this question is the concept of the victim, which is why it is particularly important that the legislator should provide a clear definition which does not lead to the development of contradictory case law.[32] The institution of a substitute private prosecution is a corrective instrument. The possibility of its use, and thus the existence of victim status, must always be assessed on an individual basis, bearing in mind that the victim has no substantive right to punish the perpetrator.[33]

4. 2 Private party ("Privatbeteiligter")

In the Anglo-Saxon countries, it is not possible to judge a public or private case in one procedure, that is, the application of the adhesion procedure against the countries of the continent is excluded.[34] Under the Greek Penal Code, an offender who, after unlawfully taking or stealing something, voluntarily returns it before being questioned as a suspect, is no longer punishable.[35]
The adhesion procedure was introduced for the sake of quick reparation, taking into account the pereconomial aspects. According to Flórián Tremmel, the third argument for expediency, in addition to ensuring the action of the victim as a private party, is to avoid conflicting decisions on the same case. Furthermore, jurisprudence considers it an important reason for the criminal court's verdict establishing guilt to be the basis of the private action, so it is more advantageous to decide on a civil claim in this procedure as well.[36]

[30] 14/2002. (III. 20.) AB decision.
[31] 1/2015. (I. 16.) AB decision.
[32] Vid. 3207/2016. (X. 17.) AB Order, 42/2005. (XI. 14.) AB decision.
[33] 3014/2013. (I. 28.) AB Order.
[34] Zita Fejesné Varga, "A büntetőeljárásban érvényesített polgári jogi igény megjelenése a perújítás intézményében," *Büntetőjogi Szemle*, no. 1 (2017): 35.
[35] Gábor Botos, "A polgári jogi igény érvényesítésének egyes kérdései a büntetőeljárás folyamán," *Belügyi Szemle*, no. 7–8 (1996): 44.
[36] Csongor Herke, "A polgári jogi igény," in *A kriminálpolitika és a társadalmi bűnmegelőzés kézikönyve*, eds. Andrea Borbíró, and Klára Kerezsi (Budapest: Fresh Art Design Kft, 2009) 125.

All three laws regulate the possibility for the victim to claim damages for the harm suffered as a result of the crime in the framework of criminal proceedings, the so-called adhesion procedure. The concept of private party is almost identical in all three laws,[37], but the German StPO. is more detailed and specifies that they can only assert a claim to property which has not yet been adjudicated.[38] All three laws provide for the possibility of claiming, in addition to pecuniary damage andnon-pecuniary damage, i.e. compensation for damage. The private party has additional rights compared to the victim who is marginalised and sunk in the role of witness, and is considered a victim in a special situation.[39] All three laws regulate the rights of the private party separately, which are additional rights compared to the ordinary victim (e.g. the right to appeal against a civil claim).

4. 2. 1 Directive 2004/80/EC

The preamble of the Directive states that in order to achieve the removal of obstacles to the free movement of persons and services between Member States, it is essential to regulate measures at EU level to help victims of crime to obtain compensation.
The former Framework Decision 2001/220/JHA and Article 16 of the current Directive 2012/29/EU also allow victims of crime to claim compensation from the offender in criminal proceedings. In this context, the preamble to Directive 2004/80/EC also aims at "ensuring that victims of crime in the European Union are afforded fair and appropriate compensation for the damage caused to them, regardless of where the crime was committed within the European Community (Union)."
The directive creates a system of cooperation between the member states that facilitates access to compensation for victims of crimes in the case of cross-border situations. The basis of the system is the domestic damage mitigation rules operated by the member states, which apply to violent crimes intentionally committed in the territory of the given member state. (Article 12) The system is relevant in the event that "the perpetrator does not have the necessary means to fulfil the court decision ordering compensation, or because the perpetrator is not known or cannot be held responsible."

[37] Hungarian: "A private party is a victim who asserts a civil claim in court proceedings, even if he or she has declared his or her intention to do so before the charge is brought." Austrian StPO.: "Any victim who declares to participate in the proceedings in order to seek compensation for the damage or harm suffered."
[38] "The injured person or his or her heir may assert against the accused in criminal proceedings a pecuniary claim arising from the criminal offence that belongs to the jurisdiction of the ordinary courts and has not yet been brought before the courts elsewhere, in proceedings before the Local Court without regard to the value of the matter in dispute. The same right is also available to others who assert such a claim."
[39] Tünde Majoros, "Bűnös vagy felelős? Polgári jogi igény érvényesítése a büntetőeljárásban," *Advocat*, no. 1–2 (2018): 10.

But how do these systems work? The most important rights of victims in this regard is to be able to submit their application in the organization of their place of residence. (Article 1) On the other hand, the obligation to pay bears the responsibility in the area on which the proceedings are based. (Article 2) During the procedure, if the decision-making authority deems it necessary, it is also possible to interview the applicant, witnesses and experts, even with the help of the supporting authority by telephone or using video conferencing, yet a direct interview can only take place on a voluntary basis. (Article 9) During the procedure, the application is submitted, as well as the decision of the decision-making authority is communicated by using a form that complies with the directive. (Article 14)
Court practice on the Victims of Laws Relief Directive highlights that the provisions of this directive are additional to the national relief system. It is out of scope if the place of sacrifice is in the member where the violations or negligent rights. The draft of the original directive not only regulated cross-border legal access to victims' harm mitigation, but wanted to set general minimum standards for victims' rights, however, this section did not achieve adequate support. The CJEU states that in order to achieve the goal of Directive 2004/80/EC, it is necessary for each facility to have its own system that provides compensation for victims of intentional violence in the area. They have a wide range of maneuvers to build the system, according to the EUB, their task is to guarantee fair and adequate compensation, that is, the given system should reasonably contribute to the reparation of the damage suffered by the victim. Ultimately, it is the responsibility of the national courts to ensure compensation in an appropriate manner, for which, according to the CJEU, the adhesion procedure acts in particular.[40]

5. Victim's rights

All the legislation I have examined provides the same rights to victims:
1. right to information
a. about their rights and obligations
b. on the subject and course of the procedure
c. clearly
2. right to inspect documents
3. right of representation
a. legal representative
b. helper
4. special protection/treatment
a. age, mental and health status, the nature of the right, the circumstances of the commission
b. gentle interrogation
c. participation of a confidential person

[40] Case C-129/19.

5. closed hearing
6. asserting a civil claim.

Although the rights of victims are constantly expanding, the possibility for the victim to take action is widening, but even under the current rules he or she does not have the substantive right to enforce the state's criminal claim. Under the right of access to the courts, a victim can file a complaint, a private prosecution, act as a private prosecutor in cases provided for by law, or as a substitute private prosecutor, but they do not have the right to have the accused convicted by the court. Judging is still a state task, which can be forced not even by the victim.[41]

The Court of Justice of the European Union (hereinafter: CJEU) treats the right of victims as a special right to testify and to have their evidence taken into account.[42] In addition, the CJEU considers it important that court proceedings do not necessarily have to take place, but that Member States help to facilitate the use of mediation.[43] All three laws place great emphasis on the possibilities of settlement between the accused and the victim, bearing in mind that the best solution for the victim is to have the proceedings completed as soon as possible and to be compensated for the damage.

The CJEU has ruled in several judgments that ensuring the proper participation of the victim in criminal proceedings is only possible with full respect for the right of defence of the accused. Victims' rights must not prejudice the procedural rights of the accused, maintaining equality of arms is of paramount importance.[44] The practice of the European Court of Human Rights (hereinafter: ECHR) also points in this direction. According to the ECHR, the right of the accused to an adequate defence, the interests of the victims and the public interest in the administration of justice must be weighed in the criminal proceedings. [45]

6. Summary

Examining the provisions on victims in Austrian and German Criminal Procedural law, it can be concluded that these countries have both undergone

[41] 3104/2018. (IV. 9.) AB Order.

[42] C-105/03. Maria Pupino – Judgment (Grand Chamber) 16 June 2005.és C-38/18. Massimo Gambino, Shpetim Hyka vs. Procura della Repubblica presso il Tribunale di Bari, Ernesto Lappostato, Banca Carige SpA and Cassa di Risparmio di Genova e Imperia – Judgment (First Chamber) 29 July 2019.

[43] C-205/09. Emil Eredics and Mária Vassné Sápi - Judgment (Second Chamber) of 21 October 2010.

[44] Róth, "Position of victims in the criminal procedure in the context with requirements of the European Union," 118.

[45] C-38/18. Massimo Gambino, Shpetim Hyka vs. Procura della Repubblica presso il Tribunale di Bari, Ernesto Lappostato, Banca Carige SpA and Cassa di Risparmio di Genova e Imperia – Judgment (First Chamber) 29 July 2019.

the paradigm shift that has occurred in our country too, where the protection of victims and the enforcement of their rights is becoming increasingly important.
The three laws provide the same rights to victims, the main reason for this is that each country has designed the victim's rights following the provisions of Directive 2012/29/EU, with special attention to victims requiring special treatment.
One of the main differences between the laws is in the definition of the victim. It can be seen that there is no uniform concept used by all countries, each legislator emphasizes something different.

Title 42 and the Impact on Asylum Seekers: Exploring the Effects of its Termination and its Changes on the US Immigration System

TÓTH, SZIMONETTA*

ABSTRACT *The repeal of Title 42, an emergency immigration restriction, represents a significant policy shift in how the United States treats migrants who arrive at the southern border, particularly those seeking asylum. For over three years, U.S. border officers used Title 42 to deport hundreds of thousands of migrants to Mexico or their home countries, claiming that their presence could contribute to the spread of the coronavirus. While Title 42 is allegedly a public health policy, it has been utilized to regulate and prevent unauthorized border crossings. Democrats and campaigners have denounced title 42 because it prevents refugees from obtaining asylum, a legal right they normally have once they reach US territory. Republicans described it as an effective border control tool, requesting that Title 42 should be codified into law so that it may be utilized outside of the pandemic setting. The period of Title 42 ended, which created more obstacles than solutions for asylum seekers. As the US ends Title 42, the rules for asylum seeking are changing once again, the United States will revert to Title 8 under the new standards. The Title 8 Code outlines a strict asylum policy which makes it harder for immigrants to file claims and to seek asylum. Under this new regulation everyone coming from Latin-America, except for Mexico, has to face the harsh reality that the requirements of Title 8 make most of them ineligible for asylum. How does the repealing of Title 42 affect the US immigration system and how will it influence the 2024 elections as the termination was introduced at a critical time, when Biden is seeking a second term?*

KEYWORDS *immigration, USA, asylum seeking, Title 42*

1. Introduction

In the intricate tapestry of US immigration policy, the repeal of Title 42 stands as a pivotal juncture, signaling a significant departure from the norms that have shaped the nation's approach to migrants arriving at its southern border. Title 42, a provision that came to prominence in the wake of the COVID-19 pandemic, was initially framed as an emergency immigration restriction

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grounded in public health concerns. Its implementation allowed for the rapid deportation of hundreds of thousands of migrants, primarily targeting those seeking asylum. However, as the policy evolved, its purported public health rationale became intertwined with broader immigration control objectives, giving rise to a complex set of debates and consequences. The subsequent repeal of Title 42 reverberates across multiple dimensions, influencing the treatment of migrants, re-calibrating the nation's immigration system, and casting a looming shadow over the upcoming 2024 US presidential elections.

Title 42 emerged as a response to the global COVID-19 pandemic, embodying the United States' endeavor to safeguard its borders against the potential spread of the virus. Essentially, it empowered U.S. border officers to deport migrants promptly, often within hours of their arrival at the southern border, under the pretext that their presence might contribute to the transmission of the virus. Seemingly a public health measure, Title 42 granted unprecedented authority to immigration officials to bypass standard due process procedures and swiftly return migrants to Mexico or their home countries. While the primary focus was ostensibly the containment of the pandemic, the policy's underpinnings extended into the broader realm of immigration control.

The repeal of Title 42 marks a significant moment, shifting the trajectory of how the United States engages with migrants arriving at its southern border, particularly those seeking asylum. No longer can the policy be used to immediately expel migrants on the grounds of public health alone. This repeal reopens the discourse on immigration and re-frames it around notions of human rights, and the rule of law. With Title 42 being revoked, the treatment of migrants becomes an indication of the nation's values and its commitment to the principles of international refugee protection.

The evolution of Title 42 from a public health emergency measure to a multifaceted instrument of immigration control necessitates a nuanced understanding of its implications. Beyond its immediate impact on migrants, this policy change also intertwines with the political landscape, particularly in light of the approaching 2024 elections. Immigration has historically been a polarizing issue in American politics, capable of swaying public opinion and influencing election outcomes. As the nation emerges from a period of heightened polarization and grapples with questions of identity, security, and humanitarian values, the repeal of Title 42 adds another layer of complexity to an already charged political environment.

The 2024 elections provide a backdrop against which the consequences of the Title 42 repeal will be played out. The timing of this policy shift places it squarely within the realm of electoral considerations, as candidates and parties vie for the support of an increasingly diverse and engaged electorate. The stance taken on immigration policy, shaped by the legacy of Title 42 and the subsequent repeal, is likely to become a defining factor in candidates' platforms, shaping the discourse on border security, humanitarian obligations, and the nation's role on the global stage.

The repeal of Title 42 unfolds as a pivotal chapter in the ongoing narrative of US immigration policy. Its transformation from a public health measure into a

tool of immigration control has wide-ranging implications that stretch beyond the treatment of migrants at the southern border. As the nation navigates this transition, the upcoming 2024 elections loom large on the horizon, serving as a stage on which the repercussions of the Title 42 repeal will be keenly felt. To comprehend the full import of this policy shift is to engage with questions of national identity, security, and compassion, ultimately shaping the contours of both immigration policy and the American political landscape in the years to come.

2. The Cross-Roads of Public Health and Immigration Laws

Concern about potential contamination by non-citizens has been a driving force behind US immigration policy since the opening of Ellis Island in the second half of the 19th century. These concerns have masked nativist and xenophobic sentiments as valid worries regarding public health hazards. The reaction to this has often involved the widespread exclusion of specific categories of non-citizens from entering the United States of America.

The history of immigration legislation in the United States demonstrates a growth of health-based exclusions for non-citizens. Beginning with a statute in the mid-19th century to restrict certain groups from entering, such as criminals and the mentally ill, the exclusion of those with physical and mental abnormalities became a fundamental component of immigration legislation by 1882.[1] Concerns over worldwide pandemics such as the Bubonic Plague resulted in the Immigration Act of 1891, which established health-based exclusions.[2] This legislation required noncitizens entering the United States to undergo medical examinations, including "loathsome or dangerous contagious diseases" as grounds for expulsion. More health-related inadmissibility reasons were introduced by the Nationality Act of 1952.[3]

The AIDS epidemic in the 1980s and 1990s further fueled xenophobia and led to the exclusion of groups. Although HIV-related exclusion was removed in 2010[4] [5], federal immigration law still renders those with communicable diseases or certain physical or mental disorders inadmissible. However, from the beginning of March 2020, these health-based exclusions were longer the exclusive grounds for rejecting non-citizens seeking admission to the United

[1] Douglas C. Baynton, "Defectives in the Land: Disability and American Immigration Policy, 1882-1924," *Journal of American Ethnic History* 24, no. 3 (Spring 2005): 31–32.

[2] *Immigration Act of 1891*, Pub. L. No. 51-551, 26 Stat. 1084 (1891).

[3] *Immigration and Nationality Act of 1952*, Pub. L. No. 414, § 212(a) (6), 66 Stat. 163, 182.

[4] 42 C.F.R. § 34.

[5] Final Rule: Medical Examination of Aliens - Removal of HIV Infection from Definition of "Communicable Disease of Public Health Significance," *Ctrs. for Disease Control and Prevention*, https://perma.cc/Z72C-6ZUP.

