

ELTE LAW JOURNAL



2021/1

ELTE LJ



ELTE  LAW
EÖTVÖS LORÁND UNIVERSITY

ELTE LAW JOURNAL

2021/1

ELTE LJ

Budapest, 2021



ELTE Law Journal, published twice a year under the auspices of ELTE Faculty of Law since 2013

President of the Editorial Board • Miklós Király

Editor-in-chief • Tamás Szabados

Editors • Balázs J. Gellér • Attila Menyhárd • Pál Sonnevend • Réka Somssich • István Varga • Krisztina Rozsnyai

Founding Editor-in-chief • Ádám Fuglinszky

Advisory Board • Kai Ambos (*Göttingen*) • Armin von Bogdandy (*Heidelberg*) • Adrian Briggs (*Oxford*) • Marcin Czepelak (*Krakow*) • Gerhard Dannecker (*Heidelberg*) • Oliver Diggelmann (*Zurich*) • Bénédicte Fauvarque-Cosson (*Paris*) • Erik Jayme (*Heidelberg*) • Herbert Küpper (*Regensburg*) • Ulrich Magnus (*Hamburg*) • Russel Miller (*Lexington, VA*) • Olivier Moreteau (*Baton Rouge, LA*) • Marianna Muravyeva (*Oxford*) • Ken Oliphant (*Bristol*) • Helmut Rüssmann (*Saarbrücken*) • Luboš Tichý (*Prague*) • Emőd Veress (*Kolozsvár/Cluj*) • Reinhard Zimmermann (*Hamburg*) • Spyridon Vrellis (*Athens*)

Contact • eltelawjournal@ajk.elte.hu

Eötvös Loránd University, Faculty of Law • 1053 Budapest, Egyetem tér 1–3, Hungary

For submission check out our submission guide at www.eltelawjournal.hu

All rights reserved. Material on these pages is copyright of Eötvös University Press or reproduced with permission from other copyright owners. It may be used for personal reference, but not otherwise copied, altered in any way or transmitted to others (unless explicitly stated otherwise) without the written permission of Eötvös University Press.

Recommended abbreviation for citations: ELTE LJ

DOI: 10.54148/ELTELJ.2021.1

ISSN 2064 4965

Editorial work • Eötvös University Press

H-1088 Budapest, Múzeum krt. 4.



**EÖTVÖS
UNIVERSITY
PRESS**

www.eotvoskiado.hu



Executive Publisher: the Executive Director of Eötvös University Press

Layout: Andrea Balázs

Cover: Ildikó Csele Kmotrik

Printed by: Multiszolg Ltd

Contents

SYMPOSIUM

ELTE Faculty of Law 350th Anniversary Conference Series

István Erdős

The Non-application of Foreign Law under the General Part
of the New Hungarian Private International Law Act 7

Balázs Rigó

Ancient Roman History as a Means for Legitimacy in the
English Early Modern Political Thought 17

István Horváth

Looking for the Disappeared Comparative Advantages in the Public Service 35

Zoltán Petrovics

Crucial Point: Several Issues of the Termination of Employment 57

Mihály Kurucz

The Food Law in the Context of Agrarian Law 77

ARTICLE

Marina Kasatkina

Consumer Protection in the Light of Smart Contracts 95

Kenneth Kodiyo

Judicial Approach to Cohabitation: A Comparative Study
of the Law of England and Wales and Kenya 107

**Symposium – ELTE Faculty of Law
350th Anniversary Conference Series**

The Non-application of Foreign Law under the General Part of the New Hungarian Private International Law Act

Abstract

Conflict of laws rules can lead to foreign law as the applicable law. However, it is not always the case that the designated foreign law will be applied at the end. Actually, one of the main questions of private international law concerns the non-application of the foreign law determined by the conflict of law rules. This contribution examines the general part of the new Hungarian Private International Law act in this regard, that is when and how the new Hungarian act can lead to the non-application of the foreign law.

Keywords: private international law, non-application of foreign law, national legislation, Hungarian Private International Law Act

Introduction

Almost forty years was the lifetime of the Law-Decree 1979/13 on private international law.¹ This law-decree, usually also referred to as the Code (of 1979), was the first complex codification of private international law in Hungary. Over its lifespan the Code was subject to several modifications, many of which were due to the developments that took place on an international and European scale. Especially the evolution and emergence of international conventions stimulated by the European integration process, and later the evolving EU private international law affected the provisions of the Code.² Just to name a few: the

* István Erdős is assistant professor at the Department for Private International Law and European Economic Law, Eötvös Loránd University, Budapest.

¹ Law-Decree No. 13 of 1979 on Private International Law.

² See in this regard e.g.: István Erdős, 'The impact of European private international law on the national conflict of laws rules in Hungary' (2013) *LIV Annales Universitatis Scientiarum Budapestinensis de Rolando Eötvös Nominatae – Sectio Iuridica*, 161–188.

intended accession to the Lugano Convention,³ or the adoption of Rome I regulation,⁴ Rome II regulation,⁵ etc. Due to these developments and several other factors (e.g. the legal form and a good number of the provisions of the Code became outdated over time, there were ambiguities regarding the application of certain provisions), especially after the accession to the European Union, there was an increasing intention to re-codify private international law in Hungary. In 2015 a Codification Committee was set up. The mandate of the Codification Committee was to produce a proposal for a new Act on Private International Law. The work of the Codification Committee took a bit more than two years. The proposal was finalised in early 2017, based on which the new and current act on private international law (Act XXVIII of 2017 on Private International Law⁶ – ‘PIL Act’) was adopted.⁷ The PIL Act entered into force on the 1st of January 2018.

The PIL Act determines the applicable law, the jurisdiction of courts and procedural rules to be followed by Hungarian authorities and the requirements concerning the recognition and enforcement of decisions of foreign courts in private law relationships involving foreign element(s), and applies unless an international treaty or a generally and directly applicable act of the European Union stipulates otherwise.⁸ Apart from these issues, the PIL Act also provides for some procedural rules.⁹ Approximately half of the PIL Act covers the narrow concept of private international law: conflict of laws.¹⁰ Of course, certain provisions of this first part are applicable to other issues as well. For example, the rules on qualification are not only applicable to the determination of the applicable law, but also for the determination of jurisdiction and to the recognition and enforcement of foreign judgments as well.¹¹

One of the essential questions of private international law concerns the non-application of the foreign law determined by the conflict of law rules. Is there any way the forum can or should not apply the foreign law? What discretionary power should the forum have in this regard? Can the parties have any kind of autonomy in this regard? This contribution invites the reader for a journey to explore how the relevant general provisions of the new PIL Act can lead to the non-application of the foreign law.

³ *Convention on jurisdiction and the enforcement of judgments in civil and commercial matters* – Done at Lugano on 16 September 1988, OJ L 319, 25.11.1988, p. 9–48.

⁴ Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ L 177, 4.7.2008, p. 6–16.

⁵ Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), OJ L 199, 31.7.2007, p. 40–49.

⁶ The Act was published in the official gazette on April 11, 2017.

⁷ The Act was adopted by the Parliament on April 4, 2017.

⁸ PIL Act ss 1–2.

⁹ E.g. on international legal assistance, service of documents, taking of evidence.

¹⁰ PIL Act ss 1–65.

¹¹ PIL Act s 4 para 4.

I The Rules on Qualification, *Renvoi*, Evasion and Reciprocity

The expression ‘non-application of the foreign law’ might assume that it is an issue that arises after the application of the relevant conflict of laws rule, so when we know what law would be the applicable law. However, our point of departure is an earlier one. It is because, at least for the sake of a short excursion, it is worth looking at some of the factors that can have an effect on the application of the conflict of laws rules themselves, since these factors – indirectly – can also lead to the non-application of a foreign law.

The first issue in this regard is qualification (or classification, characterization). Qualification is an essential step in the conflict of laws analysis, since it is the tool to get to the right, applicable conflict of laws rules. If, through the qualification process, the issue cannot be determined so that it could be rendered under a certain conflict of laws rule, foreign law will not be applied. This is because it is only possible to apply foreign law if the *lex fori* conflict of laws rules order the forum to do so. If there is no conflict of laws rule regarding a certain issue, the *lex fori* substantive law will apply. Unless there is a tool in the *lex fori* conflict of laws law to ensure that, even in that case, a door is open to the application of foreign law subject to the circumstances of the case.

The PIL Act follows, as a general principle, the *lex fori* qualification rule. It provides that the legal assessment of a particular legal relation or question in order to identify the applicable conflict of law provision to determine the applicable law is to be conducted in accordance with the definitions and concepts of the Hungarian legal order. However, what happens if there is no such legal concept or instrument in the Hungarian law? For these situations, the PIL Act orders the forum to look at the foreign law as well. According to the new rules, if a legal concept or institution is not known in the Hungarian legal order, the forum will have to look at the foreign law regulating the particular legal institution. In the course of this assessment, the forum will have to pay particular attention to the functions and purposes of the respective legal concept or institution in the given foreign legal order. If the foreign legal institution is not unknown in Hungarian law, but its objective or function under the respective foreign legal order differs from the objective or function of the given legal concept under the relevant Hungarian law then, in the course of qualification, the forum will have to take into consideration the respective foreign law as well.¹² So, as it can be seen, although the main, general rule is the *lex fori* qualification rule, subject to the circumstances of the case, the forum will also have to resort to some comparative assessment.

What happens if it turns out that although a certain legal relationship or question falls under the scope of the PIL Act, but there is no corresponding conflict of laws rule in the special part? The existence of a corresponding conflict of laws rule is essential from the point of view of the applicability of foreign law, since it is the conflict of laws rule that relieves the forum of the obligation to apply the *lex fori* national law: this rule determines the applicable law and, finally,

¹² PIL Act s 4.

the conflict of laws rule obliges the forum to apply the identified *lex causae*. Under the PIL Act, the lack of a conflict of laws rule regarding a particular legal issue falling otherwise under the scope of the PIL Act¹³ does not mean that the forum will have to resort to the application of the *lex fori* substantive law. There is a special provision in the general part of the PIL Act that provides for a solution: a subsidiary, general conflict of law rule. In such a case, the closest connection principle applies, meaning that the applicable law will be the law of the country with which the closest connection can be established.¹⁴ This is a new rule, the Code did not have any similar provision.

Mention can be made of the rules on *renvoi* as well. More particularly, where the *lex fori* accepts the back-reference, it will result in the non-application of the foreign law designated by the applied special conflict of laws rules. Regarding *renvoi* and so acceptance of the back-reference, the PIL Act is more restrictive than the Code was. While the Code, except for one special exemption,¹⁵ as a general rule provided for the acceptance of the back-reference,¹⁶ the PIL Act left this route. The PIL Act, as a general rule, excludes *renvoi*.¹⁷ It provides that if the conflict of laws provisions lead to foreign law, the rules of the applicable foreign law directly regulating the issue in question shall be applied. It means that the PIL Act follows the narrow reference approach; that is, the private international law rules of the foreign legal system cannot be taken into account. There is only one exception to this general rule.¹⁸ If the applicable foreign law is determined based on a conflict of laws rule that applies the principle of nationality (citizenships) as its connecting principle and the conflict of laws rule of the given foreign law refers back to Hungarian law then Hungarian substantive law will be the applicable law.¹⁹ Therefore, in this case, even if based on the applicable conflict of laws rule a foreign law should be the applicable law, the forum will return from this foreign legal system to the *lex fori* law, and will not apply this foreign law; it will apply Hungarian law as the applicable law.