States. The Trump Administration's interpretation of federal quarantine power[6] as the right to exclude and expel is now the law of the country.
The 1944 Regulations to Control Communicable Diseases[7] solidified the federal government's quarantine authority. Unlike previous conflicts between federal, state, and local quarantine powers, the 1944 Act explicitly granted the Surgeon General the ability to establish and enforce regulations for preventing the spread of communicable diseases from foreign countries and across states. It also empowered the Surgeon General, under Section 265 of the Act,[8] to halt the entry of foreign nationals if there was a significant risk of introducing a communicable disease.
During the COVID-19 pandemic, President Trump and his Administration enacted the Title 42 process (Section 265) to prohibit the entry of many coming from outside of the United States without US citizenship. This practice was continued by President Biden until May 2023 when changes were administered. Although Title 42 of the United States Code has various parts dealing with public health, social welfare, and civil rights, the phrase "Title 42" came to refer primarily to expulsions under Section 265.
The policy, framed as an emergency response to the pandemic, enabled U.S. Customs and Border Protection (CBP) to bypass standard immigration processes and swiftly deport anyone trying to come in the United States. Title 42 lacks explicit identification of the individuals it applies to[9], granting agencies the authority to expel, reject, or send back individuals to their original countries. Since Title 42 was invoked, its main target groups were irregular migrants and asylum seekers. However, the implementation of Title 42's public health measures was not without controversy, as it intersected with broader immigration control objectives, raising concerns about the balance between health and human rights considerations. The application of Title 42 demonstrated the intricate challenges governments face in reconciling health emergencies with immigration dynamics and human rights obligations.

3. Donald Trump’s Presidency and the Implementation of Title 42

Throughout Donald Trump's presidency, the majority of his executive measures regarding immigration directly affected the operations of the US Citizenship and Immigration Services and the Department of Labor. These actions had notable consequences for both immigration enforcement and the movement of people for humanitarian reasons. As the pandemic emerged in 2020, Trump

[6] 42 U.S.C. § 265.
[7] Public Health Service Act, ch. 373, **§** 361, *58 Stat.* 682, 703–04 (1944).
[8] 42 U.S.C. § 265.
[9] 42 U.S.C. § 265.

leveraged the COVID-19 situation as a justification to uphold and intensify limitations on different forms of immigration.[10]

Donald Trump initially issued travel bans in 2017, and when the pandemic began in 2020, they imposed Geographical COVID- 19 Travel Bans.[11] At the beginning of 2020, with the global dissemination of the virus, the Trump Administration implemented extensive immigration limitations. While several of the measures were appropriate and sufficient given the circumstances, some changes had far-reaching implications that could have been driven by the Administration's ongoing immigration objectives rather than solely aimed at containing the virus's transmission.

The response to the pandemic impacted every facet of the United States' immigration framework and encompassed some of the Administration's most audacious immigration policies. These included the imposition of travel bans affecting thirty-one nations, the halting of immigration for the majority of family- and job-based visa categories, the temporary suspension of four worker programs, and the utilization of the Title 42 process, which enabled the U.S. government to expel migrants at the border without granting them access to the asylum process. These measures played a pivotal role in the Administration's accomplishment of its pre-pandemic objectives. Through rigorous efforts spanning over two years, the Trump Administration effectively heightened the hurdles for attaining asylum and placed tighter constraints on the eligibility criteria for those seeking it. Enforcing the president's travel restrictions, which encompassed measures tied to efforts against the COVID-19 pandemic aimed at preventing visa issuance to financially vulnerable immigrants prone to relying on public assistance, along with the integration of new stages into the visa application procedure and the stipulation of supplementary information from applicants, represented the foremost alterations introduced by the State Department. While these initiatives were ostensibly geared toward enhancing security screening, they inadvertently raised barriers for certain foreign individuals seeking visas.

While Title 42's initial purpose was framed within the context of public health, its application rapidly expanded to encompass broader immigration control objectives. The policy became a focal point for the U.S. government's efforts to regulate unauthorized border crossings, particularly at the southern border. The rapid expulsion of migrants under Title 42 allowed U.S. Customs and Border Protection (CBP) to circumvent standard immigration processes, including those associated with asylum claims. The immediate expulsion of migrants under this provision prevented them from having their cases heard, raising concerns among legal experts and human rights advocates regarding due process violations. This utilization of Title 42 highlighted the intersection

[10] Jessica Bolter, Emma Israel, and Sarah Pierce, *Four Years of Profound Change: Migration Policy During the Trump Presidency*, Migration Policy Institute, Washington DC, 2022, 2, https://www.migrationpolicy.org/sites/default/files/publications/mpi-trump-at-4-report-final.pdf.

[11] Bolter, Israel, and Pierce, *Migration Policy During the Trump Presidency*, 10–12.

between public health concerns and the broader immigration control agenda, leading to contentious debates surrounding the balance between these objectives and the protection of individuals' rights.
The implementation of Title 42 faced fervent criticism from Democrats and human rights organizations and many campaigned in favor of it from the Republican party. As for the history of Title 42, we can say, that after enacting it in 2020 and creating a backlash; the result of the US presidential elections of 2020 gave a chance to create and build a new perspective of immigration to the US. The question still stands: what will Biden do?

4. Joe Biden’s Presidency and the End of Title 42

Trump's Administration has radically altered America's long-held views on immigration. The idealized picture of immigrants arriving by boatload in the United States has given way to images of barriers, detention facilities, and families being separated. Thousands of immigrants, though, remain hopeful of entering the United States one day. And, over his four years as president, Trump and his Administration did everything imaginable to make the immigration process as tough as possible. Every legal migration route was made more difficult in some way, while illegal immigrants were exposed to trauma and separation, and in the case of asylum seekers, potentially even death. And, with the COVID-19 pandemic spreading as it was, it offered the perfect justification for the execution of regulations that went beyond medical need to achieve the Administration's objective. This has put Joe Biden in a difficult situation, as he must balance his aims with overturning the policies of the previous government, which he vowed to do if elected. Progress has been slow thus far, and many are wondering how long this condition will last. And this is undoubtedly felt by the hundreds of immigrants who, despite everything, are still attempting to make it to America.
As for his presidential campaign, Biden emphasized the fact that he was going to end several policies enacted by the previous Administration. It was expected, that following upon his promises, the core of Joe Biden's immigration strategy was going to revolve around the reversal of numerous immigration policies that were enacted during the preceding Trump Administration. However, he plans to do so at a slower pace than previously stated in order to avoid flooding the border with migrants. Biden favored immigration over other critical issues such as the pandemic, the economy, racial justice, and environmental concerns. Biden's advisors made it clear that the incoming administration will need time to repair the damage done to the immigration system by the previous administration and to execute changes in a way that avoids unforeseen consequences. They said that, while Biden would utilize executive authority to push his immigration agenda, sudden changes might increase in border

crossings.[12] In this part, we are analyzing whether he kept his promises in terms of the Title 42 process.

After being elected in 2022 Biden kept the Title 42 process, resulting in thousands of expulsions at the US border. Many statistics say that the Biden Administration expelled more people than the Trump Administration, but we have to take the elections, and the peak of COVID-19 into consideration. The answer to the question already posed could be a simple yes, based on the first sentence of the paragraph, however the solution is not that simple. As for his first 24 hours in the White House, he signed seven executive orders on migration[13] and also drafted a bill introduced by Senator Mendez[14] , which aims to establish a pathway to citizenship for undocumented individuals, along with numerous other substantial modifications. Other than focusing on undoing his predecessor's policies, Biden tried to reach a bipartisan agreement, so in February 2021 Rep. Linda Sanchez and Senator Bob Menendez introduced the U.S Citizenship Act of 2021.[15] The focus of legislation was on creating an alternative route to citizenship for undocumented individuals. Additionally, it was designed to substitute the term "alien" with "non-citizen" in immigration statutes and also to tackle various associated concerns. Even though this act did not pass Sanchez introduced the U.S. Citizenship Act of 2023 which is under review by the House Committee.[16] Based on the drafts that were handed in and his previous actions in reference to his immigration policy, we can say that Biden is trying to introduce a more humane way of immigration while also

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[12] Nick Miroff, and Maria Sacchetti, "Biden says he'll reverse Trump immigration policies but wants 'guardrails' first," *The Washington Post*, December 22, 2020, https://www.washingtonpost.com/national/biden-immigration-policy-changes/2020/12/22/2eb9ef92-4400-11eb-8deb-b948d0931c16_story.html.

[13] Proclamation No. 10,141, Ending Discriminatory Bans on Entry to the United States, 86 Fed. Reg. 7005 (Jan. 20, 2021); Proclamation No. 10,142, Termination of Emergency With Respect to the Southern Border of the United States and Redirection of Funds Diverted to Border Wall Construction, 86 Fed. Reg. 7225 (Jan. 20, 2021); Exec. Order No. 13,993, Revision of Civil Immigration Enforcement Policies and Priorities, 86 Fed. Reg. 7051 (Jan. 20, 2021); Exec. Order No. 13,988, Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation, 86 Fed. Reg. 7023 (Jan. 20, 2021); Exec. Order No. 13,986, Ensuring a Lawful and Accurate Enumeration and Apportionment Pursuant to the Decennial Census, 86 Fed. Reg. 7015 (Jan. 20, 2021); Memorandum on Preserving and Fortifying Deferred Action for Childhood Arrivals (DACA), 86 Fed. Reg. 7053 (Jan. 20, 2021); Memorandum on Reinstating Deferred Enforced Departure for Liberians, 86 Fed. Reg. 7055 (Jan. 20, 2021).

[14] "January 20, 2021, Mendez to Lead Biden-Harris Immigration Legislation in the Senate," *Senator Bob Menendez*, https://www.menendez.senate.gov/newsroom/press/menendez-to-lead-biden-harris-immigration-legislation-in-the-senate.

[15] H.R. 1177 (117th): U.S. Citizenship Act, https://www.govtrack.us/congress/bills/117/hr1177/text .

[16] H.R. 3194: U.S. Citizenship Act, https://www.govtrack.us/congress/bills/118/hr3194/text .

trying to solve the pre-existing issue of the millions of undocumented people residing within the borders of the USA.

As we already know, the Title 42 process was enacted in March 2020. In January 2021, the new president, Biden had the chance and the power to end it which did not happen until 11 May 2023. Up until 2022, the Biden Administration did not say anything about terminating the Title 42 order.[17] At the end of 2020[18], and in February 2021[19] changes were made in terms of exemptions of unaccompanied minors. On May 20, 2022, a federal district court approved a preliminary injunction that halted the Administration's move to revoke Title 42. A federal judge appointed by the Trump Administration determined that the Administration had breached Administrative procedural regulations by neglecting to institute a public comment period before terminating Title 42-a process that typically takes several months. The Biden Administration issued a statement[20] disagreeing with the district court's decision and declared that the Department of Justice would contest the ruling. Additionally, the Administration's intentions to lift Title 42 have encountered resistance in Congress,[21] as certain policymakers have expressed reservations about the Administration's readiness to manage the anticipated surge in immigration activity that could result from ending the order. The Supreme Court recently opted not to deliberate on arguments concerning Title 42.[22] In January 2023, the Biden Administration announced its intention to terminate the Public Health Emergency (PHE) declaration on May 11, 2023, subsequently bringing an end to the Title 42 border restrictions.[23] Biden upheld and supported

[17] CDC Public Health Determination and Termination of Title 42 Order, *Ctrs. for Disease Control and Prevention*, https://www.cdc.gov/media/releases/2022/s0401-title-42.html.

[18] American Civil Liberties Union, "District Court Blocks Trump Administration's Illegal Border Expulsions," https://www.aclu.org/press-releases/district-court-blocks-trump-administrations-illegal-border-expulsions.

[19] Centers for Disease Control and Prevention, "Public Health Reassessment and Immediate Termination of Order Suspending the Right to Introduce Certain Persons from Countries where a Quarantinable Communicable Disease Exists with Respect to Unaccompanied Noncitizen Children," https://www.cdc.gov/coronavirus/2019-ncov/more/pdf/NoticeUnaccompaniedChildren-update.pdf.

[20] The White House, "Statement by White House Press Secretary Karine Jean-Pierre on the District Court Ruling on Title 42," https://www.whitehouse.gov/briefing-room/statements-releases/2022/05/20/statement-by-white-house-press-secretary-karine-jean-pierre-on-the-district-court-ruling-on-title-42/.

[21] NBC News 25, "Growing number of lawmakers, officials concerned about lifting Title 42," https://nbc25news.com/news/connect-to-congress/growing-number-of-lawmakers-officials-concerned-about-lifting-title-42/.

[22] Adam Liptak, "Supreme Court Cancels Arguments in Title 42 Immigration Case," *The New York Times*, https://www.nytimes.com/2023/02/16/us/politics/supreme-court-title-42-immigration.html.

[23] EXECUTIVE OFFICE OF THE PRESIDENT, OFFICE OF MANAGEMENT AND BUDGET. "STATEMENT OF ADMINISTRATION POLICY: H.R. 382 – A bill to terminate the public health emergency declared with respect to COVID-19; H.J. Res. 7

in legal battles one of Trump's most extensive border limitations, the Title 42 emergency.

4. 1 Impacts of the Termination of the Title 42

Title 42, a broad coronavirus-era provision that permitted officials to easily turn away hundreds of thousands of migrants seeking refuge at the US-Mexico border, has been phased down by the Biden administration. The removal of the public health restriction has prompted thousands of people to travel to the border. The policy, which has been in effect since March 2020, expired on Thursday, May 11, 2023. Many would think that the new immigration policies being introduced after this period would make the lives of asylum seekers easier. In 2022, the Biden administration attempted to gradually eliminate Title 42, but their efforts were thwarted by a lawsuit initiated by Republicans. When the policy eventually ceased due to the conclusion of the COVID-19 public health emergency, government data indicated that Title 42 had been employed to expel migrants over 2.7 million times from the U.S. southern border.[24]
After its expulsion, Secretary of Homeland Security, Alejandro Mayorkas issued a warning, stating "People who arrive at the border without using a lawful pathway will be presumed ineligible for asylum.".[25] From his words, it is visible, that the government is taking the issue extremely seriously. However, Biden has replaced Title 42 with an arguably stricter and more restricted regulation. His Administration began enforcing a regulation on 12 May, 2023 that prevents migrants from seeking asylum if they do not seek refugee status first in a different country before entering the United States. Many argued that this clause was just the same implementation of the Trump-era policies. This restriction, "re"-introduced by Biden eliminates all non-Mexicans from seeking asylum. The end of Title 42 means a return to Title 8, which permits migrants to apply for asylum but also results in official deportations to their country of origin for those who do not qualify, as well as the prospect of criminal prosecution for a second entrance within five years. The Biden administration issued a new regulation requiring migrants to seek asylum by scheduling an appointment at a port of entry using a web app, and it creates a presumption of ineligibility for asylum for individuals who attempt to pass between ports of entry.

– A joint resolution relating to a national emergency declared by the President on March 13, 2020," https://www.whitehouse.gov/wp-content/uploads/2023/01/SAP-H.R.-382-H.J.-Res.-7.pdf.

[24] "Nationwide Encounters," *U.S. Customs and Border Protection*," https://www.cbp.gov/newsroom/stats/nationwide-encounters.

[25] Secretary Alejandro Mayorkas (@SecMayorkas), "Starting tonight, people who arrive at the border without using a lawful pathway will be presumed ineligible for asylum. We are ready to humanely process and remove people without a legal basis to remain in the U.S. (1/4)," https://twitter.com/SecMayorkas/status/1656871849244884992.

Thousands of people arrive at the 3000-kilometer-long border with Mexico, in order to lawfully seek asylum in the United States, but many face hardships when using the asylum claim app.[26] As the Guardian's report states,[27] most of the time the app does not work, or if it does, it sends the applicants miles along the border for their appointments with the authorities. This app is known to be the only way to access the asylum system. And not only is the app the sole way in, but many have also lost their phones on the way or cannot afford to buy one that is compatible with the government's application. As part of their solution, the CBP announced changes to the app, such as increasing the number of appointments available per day,[28] with those having had a longer wait time getting earlier appointments. [29]

The changes put pressure not only on the US government but also on Mexico's federal system. Mexico's system is not prepared and does not have enough resources to maintain the enormous amount of people coming from the Americas waiting to enter the United States of America. However, as early as May 2023, the United States and Mexico announced a joint humanitarian plan[30] on migration, with Mexico agreeing to continue accepting thousands of deportees from the US.

Title 42 is now replaced by Title 8,[31] which contains immigration legislation, and lays forth procedures for dealing with people at the border. While this part of the United States Code mandates faster deportation procedures, it often affords migrants more time to file asylum claims than Title 42 did. The Biden administration has been seeking to expedite Title 8 proceedings by sending hundreds of asylum officers to the border in order to judge humanitarian claims more swiftly while administering the repercussions that Title 42 did not. The biggest difference between Title 42 and Title 8 is that under Title 42 migrants are not subjected to the five- and 10-year bars on reentry.

Both sections of the U.S. Code are outdated, and not able to deal with the current migrant situation. An urgent reform is necessary to fix the flaws of the system and is also already required from top officials across administrations, including Mayorkas, but Congress has so far not passed any reform.

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[26] CBP One™ App

[27] Justo Robles, " 'We only got errors': migrants struggle with asylum claim app at US-Mexico border," *The Guardian*, May 6, 2023, https://www.theguardian.com/us-news/2023/may/06/us-mexico-border-cbp-one-app-migrants.

[28] They raised the number from 740 to 1000.

[29] "CBP Makes Changes to CBP One™ App," U.S. Customs and Border Protection, https://www.cbp.gov/newsroom/national-media-release/cbp-makes-changes-cbp-one-app.

[30] The White House, "Mexico and United States Strengthen Joint Humanitarian Plan on Migration," https://www.whitehouse.gov/briefing-room/statements-releases/2023/05/02/mexico-and-united-states-strengthen-joint-humanitarian-plan-on-migration/.

[31] 8 U.S.C.

5. 2024 Presidential Elections in the Shadow of the End of Title 42

It is clear that President Biden is getting hammered on immigration from all sides of the political realm. President Biden undoubtedly, finds himself caught in the crossfire of immigration debates from various political factions. However, it remains uncertain whether the termination of Title 42 and the implementation of stricter immigration policies can place him in a clear "win situation." While the end of Title 42 might be seen as a step towards more compassionate immigration policies, the introduction of stringent rules could also draw criticism for contradicting his pledges for progressive change. Balancing the demands of his base, the complexity of immigration challenges, and the broader political landscape poses a formidable challenge. Ultimately, the impact on Biden's political standing will depend on how well he navigates the intricate web of immigration dynamics, resonating with both his supporters and his detractors in the lead-up to the 2024 elections. Will the introduction of harsher rules and immigration policies, along with the end of Title 42 put him in a "win situation"?

Three months passed since the end of Title 42 and we can say that the situation left him in a no-win mess, which might affect the results of the next presidential election. The "war on illegal immigration" started in the early 20th century and got more attention after every election. The previous two elections have placed immigration and the protection of the nation form the "other" as a central issue within the political landscape. Biden's opponent, ex-president Donald Trump, said the following: "You're gonna have tens of thousands of people pouring into our country…We don't want them being in our country. We have enough problems right now."[32] It is not a surprise that Trump objected to the President's decisions, but Biden also received criticism from progressives,[33] emphasizing the fact that Biden's new rule is extremely similar to the one previously enacted by Trump, since it is somewhat limiting the access to the asylum system.

As the 2024 presidential election approaches the expulsion of title 42 may sway the results either way. It is clear that immigration is still one of the hot topics that can decide between the two opponents. Biden seems to be living up to his words, however, he was left in a difficult position, having to balance his own goals along with undoing the previous administration's decisions, which he promised to do if he got elected. With one year left from his presidency, it is

[32] Donald Trump, "Transcript of CNN's town hall with former President Donald Trump," interview by Kaitlin Collins, Saint Anselm College in Goffstown, New Hampshire, CNN, May 11, 2023. https://edition.cnn.com/2023/05/11/politics/transcript-cnn-town-hall-trump/index.html.

[33] U.S. Senators Bob Menendez, Ben Ray Luján, and Alex Padilla, "Menendez, Luján, Padilla Joint Statement Ahead of the End of Title 42," press release, May 10, 2023, https://www.menendez.senate.gov/newsroom/press/menendez-lujan-padilla-joint-statement-ahead-of-the-end-of-title-42.

visible that the progress has been slow, and many are left wondering whether he can pass new immigration regulations.

6. Conclusion

In conclusion, the termination of Title 42 has marked a significant shift in the landscape of US immigration policy, inviting complex consequences and debates that extend beyond the immediate treatment of migrants. As the policy transformed from a public health measure to an instrument of immigration control, it became a focal point for discussions on human rights, national security, and the balance between health concerns and humanitarian obligations. The repeal of Title 42 coincided with President Biden's efforts to overturn the immigration policies of the Trump-era, but its replacement with arguably stricter rules demonstrates the intricate challenges of reforming a complex immigration system. The impacts of this policy shift resonate not only with the treatment of asylum seekers but also with the political atmosphere leading up to the 2024 presidential elections. Immigration has consistently proven to be a decisive factor in shaping public opinion and influencing electoral outcomes. The Biden Administration's approach to immigration, shaped by the legacy of Title 42, will undoubtedly be a key aspect of the political discourse in the run-up to the elections. The end of Title 42 has placed President Biden in a complex position, navigating between his aspirations, the demands of his base, and the broader societal debates surrounding immigration. As the nation grapples with its identity, security, and humanitarian values, the echoes of Title 42's repeal will continue to reverberate in the years to come, shaping the contours of immigration policy and the political landscape in a nation at the crossroads.

Questions of Interpretation of Certain Preconditions for Criminal Sanctions Against Legal Persons

VAJDA, SZABOLCS*

ABSTRACT *In this study, the author analyses the conditions for the application of criminal law measures against legal persons. Despite the fact that legal persons are often involved in criminal activities, relatively few legal persons are actually prosecuted. One possible reason for this, according to the author, is that Act CIV of 2001 on criminal measures against legal persons (CMALP Act) sets out a wide range of conditions for a legal person to be subject to criminal measures. In the present study, the author provides a practical analysis of each of these conditions, covering the scope of the CMALP Act and the conditions explicitly mentioned in the CMALP Act.*

KEYWORDS *criminal sanctions against legal persons, Act CIV of 2001 on criminal measures against legal persons, the preconditions for criminal measures against a legal person, the interface between civil law and criminal law*

1. Introduction

According to the statistical data of the Hungarian Central Statistical Office (or HCSO) for the year 2021, there were 1,856,859 registered enterprises in Hungary, of which 1,021,565 enterprises were explicitly designated as operating by the HCSO.[1] And if we add to all these figures other organisations, whether incorporated or not, that operate essentially on a not-for-profit basis, the number exceeds two million.[2] There is no doubt that legal persons - be they business companies or non-profit organisations - play a decisive role in everyday life, as they can be subject to legal relations just like natural persons, since civil law - more specifically Act V of 2013 on the Civil Code (hereinafter referred to as the Civil Code) - confers legal capacity on them.[3] With regard to legal persons, the Civil Code also stipulates that their legal capacity extends to

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[1] "Summary data," HCSO, https://www.ksh.hu/stadat_files/gsz/hu/gsz0001.html.

[2] "Number of registered enterprises by type of enterprise - GFO'14," HCSO, https://www.ksh.hu/stadat_files/gsz/hu/gsz0002.html

[3] See Paragraph (1) of Section 3:1 of the Civil Code.

all rights and obligations which, by their nature, are not limited to a person as a natural person.[4] In other words, it is generally accepted, purely on the basis of the regulatory concept of civil law, that legal persons may enter into civil law relationships and acquire rights and incur obligations which are recognised by civil law and which cannot be attributed exclusively to a natural person.

However, if we move away from civil law thinking and a specific legal regime, we no longer get such a clear picture of the legal status or even the (legal) subjectivity of legal persons regulated by other branches or areas of law. This is particularly true in relation to the criminal law treatment of legal persons and, more specifically, the criminal sanctions that can be applied to legal persons, which is the subject of this article. Looking at the most basic substantive law of the criminal law regime, Act C of 2012 on the Criminal Code (hereinafter referred to as the Criminal Code), it can be concluded that, in contradistinction to the civil status of legal persons, legal persons cannot commit criminal offences and, consequently, legal persons cannot be subject to criminal liability.[5] Paragraph (1) of Section 4 of the Criminal Code, containing the definition of 'crime' (or 'criminal offence'), confirms this: "*A criminal offence is an act committed intentionally or, where this Act provides for the punishment of negligent acts, negligently, which is dangerous to society and for which this Act provides for the imposition of a penalty.*" It can be clearly seen that the central element of the legal concept of crime is the act, which can only be performed by a human being, since it presupposes physical and psychological elements that are realised in the external world in a way that is perceptible to others.[6] If we compare the views in the literature and the legal concept of crime, we can conclude that a legal person is not capable of committing an act and therefore a crime. This is confirmed not only by criminal law, but also by civil law through its own system of concepts, which can also help to interpret the concept of criminal law. The Civil Code only grants the capacity to act to a natural person, i.e. the capacity to make a legal declaration in one's own name, which then entitles or obliges the same or another person to act accordingly.[7] Since civil law reserves the capacity to act, and thus the possibility to perform acts having legal effect, exclusively to natural persons, legal persons need natural persons to represent them, i.e. to act in their place and on their behalf, to

[4] See Paragraph (2) of Section 3:1 of the Civil Code.

[5] Ágnes Balogh, and Mihály Tóth, eds., *Magyar Büntetőjog Általános Rész* (Budapest: Osiris Kiadó, 2015), 110.

[6] Cf. Erika Csemáné Váradi, Ilona Görgényi, József Gula, Tibor Horváth, Judit Jacsó, Miklós Lévay, and Ferenc Sántha, *Magyar büntetőjog – általános rész* (Budapest: Wolters Kluwer Kft., 2017), part 3, chap. 1.; József Földvári, *A büntetés tana* (Budapest: Közgazdasági és Jogi Kiadó, 1970), 60–73.; Balogh, and Tóth, *Magyar Büntetőjog Általános Rész*, 102.

[7] See Paragraph (1) and Paragraph (2) of Section 2:8 of the Civil Code.

make legal declarations and thereby to acquire rights and assume obligations for the legal person.[8]

As we have seen, legal persons cannot be held criminally liable, but it is not excluded that legal persons may, within certain limits, be subject to criminal "liability" and thus to criminal sanctions.[9] This is the purpose of Act CIV of 2001 on criminal measures against legal persons (hereinafter referred to as the CMALP Act), which is also the subject of this article and which, in addition to specifying the criminal measures that may be taken against legal persons, also sets out the conditions that must be met in order to be eligible for measures under the CMALP Act.

The aim of this article, and thus its central element, is to present the conditions for the application of criminal law measures against legal persons, with particular attention to the analysis and approach of each of these conditions from a practical point of view, since, outside the commentary literature, there is a rather limited amount of legal literature that focuses specifically on the conditions for the application of measures, and this is particularly true for the approach from the side of law enforcement. It should be noted that the focus of this article is not on the analysis of legal theory or doctrine, but where appropriate the analysis has included the posing and brief interpretation of such questions. For reasons of scope, the present article does not undertake to formulate *de lege ferenda* proposals, although it is noted that there are provisions in the prerequisites of the measures which should be considered for revision by the legislator, especially from a practical point of view.

[8] This is also reflected in Paragraph (1) of Section 3:29 of the Civil Code, which states that "*The legal representation of a legal person shall be provided by the executive officer*." Section 3:22 of the Civil Code deals with the requirements and grounds for disqualification of the chief executive officer. According to Paragraph (1) of Section 3:22 of the Civil Code, "*An executive officer may be a person of legal age whose capacity to act is not restricted with respect to the extent necessary for the performance of his/her activity*." In other words, the Civil Code states *expressis verbis* that an executive officer may be a natural person who fulfils certain statutory requirements. Of course, civil law does not preclude a legal person from acting as manager of another legal person. However, Paragraph (2) of Section 3:22 of the Civil Code still requires a legal person with a legal person as its executive officer to appoint a natural person to perform the duties of executive officer. Ultimately, therefore, in order for the legal person to be able to carry out acts with a civil law effect - to make legal declarations - it is essential that at the very end of the chain there is a person, a human being whose legal declarations ultimately lead to the acquisition of rights or the assumption of obligations for the legal person represented.

[9] This is also indicated by Point i) of Paragraph (1) of Section 63 of the Criminal Code, which includes criminal measures against legal persons in the system of criminal sanctions.

2. On the conditions for the applicability of criminal law measures against legal persons

The CMALP Act lays down certain conditions for the application of criminal measures against a legal person. If we compare certain specific provisions of the CMALP Act, we can find that the conditions for the application of the measures are not exclusively set out in Section 2 of the CMALP Act, but can also be found in other sections, and we therefore wish to present them in a complex manner.

2. 1 The scope of the CMALP Act

Although Section 1 of the CMALP Act is an interpretative provision on what constitutes a legal person and a benefit for the purposes of the Act, this section also defines the scope of the CMALP Act and the entities that are excluded from its scope. In other words, in order for criminal measures to be applied to an entity, it must be subject to the CMALP Act, which is the first and most basic condition for the application of the measures. The concept of legal person in the CMALP Act is to some extent aligned with the civil law definition, but it also departs from it.[10] Point 1 of Paragraph (1) of Section 1 of the CMALP Act contains the definition of a legal person, two elements of which are worth examining, as these two elements may, at first sight, require more interpretation than the general scope of entities that have legal personality under civil law.
The CMALP Act extends the concept of legal person to include organisational units of legal persons recognised under civil law with autonomous rights of representation. The Civil Code sets out four cumulative conditions for the organisational unit of a legal person to be declared an independent legal person: the deed of foundation provides for it; the Civil Code allows it; the organisational unit has an organisation that can be separated from the founders and the legal person; and it has assets that can be separated from the founders and the legal person.[11]
If we look at the Civil Code, we can find two legal persons where the law expressly allows the creation of organisational units with separate legal personality: the association and the foundation.[12] In other words, it can be concluded that the Civil Code does not broadly allow certain types of legal persons to create organisational units with separate legal personality. It is nevertheless noteworthy that the CMALP Act itself, drawing on the conceptual

[10] Csemáné Váradi, Görgényi, Gula, Horváth, Jacsó, Lévay, and Sántha, "Magyar büntetőjog - általános rész", part 3 chap. 5 and László Kőhalmi, "A jogi személlyel szemben alkalmazható büntetőjogi intézkedések," *JURA*, no. 1 (2006): 52–62.
[11] See Paragraph (1) of Section 3:32 of the Civil Code.
[12] See Paragraph (5) of Section 3:63 of the Civil Code and Paragraph (3) of Section 3:391 of the Civil Code.

scope of civil law, explicitly includes such organisational units within the scope of the legal interpretation of legal persons.