Is it possible to intentionally modify or adjust the factual pattern of the case or the legal relationship in order to influence the result of the conflict of laws analysis, so basically changing the applicable law? *Evasion* occurs when the parties either actually modify or adjust the facts or the legal situation, or just pretend the existence of a foreign element in order to arrive at a law more favourable for them than the one that would be designated by the objective conflict of laws rule, should the patterns of the case remained intact in this regard. The Code accepted the result of such an adjustment or modification if that led to the application of the *lex fori* national law.²⁰ It was reasonable since, under the Code, the parties had the possibility

¹³ Private law relationships involving foreign element(s) and not being covered by an international treaty or a generally and directly applicable act of the European Union. See: PIL Act ss 1–2.

¹⁴ PIL Act s 11.

¹⁵ Code s 21/A.

¹⁶ Code s 4.

¹⁷ PIL Act s 5.

¹⁸ PIL Act s 5 para 2.

¹⁹ If the conflict of laws rule of the foreign law refers to a further foreign law, the substantive law of this foreign law will be the applicable law, PIL Act s 5 para 2 point a).

²⁰ Code s 8.

to request the non-application of a foreign law anyway.²¹ Contrary to the Code, the PIL Act does not provide for a general, particular provision concerning the fraudulent evasion of the applicable law. The aim not to honour the result of such fraudulent action of the parties is ensured through other means now.²² One of such means is the 'general escape clause' provision.²³ According to this general escape clause, where it is clear from the circumstances of the case that the case is manifestly more closely connected with a law of a country other than the one determined based on the special conflict of laws rules of the act, as an exception, this other law will be the applicable law. The general escape clause can not only be invoked by the parties, or by one of the parties, but the forum can apply it on its own motion as well.²⁴ Therefore, although this rule is not primarily about fraudulent evasion situations, in certain cases it can however serve as a sufficient means of correction.

The non-application of a foreign law can also be the consequence of the lack of *reciprocity*, if the requirement of reciprocity exists under the *lex fori* conflict of laws rules. There were provisions on reciprocity in the Code.²⁵ However, already under these provisions, the general rule was that the application of the foreign law does not depend on reciprocity, unless the law requires so. For the case where the law required reciprocity, the Code provided for a general presumption of reciprocity.²⁶ The PIL Act left these rules in the Code; it does not contain special provisions on reciprocity regarding the applicable law.²⁷ It means that reciprocity is not a condition for the application of the foreign law, so the lack of reciprocity cannot result in the non-application of a foreign law.

II Content-related Issues That Can Lead to the Non-application of the Foreign Law

So we arrive at the point when the connecting principle of the applicable conflict of law rule leads to a foreign law. What factors will influence whether, at the end, foreign law will be the applicable law, or the identified foreign law will be replaced by another law (the *lex fori* national law), and/or provisions of other legal orders will have to be added and applied together with the applicable foreign law? In this regard, in the following, two main questions or problems will be discussed: the determination of the content of the foreign law and the effects of the *lex fori* public interests on the final conclusion of the conflict of laws analysis.

²¹ Code s 9.

²² See in this regard the Explanatory Report of the Proposal for the Private International Law Act, 2017, general justification.

²³ PIL Act s 10.

²⁴ Explanatory Report of the Proposal for the Private International Law Act, 2017, special justification for s 10.

²⁵ Code s 6.

²⁶ Code s 6 para 2.

²⁷ It does so, however, regarding recognition and enforcement of foreign judgments and international legal assistance.

First, the determination of the content of the foreign law. Needless to say, without having proper information on the content of the foreign law, the forum is not able to apply it. But how is the content of the applicable foreign law determined? Whose obligation is it to determine the content of the foreign law? Is it the party's/parties' obligation to prove the content of the foreign law? The determination of the content of the foreign law is a core and crucial issue. This is because, if it is not possible to obtain proper information as to the content of the foreign law, the forum usually resorts to the *lex fori* national law. Since EU law does not regulate this issue,²⁸ it is a matter under the national law. In this case, the PIL Act regulates this issue, and provides that the forum has to determine the content of the foreign law *ex officio*.²⁹ So the principle *iura novit curia* applies not only to the *lex fori* national law but, based on the respective provisions of the *lex fori* private international law, it applies to the applicable foreign law as well. The PIL Act mirrors the corresponding provisions of the Code in this regard.

However, one can see a departure concerning other aspects. According to the Code,³⁰ in order to gain information on the content of a foreign law 'unknown' to the forum, when it was 'necessary', the forum could obtain expert opinion and could take into consideration the evidence provided by the parties. Also, according to the Code, the forum could turn to the ministry responsible for the administration of justice for information as to the content of the foreign law. The PIL Act introduced some changes in this regard. The PIL Act left out the requirement of necessity, changed the order of the means of establishing the content of the foreign law, and allows the forum take into consideration any evidence. So the current law provides that, in order to determine the content of the applicable foreign law, the forum can take into consideration any evidence, including particularly the submissions made by the parties, expert opinion, or the information provided by the minister responsible for the administration of justice.³¹ The aim of the new rule is to make the determination of the content of the foreign law more efficient. What happens if the content of the foreign law cannot be determined? Under the Code, in such a case, the forum had to apply the *lex fori* national law.³² Although the Code itself neither defined nor provided further provisions on when the forum could or had to conclude that the content of the foreign law could not be established, there was some guidance available on this issue. According to the explanatory report of the Code, the forum had to resort to all the available means and sources, and only if it was not possible to establish the content of the foreign law based on all these sources and means did the forum have the obligation to apply the *lex fori* national law instead of the identified foreign law.³³ Furthermore, as concluded by the ECtHR in 2004, it stems

²⁸ Regarding the 'Madrid Principles' see Carlos Esplugues, 'Harmonization of Private International Law in Europe and Application of Foreign Law: The Madrid Principles of 2010 (July 25, 2011)' (2011) 13 Yearbook of Private International Law, 273–297. <<https://doi.org/10.1515/97833866539648.273>> accessed 19 October 2021.

²⁹ PIL Act s 8 para 1.

³⁰ Code s 5.

³¹ PIL Act s 8 para 2.

³² Code s 5 para 3.

³³ Explanatory report of the Law-Decree No. 13 of 1979 on Private International Law, Chapter I, 5 point c).

from Article 6 of the European Convention on Human Rights that this analysis should be conducted and the conclusion on the issue of the content of the foreign law should be reached within a reasonable period of time.³⁴

Compared to the provisions of the Code, the PIL Act introduced new features in the written national private international legislation in this regard as well. Now, under the current rules, if the content of the applicable foreign law cannot be determined within a reasonable period of time, the forum will have resort to the Hungarian law, as the Hungarian law will become the applicable law. The difference between the Code and the PIL Act is that now the PIL Act directly provides that the forum has a reasonable period of time to determine the content of the foreign law. So far there is no national case law on the interpretation of this particular provision; however, the previously referred ECtHR case law can be of some guidance. According to the ECtHR, the reasonableness of the length of a procedure should be assessed in the light of all the circumstances of the case, including the complexity of the legal issue.³⁵

Finally, the PIL Act provides a solution for the situation when the case cannot be decided based on the application of the Hungarian law. According to the current law, if the case cannot be decided based on the Hungarian law, the law that is in the closest connection with the applicable foreign law will have to be applied.³⁶

When the content of the applicable foreign law is established, a new question arises: to what extent is the content of the foreign law compatible with the public policy considerations of the *lex fori* national law? It is an essential question, since public policy considerations can result in the non-application of the foreign law. According to the Code,³⁷ the foreign law could not have been applied to the extent that the application of the given pieces of the foreign law in the particular case was contrary to the Hungarian public order.³⁸ The Hungarian law had to be applied instead of the disregarded foreign law.³⁹ As a guidance and clarification, in order to ensure that the public policy clause cannot be invoked for discriminatory purposes,⁴⁰ the Code made clear that the forum could not disregard the law of a given foreign state just because the socio-economic system of the foreign country was different.⁴¹

The PIL Act, through its modernised public policy clause, guarantees that the public policy of the forum cannot be disregarded or jeopardised by the application of a foreign law. According to the new public policy clause, the foreign law is deemed to be incompatible with the public policy of the forum and therefore has to be disregarded if the outcome of the application of the foreign law is obviously and manifestly incompatible with the constitutional values and basic principles of the Hungarian legal system. The forum can resort to the Hungarian law and apply

³⁴ Case of *Karalyos and Huber v. Hungary and Greece*, 75116/01, Judgment, 6 April 2004.

³⁵ See in this regard: Case of *Karalyos and Huber v. Hungary and Greece*, 75116/01, Judgment, 6 April 2004, para 32.

³⁶ PIL Act s 8 para 3.

³⁷ Code s 7 para 1.

³⁸ Explanatory report of the Law-Decree No. 13 of 1979 on Private International Law, Chapter I, 5 point *e*).

³⁹ Code s 7 para 3.

⁴⁰ Explanatory report of the Law-Decree No. 13 of 1979 on Private International Law, Chapter I, 5 point *e*).

⁴¹ Code s 7 para 2.

the Hungarian law instead of the respective provisions of the foreign law only if the adverse outcome (the breach of public policy) cannot be eliminated in any other way.⁴²

The PIL Act contains provisions on imperative rules as well.⁴³ The imperative rules can affect the composition of the set of norms applicable in the case. This is because where the forum notices that the issue is regulated through imperative rules in the *lex fori* substantive law, the forum will have to apply these imperative rules directly. The PIL Act makes sure that it does not prevent the application of provisions of the Hungarian legal order which, based on their subject matter and objective, are imperative, meaning, that they are always applicable regardless of the applicable law. However, it is not only about the Hungarian mandatory rules. Overriding mandatory provisions of other national laws can also be taken into account, but only if they are in close connection with the case and are of an essential nature concerning the decision on the substance of case.

III Application of the Foreign Law: Option or Obligation?

Is it an obligation for the forum to apply the foreign law? Or will the forum only apply the foreign law if the parties or one of the parties plead or pleads the application of the foreign law? Can the silence of the parties be interpreted as an implied request not to apply foreign law in the case?

The Code did not have an express provision on the obligation of the forum to apply the identified foreign law. However, such an obligation could have been deducted from the function of the conflict of laws rules, and also from the special provision of the Code which allowed the parties to request the non-application of the foreign law.⁴⁴ It meant that the parties could request the forum not to apply the foreign law designated by the conflict of law rule. However, it is important that the parties could only request the non-application of the foreign law, but could not designate what law should be applied instead (unless the parties could have chosen the law applicable to the given legal relationship anyway). The applicable law in that case was the *lex fori* substantive law. The PIL Act does not provide this possibility for the parties.

The PIL Act is more concrete and direct regarding the application of the foreign law. It makes clear that the forum has to apply the foreign law *ex officio*;⁴⁵ that is, it does not depend on whether the parties refer to it, or even plead the application. Furthermore, as the PIL Act further reads, the forum has to apply and interpret the rules of the foreign law in line with the respective rules and practice of the foreign law.⁴⁶

⁴² PIL Act s 12.

⁴³ PIL Act s 13.

⁴⁴ Code s 9.

⁴⁵ PIL Act s 7 para 1.

⁴⁶ PIL Act s 7 para 2.

Closing Remarks

Is there any way the forum can or should not apply the foreign law? What discretionary power should the forum have in this regard? Can the parties have any kind of autonomy in this regard? The aim of this contribution was to look at those general provisions of the PIL Act that might result in the non-application of foreign law.

As we could see, the PIL Act contains modern rules in this regard. It makes clear that if, under the conflict of laws rules, the applicable law is a foreign law, it is the obligation of the forum to apply this foreign law. So it is not subject to the discretionary power of the forum. At the same time, the forum has a room for assessment in other cases: e.g. under the general escape clause or the public policy clause. Of course, in these cases, the forum cannot assess whether to apply the foreign law or not; its assessment extends to the issue of the determination of the applicable law, or to the compliance of the applicable foreign law with the public policy of the *lex fori* law. Also, regarding the determination of the content of the foreign law, it is the forum that will decide – within the limitations of the provisions of the PIL Act – when to move from the intended application of the foreign law to the actual application of the *lex fori* national law.