The CMALP Act also defines the term "legal person" to include entities that may have separate legal personality in civil law relations and have assets separate from their members.[13] That is, if this conceptual element is understood, this category includes civil law entities without legal personality which have assets separate from their members. Thus, for example, a civil law partnership, which may meet the criterion of being subject to a civil law relationship, [14] but which does not have assets separate from its "members", is not covered by the CMALP Act.[15] The sole proprietorship, on the other hand, meets the legal requirements. Act CXV of 2009 on Individual Entrepreneurs and Sole Proprietorships (hereinafter referred to as the IESP Act) defines the sole proprietorship as follows: sole proprietorship is a legal entity without legal personality established by a natural person registered as an individual entrepreneur and it is created by registration in the Commercial Register.[16] The legal capacity of a sole proprietorship is enshrined in the IESP Act itself, as it states that a sole proprietorship has the legal capacity to acquire rights and incur obligations under its business name.[17] And if we examine the provisions of the IESP Act on the assets of the sole proprietorship, we can conclude that the sole proprietorship has assets separate from those of its member, and that sole proprietorships are therefore covered by the CMALP Act.[18]

However, the CMALP Act contains not only a positive definition of which organisations are covered, but also a negative definition of which organisations are excluded. The elements of this list have in common that they refer to States, local authorities and, more specifically, to their public authority and administrative activities, but the CMALP Act also refers to certain international organisations established by international treaty as excluded entities.[19]

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[13] See Point 1 of Paragraph (1) of Section 1 of CMALP Act.

[14] Cf. Paragraph (1) of Section 6:498 of the Civil Code. It is worth noting here, however, that in the case of a contractual relationship in which one of the parties is a civil law partnership, the obligation is not in fact created with this "*societas*" but with its members, creating a specific multi-subject obligation. Cf. eds. József Benke, and Tibor Nochta, *Magyar polgári jog. Kötelmi Jog II.* (Budapest–Pécs: Dialóg Campus Kiadó, 2018), 360–368.

[15] Paragraph (1) of Section 6:500 of the Civil Code states that "*As regards the assets contributed, the ones that can not be consumed will be used collectively, and the ones that can be consumed will be owned jointly.*" In other words, if we interpret the quoted provision of the Civil Code logically, if a civil law partnership is created by the parties, the members create contractual and even property-law relationships over the "services" that are the subject of the contributions for themselves and not for the civil law partnership.

[16] Cf. Paragraph (1) of Section 20 of the IESP Act.

[17] See Paragraph (2) of Section 20 of the IESP Act.

[18] See Sections 26-29 of the IESP Act.

[19] Cf. Paragraph (2) of Section 1 of the CMALP Act.

2. 2 Certain specified conditions for the application of the measures

Section 2 of the CMALP Act expresses the conditions under which the possibility of applying criminal law measures against legal persons may arise in the first place. If we take a broad view of the conditions, we can see that the legislator uses both conjunctive and alternative conditions, which we will describe in detail below.

2. 2. 1 Intentional commission of a criminal offence

As a general condition, the CMALP Act stipulates that the measures can only be applied in cases of intentional offences.[20] It is clear that the CMALP does not limit the list of intentional offences for which measures may be taken against a legal person. In this context, Tamás Sárközy notes - and we agree - that this may be a cause for concern, as even in the case of intentional offences of minor material gravity (e.g. failure to provide economic data in violation of Section 409 of the Criminal Code), the legal person concerned may be threatened with the possibility of the application of the measure envisaged by the CMALP Act.[21] In our opinion, even if it is not the presumed intention of the legislator to provide for the possibility of applying measures against legal persons in the case of economic crimes of genuinely low social danger, the court has the possibility to do so without further ado, in the absence of any legal restriction, if all the conditions are met.

2. 2. 2 The question of purpose, result or use

As a further conjunctive condition, Paragraph (1) of Section 2 of the CMALP Act states the following:

a) the natural person who commits the intentional criminal offence has the aim of obtaining an advantage for the benefit of the legal person by committing the offence; or

b) the offender does not have the intention of obtaining an advantage, but the commission of the criminal offence results in it; or

c) the offender intentionally commits the criminal offence by using the legal person.

[20] See Paragraph (1) of Section (2) of CMALP Act. It should be noted that, in accordance with Paragpraph (1) of Section 2 of the Criminal Code, the legislator has made a distinction according to when the offence was committed. In this context, the Criminal Code applies to (criminal) acts committed after the entry into force of the new Criminal Code, i.e. after 1 July 2013, while Act IV of 1978 on the Criminal Code applies to (criminal) acts committed before that date.

[21] Tamás Sárközy, "Büntetőjogi intézkedések a jogi személyekkel szemben?," *Magyar Jog*, no. 8 (2002), 449–456.

Thus, the CMALP Act "secondly" imposes alternative conditions so that there is a possibility of applying the measure if any of the above cases arise. The following is an attempt to interpret each of the alternative conditions.
In the first case, the offender's aim is to gain an advantage for the benefit of the legal person. In this case, it would therefore appear that the legislator intended to assess the subjective elements of the offence, including the possible element of purpose. The purpose is nothing other than "*the aim of the offender as set out in the statutory instrument*."[22] If we consider purpose as a purpose formulated in the statutory elements of offences in the Criminal Code, we can conclude that there is no criminal offence in the Criminal Code that explicitly formulates the purpose of obtaining an advantage for the benefit of a legal person as an element of the offence. Thus, in our opinion, the CMALP Act did not intend to refer to a purpose as it is used in the conceptual system of the Criminal Code (and the relevant legal literature), but introduced a quasi-specific and therefore very narrowly interpretable definition of the purpose in the prerequisites for measures against legal persons. That is to say, the offender has the intention, whether probable or actual, to commit an offence, combined with the 'purpose' of benefiting the legal person by committing the offence. To give a practical example, the prospect of criminal measures against legal persons can easily be raised by the offence of marketing a poor-quality product, as provided for in Paragraph (1) of Section 415 of the Criminal Code: "*Whoever markets a product of inferior quality as a product of superior quality shall be punished by imprisonment for a term of up to three years*." If we want to evaluate the quoted legal provision in a way that is relevant from the present point of view, we can conclude that the Criminal Code does not evaluate the purpose on the subjective side of the offence. In other words, if a person markets a poor-quality product as a good quality product, he commits the cited offence, regardless of the purpose otherwise pursued. It is not unreasonable to assume that the offender does this by placing the product on the market through a company with a view to obtaining a benefit for that company. For example, he may obtain a benefit by placing the product on the market as a high-quality product at a lower cost of purchase or production, thereby generating a higher profit for the legal entity. Thus, the "purpose" of the perpetrator (to benefit the legal person) is not assessed in the statutory facts, but the possibility of applying the measure under the CMALP Act against the legal person may still arise. In our view, it is therefore justified that the CMALP Act considers a specific purpose as a precondition, which does not, or does not necessarily, appear in the statutory elements of the offence, and therefore the definition or assessment of the phrase "the purpose was to benefit the legal person" as a purpose is worth considering.
In the second case, the CMALP Act does not formulate the acquisition of an advantage as an objective, but explicitly as a result. In other words, the legislator wants to define the material aspect of the offence, including the frequent element of the material aspect, the result of the act.[23] Thus, in order to

[22] Balogh, and Tóth, *Magyar Büntetőjog Általános Rész*, 120.
[23] Balogh, and Tóth, *Magyar Büntetőjog Általános Rész,* 101.

fulfil this condition, it is not necessary for the perpetrator to have the intention that the legal person will benefit from the commission of the offence; it is sufficient that the benefit as a result occurs on the side of the legal person.[24] By analogy, as we have already done in the context of purpose, it is necessary to note here that the possibility of applying measures against legal persons in this case does not depend on the fact that the statutory definition of the offence committed considers the result as a possible object of the offence. For the condition to be met, it is sufficient that the commission of the offence results in some benefit to the legal person. At this point, we think it is necessary to briefly examine what is meant by the concept of benefit in the CMALP Act: "*Benefit shall be understood to include any thing, right, claim, advantage, whether or not registered under the Accounting Act, as well as the exemption of a legal person from an obligation arising from a law or a contract or from an expense required by the rules of sound management.*"[25] The current concept of benefit, as used in the CMALP Act, was established by Act XXVI of 2008, the explanatory memorandum to which states that "*[...] in addition to the pecuniary benefit, the other benefit obtained or to be obtained by the legal person also justifies the application of the measure. This is important because, particularly in the case of offences against the purity of public life, the benefit obtained or sought is not always of a pecuniary nature."*[26] In other words, the CMALP Act treats benefit as a *sui generis* concept, thus allowing for a much wider margin of judicial discretion.[27]

In the third category, the CMALP Act establishes as an alternative condition that the offender commits the intentional offence by using the legal person. This twist was introduced into Paragraph (1) of Section 2 of the CMALP Act by Act CCXXIII of 2012 and, in our view, serves as a kind of subsidiary condition compared to the alternative conditions examined in the previous two cases. As explained in the explanatory memorandum to Act CCXXIII of 2012, there may be situations where the commission of the offence is not intended to benefit the legal person or does not result in any benefit to the legal person, but the commission of the offence nevertheless creates a link with the legal person concerned, namely, the offender uses it to commit the offence. The explanatory memorandum gives the example of terrorist financing.[28] In this case, the legal person is not involved in the commission of the offence as a beneficiary, but as an instrument or an intermediary used by the offender to commit the offence. The inclusion of this condition in the CMALP Act may make it easier for the prosecution to prove its case. In other words, if the prosecution cannot prove

[24] Cf. Sárközy, "Büntetőjogi intézkedések a jogi személyekkel szemben?," 449–456.
[25] Point 2 of Paragraph (1) of Section 1 of the CMALP Act.
[26] Explanatory memorandum to Bill T/5651 on the amendment of Act CIV of 2001 on criminal measures against legal persons.
[27] Sárközy, "Büntetőjogi intézkedések a jogi személyekkel szemben?," 449–456.
[28] See Explanatory Memorandum to Bill T/9246 on the transitional provisions relating to the entry into force of Act C of 2012 on the Criminal Code and on the amendment of certain Acts.

beyond reasonable doubt that the offender intended to benefit the legal person by committing the offence, or that the legal person benefited from the commission of the offence in question within the meaning of Point 2 of Paragraph (1) of Section 1 of the CMALP Act, it will be able to submit to the court, on the basis of the available evidence, its conclusion that there is a link between the commission of the offence and the legal person which may justify the application of the measures. Thus, in our view, the use of a legal person to commit a crime is easier to prove, by means of material evidence, such as contracts, invoices, bank statements, lists of bank transactions, other accounting documents, than the perpetrator's objective of obtaining a financial benefit for the legal person, which remains in the subjective world of thought and is not always clearly visible to the outside world,. This is particularly the case where the perpetrator's efforts are unsuccessful and the legal person does not actually benefit from the offence.

2. 2. 3 The perpetrator's identit

Paragraphs (1) and (2) of Section 2 of the CMALP Act also provide that the intentional offence must be committed by natural persons in a certain capacity or position. In practice, the law divides these persons into three categories:

a) the first group includes the chief executive officer or member authorised to represent the legal entity, its employee or officer, the company director, the member of the supervisory board or their delegate;

b) the second category includes the member or employee of the legal person;

c) the third category may include practically any natural person.[29]

The CMALP Act sets out additional criteria for each category of the perpetrator. In the first case, the persons listed in point a) must commit the offence in the course of the legal person's activities. What the law means by the scope of activities is not interpreted by the legislator, so in our opinion the scope of activities includes all activities that can be carried out by the legal person according to its articles of association. In any case, from a practical point of view, it may be questionable whether the legislator intended the scope of activities in this case to cover only activities lawfully carried out by a legal person or also those carried out unlawfully, but it seems reasonable to interpret the scope of activities broadly, i.e. to cover all activities, whether lawful or unlawful. Indeed, the mere fact that a legal person carries out an activity unlawfully could in itself give rise to a suspicion that a criminal offence has been committed, which could ultimately lead to the possibility of taking action against that legal person. The common feature of the listed persons is that they

[29] Cf. Point a) and Point b) of Paragraph (1) and Paragraph (2) of Section 2 of the CMALP Act. In addition, cf. Nikoletta Kovács, "A jogi személy büntetőjogi felelősségének hazai viszonyai" (Publication, Jogi Fórum, Miskolc, 2021), 12. https://www.jogiforum.hu/publikacio/2023/04/24/a-jogi-szemely-buntetojogi-felelossegenek-hazai-viszonyai/

can exercise a decisive influence on the legal person, its operation and legal relations, as they can represent the legal person. As Sárközy also points out, the member of the supervisory board of the legal person may be an "odd one out" as a possible perpetrator, since the members of the supervisory board have neither the duty nor the right to represent the legal person. [30] This statement is somewhat nuanced by the functioning of the executive supervisory board, which is governed by Section 3:123 of the Civil Code, as the executive supervisory board is already responsible for deciding or approving certain matters within the competence of the supreme body or management.[31] In such a case, the Civil Code provides that the provisions applicable to the persons entitled to decide on the matter in question under the Civil Code shall apply to the members of the supervisory board with respect to their decision-making activities.[32] Presumably, the legislator did not intend to regulate in such detail the cases in which a member of the supervisory board may be a potential perpetrator, so the provision applies to both executive and non-executive supervisory board members.

The second group includes only persons who do not consider themselves to be representatives of the legal person and, in the case of an employee, the possibility of taking decisions on behalf of the legal person is also lacking. Here, too, the law lays down as a further condition that an offence committed by such persons may give rise to the "liability" of the legal person if *"[...] the performance of the management or control duties of the chief executive officer, company director or supervisory board could have prevented the commission of the offence."*[33] If we try to interpret this condition correctly, we can see that the offence committed by the member and employee is attributable to the legal person if the management commits an omission. In other words, if the persons listed in Point b) of Paragraph (1) of Section 2 of the CMALP Act were objectively capable of exercising control, but failed to do so either intentionally, recklessly or in a manner that did not amount to negligence, the liability of the legal person can be established for the offence committed by the member or employee.[34] In practice, the legislator has thus limited the exemption from liability to the case where the offence could not have been prevented even if the duty of execising control had been fulfilled. It may be questionable whether this possibility could arise in practice if a check did not reveal that the member or employee intended to commit an offence. In our view, if such persons carry out their duty of control with the competence expected of them, they must at least be negligent in failing to detect the possibility of an offence being committed. In fact, the CMALP Act does not even allow for an exemption from the duty to supervise, since if supervision is not carried out by the chief executive officer,

[30] Sárközy, "Büntetőjogi intézkedések a jogi személyekkel szemben?," 449–456.
[31] See Paragraph (1) of Section 3:123 of the Civil Code.
[32] Cf. Paragraph (3) of Section 3:123 of the Civil Code.
[33] Point b) of Paragraph (1) of Section 2 of the CMALP Act.
[34] István Kónya, ed., *Magyar Büntetőjog I-IV. Kommentár a gyakorlat számára* (Budapest: ORAC Kiadó, 2022).

the director or the supervisory board, this condition is fulfilled in itself, and if it is carried out and the activity of the member or employee in question does not become apparent or at least suspicious to them, then in our view there is a slight omission, even in the form of negligence.

The third group includes any person who cannot be classified in the first or second group. In this case, two further conjunctive conditions are imposed by the CMALP Act for establishing the liability of a legal person: *"[...] the offence was committed for the benefit of the legal person, or the offence was committed using the legal person, and the chief executive officer or member authorised to represent the legal person, employee or officer, company director or member of the supervisory board of the legal person knew that the offence had been committed.*"[35] With regard to the first conjunctive condition, the CMALP Act regulates alternatively the acquisition of a benefit and the use of the legal entity. In our view, the latter condition needs to be interpreted and examined in any case, as it is not dealt with in the commentary literature we have reviewed.[36] In practice, it is not inconceivable that a person with only an external link to the legal person could commit an offence through the legal person, using the legal person, without any benefit to the legal person. This could be the case with the financing of terrorism, as mentioned above, or even with fraud under Paragraph (1) of Section 373 of the Criminal Code, where the objective of the unlawful gain is the objective of the natural person outside the legal person, but the legal person is "interposed" to achieve it. Of course, it is not sufficient for the condition to be fulfilled that the outsider - *extraneus* - merely uses the legal person; certain persons, i.e. the chief executive officer, the member or employee authorised to represent the company, the officer, the company director or the member of the supervisory board, must know that the offence has been committed.[37]

2. 3 Criminal conviction or lack of conviction of the offender

Having reviewed the legal provisions explicitly mentioned by the CMALP Act as conditions for the application of measures, we must also briefly consider the criteria that Section 3 of the CMALP Act requires in order for measures to be applied, namely, that the offender be punished or that certain measures be applied or not be applied in certain cases.

The law clearly stipulates that the court must impose a penalty on the offender. If no penalty is imposed, a reprimand, probation, confiscation or forfeiture of property must be imposed in order to allow the application of measures against the legal person. These measures are: the dissolution of the legal person, the

[35] Paragraph (2) of Section 2 of the CMALP Act.

[36] In the context of the analysis of the other conditions cf. Kónya, "Magyar Büntetőjog I-IV. Kommentár a gyakorlat számára".

[37] On the situation of uninvolved perpetrators, see also Zoltán András Nagy, "A jogi személy büntetőjogi felelősségét megállapító törvényről," *JURA*, no. 1 (2009): 94–100.

restriction of the activities of the legal person or the imposition of a fine.[38] Although the scope of the measures is limited in the CMALP Act, it is clear that the CMALP Act does not contain such a limitation for the imposition of penalties. Thus, the imposition of one of the penalties provided for in Paragraph (1) of Section 33 of the Criminal Code on the perpetrator of the offence already constitutes grounds for the criminal "prosecution" of the legal person, provided that the numerous preconditions are met. Thus, the fulfilment of this precondition requires almost no discretion on the part of the applier of law, but its fulfilment is undoubtedly necessary for the court to impose criminal sanctions on the legal person. Although it is not the purpose of this paper to take a position on this issue, it may be debatable whether it is necessary from a criminal policy point of view to define the criminal liability of offenders in such a broad way. It certainly makes little practical sense to take action against the legal person concerned in cases of triviality, but it is possible to do so without further ado on the basis of the legal rules.[39]

Under the current CMALP Act, it is already possible to take action against a legal person even if the perpetrator is not held criminally liable for a specific reason. These grounds are set out in Points a) to h) of Paragraph (2) of Section 3 of the CMALP Act, which this article will not attempt to describe in detail, particularly for reasons of length.[40] However, it should be noted that the CMALP Act allows a legal person to be held liable for a number of reasons in this area, even if the perpetrator is not held liable. Of course, this presupposes – in accordance with Paragraph (1) of Section 2 of the CMALP Act – that the offence is committed with the purpose or effect of obtaining an advantage for the legal person or that the offence is committed by using the legal person. These criteria have already been discussed in detail above and will not be repeated here. In our view, the cited provision of the CMALP Act certainly warrants further practical and even theoretical examination. Without providing an exhaustive list, the case of Section 3 (2) (c) of the CMALP Act may be mentioned as an example. Here the Act stipulates that the perpetrator will not be held liable because *"[...] the investigating authority or the public prosecutor has discontinued the proceedings because the suspect did not commit the offence."* In other words, during the criminal proceedings it was established that a criminal offence had been committed and that this offence was linked to the legal person, but the identity of the actual perpetrator could not be established. This is noteworthy because Points a) and b) of Paragraph (1) of Section 2 of the CMALP Act explicitly require the perpetrator to act in a certain capacity, while Paragraph (2) of Section 2 of the CMALP Act does not require the capacity of the perpetrator, but requires that the management of the legal person be aware of the commission of the offence. Thus, if in the course of criminal proceedings it is established that the suspect, whatever his or her capacity, did not commit

[38] See Paragraph (1) of Section 3 of the CMALP Act.
[39] Zsanett Fantoly, "A jogi személy büntetőjogi felelőssége európai kitekintéssel" (PhD diss., Szegedi Tudományegyetem Állam- és Jogtudományi Kar, 2007), 154–155.
[40] See Paragraph (2) of Section 3 of CMALP Act.

the offence, the court and the investigating authority will not have a perpetrator who could be identified, for example, as the chief executive officer or company director of the legal person, i.e. it will not be possible to determine whether the conditions of Paragraph (1) of Section 2 of the CMALP Act are fully met, and if they are not met, there will be no possibility of applying the measures. Paragraph 2 of Section 3 of the CMALP Act does not state that the conditions of Section 2 of the CMALP Act do not apply in the cases referred to in Points a) to h) of Paragraph (2) of Section 3 of the CMALP Act, but that the measures set out in Paragraph (1) of Section 3 of the CMALP Act also apply in this case. In our view, the same conclusion can be drawn in the case of the category of offenders covered by Section 2 (2) of the CMALP Act. It is not inconceivable, but in practice we see little chance that the prosecution will be able to prove that the management of the legal person knew about the commission of the offence, but the prosecution or the police could not identify the perpetrator.

In our opinion, if the legislator's aim with the provision of Paragraph (2) of Section 3 of the CMALP Act is to "override" the conditions of Parapraph (1) of Section 2 of the CMALP Act and to establish the criminal liability of a legal person even if the identity of the actual perpetrator could not be established or if this person is not the same as the suspect, then it would be necessary to clarify Paragraph (2) of Section 3 of the CMALP Act. The explanatory memorandum for the 2012 amendment to the CMALP Act seems to confirm this ambition: "*Another major problem identified by international studies is the legal requirement that, in order to establish the criminal liability of a legal person, the criminal liability of the natural person who committed the offence (chief executive officer, member with power of representation, etc.) must be established. However, the latter cannot be established in all cases. In order to solve this problem, the legislator has considerably extended the cases in which action can be taken against a legal person even if the criminal liability of the natural person who committed the offence cannot be established, although it is clear that an offence has been committed. […] In each of the above cases, the application of the measure depends on the existence of one of the two logical links (benefit or commission by using the legal person) between the legal person and the offence*."[41] Although the discrepancy between the provisions of the CMALP Act presented here may seem theoretical, the perceived inconsistency of the legislation makes the work of law enforcement more difficult.

3. Summary thoughts

As we have seen, the CMALP Act lays down a rather complex set of conditions for the measures that can be taken against legal persons. This is undoubtedly justified by the fact that, from a criminal law point of view, it is a question of sanctioning a specific "subject". It should also be borne in mind that the

[41] See Explanatory memorandum to Bill No. T/9246 on the transitional provisions relating to the entry into force of Act C of 2012 on the Criminal Code and amending certain Acts.

interpretation of these legal conditions is not always black and white, so the legislator requires a great deal of practical experience from those applying the law, which goes beyond the scope of criminal law. In our view, the rapidly changing social, legal and, above all, economic circumstances pose a challenge to both the legislator and the practitioner in the application of the CMALP Act, in particular, because of the relatively small number of Court Decisions referring to and interpreting certain provisions of the CMALP Act.[42] Nonetheless, this would be explicitly justified by the legislation. In our view, a correct interpretation of the set of preconditions described is essential for the courts to be able to apply measures against legal persons in a justified manner, and further practice-oriented research into the preconditions is therefore warranted. In our opinion, the legislator's aim of establishing conditions for criminal sanctions against legal persons, both from the material and the immaterial side of the offence, is the right one, but, as explained, it is not possible to avoid "fine-tuning" the legal provisions in the future, especially on the basis of practical experience. This may lead to further questions: are the strict conditions the reason why so few measures are taken against legal persons? What can the legislator do to ensure that the criminalisation of legal persons achieves its practical objective? Is there a need for specific legislation in this area? Can the conditions described be simplified to ensure more effective application of the law?

[42] See Zsolt Szomora, "A jogi személlyel szembeni büntetőjogi intézkedés ügyészség általi indítványozásának eljárási határidejét értelmezte a Kúria," https://jogaszegylet.hu/jogelet/a-jogi-szemellyel-szembeni-buntetojogi-intezkedes-ugyeszsegi-altali-inditvanyozasanak-eljarasi-hataridejet-ertelmezte-a-kuria/

The Modernity and Legal Unification of the Portuguese-Spanish-Ibero-American Legal Culture in the 19th and 20th Centuries

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ABSTRACT *The topic of legal culture*[1] *is much broader and more comprehensive than its richness of thought could be perceived in the context of an article. Connecting law to the concept of culture is a relatively recent phenomenon.*
The concept of culture dating from the middle of the 19th century and still accepted today is that culture means everything that has been created through the physical and mental work of human society. At the beginning of the 20th century, German jurist Kohler regarded contribution to the advancement of culture as the most important task of law and jurisprudence. For him, law is a creative science which evolves to satisfy the needs of society. Professor Radbruch from Germany defined law as a cultural power, a component of culture. Zjelmann saw the main value of comparing laws in that it allows law to be perceived as a cultural phenomenon.

KEYWORDS *Ibero-American legal culture, Ibero-American legal systems, legal developments in Latin America, Spanish-Portuguese family of laws*

1. Introduction

Legal culture is still an intensively researched term of arts. Perceptions can be divided into at least three types. L. Friedman separates "internal" legal culture, which means the set of attitudes and values of the legal profession, from "external" legal culture, which is the attitude and set of values of the laity, society.
The other group of authors, such as Nelken, is a proponent of a broader definition, including both the law and the tendency to sue in the concept. Finally, there are those who suggest a different concept than "legal culture".

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[1] Antal Visegrády, *Jogi kultúra, jogelmélet és joggyakorlat* (Budapest: Aula Kiadó, 2003), 122.

Cotterrell replaced it with the notion of "legal ideology". According to him, ' [l]egal ideology consists of the elements of value and cognitive ideas assumed, expressed and formed in the practice of the development, interpretation and application of the legal doctrine in the legal system."
Upendra Baxi differentiates between "residual", "emerging" and "dominant cultures". The first is a remainder of the past, but it is also actively involved in the cultural processes of the present. The emerging culture is associated with emerging strata or groups, but is usually difficult to define, slow in development and subordinate to the dominant culture. Applying this theory to legal culture, the author emphasizes that residual elements are active, expressing living experiences and even values. The situation of the dominant culture is unstable compared to the other two, the situation may change. There is also a viewpoint that sees a danger in introducing into legal culture an anthropological element that is difficult to define in law.
As for the latest developments, the concept of "comparative legal cultures" has emerged, which, according to its representatives, can serve as a primary means of exploring more deeply the connections and interconnections at work in the creation and operation of many factors of law. The evaluation of this new Janus faced (double sided) trend can be a way out of the uncertain situation associated with the paradigm shift in the field of comparative law, and, on the other hand, it can contribute to the integration of comparative law into the broader framework of legal history, legal ethnology or sociology of law.
There is a constant interaction and a multifaceted relationship between culture and law, which can be summarized in two basic theorems: on the one hand, law is one of the components of the culture of a given society, and on the other hand, there is no law or legal system that is not influenced by the culture of the given society.
Legal culture consists of the following elements: 1) the written law and the law in force ("law in books" and "law in action"); 2) institutional infrastructure (court system, legal profession); 3) models of legally relevant behaviour (e.g. litigation) and 4) legal awareness.
In broad lines, a distinction can be made between so-called regulatory and indicative legal cultures. The former covers Western cultures, where the acceptance of law takes place as a rule of conduct indeed, in a normative sense, but by no means to the same extent. In the common law system, for example, the authority of the court is more preeminent than in other countries. However, European or so-called continental legal cultures are not uniform either. Just to note two examples: in contrast to German legal culture, which traditionally values law and is at the forefront of civil litigation in Europe, Dutch legal culture is characterized by the legal term 'Beleid' (the English 'policy'), which means following favourable laws and avoiding harmful laws (circumvention). An utmost example of this is that until the enactment of the Euthanasia Act of 1993, according to which in exceptional cases medical assistance with suicide is permitted and is not punishable, although the Criminal Code had banned it, medical practice continued to provide assistance with suicide. The Dutch are working to resolve their conflicts out of court.

In indicative legal cultures – such as the Asian and African legal cultures – the law is not necessarily normative in the true sense of the word, nor is it perceived as such by society. Laws traditionally had an informative and indicative significance, and this social attitude is only reinforced by the increase in the number of unenforceable, often symbolic, laws. A separate scientific trend, the so-called "Law and Development" deals with the problem of how modern legal acts and legal institutions are introduced/ taken over in the legal cultures in question and function differently from regulatory legal cultures. The legal culture of the Central and Eastern European region is characterized by a historically developed legal approach, the essence of which is a belief in legal regulation, or excessive trust in legal regulation. Simultaneously, there has been and still is an approach to social problems within a certain legal framework. The effectiveness of the law was also influenced by the growing importance of norms of behaviour developed by real processes due to untraceable legal regulations.

At the same time, studies on the legal culture of Hungarian society indicated knowledge and approval of legislation embodying traditional values (e.g. in 1976: 83% of the respondents said that an increase in the number of divorces was "unfavourable". However, the divorce rate is very high in Hungary. All this sheds light on the contradictions in the legal culture.

To sum it all up, a legal culture that shapes the behaviour of organizations and citizens in line with the objectives of the legislation enhances the effectiveness of the law, otherwise it reduces the effectiveness of the law. There is no country with a single, unified legal culture. This is because there are many different cultures in each country, due to the complexity of societies (communities, groups). Another view speaks directly of legal "subcultures". A noted example is the legal-anti-culture of criminals and the legal culture of law enforcement. The latter is well illustrated by the fact that the courts condemn conscientious objectors in northern and southern Norway, while acquitting them in western and central Norway. Although legal cultures in the same society lead to different behaviours, relevant research has also shown that age, gender, income, nationality and race etc. are determining factors, this is why they are correlated with an attitude towards the law.

Legal culture has developed historically just like political culture and the latter influences and may even shape the characteristics and realization of the former. Legal culture is always between tradition and innovation. The development of a legal culture is a long-term process, involving not only intrinsic growth, but also the task of nurturing an existing culture. Hence, a legal culture is not only adherence to what has developed, but also a change for the sake of change.

An interesting and valuable explanation for the development of legal cultures is given by Alan Watson's theory of transplantation. Many case studies show the mystery and novelty of the similarity of legal development in the most diverse socio-economic formations and legal arrangements from the ancient Middle East to present-day New Zealand, rather than in original ingenuity, lies in taking over what is already known elsewhere and, at most, thinking it further. Transferring of law is a universal development factor for the legal system. In his

recent work, Watson explains that his studies of the history of law have convinced him that, since the rulers of the Western world had little interest in private law, this task gradually fell into the hands of a non-legislative elite (e.g. Roman jurists, medieval English judges and continental legal professors). These legal developers then developed their own legal culture, detached from social reality, which determined, on the one hand, the parameters of their legal thinking and, on the other hand, the nature of the legal system they considered worthy of lending and the extent of lending. This culture differs from society to society, but it does have common historical characteristics. Thus, law and legal culture do not develop mechanically from economic, social and political relations!

We can also give a modern example for all this. In Austria, in 1977, the institution of the ombudsman was taken over from the Scandinavian legal system and transformed into a parliamentary oversight body called the "People's Advocacy", in accordance with Austria's political system. Despite the different circumstances, the institution has survived its "transposition" into the Austrian legal system and has proved its worth over time.