Regarding the autonomy of the parties, contrary to the approach followed by the Code, under the PIL Act the parties cannot request the non-application of the foreign law from the forum any longer. However, on the other hand, the PIL Act provides for a wider autonomy for the parties; that is, the parties can choose the applicable law in more situations than they could under the Code.

So, as the above analysis shows, the PIL Act follows a modern approach to ensure that when the conflict of laws rules would lead to the application of a foreign law, this foreign law will be applied by the forum, subject to some limited exemptions; ones that are generally accepted in private international law.

Ancient Roman History as a Means for Legitimacy in the English Early Modern Political Thought

Abstract

The paper examines how the Roman history as one relevant part of the Classical knowledge and history was used by Sir Robert Filmer as argumentation for the legitimacy in the debate concerning the best form of government. Filmer cited the examples in favour of the monarchs and more importantly against the popular or mixed form of government. Filmer was not aware of the forthcoming English civil war, however, he was frightened of one in the light of the Roman history. Therefore, he called for avoiding the popular rule because he could not imagine that it does not lead to war and massacre.

Keywords: Roman history, Sir Robert Filmer, legitimacy, early modern political thought

Introduction

The humanist intellectuals endeavouring for universality found it obvious that the source of their knowledge, arguments and even inspirations should be acquired from the ancient times. It was no different for early modern English political philosophy and theory of the state. Moreover, if we examine only their quantity, we can find that the books of authority from Greek and Roman antiquity are dwarfed by the overwhelming arguments of the Old and, to a lesser extent, the New Testament. The Bible was a point of reference, an origin in early modern England; it was the frame in which the thoughts, arguments, theories or even their behaviour were adjusted. Quotations from the Bible basically overruled in quantity the legal and political philosophical works at the expense of authorities from Classical Greece

* Balázs Rigó (PhD) is senior lecturer at Eötvös Loránd University, Budapest, Faculty of Law, Department of Roman Law and Universal Legal History (e-mail: rigo.balazs@ajk.elte.hu); ORCID ID: 0000-0003-0112-9546.

and Rome. The causes of this phenomenon were the Reformation and printing and, as a result of them, the Bible became common property which, in the people's mother tongue, made itself to be the very first thoughtful reading experience.

Nevertheless, the early modern authors used their antique predecessors' works by naturally selecting those sources with which and whom they could justify their arguments. However, in the everyday discussions reflecting the public sphere, instead of the authors writing in Greek or Latin, the Biblical stories translated into the national language came to the fore. Thus, these resources of antiquity could be regarded as the coronation of the overwhelming Biblical quotations that gave the main theme and guidance of the discussions. Because, if not just the world of the Bible, but the ancient Greek and Roman civilization revealed social phenomena, the political thoughts and the deduced arguments on which early modern scholars relied, then the theses of such authors were entirely justifiable.¹

Beyond the sheer citations, the literature of the Bible and antiquity became an instrument for legitimacy in the reasoning of the early modern discourse, because the authors in any side of the discourse were using and referring to their own arguments through those citations. Moreover, they came to completely different conclusions and interpretations from the same historical facts many times, which leads us to surmise that, besides showing off their historic knowledge, they had another aim when they recalled the achievements of ancient civilizations.²

I The References to the Roman Civilization in the Early Modern English Literature

Examining the early modern English authors' works on the theory of the state, we can state that we can find reference to Roman history basically in three cases, namely (1) the general data on mythology and history on any theme; (2) the more specific references in their works, describing the universal knowledge of their own age encyclopaedically; (3) finally, references to the works in which the people and their behaviour were examined.

¹ We shall emphasise that the Athenian notion of democracy is far more relevant to 17th century England than the *pebes* of Rome, however this paper deals only with the Roman heritage as the theme of the conference.

² For the humanists, the most important objective were life-long learning and education. For the humanist mind and the wider world of the humanists and their religious disputes see Anthony Grafton, Lisa Jardine, *From Humanism to the Humanities. Education and the Liberal Arts in Fifteenth- and Sixteenth-century Europe* (Harvard University Press 1986, Cambridge, MA). Erika Rummel, *The Humanist-Scholastic Debate in the Renaissance & Reformation* (Harvard Historical Studies 120., Harvard University Press 1995, Cambridge, MA). Várkonyi Gábor, *Ünnepek és hétköznapok. Művelődés és mentalitás a török kori Magyarországon* (General Press 2009, Budapest) 62–81 and 37–61; Martin Dzelzainis, 'Ideas in Conflict: Political and Religious Thought during the English Revolution' in Neil H. Keeble (ed), *The Cambridge Companion to Writing of the English Revolution* (Cambridge University Press 2001, Cambridge). <<https://doi.org/10.1017/CCOL0521642523.003>> accessed 19 October 2021.

From the amount of historical-mythological data, in the present paper we quote only those that serve as an instrument of legitimacy in the theories of the state; their enumeration ancient data for the sake of boasting and encyclopaedic works will be omitted.

If the authors were scrutinising the people in a general and broad level, they were doing this mainly with reference to the Romans. The reason for that is not difficult to answer. The attitude and behaviour of the people, either in the Greek polis or in the Roman republic, served as a great example even after a thousand years; however, this cannot be stated about the Bible so definitely.

Regarding the central element of this theme, popular rule, (i.e. democracy), Sir Robert Filmer played an important role in early modern English political thought with his critical survey of the nature of the power of the multitude, as Filmer put democracy. Although Filmer did not use the term social contract, he denied the natural and original right of the people to choose the form of government. He rejected parliamentarism, popular government and the supremacy of the law made by the Parliament as a consequence. Meanwhile, he defended the supreme power of the king, who rules from the will of God and by the right of prime lineal succession. The examination of Filmer's great opus, the *Patriarcha*, which gives the core of this paper, is a great example of how the facts and dates from the Roman history can be utilized to prove a whole theory of the state, besides that his whole theory is constituted from the interpretation and citation of the sequence of Biblical events and phenomena. Therefore, before his opinion about the people, we briefly outline Filmer's patriarchal theory of the state.³

³ For the more detailed analysis of this theory and for the literature see Cesare Cuttica, 'Sir Robert Filmer (1588–1653) and the Condescension of Posterity: Historiographical Interpretations' (2011) 21 (2) *Intellectual History Review*, 195–208. <<https://doi.org/10.1080/17496977.2011.574345>> accessed 19 October 2021; Peter Laslett, 'Introduction' in S. Robert Filmer, *Patriarcha and Other Political Works* (1949, Oxford) ix–xxiv. Peter Laslett, 'Sir Robert Filmer: The Man versus the Whig Myth' (1948) 5 *The William and Mary Quarterly*, 523–546. <<https://doi.org/10.2307/1920638>> accessed 19 October 2021; Peter Laslett, 'The Gentry of Kent in 1640' (1948) 9 *Cambridge Historical Journal*, 148–164; Gordon Schochet, *Patriarchalism in Political Thought. The Authoritarian Family and Political Speculation and Attitudes Especially in Seventeenth-century England* (1975, Oxford). Balázs Rigó, 'Sir Robert Filmer patriarchális államelméletének gyökerei a kora újkori eszmearamlatok tükrében' (2017) 72 (2) *Jogtudományi Közlöny*, 66–75. See further particularly Kontler László, *Az állam rejtelvei* (Atlantisz 1997, Budapest) 102–110; and Sashalmi Endre, 'Sir Robert Filmer (1588–1653) and the Patriotic Monarch: Patriarchalism in Seventeenth-Century Political Thought' (2013) 20 *European Review of History / Revue européenne d'histoire*, 914–915. <<https://doi.org/10.1080/13507486.2013.832874>> accessed 19 October 2021; The sources of Filmer's work are from Sir Robert Filmer: *Patriarcha and Other Writings* (ed. Johann P. Sommerville 1991, Cambridge). As far as I know, there is no literature dedicated specifically to Filmer's thoughts on ancient Roman history. The cause of it can be that, in the Filmerian body of works, his references to Roman history only mean his anti-thesis against the theses of natural law and contemporary parliamentarism. Nevertheless, the analysis of these chapters on ancient Roman history can enlighten us on the essence of the Filmerian synthesis, patriarchalism, more closely.

II The Draft of Sir Robert Filmer's Patriarchal Theory in the Spotlight and in His Interpretation of the Roman History

The core of the theory is that the power of fathers is natural because it has existed since the creation of man. Man and nature were created by God, therefore Adam was the very first and sole head of the family, the patriarch, who since his creation and by his primary status, had an absolute fatherly authority over his progeny and all the other heads of families as successors inherited his absolute fatherly authority thus that derived by the right of fatherhood.⁴ The family is identical to the civil (political) community, and, as a natural consequence, fatherly power is to civil (political) authority.⁵ Apart from the obvious Biblical origin, Filmer refers to Julius Caesar in describing the birth of the English political authority.

Caesar found more kings in France than there be now provinces there, and at his sailing over into this island [England] he found four kings in our county of Kent. These heaps of kings in each nation are an argument that their territories were but small, and strongly confirm our assertion that erection of kingdoms came at first only by distinction of families. [...] The British names of *Danmonii*, *Durotriges*, *Belgae*, *Attrebatii*, *Trinobantes*, *Iceni*, *Silures* and the rest are plentiful testimonies of the several kingdoms of the Britons when the Romans became our lords.⁶

Thus, Adam was not just the head of the family, the patriarch, but the first monarch as well, from whom all the succeeding monarchs could derive their own power.⁷

The coalescence of role of the head of the family and the monarch is manifested in their names since

as long as the first fathers of families lived, the name of patriarchs did aptly belong unto them. But after a few descents, when the true fatherhood itself was extinct and only the right of the father descended to the true heir, then the title of prince or king was more significant to express the power of him who succeeds only to the right of that fatherhood which his ancestors did naturally enjoy. By this means it comes to pass what many a child, by succeeding a king, hath the right of a father over many a grey-headed multitude, and hath the title of *pater patriae* [father of the fatherland].⁸

Thus, the political, regal authority is natural and absolute from its beginning because Adam did not (have to) share it with anyone. Since the authority of the monarch was the manifestation of God's will through Adam, this authority was entirely legitimate. Unconditional obedience

⁴ Filmer (n 3) *Patriarcha* I/3. 6. Hereinafter, in the citations to the *Patriarcha*, we provide only the numbers of the chapters and pages.

⁵ I/4. 7.

⁶ I/7. 9. and III/13. 53. [Caesar: *De bello Gallico* 5, 22.].

⁷ I/8. 10.

⁸ I/8. 10.

was a moral obligation and command.⁹ Therefore, resistance against the patriarch was equal to that against God, hence resistance and disobedience were sins. Nevertheless, the obedience and loyalty were moral obligations to the fatherly monarch. Sashalmi highlights that, besides the Bible and the theological arguments, the specific legal establishment of the certain countries was connected to the divine rights of kings, by which phenomenon the legal and theological arguments were inseparable.¹⁰ Várkonyi, supplementing the theological and legal aspects, emphasises that, in the early modern age ‘in an allegorical form, the father’s person guaranteed and expressed the unity of the created world.’¹¹

Filmer, analysing the characteristics of obedience, cites the Roman example on the fatherly power over their children from Bodin at some length.