In our previous studies we have tried to prove with arguments that the Portuguese and the Spaniards (the collective term for Castilians, Aragonese, Catalans, Basques, Gallegos, etc.)[2] have created an independent legal culture, while Roman law, for example, has become the preserved principle of this modernity!

We also want to point out that European civilisation in Ibero-America, under these two former colonial powers, represented a specific Portuguese-Spanish cultural tradition, imbued with Catholicism, an ideological, missionary evangelisation, crowned by the use of economic coercion.

Centuries of coexistence have given birth to an Ibero-American legal culture that has evolved from the wars of independence in the 19th century to the present day, and which, while it may have its own particularities from country to country, can be seen as a coherent whole in terms of its foundations and main components. It is another matter entirely whether, within this structure, we can point out where Ibero (or Hispanic) culture ends and native (Indian) culture begins, from the point of view of, say, customary law. This aspect of the indigenous question began to have an impact on the unfolding of native (indigenous) peoples' movements around the 1992 bicentennial and then, in the 2000s, its thematization, especially in Bolivia. Among blacks, the continuation of African traditions is expressed not in customary law, but in the world of religion, superstition, nature spirits and creatures, rites, ceremonies, bird feathers, emblems, wood carvings, etc.

[2] It is not our intention to blur or confuse the existing and perceived ethnic differences that so characterise Spain, as we shall see, a legal system that is becoming modernised and unified is becoming Spanish, so that it can leave behind legal particularism and replace it with regionalism and autonomous legislation – a process that is fraught with setbacks and setbacks, and the best evidence for this argument is to be found in the texts of the constitutions.

2. The transformation of the pre-modern Portuguese-Spanish legal culture into a modern legal system during the legal unification efforts of the 19th and 20th centuries

By the beginning of the 19th century, the pre-modern Portuguese-Spanish legal culture was under complex fire. It was constantly challenged on the ideological side by the Enlightenment, on the practical and political side by the French Revolution, and then by its extended arms, both legally and militarily, the Code Civil (1804) and the arrival of Napoleon's invading army (1808) in the Iberian Peninsula. The result is known here in Europe.
But in Ibero-America, its mechanism of action was no less underestimated. It reinforced the maturing independence aspirations of the past. The creoles of the Spanish viceroyalties, with the exception of Mexico, saw the time ripe for a real takeover. They did so successfully after a long and short armed struggle, while failing to create a single federative/confederative independent state or to carry out any substantial restructuring of the existing colonial administration, in the absence of a modernisation concept. A change of power from above, a replacement of the Spanish elite in the old country, was carried out.
In Brazil, the House of Bragança retained control throughout the independence process, thus preserving the natural and political unity of the country and avoiding the separatism and caudillo (civil) wars that characterised the former Spanish colonies, as well as the "Haitization" of the former French colony Haiti (uncontrolled and uncontrollable anarchy, lack of security of life and property). Brazil's constitution of 1824 was adopted as a mixture of Anglo-Saxon and French legal concepts.

2. 1 The main elements in the development of modern law in the 19th century

Conceptually, the point of departure is the Enlightenment and rationalism, including the rationalist aspect of German philosophy. On the side of the economic policy, the idea of liberalism and the free market is also complemented by a German (Prussian) approach – Fichte's theory of the closed trading state – which takes the form of the German Zollverein.
On the legal side, what can be described as a turn to modernity, based on the need for the unification of the law, which was brought about by the French political-legal revolution, was also achieved by French methods (the introduction of legal codes on the one hand, military conquest in the name of freedom on the other).
In principle, there are three codes that can be considered from the point of view of modernity: the Allgemeines Landrecht (ALR) of 1794, the Code Civil (CC) of 1804 and the Allgemeines bürgerliches Gesetzbuch (ABGB) of 1811, but the Code Civil has proved to be the most influential in terms of its innovations and solutions, style and interpretability.

Among the German thinkers, Hegel, Savigny and Thibault were influencing legal theory, philosophy and history at this time, and the historical-legal school, with its rethinking of pan-dictatorship, made a great step towards the crystallisation of Germanic law by the end of the 19th century.
In the development of Anglo-Saxon common law, the US common law diverged from that of the former mother country at several points and this was the form that the former Spanish colonies, which became Ibero-America, had to contend with later.
By the end of the 19th century, comparative law had emerged as a new science and it became possible to "compare" the legal systems of the modern world, to show similarities and differences.

2. 2 The modernisation of Portuguese-Spanish legal culture in nineteenth-century Latin America

Replacing and redesigning the inherited colonial legacy of the independent states has become a daily legal policy issue. One thing seemed certain: Spanish law as a mother law was out of the question, as its transcendence was on the agenda. In addition, a modern civil code was not enacted in Spain until 1889.
Latin American countries have maintained a legal education based on Roman law. The Code Civil was therefore the most appropriate model for the restructuring of the civil law part of the legal system. Several countries introduced it and translated it from French into Spanish (e.g. Haiti in 1826, Bolivia in 1830, Dominica in 1884).
Uwe Kischel[3] points out that, in addition to simple adaptation, a separate Latin American jurisprudence has already taken off.

2. 3 The development of Latin American (Ibero-American) law and the expansion of common law in the 20th century, and the impact of these legal cultures on each other

As the US extended its sphere of influence into Ibero-America, common law and the public law institutions that had already been noticed and even tried to be copied by these countries, with little success, emerged as competing law.
The Romano-Germanic-based Ibero-American legal group has taken up the gauntlet against the intrusion of US common law.
European civilisational origins alone did not and do not make the Anglo-Saxon United States and the countries of Iberian (Hispanic and Luzobrazilian) origin and language deeply rooted cultural cousins, since the institutions that form the most durable fabric of these societies (the family, the more patriarchal way of life, the specificities of agriculture, trade and traffic relations, etc.) are the

[3] Uwe Kischel, *Comparative Law* (Oxford: Oxford University Press, 2019), 585–619.; Gábor Hamza, "Andrés Bello, the humanist thinker and codifier and the development of private law in Chile," *Jogelméleti Szemle*, no. 3 (2013): 205–210.

"children" of the Romano-Germanic legal culture and not of the extreme individualism of the common law, which they reject.[4]

2. 3. 1 Formation and main elements of Ibero-American legal culture

Ibero-American legal culture is based on the Romano-British-Pre-Columbian cultural blocs. It takes its form from Roman law, in Latin "ius commune Americanum", in Spanish "derecho común americano". This European Romanist tradition is blended with the customs and institutions of the native indigenous peoples.[5] In Brazil, only indirect effects are mentioned in relation to indigenous Indians and African Negroes when the development of the law in their country is discussed. As early as 1896, Bevilaqua drew attention to the specific legal institutions of the native peoples and their study with little success.

Given the fact that the conquest of the New World was carried out in the spirit of the concubinage of the sword and the cross, and that Catholicism and its institution were state-controlled and financed by the colonial churches, and canon law was part of Portuguese-Spanish law, this issue remained important after independence. This issue is described as the "Romanist-Canonical tradition" ("tradición romano-canonica").

A separate component is the social order, described and legally protected in the Civil Code of each state, in which the individual as a citizen is given a much greater role and rights than in pre-Columbian cultures, where the primacy of the community has always prevailed. These civic codes reflect a strong Romanist outlook and, in political terms, they carry democratic values.

Last, but not least, it is necessary to talk about those elements that have their origins in the Romanist-canonist tradition of Ibero-American legal culture, but which are problematic areas in contemporary societies (whether we look at them from the point of view of social policy, anthropology, jurisprudence, etc.).

[4] However, it may also be true that, from a modernisation perspective, American common law is more pragmatic in its approach to litigation, more attentive to the discovery of facts arising from the conduct of life and more reflective of templates for behaviour. From this perspective, Ibero-American countries are seen as a hybrid of Westernised civilisation rather than being solely Western (perhaps because they are not Anglo-Saxon, though of Germanic origin.)

[5] "The differences within the unit are partly due to the historical circumstances that preceded the codifications (Spanish or Portuguese conquest, the existence of indigenous communities or the existence of pre-Columbian institutions), and partly to centrifugal tendencies that emerged in parallel with the emergence of independent nation states and codified state legal systems (e.g. in the Pacific and Andean states, civil law codes show the influence of the Codigo of Andrés Bello, in the Atlantic equatorial states, the influence of the Esboço of Teixeira de Freitas and the Codigo of Vélez Sársfield (72), and partly the influence of the various European codes" – writes Catalano. Ibid. 58.

First and foremost, there is the problem of the demographic explosion, which is linked to the changing values of marriage, cohabitation (without marriage) and the family.
Secondly, there are the cases of state taxes, restrictions on land ownership for the public interest, the unhealthily disproportionate distribution of land tenure in Brazil, the fate of Amazonia and its forests, and the environmental protection. The most important task to be resolved, and the oldest problem, should be to rethink the close relationship between land and the family.
A major step forward was the introduction of the Brazilian Civil Code in 2002, which is a good summary of the legal culture of Brazil, now a legal superpower and an emerging regional power.

2. 3. 2 The "infiltration" of common law into Ibero-American legal culture and their interaction

In several waves during the 19th and 20th centuries, Anglo-Saxon common law came into permanent contact with the Ibero-American legal culture, which was modernising from the old Portuguese-Spanish law and moving towards unification.
Historically, the first in line is Quebec, which was acquired by Britain from France during the Seven Years' War (1756-1763). The USA increased its territory through purchases, wars and "altruistic aid" to Anglo-Saxon settlers (see the case of Texas), which had Romano-Germanic legal systems (except Alaska, which was purchased from the Russian Empire in 1867). In 1898, with the war against Spain, Puerto Rico, Cuba and the Philippines fell into its lap. The American common law has also "attacked" the legal systems of these countries and has put constant pressure on their Roman law-based civil systems. In the US Louisiana is the only exception because of its Roman legal structure of private law.
Roscoe Pound, the famous legal theorist and scholar, concluded at the beginning of the 20th century, in pages 2-6 of his "The Spirit of the Common Law", published in 1921, that the advancement of the common law in the codification in other countries was dynamic, a kind of triumph, with the exception of Japan, where they had failed. The strength of the common law is made possible by the specific dispute resolution method already mentioned, the individual legislative activity of the judiciary, and this is the driving force behind the slow but sustained and steady influx of American common law. The other factor is found in the concept of "extreme individualism" in Anglo-Saxon law. But Roman law is not individualistic.
Koschaker called Roman law Juristenrecht and contrasted it sharply with common law. The two categories initiated by him and De Francisci were suitable, for example, to show the "legal Americanisation" of Puerto Rico as a penetration effect, and then the resistant factors had to be found and detected: these were found in family law. The basic unit of the societies of the Ibero-American legal cultures is the family, while common law is based on the individual, "the" individual. If Anglo-Saxon law makes a breakthrough here

with the pressure of penetration, resistance will diminish and then be transformed to meet the demands of the new penetration. The victorious law will call this modernisation.
The penetration of common law at the expense of the Ibero-American legal culture is most evident in the field of commercial law. It is a general opinion and perception that the reception of a foreign legal institution – common law – with all its solutions, instruments and adaptation of its legal procedures, has breached the wall of unity of the Romanist legal system.

2. 4 The modernisation of the legal cultures of Portugal and Spain in the 19th and 20th centuries

The modernisation of the Portuguese legal system in the area of private law began in 1833 with the adoption of the Ferreira Borges Commercial Law – Código de comerco – which was replaced in 1888 by a new modernised law with Italian and Spanish influences.
Preparation of the Portuguese Civil Code – Código civil – began in 1850 and it was drafted by Professor António Luis Visconde de Seabra and enacted from 1868. He used the ALR, the Code Civil and the ABGB to draft it.
A new Civil Code was adopted in 1966 and came into force in 1967[6] (the influence of the German BGB can be seen in the structure and terminology of the code). Portuguese private law has since followed German rather than Romanist legal solutions.
The transformation of the Spanish legal system has been slow with setbacks due to a series of public law battles. The fundamental problem and dilemma was that the political-economic objectives of centralisation and unification were in constant conflict with the survival of the political-administrative apparatus of the old system, including local legislation, which remained the "guarantee" of the fragmentation of the legal system.
The Penal Code was promulgated in 1822, and by 1829 the Commercial Code had been adopted, but the codification of the Civil Code met with even greater resistance than expected. The Civil Code was finally adopted in 1888, came into force in 1889 – and is still in effect today.
It is important to note that the Civil Code is not a code, has subsidiarity in certain areas of law (derecho civil común) and "applies mainly to matrimonial, succession and property law, as opposed to local (private) law (derecho foral), which is also directly based on Roman law and whose organisation into official collections (Compilación) continued after the adoption of the 1978 Constitution institutionalising regional autonomy"[7].

[6] The Civil Code was also enacted in Portugal's colonies, and after 1974, when Angola, Guinea-Bissau, Mozambique, São Tomé and Príncipe and Cape Verde became independent, it was maintained in force as their own code.
[7] Gábor Hamza, *Az európai magánjog fejlődése* (Budapest: Nemzeti Tankönyvkiadó, 2002), 159.

We agree with D'Ors' view that "the old European ius commune in Spain has contributed to the survival of legal pluralism to this day, in contrast to the French-style centralisation and unification efforts."[8] Indeed, separatism and regionalism within Spain were also built on legal particularism.

3. The "classification" of the Portuguese-Spanish-Ibero-American legal systems according to the classifications of legal theory

For the sake of theoretical clarification, an overview of the typology of modern legal systems, perhaps the best-known concept of which is the family of laws, seems necessary. Our starting point is René David.[9] His famous work has been revised and clarified several times, and his former students have continued to reflect on it and add new insights. We will also analyse the legal theory of the authors Zweigert-Kötz, Professor Antal Visegrády's insights on legal culture and Kischel's analysis of the civil law of Latin America.

3. 1 Theoretical issues and ways of dealing with the grouping of legal systems: families of law

Since the beginning of the 20th century, the science (theory and methodology) of comparativism has been on the agenda to examine, mainly from a legal-theoretical point of view, legal approaches operating as legal systems in the societies of modernity and in other traditional or religious states. If we wish to sketch briefly the 20th century attempts of comparativism to classify the law in a schematic way, yet in their succession (but not necessarily in a sequential way), the line opens with Georges Sauser-Hall (1884-1966)[10] back in 1913. Based on the notion of race, he creates four groups: 1) the law of the Aryan (Indo-European) peoples; 2) the law of the Semitic peoples; 3) the law of the Mongoloid peoples; 4) the law of the barbarian peoples.
Shortly afterwards, in 1934, the Argentine legal philosopher Enrique Martinez Paz (1882-1952)[11] also classified legal systems into four categories: 1) Common law-Barbarian-English, Scandinavian, etc.-laws; 2) Barbarian-Romanesque-German, Italian, Austrian-laws; 3) Barbarian-Romanesque-Canonical-Spanish and Portuguese-laws; 4) Romanesque-Canonical-Democratic-above all Latin American, Swiss and Russian-laws.

[8] José Sanchez, and Arcilla Bernal, "The survival of the Roman legal tradition and the reception of the common law (ius commune) in Spain," in *Tanulmányok a római jog és továbbélése köréből. (Kézirat)*, ed. Hamza Gábor (Budapest: Nemzeti Tankönyvkiadó, 1995), 117.
[9] René David, *A jelenkor nagy jogrendszerei* (Budapest: *Közgazdasági- és Jogi Könyvkiadó*, 1977).
[10] Antal Visegrády, *Jog és állambölcselet* (Budapest: Menedzser Praxis, 2016), 62.
[11] Ibid.

Swiss jurist Adolf Schnitzer (1889-1989)[12] distinguished five legal systems from the historical point of view: 1) the law of primitive peoples; 2) the law of ancient civilisations; 3) European-American law (a) Romanist, b) Germanic, c) Slavic, d) Anglo-American law; 4) religious law; 5) Afro-Asian law.
The Arminjon-Nolde-Wolff trio of authors[13] understands a typical legal system as national laws, seven in number: 1) French; 2) Germanic; 3) Scandinavian; 4) English; 5) Russian; 6) Islamic; 7) Hindu. René David first formulated his theory of families of law as the great legal systems of the world in 1950. At that time, he identified five groups: 1) Western French and Anglo-American legal systems; 2) Soviet; 3) Muslim; 4) Hindu; 5) Chinese.[14]
By the end of the 1960s, he had come up with a new classification. He reduced the names of the families of law to four, restructured them and changed them in important respects: 1) Romanist-Germanic; 2) Anglo-Saxon; 3) Socialist; 4) Philosophical or religious.
There are clearly ideological considerations beyond historicity. David's theoretical construction has been subjected to a correction by Swedish jurist Ake Malmström. She also considers that there are four families of law, but that Zweigert's theory of legal systems has led to the creation of new subgroups within them. For the purposes of our study, he is the first to equate the Latin American legal system with the other Western legal families, in a non-Martinez Paz eclectic way. Here are his groups: 1) Western (European-American): a) the family of continental European legal systems; b) the family of Latin American legal systems; c) the Scandinavian legal systems; d) the Anglo-Saxon family of legal systems; 2) Socialist (Communist) group: a) Soviet law; b) People's democratic legal systems; c) the Chinese legal system; 3) Asian non-communist legal systems; 4) African states: a) Anglophone; b) Francophone legal systems.
After 1989, this theoretical construct also became obsolete. We would like to point to two further developments as a realistic process of legal family formation in legal theory and philosophy. One is the trend towards mixed legal systems, the other is a family of socialist legal systems, which has undergone a metamorphosis of its own, changing its name and partly its structure. Already after 1989/1990, with the disappearance of the Soviet bloc, it was suggested that it might be replaced by a post-socialist family of laws, following the lead of Balázs Fekete.[15] This expectation was not viable, and the processes of realpolitik and actual legal system-building moved in a new direction, towards illiberalism.[16]

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[12] Ibid.
[13] Visegrády, *Jog és állambölcselet*, 63.
[14] Ibid. For the grouping of legal systems see Csaba Varga, *Law and Philosophy* (Budapest: Publications of the Project on Comparative Legal Cultures of the Faculty of Law of Lorand Eötvös University in Budapest, 1994), 209–211.
[15] Balázs Fekete, "A jogi átalakulás határai: egy jogcsalád születése 1989 után Közép-Kelet-Európában," *Kontroll – Jogtudományi folyóirat* 2, no. 1 (2004): 4–21.
[16] Now – it seems – such a political system might have a better chance with legal systems that "faithfully" model it: with China, Russia, Turkey in the lead, because each of them has a different religious background (e.g. Confucianism and leftist ideologism;

3. 2 Zweigert and Kötz: legal powers on the basis of the "stylistic traits" of legal systems

The theoretical basis of the powers is as well-known as the Davidian construction. The German authors came up with the idea in 1971, which they further refined in their 1996 book,[17] that five so-called stylistic elements form the basis of the grouping of laws.

The five stylistic elements are: 1) historical background captured in its development;[18] 2) legal mindset (norms of "what law is"); 3) characteristic legal institutions; 4) sources of law and ways of dealing with them; 5) analysis of ideologies.

Zweigert and Kötz point out that their classification is for private law and not public law, but they refer to the possibility of a change of group (in David's case, this can be a change of family or a mixed family).

Mathias Reimann[19] talks about legal traditions instead of families of laws and groups of laws, adopting a more dynamic approach by extending it to economic, religious, etc. factors, so that legal systems can be understood, described and grouped as part of a culture, as an expression of the underlying mindset (mentality).

If we follow Max Weber's guidance, then ideal types such as the concepts of families of laws and groups of laws are nothing more than conceptual abstractions, which do not exist in reality as such, because they are neither perfect nor complete due to their constant change (Eliot writes that no concept is ever brought into focus until it is misused – an observation worth considering[20]).

The legal theory of groups of law, which is more closely associated with Zweigert, based on the division into seven groups by the Arminjon – Nolde –

Orthodox Christianity and Slavic missionary consciousness or Islamism and resurgent Turkish regional power ambitions).

[17] Konrad Zweigert, and Hein Kötz, *Introduction to Comparative Law in the Fields of Private Law (3rd edition)* (Tübingen: Mohr, 1996). But in the 1998 English edition, the socialist jurisdiction has already been removed, while the Far Eastern, Islamic and Hindu jurisdictions have not "earned" the inclusion! The categorisation as a grouping provided an opportunity for Siems (Mathias Siems, *Comparative Law* (Cambridge: Cambridge University Press, 2014), especially 74–80.) and Kischel to further discuss these issues and the latter's position will be discussed in more detail later.

[18] Here we refer to the fact that development in the philosophical and legal-philosophical sense is a "one-way crystallization", which can be development (progress), regression (decline), a cycle or a dead end – in the light of subsequent historical processes. The Hegelian Aufhebung (Aufhebung, abolishing, preserving) can be a good example of a substantive demonstration of the discrepancy between the original meaning of an earlier stylistic element and the concept it currently carries.

[19] Mathias Reimann, "The Progress and Failure of Comparative Law in the Second Half of the 20th Century," *American Journal of Comparative Law* 50, (2002): 671.

[20] Eliot Thomas Stearns, *A kultúra meghatározása* (Budapest: Szent István Társulat, 2003), 9.

Wolff author triad,[21] divided legal systems into eight groups: 1) Romanist; 2) Germanic; 3) Nordic; 4) common law; 5) socialist; 6) Far Eastern; 7) Islamic; 8) Hindu.
In the 1996 German and the 1998 English editions, the authors Zweigert-Kötz emphasise the stylistic elements of the chosen legal system as the "parent system" and, in comparison, speak of "affiliated" legal systems.
Mother laws are, for example, French law and Italian law in the Romanist group, German and Swiss law in the Germanic group, and English law and American law in the common law group.
Affiliated laws, in our case, Portuguese law, Spanish law and Ibero-American laws, are part of the Roman (Romanist) legal system, which is the mother law, and its development has an impact on their development, and their direction of development determines whether they remain within this group or go beyond it. This is an important aspect to consider when providing a classification in our study into a legal system or group of law based on legal theory.

3. 3 The Romanist legal field and its main stylistic elements after the millennium

In the classification of the states in the Romanist group, we find three elements that are specific only to them and not to others. These are: 1) the absence of the rule of law, which leaves ample scope for governance by decree; 2) the existence of the so-called organic laws (lois organiques)[22]; 3) the existence of a bicameral parliament.
The stylistic elements listed here are of a public law nature, which goes beyond Zweigert and Kötz's theory based on the grouping of private law systems.
A very detailed yet comprehensive description and analysis of the stylistic elements of the Romanist group of laws is provided by the Badó-Harkai-Hettinger trio.[23]
Among the legal styles, the trait of granting priority to the principle of historicity is suitable for delimiting the members (states) of the Romanist group outside Europe.
To name the historicity that has – with no small exaggeration - conquered Ibero (Latin) America for the second time for the Romanist group, this time a system representing and carrying modernity, was the Code Civil (with Napoleon's powerful midwifery). The direction of development of Portuguese and Spanish law is important for the topic of our study, because, for example, the Spanish

[21] Pierre Arminjon, Boris Baron Nolde, and Martin Wolff, *Traité de droit comparé I.* (Paris: LGDJ, 1950), 42–47. The seven groups: 1) French; 2) Germanic; 3) Scandinavian; 4) English; 5) Russian; 6) Islamic; 7) Hindu.
[22] Organic laws are designed to unburden the constitution. Their classic home is France, but they are also included in the laws of Romania and Spain.
[23] Attila Badó, István Harkai, and Sándor Hettinger, "A romanista jogkör stíluselemei a 21. században," In *Összehasonlító módszer az alkotmányjogban,* eds. Lóránt Csink, and Balázs Schanda (Budapest: Pázmány Press, 2017), 145–199.

Constitution of Cadiz of 1812 (in force until 1814) regulated the relationship between the mother country and its colonies,[24] and also gave them representation in the Cortes. This liberal constitution, with its forward-looking legal solutions, was lost. The former colonies later sought to transplant and establish ideas in public law from the Constitution of the United States of America, but without success.

The Portuguese have also failed to keep Brazil together with the mainland. The Portuguese Civil Code of 1867 (Código civil) still reflects French and Spanish influences, while the Código civil of 1966, now in force, has more German (Germanist) Swiss and Italian legal features, and therefore the Zweigert-Kötz literature questions its Romanist character, preferring to reclassify it as Germanist.

The legal development of Latin (Ibero) America has favoured the spread of Romanist law, but the legal penetration of common law (see I.3.2 below) is a common phenomenon and the last millennium has seen a new force in the customary laws of native peoples. Reform efforts in public law are also reflected in the incorporation of new constitutional guarantees for the protection of minorities and human rights.

The Ibero-American countries almost completely reproduce the three specific elements described in the first paragraph of this section, which give the Romanist group its Ibero-American character. The question is whether this is already a "big girl" or still a girl branch, or whether we can speak of a young mother branch becoming independent.

If the latter is accepted, then the introduction to the concept and system of legal culture may be of particular importance.

3. 4 Portuguese, Spanish and Ibero-American legal systems as a legal culture or legal cultures?

In our study, up to this point, to answer the question raised here, we have consistently held that the legal systems under discussion are part of legal culture. Whether we are talking about families of law, groups of law or now legal culture, we know and accept classifications because they contain a great deal of truth, are full of theoretical innovations and novelties in the principles, while, as a consequence of generalisations as well as a series of particularities and differences, they can never be complete.

[24] The colonial territories were New Spain (Mexico), New Galicia (audiencia in the north of Mexico), Yucatan (Mayan peninsula in the southeast of Mexico), Guatemala, the eastern and western provinces, Cuba, Florida, Santo Domingo, Puerto Rico, New Granada (a sub-kingdom of present-day Panama, Colombia, part of Venezuela and Ecuador), Venezuela, Peru (a sub-kingdom), Chile and Rio de la Plata (a sub-kingdom of present-day Argentina, Uruguay).

Taking these into account, we have used and continue to use the taxonomically most acceptable concept of 'legal culture'.[25] In the context of Ibero-America, we wish to nuance our position.

4. Elements of legal culture in the legal philosophy of Antal Visegrády

We would like to give an overview of Professor Visegrády's work on legal efficiency, with an increasingly broad and deep theoretical focus on legal culture, covering a relatively narrow time frame, i.e. 1996-2017.

4. 1 The "Principles of Law"

A university compendium entitled Legal Basics[26], published in 1996, gives a brief description of legal culture, mentioning four elements: a) the dichotomy of law in books and law in action; b) the institutional system (the court system and the legal profession as infrastructure); c) the models of behaviour with legal relevance (e.g. litigation); d) legal awareness (legal culture of the individual). It links the effectiveness of the law to the last element, in line with the organisations and the objectives of the legislation.

4. 2 "Foundations of the philosophy of law and the state"

In 2001, a textbook with the above-mentioned title was completed and published, and is now a work of reference. The author maintains his previous position, does not change the number of elements of legal culture, but adds to its range of interpretation, including the theory of legal transplantation, presenting Alan Watson's model and taking it further. The Chicago study is detailed (the legitimating function of law, the level of public acceptance of the law, is also measured) and the support for legal authorities is presented. He also cited examples from German-speaking countries of the reception of laws when their legal provisions could offend citizens. A specific discussion was devoted to students' legal awareness and knowledge of the law in relation to the family, the death penalty and euthanasia.

[25] There is a sea of literature on the concept of legal culture, just to mention a few examples: Jorge Sánchez Cordero (Mexican), Manuel Gutan (Romanian), Fernando Hinestrosa (Mexican), Georg Mohr (German), Kaarlo Tuori (Finnish), Zsolt Nagy, Balázs Fekete, Zoltán Péteri, Csaba Varga, Antal Visegrády.

[26] Antal Visegrády, *Jogi Alaptan* (Pécs: Magánkiadás, 1996), 101.; Ferenc Kondorosi, and Antal Visegrády, *A jogi gondolkodás kezdete és új irányai Európában*, Budapest: Magánkiadás, 2010), 202.

4. 3 "The beginnings and new directions of legal thinking in Europe"

My co-author Professor Visegrády's work was published in 2010, and its co-author was Ferenc Kondorosi.[27] Due to the choice of topic, the direction of the discussion is different, but political and legal culture is also discussed in detail here. Here, theories of convergence between EU legal cultures are presented and the "EUisation" of legal institutions in national legal systems is discussed. They highlight the incorporation of the human rights decisions of the German Constitutional Court into Community law, as well as the role of the European Court of Justice in "bringing together" (acting as a "cohort") the continental family of law and common law. They also talk about the shift of British courts towards the American model in their jurisprudence and about Hungarian legal culture in the context of legal harmonisation.
The work argues that EU law is a product of European legal cultures, which are in the process of being shaped and formed. The authors write about the Spanish and Portuguese legal systems – to a good standard, and in an interesting and accessible way.

4. 4 "Philosophy of law and state"[28]

In 2016, this book was published with a substantial and aesthetic look. Basically, what is explained under the previous point is presented in a slightly re-focused way.

4. 5 "A framework for understanding legal culture and legal effectiveness"[29]

My co-author Professor Visegrády's paper begins with a reference to Friedmann (who is considered the father of the term 'legal culture', based on a 1975 book), and then goes on to consider the other positions he deems relevant to his argument.
An important recognition is that "there is no country with a single, uniform legal culture".[30] Legal culture has a historical and processual character.
In the second part of his study, he writes about the validity and effectiveness of law in the German-speaking world, combined with a discussion of the theories of twentieth-century legal scholars. He then describes the Anglo-Saxon concepts, followed by the French (Belgian Francophone) concepts, and then by an outline of the concepts of legal validity of Scandinavian legal realism.

[27] Kondorosi, and Visegrády, *A jogi gondolkodás kezdete és új irányai Európában*, 202.
[28] Antal Visegrády, *Jog és állambölcselet* (Budapest: Menedzser Praxis, 2016), 229.
[29] Antal Visegrády, "A jogi kultúra és a joghatékonyság értelmezési keretei," *JURA* 23, no. 2 (2017): 238–254.
[30] Ibid. 239.

Lastly, he discusses our region, with his usual precise and flowing style, and his thoughtful exposition of the views on the effectiveness of law.

5. Uwe Kischel: Latin America – a Spanish-Portuguese family of laws?[31]

Uwe Kischel's book entitled *Comparative Law* was published in 2019. On pages 585-619, he looks back at the legal systems of Latin America in its colonial past, and moves forward to search for legal models for the independent states during the 19th century, in which the constitutional solutions of Romanist French law and the American version of common law came to the fore. In addition to the French Code Civil, these former colonies were also interested in these French versions of the republican polity. In the 20th century, US interest in the "backyard" also increased, but it was mainly to promote attempts to infiltrate common law. A paradigm shift between the two halves of the Americas, Anglo-Saxon and Ibero-American, began to take place in the 1980s, bringing about a major change in the human rights and customary law situation of indigenous peoples.

Kischel looks at both the generations of fundamental rights and the possibilities for their judicial enforcement, namely their enforceability.