The Romans, even in their most popular estate, had this law in force, and this power of parents was ratified and amplified by the laws of the twelve tables, to the enabling of parents to sell their children two or three times over. By the help of this fatherly power Rome long flourished, and oftentimes was freed from great dangers. The fathers have drawn out of the very assemblies their own sons, when, being tribunes, they have published laws tending to sedition. Memorable is the example of Cassius, who ‘threw his son headlong out of the consistory, publishing the law *agraria* for the division of lands in the behoof of the people. And afterwards, by his own private judgment, put him to death’ by throwing him down from the Tarpeian rock, the magistrates and people standing threat amazed and not daring to resist his fatherly authority, although they would win all their hearts have had that law for the division of land. By which it appears it was lawful for the father to dispose of the life of his child contrary to the will of the magistrates or people. The Romans also had a law that what the children got was not their own but their father’s, although Solon made a law which acquitted the son from the nourishing of his father if his father had taught him no trade whereby to get his living.¹²

In this citation, the rights of the *pater familias*, the content of the *patria potestas* and even the right of coercion of the *pater familias* (*coercitio*) is revealed. However, it is to be emphasised that Filmer took this quote from Bodin, who (i.e. Bodin) used the terminology of Roman law and history in his great work ‘The Six Books of the Republic’ (*Les Six livres de la République*)

⁹ I/10. 11–12.

¹⁰ Sashalmi Endre, ‘Abszolutizmus és isteni jogalap’ in Kiss Gergely, Radó Bálint, Sashalmi Endre, *Abszolutizmus és isteni jogalap. Szöveggyűjtemény* (Historia Ecclesiastica Hungarica Alapítvány / Magyar Egyháztörténeti Enciklopédia Munkaközösség 2006, Budapest) 11–38, 34. See further Kontler (n 3) 91–99. For the theory of absolutism, see further Kisteleki Károly, ‘Az abszolút monarchia teoretikus gyökerei’ and Sashalmi Endre, ‘Az abszolutizmus: az abszolút monarchia elmélete’ and Stipta István, ‘Az abszolutizmus fogalma, változatai és alkotmánytörténeti jellemzői’; all three articles are found in Képes György (ed), *Az abszolút monarchia* (2011, Budapest).

¹¹ Várkonyi (n 2) 87. Várkonyi, in his chapter on the authority of fathers, recalls the opus of Antonio de Guevara, the confessor of the Holy Roman Emperor Charles V, s, the Dial of the Princes (*Reloj de Príncipes*) in which Guevara compares the father with Marcus Aurelius.

¹² II/4. 18.

deliberately. Moreover, it was far more unhistorical and anachronistic, and we fell into the trap of unsubstantiated retrospection of the phenomena, if we saw the *pater familias* of Roman law in Filmer's theory! As it is argued so far, Filmer just like all his contemporaries, referred to the Bible as the origin of all scientific and social-political development. Filmer himself writes in many chapters that Adam is regarded to be the first father, the patriarch, and he deduces his theory from this fact. For him, the elements of ancient Roman history serve only as an affirmation.¹³ However, in his discourse on the people, Filmer regards Roman history in set terms, as the key argument to justify his theory. Why did the people become so significant to Filmer and in the early modern theory of the state? What did the role of the people mean in the political discourses? What was the monarch's attitude towards the people?

III The Role of the People in Early Modern Political Discourses

From the aspect of the early modern king, the people had several functions. On the one hand, on the theories of the sovereignty of the people, and on the primacy of the parliament, the basis of the power was the people itself. As a consequence, the monarch had limited power, whose limit was the people. On the theories of social contract, the monarch made a contract with the people, in which the people designated some or all of its rights to the monarch. Therefore, the form of the government was parliamentary, hence the interest and the will of the people were represented in the general assemblies i.e. parliaments or other particular assemblies of the estates.¹⁴

The opposite pole of the popular sovereignty; parliamentary governance and social contracts were in the absolute power of the monarchs who rule by the Grace of God, where the people were not the active subjects, but the passive objects of power. In this theory, the people were damned to obedience, even if the absolute monarch regarded his very task to defend and maintain the prime aim or the supreme law that was the salvation of the people. In Cicero's words *salus populi suprema lex esto*. In this context, it was irrelevant whether the kings had a true, ideal type of absolute power or they had just a demand for it. The cause of this irrelevance was that the monarch had either total or limited power over the people or the estates, if he lost his sense of reality and soundness or he ruled without the full range of political tactics, the king would reject the limits of his power by his putative absolute authority. Moreover, by the concept of Grace of God, the people had no other obligation

¹³ 'Property and community of goods did follow originally from him, and it is the duty of a father to provide as well for the common good of his children as for their particular.' II/4. 19.

¹⁴ For the theories of social contract, natural law and the antagonistic debate between Filmer and Locke see Kontler László, 'Locke és a liberális természetjogi hagyomány' in John Locke, *Értekezés a polgári kormányzatról* (Gondolat 1986, Budapest) 7–37. John Spurr, 'Style, Wit and Religion in Restoration England' in Stephen Taylor, Grant Tapsell, (ed), *The Nature of the English Revolution Revisited* (Boydell&Brewer 2013, Woodbridge, Rochester, NY) 233.

than the admiration of the monarch. Thus, the monarchs wanted to have both divine and civil authority on the divine anointing of the kings and on their absolute power.

Why did the monarchs fear the people? Why did they want to condemn them to unconditional obedience, if the monarchs' main principle was to provide them happiness and to protect the people during their whole reign? What did they think of the people indeed, if they despised them so much?

IV The Adjudication of the People by the Experiences of Ancient Roman History – The Development of the Popular Rule and Its Defects

In connection with the examination of the best government, Filmer dedicated almost the entire second chapter of *Patriarcha* to the examples of popular government in the history of antiquity, especially that of the Roman republic. He started his train of thoughts with the comparison of Aristotle's *Politics* and *Nicomachean Ethics*; according to the previous one, he held it against Aristotle that he had not made any conclusion about the best form of government. However, by a citation from the *Nicomachean Ethics*, Filmer was contented to quote the Greek author that the 'monarchy is the best form of government, and a popular estate the worst'.¹⁵ Moreover, Aristotle added that the monarchy was 'the first, the natural, and the divinest form of government'.¹⁶

In his following arguments, Filmer took the side of the conservative standpoint, by arguing that the reasons for the continuous existence of socio-political establishments were their effectiveness and acceptance, and that the more ancient an establishment was, the better it was for the people. Thus, the conservative point of view attributed the power of legitimacy to time and history. Moreover, in conservative ideas, time was completed by permanency and order, the connection of which meant legal certainty and tranquillity. 'Indeed, the world for a long time knew no other sort of government but only monarchy. The best order, the greatest strength, the most stability and easiest government were to be found all in monarchy, and in no other form of government.'¹⁷ And if the people subverted the ruling regime by 'wantonnes, ambition or factions', the only chance was that these 'bloody and miserable' 'mutations' were limited to a short period.¹⁸

After that, Filmer referred to the negative critics of democratic governments. He again recalled their temporality by arguing that Roman democracy, which was 'the most flourishing democracy that the world hath ever known'¹⁹ lasted for only 480 years, while monarchies

¹⁵ II/10. 24. [*Nicomachean Ethics* 1160a36].

¹⁶ Ibid. [*Nicomachean Ethics* 1289a39–40].

¹⁷ II/10. 24.

¹⁸ Ibid.

¹⁹ II/11. 25.

were much more long-standing, even for a millennium. The main peculiarity in this almost half millennium were the variability and instability that Filmer proved by the enumeration of the form of governments from the Tarquinius to Augustus. The two consuls after the king, the tribunes of the people, the council of ten men, the temporary dictators, the military tribunes and the changeability of these gave the evidence to Filmer that ‘for after they had once lost the natural power of kings, they could not find upon what form of government to rest. Their fickleness is an evidence that they found things amiss in every change.’²⁰

Filmer did not or did not want to realise the progress that the history of the ancient Rome went from monarchy to democracy. He highlighted only the two endpoints, the monarchy and the empire. The transition between the two poles was regarded only as deflection, deviation or an impasse, which, knowing the events, was a reasonable argument in retrospect. After this, it was not surprising that the description of the terror and bloodshed of the civil wars and the rebellions of slaves, the deterrent examples of the popular government, or in Filmer’s terms, the power of the multitude, was following in a detailed way. Gracchus, Apulius, Drusus, Marius, Sulla, Catilina, Caesar, Pompey, Augustus, Lepidus, Antonius were all the harmful consequences of the democratic regimes, who ruined not just the city of Rome, but the whole Italian peninsula as well.²¹ We should not forget that Filmer wrote the *Patriarcha* before the civil war, so he did not put down his own experiences of being dragged through the mire, of plunder and imprisonment.²²

Regarding democracy, Filmer tended to concede some parts of it, since he recognised that it was for some time very popular; even so, he put restraint on this popularity to the city of Rome and not to the entire empire. ‘For no democracy can extend further than to one city. It is impossible to govern a kingdom, much less many kingdoms, by the whole people, or by the greatest part of them.’²³ Filmer’s argument implied that he could accept democracy, but only in city-states, while in the realms of England, Scotland and Ireland with the personal union of the Stuarts i.e. in Great Britain²⁴ popular government is inapplicable.

Filmer was truly aware of the expansion of the Roman Empire under the republic; even so, he considered it only as an extension in quantity and not quality. Rome became the

²⁰ Ibid.

²¹ Ibid.

²² There are some signs that the first version of the *Patriarcha* was written prior to the beginning of the 1630’s. More precisely, according to the literature, the first two chapters were written earlier than the third, which last is not in direct connection with the previous two, either in structure or in content. In the most recent research, Cuttica dates the completion of the *Patriarcha* between 1628 and 1631; however, according to the arguments by Tuck and Sommerville, he holds the hypothesis as well that there had been a very first version that was created between 1606 and 1614. Sommerville (n 3). Introduction xxxii-xxxiv, and Richard Tuck, ‘A new date for Filmer’s *Patriarcha*’ (1986) 29 *Historical Journal*, 183–186. <<https://doi.org/10.1017/S0018246X00018677>> accessed 19 October 2021; Cesare Cuttica, *Sir Robert Filmer (1588–1653) and the patriotic monarch. Patriarchalism in seventeenth-century political thought* (MUP 2012, Manchester) 86. <<https://doi.org/10.7228/manchester/9780719083747.001.0001>> accessed 19 October 2021.

²³ II/11. 25.

²⁴ The term Great Britain was used in common talk but was not official until the Act of Union in 1707.

mistress of the world in vain, because the foundation of the empire was laid down under the kings, and the perfection of the empire was the achievement of the emperors. The greatest conquests were under Trajan, and the longest period of peace, the *pax romana*, was under Augustus, hence they were the merits of the emperors.²⁵

Regarding the analysis of ancient Roman history, it is inevitable to examine the role of generals in the early modern age as well. Thomas More highlighted in his *Utopia* Sallust's remark on soldiers, in whose training regular drilling was essential: 'hand and spirit grow dull in lack of practice'. More wanted to achieve this goal by an army of veterans and by regular or even constant warfare which was the opposite to the early modern wars waged by mercenaries.²⁶

Rome, even having the most capable soldiers, had to nominate by necessity a military dictator though, 'thereby giving this honourable testimony of monarchy, that the last refuge in perils of states is to fly to regal authority'.²⁷ The lack of the dictator would tinge the picture; although the army of the republic defeated the aggressors, Filmer nonetheless attributed this success only to a superhuman miracle²⁸ and not to the form of government. Moreover, he quoted the last phase of the wars as a lesson. '*Suis et ipsa Roma viribus ruit* [Rome fell by her own might] for the arms she had prepared to conquer other nations were turned upon herself, and civil contentions at last settled the government again into a monarchy.'²⁹

Filmer proved the development of the democracy of Athens; in Filmer's words, the popular estate of Athens, by a smart and creative though weak argument, that we cite only to show the ingenuity. The constitution of democracy in Athens³⁰ was 'not because of the vices of their last king, but for that his virtuous deserts were such as the people thought no man worthy enough to succeed him – a pretty wanton quarrel to monarchy!'³¹ Further, contrary to the citation, Filmer mentioned king Codrus's self-sacrifice, because, due to the prediction, Codrus could only protect Athens if he fell in battle. Filmer deduced from this fact that Athens changed the form of government out of her love and respect towards king Codrus.