The book draws attention to the particular social consciousness that the Spanish colonial authorities had a habit of using the phrase "se obedece, pero no se cumple", i.e. "obey the law, but don't follow it". This is how the legal text became a written form and the legal reality became a question of fact, with a deep gulf between them, representing one of the hallmarks of this legal culture. This problem was not the same for all the viceroyalties and audiencias, and was not present at the same time, but it persists to this day and has a negative impact on these societies. It is interesting to note that, given the difficulty of effectively transposing written law into these cultures, this is compounded by the very crude language used in the commentaries to describe the phenomena, and is presented as a genuine "culture of indispensability" or "lawlessness". The problem becomes apparent when a minister can publicly state: "Who cares about the constitution. It's just a piece of old paper." Therefore, reforms and complaints achieve nothing. A specific terminology, impunidad, develops for this situation. The elite, even at the level of generality, is not afraid of accountability and becomes immune to criminal law and to prosecution. The aforementioned deep chasm creates parallel worlds with rules and behaviours that govern and influence them. And people live their lives adapting to this duality. Large sections of the population are turning to evasion of the law because they do not trust the courts to apply the law, and there is a growing sense of human injustice.[32] The written laws that guarantee judicial

[31] Kischel, *Comparative Law*, 590.

[32] The trio of authors Badó-Harkai-Hettinger (p. 27) reaches the same theoretical conclusion about the mechanisms of the influence of the branches of power on society:

independence in all Ibero-American countries do not in any way guarantee the required degree of practical and effective independence, and their ineffectiveness is well known.

5. 1 Low prestige of the judiciary

The third branch of power is a living legacy from colonial times of failure. While the inquisitorial process has a very different content in Romanist France or German criminal procedure, in the vast majority of Ibero-American countries we are dealing with "authentic inquisitorial elements". The suspects were often imprisoned, their detention on remand prolonged and only with great difficulty were they able to regain their freedom. The whole thing was shrouded in mystery. Neither the issue of legal protection nor the principle of freedom of speech were raised. The reforms in the field of criminal law were based on German law. In Ibero-America, as with all reforms, when legal reform is undertaken, successful change – change in itself – is only possible as a result of a sustained political effort, and this has an impact on the change in legal culture. Complicating factors are mistrust and a lack of financial resources.
In the field of justice, we can talk about a major change after 1992, but the situation is still not reassuring. What we are seeing is the infusion of socio-cultural rights into constitutions (the literature speaks of social

"Latin American countries are mostly characterized by a strong, interventionist executive. However, using the terminology of the World Bank, the implementation of "good governance" is particularly deficient in the field of law. The often very weak or possibly non-existent legislature has left a deep wound in the legislative process. Make no mistake, Latin American countries have no shortage of elegantly drafted codes, constitutions and other legislation. The Chilean Civil Code, the work of Andrés Bello, is considered by some to be literary in its wording and structure. In Latin America, this legislative technique has a long history. Nevertheless, an examination of Latin American legal systems reveals that, in many respects, the law does not reflect the heterogeneous social realities of each nation, with many sections of the population choosing to evade the law and the courts applying it in a way that creates social injustice. The dysfunctional relationship between law and society seems to be deepening, exacerbated by the population explosion, the rural-urban migration and the debt crisis of the 1980s. The executive has repeatedly taken the place of the legislature in Latin America, and the executive has regulated by decree the conditions of life that require regulation by law. This was compounded by the fact that executive power was often concentrated in the hands of military regimes, which allowed laws to be promulgated without transparency and accountability. Thus, the legislature was not, and could not be, in a position to do its job in a way that took account of social needs and context. The legislature has a history of inefficiency and lack of parliamentary debate. Weak or non-existent legislative power has resulted in law that does not reflect social reality. Latin American states do not necessarily share the ideals of the civil law system. If we take into account the pace of development of Latin American societies and the heterogeneity of the population, we can conclude that, in its purest form, the objectives of a civil justice system in the strict sense cannot be achieved in Latin America." Badó, Harkai, and Hettinger, "A romanista jogkör stíluselemei a 21. században," 178–179.

constitutionalism), but this also opens the way to judicial interpretation of the law, which is a solution of case law, i.e. it loosens up the civil law system, so that the new constitutional norms open the way to the penetration of common law. It also disrupts the uniform regulation of traditional areas of private law.
Therefore, public and private law do not form a stable legal system, because none of the political, economic and social situation and environment allows it (although international conditions have changed very favourably). Stability is also counteracted by the extent and entrenchment of corruption and drug trafficking, which influence the functioning of all parts of the state, albeit in different ways and at different levels, depending on the country. "There is a statistical correlation between the level of mistrust in a particular country and the objective level of income inequality, as well as the extent to which citizens perceive this inequality as unfair. In other words, the greater the inequality, the greater the mistrust."[33]

5. 2 Judicial enforcement of fundamental rights

Following the American example, the use of the judicial route was introduced in the mid-19th century and became the trigger for case law adjudication. In the 20th century, there was a move towards a more European model of constitutional adjudication, with separate constitutional adjudication and, from time to time, independent constitutional courts. Constitutional courts are often "activist", seeking to establish and challenge the unconstitutionality of a given piece of legislation by means of abstract judicial interpretations of the law. This marks a paradigm shift. It is also the case – for example in Chile – that the right of judicial review extends only as far as the law has not become final. In other countries, such as Mexico, the time limit is 30 days (Art. 105, para. 2 of the Constitution); in Nicaragua, 60 days (Art. 12 of the Ley de Amparo); in Peru, it is up to 6 years (Art. 100 of the Constitutional Code of Procedures); and there are states where there is no time limit and also states that allow a certain number of citizens or parties to have access to judicial review.
We should also mention Brazil, which has also built its own constitutional system. As Gábor Hamza has already stressed, Brazil is not only an emerging economic power (the so-called BRICS countries, i.e. Brazil-Russia-India-China-Southern-Africa), but also a legal power.
The judicial route initially took the form of an empowerment and any federal court could review the constitutionality of laws in any particular case and, if necessary, revoke their validity. This already required the decision of a plenary session of the Court or a special body created for this purpose, under Article 97 of the Brazilian Constitution, which required an absolute majority of votes. At the top of the Brazilian judicial hierarchy is the Supremo Tribunal Federal (STF) (Supreme Court of Justice). The STF can call on the upper house of the legislature, the Federal Senate, to revoke the law, the latter not being bound by the STF and thus free to decide at its own discretion.

[33] Kischel, *Comparative Law*, 605.

Another way to challenge the law is to file a direct complaint of unconstitutionality (ação directa de inconstitucionalidade) under Articles 102(1)(a) and 103 of the Constitution. This provision provides for the possibility for a limited number of constitutional bodies to lodge a complaint without a time limit, either on the grounds of a law being challenged or on the grounds of the failure to adopt a law. However, the decision taken in this procedure is already valid erga omnes (against everyone). A subtype of this complaint, governed by the same constitutional provisions, is the complaint for a declaration of constitutionality (ação declaratória de constitucionalidade). This serves the purpose of compensating for the shortcomings of indirect judicial review, namely, the uncertainty generated in the legislative system, because the regulation does not have an erga omnes effect, the power of decision is not limited to one court, an STF provision that a law is unconstitutional is not linked exclusively to federal status. The ação declaratoria does not allow the STF to make an abstract decision that has general effect and thereby provide legal certainty.

Brazilian law does not allow for a constitutional complaint, modelled on the German model, where a citizen is allowed to bring a violation of his fundamental rights before the Constitutional Court after having exercised his right to a remedy before the ordinary court. This fully clarifies the fact that the STF is, in any case, the highest judicial forum on all issues, making a special form of constitutional complaint unnecessary. However, there are special procedures which allow for the bringing of personal fundamental rights cases before the STF. These include the so-called habeas corpus, which applies to proceedings concerning detention, the Mandado de Segurança, as a comprehensive complaint for all violations of personal rights (not just those guaranteed by the Constitution), and the Mandado de Injunção, which applies to complaints of maladministration in certain areas, such as social rights. These specially designed procedures are apparently absent from civil law and are called injunctions even in Brazil. That being said, the entire system of legal protection of constitutional rights cannot be understood only by reference to foreign legal systems, but can be approached through its own – Brazilian – terminology.

5. 3 One component of Ibero-American legal culture (legal systems): customary law

Customary law is an important element of legal culture and has a special place in American Indian history as a source of law. Kischel devotes a great deal of space to the present-day law of the Indians (indigenous, native, ameroind) and their ancient customs. Also worth noting here is the book *Civilization of the South American Indians: With special Reference to Magic and Religion (Classic Reprint)* by Rafaël Karsten (1879-1956), republished in 2018, which provides an inescapable factual record and helps to better understand Indian customs.

6. Our position on the classification of Portuguese, Spanish and Ibero-American legal cultures

In our view, the following "classifications" could be considered:

- the establishment of a separate Spanish-Portuguese family of laws;
- the Portuguese-Spanish jurisdiction (including Ibero-America), which was separated from the Romanist jurisdiction and made autonomous;
- Portuguese-Spanish legal culture, which includes Ibero-American legal systems;
- there is a separate Portuguese-Spanish and an Ibero-American legal culture;
- finally, it can exist as a Portuguese-Spanish-Ibero-American legal culture (where the divergence of the individual legal elements does not reach the level necessary to become autonomous).

If we look at this range of possibilities and take into account the results of studies into legal theory and the philosophy of law, we can make the following observations on the above:

- the notion of a family of laws as elaborated by René David, which is questioningly assumed by Uwe Kischel as "A Spanish-Portuguese Legal Family?", is not, in our view, met by the Spanish-Portuguese legal systems either as such or together with the Ibero-American legal systems;
- the move away from the Romanist group of laws, the fading of the "French model", is a real process, but the influence of German and Swiss law has increased and after 1978 Spanish jurisprudence and judicial practice has also gained in prestige in Ibero-America.

  In our view, the best position for this hypothesis is to leave Ibero-American law within the scope of the Romanist group of law, pointing out that it is subject to increasing German and common law influence;
- the common basis of the last three classifications: the approach from the aspect of legal cultures, which has been considered as a corollary throughout the discussion;

  in this way, legal culture is considered the most flexible concept when performing a "taxonomy".

6. 1 On Portuguese-Spanish-Ibero-American legal cultures

We have tried to map out the components, first, of the Portuguese-Spanish and then, after colonialism and independence, the Ibero-American legal culture.
Consequently, we can imagine several kinds of discontinuities in the life of these legal cultures. From the point of view of modern legal systems, it seems easy to distinguish between pre-modern and modern. If we approach them from the point of view of their development, their enrichment in terms of content,

form and legal technique, and their changes, we can draw almost any number of epochs.

The emphasis on change is also important because there are elements of these legal cultures which are not currently in the foreground (such as canon law), elements which are in a "state of flux", so to speak, i.e. they are sometimes in the foreground and sometimes in the background, apparently dormant. Ibero-American customary law cultures and the Visigoth-Germanic legal influence of the Spaniards fall into this category.

The Portuguese-Spanish legal culture, in addition to the aforementioned Visigoth (and Swabian) influence and adoption, incorporated Frankish law into its early system (especially in Catalonia) and the Bourbon rule of the 18th century paved the way for the "gift" of the Code Napoleon, delivered by an armed invasion in 1808, and its rapid reception. Legal modernisation came from outside and proved overwhelming. The same thing happened in Ibero-America. Here, the accumulation of antagonisms between society and the law, leading to the development of a complex system of extra-legal norms, whether in the acquisition of property, trade or the settlement of disputes "in the field of governance at the community level", is seen as an aggravating factor.[34] These negative consequences show the low effectiveness of formal (written) law.[35]

Nor can we ignore the "strong opposition to custom in the field of formal law". For example, one of the most important principles in the drafting of the Chilean Civil Code was the primacy of written law. According to Juan G. Matus Valencia, "custom does not have the force of law except in cases where the law expressly so provides". This attitude is the prevailing view even in the revision of the civil codes in Latin America today. Article 1 of the Peruvian Civil Code expressly prohibits the application of customary law that is contrary to the law. This section of the law has important implications both for customary law traditionally established in indigenous circles and for modern customs in the informal sector. Indigenous societies have a centuries-old history of normative legal institutions, which are at best reluctantly and sporadically recognised by the formal legal system. In the 20th century, with the rise of the informal sector, there has been a proliferation of uncodified, unwritten principles.

The informal sector exists in many Latin American countries, and governments have enacted legislation outside the scope of the legal codes, tacitly acknowledging that the codes do not reflect real social conditions. In Brazil, for example, with the adoption of the Microenterprise Law, the legislature has

[34] Badó, Harkai, Hettinger, "A romanista jogkör stíluselemei a 21. században," 187.

[35] "The Latin American countries can be described in terms of the conflict between law and society as follows: first of all, there is a conflict between the customary law of the informal sector and formal law. Secondly, there is also a conflict between the bureaucratic ideal of the civil judge, adopted as a model, and the heterogeneous and changing social reality. Thirdly, formal law is often widely eschewed in favour of transactions that are beneficial to society or the economy. Lastly, the de facto legitimacy of non-constitutional governments and the long tradition of their legislation continues in the Latin American region." Ibid.

created a registration requirement for illegal businesses created in the grey economy to bring them back into the legal, white economy. Merryman sees this as a form of "legal micro-legislation". These "laws" do not come out of the hands of law professors writing law books in a vacuum, but are the result of a compromise between heterogeneous forces in societies with great potential that threaten the status quo.

Latin Americans have ambivalent feelings about the law. In some respects they ignore it, but in others they still have an idealistic view that legislation can solve all problems.[36]

The real power is the executive, and most constitutions empower governments to regulate areas of life by decree and thus override judicial decisions, so that judicial power and control can only be apparent. There is also a need to improve the quality of the administration of the judiciary, which involves a reform of the appointment and promotion system. A sign of this is the creation of judicial councils along European (Spanish-French) lines (such as the National Council for the Judiciary (OIT) in Hungary, now called National Judicial Office (OBH)).

Judicial councils, as self-governing bodies, can only carry out their functions effectively and autonomously if the whole judiciary is restructured.

7. Conclusion

In our study, we have undertaken to outline the history of the development of the Portuguese-Spanish-Ibero-American legal culture in the 19th and 20th centuries and to analyse it from the point of view of legal theory and philosophy. The most important thing is their development into modern legal systems, and it was the mainly Romanist and to a lesser extent German-Swiss legal solutions that made this possible. The efforts that have been made in Ibero-America to create its own legal culture are also worth to be noted, and this legal culture has a significant degree of identity or similarity with Portuguese and Spanish legal culture, but through the slow process of recognition of indigenous customary law, it has also become part of the Ibero-American legal system. There are visible signs of the expansion of the common law and the changes this expansion has brought to the legal system. We compared the models of classification of legal systems accepted in the literature based on David, the authors Zweigert-Kötz and the patterns of legal cultures. We have highlighted the work of Professor Antal Visegrády from Hungary and that of Professor Uwe Kischel from abroad – both authorities on legal theory and philosophy – and presented their main conclusions. We have focused on the analysis of Ibero-American legal systems, relying heavily on the insights of Professor Kischel. Finally, we have taken a stand on the classification to be adopted in our study and have clearly voted in favour of the definition and classification "Portuguese-Spanish-Ibero-American legal culture."

[36] Ibid. 188–189.

FORMER VOLUMES OF STUDIA IURIDICA

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2. *Kauser* Lipót: Hozzászólás a házassági vagyonközösség lényegesebb problémáihoz
3. *Rudolf* Lóránt: A pénzfizetési jogviszony fogalmi jegyeiről
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19. *Csizmadia* Andor: Feudális jogintézmények továbbélése a Horthy-korszakban
20. *Antalffy* György: Az állam szervezetéről a rabszolgatartó athéni demokráciában
21. *Szotáczky* Mihály: Az egyéni érdek és az osztályérdek viszonya a tárgyi jogban

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