On the contrary, the overthrow of the Roman kingdom was 'out of the hatred to their Tarquin'.³² According to Filmer, neither Athens nor Rome 'thought it fit to change their state into a democrac'.³³ To testify his statement, Filmer argued that the archons and consuls were close to monarchs, i.e. to a single person's personal rule. Mathematically Filmer was right, yet, he deliberately or unknowingly ignored that the archons' and consuls' authority was not in their rights that were hardly limited by the people, and it was therefore very similar to that

²⁵ II/12. 26.

²⁶ Thomas More, *Utopia* (ed. G. M. Logan; trans. R. M. Adams, 2016, Cambridge) 18.

²⁷ II/13. 26.

²⁸ Ibid.

²⁹ Ibid.

³⁰ NB. After the monarchy, Athens became an aristocratic republic at first, and only after that followed democracy.

³¹ II/14. 26.

³² Ibid.

³³ II/14. 27.

of the monarch's. The main characteristics of these offices was that they were exchangeable in person and their official function was limited in time.

Filmer uncovered the nature of the liberty of the antiquity in *Observations Concerning the Originall of Government...*, his work of about one and a half decade later.

For the liberty of the Athenians and Romans is a liberty only to be found in popular estates, and not in monarchies. [...] meaning every particular citizen to be free. Not that every particular man had a liberty to resist his government or do what he list, but a liberty only for particular men to govern and to be governed by turns [...] This was a liberty not to be found in hereditary monarchies. So Tacitus mentioning the several governments of Rome, joins the consulship and liberty to be brought in by Brutus, because by the annual election on consuls particular citizens came in their course to govern and to be governed [Tacitus: *Annales* 1, 1].³⁴

However, from Roman history, Filmer did not alter the past in the *Patriarcha* when he argued that 'the people by lessening the authority of their magistrates, did by degrees and stealth bring in their popular government'.³⁵ He did not alter in his final conclusion, but became very enraptured by his closing remarks, 'I verily believe never any democratical state showed itself at first fairly to the world by any elective entrance, but they all secretly crept in by the back door of sedition and faction'.³⁶

As a consequence of popular rule, not only could monarchs live in bitter exile, but honest, meritorious and fair politicians, generals and leaders. Rutilius, Metellus, Coriolanus, the two Scipios and Tully lived in exile as well. In which situation, the mob and the rump succeeded and Rome 'was a sanctuary for all turbulent, discontented and seditious spirits'.³⁷ The corruption, the struggle of the factions, the purchase of the voice of the people, the murders from political interests made Rome a backdrop for bloodshed.

V The Premonition of the Course of the Events of the Revolutions – According to Filmer's Opinion of the People

Filmer found the above mentioned phenomena as inevitable and necessary compounds of popular rule, and the cause of this was that

the nature of all people is to desire liberty without restraint, which cannot be but where the wicked bear rule. And if the people should be so indiscreet as to advance virtuous men, they lose their power, for that good men would favour none but the good, which are always the fewer in number;

³⁴ 'Observations Concerning the Originall of Government' in Filmer (n 3) X. cap. 190–191.

³⁵ II/14. 27.

³⁶ Ibid.

³⁷ Ibid.

and the wicked and vicious (which is still the greatest part of the people) should be excluded from all preferment, and in the end, by little and little, wise men should seize upon the state and take it from the people.³⁸

Filmer's departure from Roman history concentrates several social principles on popular government. First of all, Filmer argued that, in democracies, politics was inevitably reduced and simplified into two sides. The logic of it was that there were the good and the bad. The good were evidently their own party, while the other could be only the bad. This confrontation made the frame of democracy, in Filmer's point of view. Filmer's other thesis was that, from the distortion of this confrontation, the immoral, wicked people as a consequence of the discordance gained power; however, paradoxically, the state of affairs became beyond control, so that finally the vicious people became fewer in number and the wise seized power.

This paradoxical situation, when bad times creates good people, and thereby it brings good times, supplemented by the unlimited liberty of the people, explains the phenomenon that Filmer could only forebode but not experience. This thesis is nothing else but revolution, which is the most radical and threatening form of popular power, that 'devours its own children', as created by Jacques Mallet du Pan (1749–1800), a French journalist. This thesis was revealed for the first time in the English revolution. The explanation of it is that, in turbulent times, the people, as a result of their unlimited liberty, feel the possibility of getting closer to power. By getting the power, the new rank or party directly under or out of the previous rank in power, wants to stop making changes, while the ranks under them want to continue the changes. The term being out of power is important in this explanation because this model is able to describe either the linear or concentric motion of the ranks, without using the old Marxist terminology of the struggle of the classes. In this interpretation, it is irrelevant whether the ranks having no power are under the top rank, or out of the centre rank, so whether we use the vertical or the horizontal point of view. However, the vertical usage implies some suppression, while the horizontal has some competitive characteristics, such as the political parties in parliaments.

The essence of the model is that, in turbulent times, all ranks move towards the centre, i.e. to seize power. From the contrast or antagonism between the ranks, it follows that if the conflicts cannot be solved by negotiations, sooner or later weapons will provide the solution,³⁹ until the time of consolidation comes. The English civil war gives an excellent example of this phenomenon. Charles I was first deposed then beheaded, later on the Presbyterian majority in Parliament seized the power. However, they came into conflict with the independents and the levellers. The levellers were heavily beaten and oppressed by Oliver Cromwell, thus he hindered the levellers from seizing power, so the rank demanding full social equality lost in the progress of the revolution. After Cromwell's military dictatorship, the consolidation of the Stuart's followed, known as the

³⁸ II/15. 28.

³⁹ For the details of the civil wars see further an excellent concise summary by Blair Worden, *The English Civil Wars 1640–1660* (2009, London). For the execution of the king see further Charles Spencer, *Killers of the King. The Men Who Dared to Execute Charles I.* (2014, London).

Restoration. The Glorious Revolution after the Restoration, was a further return to the previous state, which was apparent in the regained position of the landowner gentry, and the Stuart dynasty's succession in the female line. This sequence of the events is an apparent example that, after some radicalization, the revolutions reach the final stage of consolidation, in which by expelling the radical elements from power, there would be chance of achieving changes by compromises.⁴⁰

The concept of revolution meaning radical socio-political changes became clear only in the 19th century. Until that time, it meant circulation, return to the original state. (From the compounds of 're' = 'back' and 'volvo, volvere' = 'turn, rotate'.) The Glorious Revolution ending the civil war and the Restoration was regarded in this original sense as a revolution,⁴¹ which strengthens Filmer's foreboding about the emergence of the moral people from the quarrels generated by bad times and people.

After this, it is not surprising, that Filmer, recalling Thucydides, Xenophon, Livy, Tacitus, Cicero and Sallust, described the imponderability, fallibility, frailty and inconsequence of the people.

They are not led by wisdom to judge of anything, but by violence and by rashness. [...] After the manner of cattle they follow the herd that goes before. With envious eyes they behold the felicity of others. [...] They are most prone to suspicions, and use to condemn men for guilty upon any false suggestion. [...] When there is no author, they fear those evils which themselves have feigned.⁴² Therefore, prior to Hobbes *Leviathan* Filmer called the people as a 'beast of many heads.'⁴³

Moreover, Filmer again described the future events of not only the Cromwellian period, when he analysed the nature of popular government or the power of the multitude.⁴⁴

As it is begot by sedition, so it is nourished by arms; it can never stand without wars, either with an enemy abroad, or with friends at home. The only means to preserve it is to have some powerful enemy near, who may serve instead of a king to govern it, that so, though they have not a king among them, yet they may have as good as a king over them, for the common danger of an enemy keeps them in better unity than the laws they make themselves.⁴⁵

Thus, according to Filmer, the mutual enemy was the essential component for democracy because the monarch's personality as a binding element did not exist. From another point of view, and from Filmer's terminology, it was apparent that this binding component was

⁴⁰ The traditional whig interpretation is debated in the work of Edward Vallance, *The Glorious Revolution. 1688 – Britain's Fight for Liberty* (Little, Brown & Company 2006, London).

⁴¹ Reinhart Koselleck: *Az elmúlt jövő. A történelmi idők szemantikája* (Atlantisz 2003, Budapest, 75–97) 80.

⁴² II/15. 28.

⁴³ *Ibid.*

⁴⁴ For the events and the interregnum see further A. A. Hillary, *Oliver Cromwell and the Challenge to the Monarchy* (Pergamen 1969, London) and Szántó György T., *Oliver Cromwell. Egy katonaszent élete és kora* (Maecenas 2005, Budapest).

⁴⁵ II/15. 29.

positive in monarchy, and negative in democracy. Adding to Filmer's argument, we have to emphasise that not only did republic governments solved their internal problems by external means, i.e. with wars, but the kings at any age lived with this method as well. Yet, we accept in Filmer's argument that in republics it is more difficult to be align oneself with any person who could keep the whole of society together through his/her own person.

VI The Comparison of the Regal and Popular Form of Governments

Filmer's judgement, having empirical grounds about the two forms of government was and still is unquestionable. '[The way] to examine what proportion the mischiefs of sedition and tyranny have one another, is to enquire in which kind of government most subjects have lost their lives.⁴⁶ This statement is so eternal that it has to win the admiration of all people. The question was which form of government can bring the greatest peace. Filmer resorted to Roman history again. He compared the civil wars of the last century of the admired popular rule with the ferocity and cruelty of the tyrant despotic emperors. Unsurprisingly, recalling Sulla's biography by Plutarch, he reached the argument that 'the murders by Tiberius, Caligula, Nero, Domitian and Commodus, put all together, cannot match that civil tragedy which was acted in that one sedition between Marius and Sulla.⁴⁷

To resolve this problem, Filmer, on the one hand, quoted James I's arguments from *The Trew Law of Free Monarchies*. 'A king can never be so notoriously vicious but he will generally favour justice, and maintain some order, except in the particulars wherein his inordinate lust carries him away.⁴⁸ This argument is improper theoretically, because the difference between a tyrant and a king is only in the latter's intention, i.e. that he does not want to be a tyrant. Moreover, the king is great because he is the king, so the king's greatness comes from the concept of the king, thus the king is great, because he is the king. This tautology appeared in Erasmus's *The Education of a Christian Prince*.⁴⁹ Erasmus considered the king to be a great king according to his education. If the king's educator was great, the king would become great as well. To stop this circular arguments, we have to qualify a king as great, if he achieved this qualification by his deeds. Thus, a king can achieve the adjective great during or especially after his reign; until his death he can only aim to be great.

However, we have to agree with Filmer that, during a civil war, the whole of society wages a war against each other, where neither life, nor property is taboo. Since the aim is to seize power and to defeat the other part of the nation, being defeated is equal to high treason when the rebels pay with their life. However, in a kingdom, the monarch cannot afford to impose life sentences and to acquire the property of the citizens, because that would make his own realm weaker.⁵⁰

⁴⁶ II/16. 29.

⁴⁷ Ibid.

⁴⁸ II/16. 30.

⁴⁹ Erasmus, *The Education of a Christian Prince*.

⁵⁰ II/16. 29–31.

This reasoning is in contrast with More's *Utopia*, in which he quotes and interprets the example of Crassus:

[A] king can never have enough gold, because he must maintain an army. Further, that a king, even if he wants to, can do no wrong, for all property belongs to the king, and so do his subjects themselves; a man owns nothing but what the king, in his goodness, sees fit not to take from him. It is important for the king to leave his subjects as little as possible, because his own safety depends on keeping them from getting too frisky with wealth and freedom. For riches and liberty make people less patient to endure harsh and unjust commands, whereas poverty and want blunt their spirits, make them docile, and grind out of the oppressed the lofty spirit of rebellion.⁵¹

VII The Critics of the Mixed Form of Government of Monarchy and Popular Government

In fortunate cases, the advantages of monarchy and democracy, are united in a mixed form of government. Yet, according to Filmer's opinion, it was impossible.

For if a king but once admit the people to be his companions, he leaves to be a king, and the state becomes a democracy. At least, he is but a titular and no real king, that hath not the sovereignty to himself. For the having of this alone, and nothing but this, makes a king to be a king. [...] For if [...] the king, the nobility, and people have equal shares in the sovereignty, then the king hath but one voice, the nobility likewise one, and the people one, and then any of two of these voices should have power to overrule the third. Thus the nobility and commons together should have power to make a law bind the king, [...] but if could, the state must needs be popular and not regal.⁵²

It is detectable that Filmer overreached himself and cannot imagine the real significance of the mixed form of government that Cicero also held as optimal; namely, that the mutual overlapping of the authorities in the separation of powers, in this case the authority of the monarch and the people, would hinder one and the other. The mixed form of government demanded compromises be made so that both sides would be satisfied in the governance.

Filmer dedicated a separate volume to the question of the mixed form of government, the title was telling: *The Anarchy of a Limited or Mixed Monarchy* [...]. This work was written in 1644, but was published only in 1648. In this work, Filmer criticized sentence by sentence the parliamentarian Philip Hunton's *Treatise of Monarchy* published in 1643. Filmer, as we have seen, shared his opinion on the mixed form of government in the *Patriarcha*. To make his point of view legitimate, he referred to the Roman civilization with two Latin mottos.

⁵¹ More (n 26) 34.

⁵² II/17. 32.

One of the motto was '*Libertas populi quem regna coercent / Libertate perit* – The liberty of a people which is subject to royal government is lost if they gain too great liberty'.⁵³ If we consider this statement formally and mathematically, we have to agree that the thing that is everyone's is, worth less than if it were the property of the few. However, the value of liberty is just the opposite; the more people have it, the broader it is, and thus it makes a greater control on the power. This contradiction was exactly the point between the Stuarts and the Parliament in the civil war. Filmer's concept of liberty reflected the principles of the *ancien regime*,⁵⁴ and it appeared in the other Latin motto: '*Neque enim libertate gratior ulla est / Quam domino servire bono* – Nor is there any more welcome liberty than to be subject to a good master'.⁵⁵ In this sentence, beyond the obvious obedience, we can observe another phenomenon that lasts until today. This is the trust of people towards professionals, the master or the expert, to whom, because of their professionalism, the people transfers the power and thus the responsibility. The expert in this case was the monarch who had the exclusive right for the secret knowledge (*arcana imperii*) to govern and rule.⁵⁶

It is similar in *The Free-Holders Grand Inquest*, which is regarded as the continuation of *Patriarcha* in the literature, in which Filmer gives the royalist interpretation of English constitutional history. Beyond the motto, we cannot find any explicit reference to the Romans, yet, the motto speaks for itself. '*Fallitur egregio quisquis sub Principe credit / Servitium: Nunquam Libertas gratior extat, / Quam sub rege pio*. Anyone who believes that it is servitude to live under a prince is badly mistaken: there is no more welcome liberty than to be under a righteous king'.⁵⁷ We can observe the return of unconditional obedience in this motto. Righteousness as a criterion generates legal certainty, and at the same time general sense of safety, which should be the measure for both the monarchy and popular government.

It is undeniable that, by mixing the forms of government, the legal principle that no one can be judge in his/her own case is violated. If the monarch and the people make a contract about the power, and then a quarrel emerges, one party would be a prosecutor as well. This authority and role of the people, caused the death of several good emperors in Roman history (such as Pertinax, Alexander Severus, Gordianus, Gallus, Aemilianus, Quintilius,

⁵³ [Lucanus: Lib. 3, Pharsalia III. 145–146.] *The Anarchy of a Limited or Mixed Monarchy*. In Filmer (n 3) 131.

⁵⁴ As for the the traditional whig interpretation of the historical context, we shall recall that Charles I wanted to rule as a continental-style absolutist monarch but he was unable to do so because, ever since Magna Carta was signed in 1215, kings had to rely on Parliament to make and pass laws – including those relating to taxation, and he constantly needed more money to fund his lifestyle and enable him to get more involved in the 30 Years War. For much of his reign he summoned Parliament, submitted a bill to raise taxes and Parliament voted it down and used their time to criticise him instead. He then prorogued Parliament for years at a stretch and this routine ultimately led to civil war. Yet, the revisionist historiography e.x. Kenyon heavily argues contrary, and denies the Stuart monarch's willingness to build absolutism. Moreover, Filmer wrote the *Patriarcha* in the second half of the 1620's, so he could have not known that Charles I would prorogue the Parliament for 11 years.

⁵⁵ [Claudianus: De Consulatu Stilichonis III. 114–115.] 'The Anarchy of a Limited or Mixed Monarchy' in Filmer (n 3) 131.

⁵⁶ I/1. 3–4.

⁵⁷ [Claudianus De Consulatu Stilichonis III 113–115] 'The Free-Holders Grand Inquest' in Filmer (n 3) 69.

Aurelianus, Tacitus, Probus and Numerianus), while, at the same time, it caused the election of several bad ones (such as Nero, Heliogabalus, Otho and Vitellius).⁵⁸

Conclusions

In the early modern theory of the state, as a consequence of their views based on the equality of the citizens, the theoreticians of social contract and parliamentarism could quote only the tyrant emperors as examples from antique Roman history. However, as a consequence of the theory of the law of nature, it was not necessary for them. There cannot be found any explicit reference to Roman history in Locke's *Two Treatises of Government*. Yet, Cicero had a great influence on his theories.⁵⁹ The conservative, royalist authors used Roman history as a deterring example. Robert Filmer was an outspoken and excellent author of this type. He quoted the Roman examples of the civil war at great length, and he reached several conclusions that are still valid to this day. According to him, the people have been and will be unpredictable, suggestible, irresponsible, selfish etc. From these facts, it is self-evident that the people cannot participate in the secret profession (*arcana imperii*) of the monarchs, i.e. the governance of the people.

Filmer could not live under the rule of Cromwell and the independents or even in the leveller's movement entirely. However, after the execution of Charles I, the people could present that though its attitude, it can build up a great democracy. The people could not live with the settlement of institutional guarantees of the power. Moreover, its power collapsed as a house of cards at the very time of the commanding presence of the army, i. e. when Cromwell's military administration was in effect enforcing the will of the Protector. Thus, Filmer's argument got a true testimony about the nature of popular rule of our c. 450 years of hindsight. When the conservative tory politicians published Filmer's *Patriarcha* during the exclusion crisis (1679–1681), they undertook to legitimize the future James II, at that time the Duke of York in the eyes of the public. According to this work, the title for James's reign from the Grace of God were James's succession in Adam's power, his fatherly power over the people, and the people's unconditional obedience towards the king. Thus, the grounds of the power derived from the thousands years of tradition mentioned in the Bible, i.e. from the respect of the role and the head of the family, which are mostly emotional arguments.

The question is still to be answered. How can the unpredictable, impressionable, so the people led by emotions be governed with the due obedience to the rigorous father? What can James II do with the people that had already tasted the Marloweian sweetness of a crown?

⁵⁸ II/18. 32–33.

⁵⁹ Hamza Gábor, 'Cicero De re publicá-ja és az antik jogbölcselet' in Cicero, *Az állam* (trans. G. Hamza; 2007, Budapest) 7–56.

Looking for the Disappeared Comparative Advantages in Public Service

Abstract

A change in labour law necessarily follows a change of political and economic regime. In 1992, the labour regulation of competition, non-profit and public sector in Hungary became structurally separate. However, due to budgetary problems, the regulation of the civil service is structurally divided in the regulation of this sector, namely in a dual system trichotomous division. The study describes and analyses the three-decade problems of public service regulation, in particular the unjustified fragmentation of regulation and the amortization of comparative advantages, which adversely affect the ability of the civil service to acquire and retain labour force. As for the end result, it may adversely affect the quality of public services and members of society.

Keywords: comparative advantage, public sector, dismissal, civil service official, public servant, remuneration, fragmentation of legislation

The fact that lawyers create the laws is similarly insane as if the doctors had created the diseases.
Murphy's Law for Lawyers

According to the public administration legal textbook published in the Horthy Era, financial advantages played the most important role among the entitlements of public officials.¹ Due to the changing values and circumstances and the occurrence of new phenomena, the 75 years that have passed undermined and changed numerous rules on employment conditions. My paper investigates the stability of public service jobs, considered as a comparative advantage, and the predictability of advancement. These are complex legal

* István Horváth is assistant professor at Eötvös Loránd University, Faculty of Law, Department of Criminology. This study was prepared under Project 5.2.2 'Research of the investigation of international organised crime from the point of view of the exchange of information' of the Internal Security Fund supported by the Ministry of the Interior in Hungary.

¹ Vargha, *Közigazgatási jog szeminárium* (jegyzet, Budapest, 1940/41. tanév) 181.

institutions that characterize the attraction of public service in the labour market and the quality of public services. I shall examine the afterlife of the erstwhile public service comparative advantages...

I The Comparative Advantage: From Economy to Public Service

David Ricardo, the British classical economist, established the model based on *comparative advantages*. He came to the conclusion that relative advantages must prevail over absolute advantages in the field of trade.² *The adaptation of relative advantages defined in economics to the public sector* indicates a positive derogation from the private sector, revealed in particular employment conditions. Such conditions, that result in a lower salary than in the private sector, however, provide a stable and reliable existence, avoiding the risks of the private sector. By this, the ability of the public sector to acquire and maintain a workforce was secured. The reliability of employment conditions is revealed in the regulations of two legal institutions: on the one hand, the *restriction of terminating the legal relationship by the employer* compared that of the private sector and, on the other hand, *career progression* that guarantees pay increases upon meeting the legal provisions. That is professional advancement.

Regulatory tools related to common labour law guarantee the comparative advantages in the public sector. The legislative role of the state is dominant, affecting all segments of the legal relationship and is mainly *binding* in nature, hence negotiation between parties is excluded or restricted. For this reason, the regulatory function of the collective agreement is excluded or limited for a particular group of employees. The employer, trade union or their confederation acquires power to regulate in cases where the state resigns from the legislation process and hands over this competence.³

II The International Environment of Regulation: The Opening of the Closed Public Sector

Prior to surveying the Hungarian regulations, it is reasonable to provide a short overview of the *international trends* affecting the public sector. The economic processes of the 1990s urged developed countries to revise the legislation of public affairs and reconsider *the role of the state* in them. *Reform programmes* aimed at tasks of the private and public sectors were launched in almost all OECD countries, which clearly outline the trends although the results varied. The goal was to make the public sector more effective and more adjusted to the needs of society.

² Ecopedia.hu, 'Komparatív előny' <<http://ecopedia.hu/komparativ-elony>> accessed 17 September 2017.

³ Franz Traxler, 'Collective bargaining and industrial change: a case of disorganization? A comparative analysis of eighteen OECD countries' (1996) 12 (2) *European Sociological Review*, 271–287. <<https://doi.org/10.1093/oxfordjournals.esr.a018192>> accessed 19 October 2021.

Many commonalities and similarities were observed in the *human resource management* of the private and public sectors, hence the *raison d'être* for applying same solutions occurred for their codification. Demands articulated around the millennium included *efficacy and downsizing, decentralisation and flexibility, independence and responsibility in using human resources*.⁴

A common feature was the *transformation of the labour market*: it became gradually harder to acquire and maintain a quality labour force in the public sector. Globalisation and international integration require the investigation of the conditions of public service in international dimensions. Studies date the initiation of changes in public sector, the opening of the closed public sector and the introduction of certain elements of private labour law to the beginning of the 1980s. The traditional assignment was partly replaced by particular contractual forms to break down the traditional hierarchy of the public sector.⁵ The change was mainly driven by the high level of public expenditure that could negatively affect national competitiveness in the globalising world economy.

The *macroeconomic necessities* were reinforced by the *Maastricht criteria* (the conditions for adopting the Euro as a common currency) in the EU countries that were required for economic and monetary union (EMU) membership and the Stability and Growth Pact of 1997, by maintaining the pressure on the budget policy of the governments. Moreover, added to the macroeconomic factors was *microeconomic scepticism*, namely, whether the traditional forms of public service could strengthen and maintain all employees in this sector and the level of services available, reflecting the growing expectation regarding both quality and efficacy. In most countries, the characteristic features of the legal status in public service, including the 'cumbersome' system of public and legal administration, are the central assessment of salaries, primitive forms of human resource management and resisting the impact of the trade unions.⁶

Decisive facts: directly or indirectly, governments employ public servants constituting 20–30% of the total labour force; they define the expenditure of the public sector with regard to the economic policy in effect. The political sensitivity of particular public services justifies the government having strict control over such services. Numerous proposed structural and employment reforms support the increasing role of public sector employers; however, the government aspect mentioned urges control over the activities of particular organisations. For the trade unions, public service is one of the critical areas of their exercise of economic and political influence; nevertheless, they have to face the decreasing number of members and constant pressure due to employers' need for flexibility.⁷

⁴ Horváth István, *Diagnózis és terápia, Javaslat a magyar közszolgálat szabályozásának reformjára – figyelemmel az EU tagállamok jogalkotására, hazai múltunkra és jelenünkre* (PhD thesis, Pécsi Tudományegyetem, Állam- és Jogtudományi Kar, Munkajogi Program 2006, Pécs) 127.

⁵ Kiss György, *A közszolgálat – hatósági és nem közhatalmi jellegű – munkavégzés szabályozásának meghatározó elemei az Európai Unió egyes tagállamaiban* (manuscript, 2002) 3–16.

⁶ 'Synthesis of reform experiences in nine OECD-countries: Government roles and functions and Public Management' (OECD PUMA/SGF 1999 Paris, 99/1) 6.

⁷ Kiss (n 5) 1–3.

1 Jobs in the Public Sector: The Amortisation of Stability

One of the main elements of the special legal regulation of public service is *the stability of employment*; namely, it is long term and provides a certain guarantee for the individual's career. In many OECD countries, however, *stability as value is being eroded*, and many public servants are employed for a definite period.⁸

The *Employment policy* of particular OECD countries directly and indirectly affects the regulation of public service. The *downsizing processes* due to economic efficiency offer two major methods. According to the first one, the number of employees should be reduced by a certain percentage in each year. According to the second, the number of employees in the public sector is reduced due to privatisation, outsourcing or other institutional reforms. One of the consequences of privatization may be being redundant that is accompanied by other negative consequences. On the one hand, the employment of ex-public servants in the private sector requires an active employment policy and training, and, on the other hand, downsizings often resulted in the deteriorating level of public services. The first great volume downsizing in Hungary, promulgated in a government decree, took place in 2003.⁹

2 The Transforming Social Values Decompose the Comparative Advantages

Critics and expectations regarding the Hungarian public service cannot exclude the problems that occurred within the framework of OECD membership. It is to be highlighted that while *employment security in the public sector decreased* and legal possibilities providing privileges changed, salaries and benefits were not raised in parallel with the private sector. Due to this process, the comparative advantages of the public sector have been narrowed down or even diminished, hence qualified labour and managers in particular will be hard to be found in the public administration. For this reason, a separate *chief official body* was established in various countries to manage this problem. This body usually preserves the narrowing and diminishing comparative advantages (e.g. excellent remuneration, other benefits).¹⁰

A *new dimension of the conflict*, in which the legislation takes a side, is the difference between the traditional public service values and the demands brought by the rapid changes in society. The expectation regarding the efficient operation of public service plays an important role in almost all OECD countries; however, it requires qualified labour that is hard to come by. Consequently, human resource management shall be totally revised and renewed.¹¹

⁸ Horváth (n 4) 107.

⁹ Government Decree 1106/2003. (X.31.) on the government redundancy.

¹⁰ Act XXXVI of 2001 introduced institution of senior counselor providing the excellent salary advancement. The Act LXXXIII of 2007 terminated this position.

¹¹ Balázs István, 'A közszolgálati fejlődés tendenciái a világ fejlett országaiban' (2011) 51 (11) Magyar Közigazgatás, 641–647.

3 Diminishing Salary Advancement Based on Time in Public Service

In addition to the above trend, public service remuneration considered as comparative advantage and eliminating the risk of the private sector is gradually deteriorating. It is *career advancement based on service time spent in the public sector* that is also attacked by the generation conflict between the senior generation with less ability to adapt and the more flexible and skilled young generation.¹² The restrictive effect of *state economic policy* draws the attention of the government to the salary and employment policy of the public sector even more. The complex effect of the increasingly global and integrated financial markets and the monetary coercive factors regarding the unified currency system of the EU undermined a certain set of measures available to member states, restricting their decision-making autonomy. The government therefore gripped tighter on the remaining economic policy tools, including *public sector expenditure*, more precisely, the rules on salaries in the public sector.¹³

Salary advancement based on the service time spent in the public sector and guaranteed by a legal provision considered as a comparative advantage was undermined by *performance evaluations*, imported from the private sector. The presence of performance requirements in the public sector was unknown prior to that. The *New Public Management* that gained momentum in the mid-1990s aimed at improving the effectiveness and quality of the public sector tried to adapt various administrative and organisational methods that had been successful in the private sector. The time spent in the public sector, previously considered as a comparative advantage, was gradually replaced by performance assessment and *remuneration based on such assessments*. Such a pay system is regarded as questioning *public service as a traditional career* and challenged career advancement and employment stability. A negative assessment not only affects the salary paid to the public servant but also their employment. A series of negative assessments may lead to the termination of employment. The vanishing of classical public service values may upset the *labour market balance* between the private and public sector.¹⁴

III The Legal Structure of Civilian Public Service: Causeless Duplications with Controversial Rules

Before analysing the comparative advantages, I shall briefly summarise the *regulatory framework* of in which it is situated. The legislative result, or more precisely, the consequence of change of system in the field of labour law is the duplicated legal regulation of the civilian

¹² Balázs (n 11) 645.

¹³ Stephen Bach, *The Management of Employment Relations in the NHS: Pay, Work Organisation and the Internal Market* (PhD thesis, University of Warwick 1998) 4.

¹⁴ Balázs István, 'A teljesítményhez kötött illetményrendszer bevezetésének helyzete az Európai Unió országában' (2002) 52 (10) Magyar Közigazgatás, 577–581.

public service; namely the parallel introduction of public servant and civil servant legal status. The introduction of the market economy required the elimination of the earlier unified system that disregarded the legal status and the function of employers. For this reason, *Act XXII of 1992 on the Labour Code* (hereinafter referred to as the earlier Labour Code), and – as I term civilian public service – *Act XXIII of 1992 on the Legal Status of Civil Servants* (hereinafter referred to as Act on Civil Servants) that regulates public service and *Act XXIII of 1992 on the Legal Status of Public Servants* (hereinafter referred to as Act on Public Servants) were adopted.

The passing of the earlier Labour Code aimed at the for profit and non-profit sectors was accompanied by the legal regulation of the public sector. It was not necessary, however, that budgetary institutions carrying out local public tasks and providing public services were not included as employers in a single bill. Undoubtedly, a striking difference between civil servant and public servant legal status was found in the former practicing the power of the state. *The different labour law regulation of the for-profit sector and the public sector* does not explain, however, the so-called *trichotomous law structure*, as practicing the power of the state as characteristic feature was not considered as a cause. My opinion is supported by the foreign and Hungarian legal history, as there is no such distinction as it is specified in the Act on Civil Servants and Act on Public Servants.¹⁵

The regulation of *civil servant status* is not only the consequence of the change of systems but also a replacement of a missing link in a historical process. On the contrary, the *public servant status* was brought about by the fall of communism. A bigger group of people carrying out various public services (e.g. in public education, public health, public library) was offered a labour market status that was better than those in the private sector – but worse than that of civil servants – to secure the level of services and one of the sources of citizens who provided the political foundation of the system. In exchange for that, the state restricted the assertion of interest in labour relationships to some extent.¹⁶

The background of the labour regulation entering into effect in 1992 reveals a fundamental financial factor that could not have been omitted by the governments in power. This is *the economic state of the country, namely the gigantic budget deficit*.¹⁷ In the first half of the 1990s, the governments sacrificed the sources required to establish a bourgeois existence for supporting the accumulation of capital. This is clear from the government decree of 1995 on austerity measures for economic stabilisation: ‘...the Government thinks it is desirable that the allocation of assets from the budgetary institutions and the people should be carried for the benefit of entrepreneurs’.¹⁸

The Act on Public Servants and then Act CXCIX of 2011 on Civil Service Officials (hereinafter referred to as Act on Civil Service Officials), which in 2012 replaced the Act on

¹⁵ Horváth (n 4) 28.

¹⁶ Berkí Erzsébet, *A köz szolgáloi* (manuscript 1998, Budapest) 3–5.

¹⁷ Barabás Gyula, Hamecz István, Neményi Judit, ‘A költségvetés finanszírozási rendszerének átalakítása és az eladósodás megfékezése – I. rész’ (1998) XLV (July–August) *Közgazdasági Szemle*, 653–674.

¹⁸ Government Decree 1023/1995. (III. 22.) on the corrective measures of 1995 for the economic stability.

Civil Servants, and Act LII of 2016 on State Officials (hereinafter referred to as Act on State Officials) (see also *V. 1. The fragmentation of legal regulations (two codification types)*) resulted in another type of duplication from 1992, that employment in public services requiring a similar legal status were regulated otherwise without any proper reason. Work carried out under such a legal relationship meant fulfilling state and local government tasks specified in legal regulations, covered by budgetary sources.

IV Stability of Employment – Undermined or Diminished Comparative Advantages

Regarding the *stability of legal status*, a comparative advantage is, what legal institutions are available to prevent the termination of employment by the employer, through no fault of the public sector employee. Before that, I shall reflect on the differences governing the rules on termination specified in Act I of 2012 on the Labour Code (hereinafter referred to as Labour Code) and on dismissal specified in the Act on Public Servants and Act on Civil Service Officials.

1 Termination and Dismissal Causes

Termination as per the Labour Code, which is the typical termination of so-called stable legal relations for an indefinite period,¹⁹ as a means of terminating employment has been replaced by employee *dismissal*, reviving the name that was applied in law prior to 1945. Termination and dismissal are usually accompanied by a specific *cause*. For the regulation of these, the legislator applied different methods. The Labour Code preserved the *relatively fixed dismissal system* of the previous Codes. The law does not specify the causes of termination in a taxative way; instead the cause shall meet the requirements of the Labour Code.²⁰ The Act on Public Servants and Act on Civil Service Officials recalled the dismissal system prior to 1945; namely, it applies an absolutely fixed structure that is different from that used by the Labour Code. Dismissal shall be carried out in accordance with the causes of defined in a taxative way.²¹

The termination of the employment for indefinite period meant no comparative advantage compared to the private sector since the labour law change of system in 1992. For the most part, with the taxative definitions, the Act on Public Servants and Act on Civil Service Officials used the same causes specified in the termination rule of the earlier Labour Code.²² A positive change brought by the past 25 years is that, against the Labour Code, the Act on Public Servants and Act on Civil Service Officials provides *females with at least 40 years of*

¹⁹ Kiss György, *Munkajog* (Osiris Kiadó 2005, Budapest) 235.

²⁰ See s 66 para 2 of the Labour Code.

²¹ Gyulavári Tamás (ed), *Munkajog* (ELTE Eötvös Kiadó 2014, Budapest) 188.

²² Earlier Labour Code s 89 para 3; Civil Servants Act s 17 para 1 and Act on Public Servants. Section 30 para 1.

employment with the possibility of retirement, which is rather advantageous compared to the general rules. Upon request, their employers shall terminate such employment.²³

2 And Those That May Be Hardly Justified – The Comparative Disadvantages

The tide turned in the field of regulation: comparative disadvantages compared to the labour law of the private sector were codified in the Act on Civil Service Officials, replacing the Act on Civil Servants in 2012. Two statements of facts were added to the causes for dismissal that unfortunately justify the undue special situation of vulnerability of public employees to their employer. The Act on Civil Service Officials obliges the employer to dismiss if the *government official's superior loses trust*²⁴ in the government official. Even the *codification* is wrongful! Erosion of confidence may not be the cause; only the consequence of the dismissal. The explanatory rule the Act on Civil Service Officials, according to which erosion of confidence is declared when the government official fails to meet certain requirements specified in the law, makes no difference. The norms defined in there, however, do not lead to an erosion of confidence when they are infringed.²⁵ One of them is: *carrying out tasks with professional loyalty towards the superior*: this almost means that servility is required. Instead, the legitimate instructions of the executives shall be followed, as the public service official (as the person practicing the power of the state) shall be loyal to the rule of law.

Unfortunately, the further explanatory rule of the Act on Civil Service Officials also leads to a dead end. According to the law, *professional loyalty*, devotion to professional values, collaboration with executives and co-workers and carrying out tasks with discipline, professional dedication and in a perceptive way are all norms.²⁶ If this regulation is reversed is it considered as erosion of confidence when a government official ends up having a professional difference of opinion with his or her superior? Lack of collaboration with fellow workers is not an erosion of confidence but inability to fit in at the workplace, and if the tasks are carried out without discipline or professional dedication and in an imperceptive way, the person is unfit for the job. Moreover, we shall not forget what the term confidence implies. According to Merriam Webster's Dictionary, it is a relation of trust or intimacy, reliance on another's discretion. Hence, erosion of confidence requires different a statement of facts than those specified by Act on Civil Service Officials...

Another codification problem in the Act on Civil Service Officials in relation with erosion of confidence is the *possibility of launching a disciplinary procedure*. According to

²³ Act on Public Servants pt III ch II s 30 para 1; The public servant employment shall be terminated if the condition specified in Act LXXXI of 1997 s 18 para 2 item *a*) is demanded by the public servant no later than the end of the termination period. [For civil service see the Act on Civil Service Officials s 63 para 2 item *f*)].

²⁴ Act on Civil Service Officials pt IV ch III s 63 para 2 item *e*).

²⁵ Act on Civil Service Officials pt IV ch III s 66 para 1.

²⁶ Act on Civil Service Officials pt IV ch III s 76 para 2.

Act on Civil Service Officials, upon the suspicion beyond reasonable doubt of professional misconduct, the person practicing employer's right shall launch the procedure.²⁷ The cited rule of Act on Civil Service Officials is illogical. The disciplinary procedure should be launched to make clear whether the suspicion beyond reasonable doubt is true or just leads to erosion of confidence.

Rejecting a unilateral modification of appointment by the employer, which is impossible in the codification of the Labour Code (which has private law characteristics), *partly leads to dismissal*. According to the law, acceptance is automatic, the consent of the civil servant is not required to change the place of work within the particular settlement and if the change of job title requires the modification of the appointment.²⁸ (This latter is a codification failure, as the modification of appointment does not follow the change, it is rather the contrary: the modification itself is the change). Beside the fact the public servants working in the other field of the public services are not in such a vulnerable situation, the provision *is a disadvantage regarding their employment* because, in line with the Labour Code, the modification of a labour contract, including the change of job title and place of work, shall be carried out with the mutual consent of the employee and the employer.

The provision of the Act on Civil Service Officials is reprehensible as the employer's power, differing from the contractual theory of the common law of labour, is not accompanied by higher job security for the employee, for instance with an institutional system to prevent dismissal without legitimate grounds. That is to say, one scale of the balance is empty. A further legislation effort, possibly implying *negative discrimination*, is the rule based on which the modification of their appointment by the employer shall not be disproportionately injurious to the government official, especially with regard his/her health and family conditions is not applicable to executive government officials (e.g. the department head and her/his deputy).²⁹

3 The Protection of the Public Service Job – The Possible Foundation

Regarding international experience also, public service regulation shall protect the employee from the insecurity that is the characteristic feature of the private sector, hence the possibility of terminating employment is less in the public sector.³⁰ The regulation and sociology of public service, in contrast with the private sector, is affected by the fact that public services may not be relocated from one country to another. Due to the characteristic of the service, more precisely because of its stability (administration, health and education tasks), public service possesses all assets required *for legal institutions that guarantee employment stability*. Stability is not only in the interest of the public service employee, but also of the state, as *avoiding*

²⁷ Act on Civil Service Officials pt IV ch III s 156 para 1.

²⁸ Act on Civil Service Officials pt IV ch III s 48 para 2 items *c*) and *d*).

²⁹ Act on Civil Service Officials pt IV ch III s 8 para 6.

³⁰ Synthesis of reform experience in nine OECD countries (n 6) 8.

dismissals is a saving for the budget. International experience demonstrates that dismissal is very expensive both directly and indirectly. Besides the compensation accompanying dismissal, unemployment benefit, re-training and premature retirement pension increase the state expenditure and the *drop in demand for consumable goods* is also accompanied by negative economic effects.³¹

4 Unprotected Civil Service Officials

Putting some emotion in my paper, for me, the Act on Public Servants and Act on Civil Service Officials seem to have been adopted by two different states. Just a simple question: why is a room guard in a museum of a local government protected better against dismissal than the civil servant in the mayor's office, which is the operator of this museum? Since the *change of labour system in 1992*, diverging legislative approach may be observed in Act on Public Servants and Act on Civil Service Officials. Under the scope of the Act on Civil Service Officials, the *institutionalized prevention of dismissal ceased* in cases of termination due to any organisational cause. Upon losing the comparative advantage, the public official is *more vulnerable than those employed in the private and non-profit sector*. According to the Labour Code, the termination of employment of two categories³² in a vulnerable labour situation due to ability of the employee or the operation of employer may be carried out if there is no other unoccupied position at the workplace or the employee rejects such a job offer.³³ The Act on Civil Service Officials contains no such preventive regulation. A complete U turn may be observed: employees *under the scope of the Act on Civil Service Officials has some comparative advantages* compared to civil service officials proceeding with public administration competency.

Only one dismissal preventive measure remained in the Act on Civil Service Officials: the official may be dismissed on the grounds of being unfit due to health reasons if there is no other unoccupied position at the workplace or the employee rejects such job offer.³⁴ There is no need to search for a job at the public administration body under the direction of the official body..

The so-called '*reserve pool*' effective as of the amendment of Act on Civil Servants and preserved by Act on Civil Service Officials is not aimed at preventing dismissal. Those who have been dismissed are placed in the reserve for the duration termination of employment to find them suitable job at another public administration organization.³⁵ At the same time, however, being in the reserve does not guarantee the avoidance of termination of employment

³¹ Horváth (n 4) 104.

³² A person not retired with age within five years of age limit for entitlement for old age pension, or mother who is not in unpaid vacation regarding child support, father raising his child alone until the child turns age 3.

³³ Labour Code pt II ch X s 66 para 4.

³⁴ Act on Civil Service Officials pt IV ch III s 63 para 4.

³⁵ Act on Civil Service Officials pt IV ch III s 73.

even if there is a suitable job. As a Curia of Hungary *decision* states: subsequent to placing the employee in the reserve, the employer is not obliged to offer him/her the vacant job, hence the civil servant may not establish a right to it even though she/he was aware of the vacant job.³⁶

5 Public Servants: Two Chances to Prevent Dismissal with One Exception That Seems to Be Negatively Discriminating

In 2007, the *provisions aimed at preventing dismissal being* more ample than before according to the Act on Public Servants became effective.³⁷ The inconsistency of public service legislation is such that the change did not inspire the lawmakers, regarding both the Act on Civil Servants and the Act on Civil Service Officials. Indeed, as we have already seen in the example of the latter Act, the direction of the regulation is the contrary. The *legislation's intervention of a public law character* is undoubtedly considered as a comparative public service advantage compared to the Labour Code. There are two chances to *prevent dismissal* of non-retirement-age public servants without legitimate grounds (unfit due to medical reasons, reorganisation, redundancy, or if the activity is terminated): *obligation by the employer to offer job or part-time job*.

The Act on Public Servants requires the maintainer of the employer, upon the request of the employee, to search for and offer the suitable job in all institutions under the scope of the law (e.g. in all public institutions of a particular local government) prior to communicating the dismissal.³⁸

In the case of collaboration, multiple local governments may conclude an agreement to offer job; mainly the smaller settlements may 'save' public servants from being dismissed, where there few institutions are maintained by the local government and jobs are scarce in the private sector as well.³⁹ Dismissal requires the lack of a job that can be offered or if the offered job was rejected.

Moreover, to prevent dismissal, the Act on Public Servants introduced the *compulsory part-time job stipulation* upon the request of public servants in 2007. It might as well be called the *solidarity-based distribution of working time*. It is better when more people are employed in part-time jobs than when too many lose their job besides the full-time employees. This idea originates from Germany. The government tried to apply the *job preserving policy of the Volkswagen Group* to the Eastern part of Germany. In 1994, a *framework agreement* was signed to *preserve jobs*. According to this, the working hours and the remuneration could be reduced to certain or to all employees (e.g. from 40 hours a week to 32, with partial compensation) to avoid the final step, dismissal⁴⁰ According to the Act on Public Servants, the

³⁶ BH 2008. 251.

³⁷ See Act C of 2007 on the modification of Act on Public Servants; effective as of September 1, 2007.

³⁸ Act on Public Servants pt III ch II s 30/A.

³⁹ Act on Public Servants pt III ch II s 30/D.

⁴⁰ Für Grafe, 'Die Umsetzung des § 15. BAT-O im Land Brandenburg' (1995) 3 (50) Arbeit und Arbeitsrecht, 190–193.

employment of those public servants who jointly request the modification of working hours in writing may not be terminated if it does not exceed the distributable daily or weekly total working hours communicated by the employer. The employer shall modify the appointment in accordance with such a request.⁴¹

The *negative part of the regulation* is that the legislation preserved the *vertical approach* that entered into force in 1992 with the Act on Public Servants which restricts the number of jobs to be offered. That is to say, the system only includes employers in a hierarchical relationship with the public institution and its maintainer. The evidence for the *lack of a unified public service legislation concept since the change of system* is that employers under the effect of the Act on Civil Servants and then the Act on Civil Service Official are not included in the job offer scheme. It is not a surprise, however, as the dismissal prevention guaranteed by law ceased to exist in public administration. It would therefore be absurd that, when there is no regulation to avoid the dismissal of civil service officials under the effect of Act on Civil Service Official, public servants are offered civil service jobs. It would be that absurd if, for instance, the public servant of the public institution in a city offered a job in the mayor's office of that city instead of being made redundant. One person less on the dole in that settlement...

And the probable negative discrimination mentioned in the title: Act CCIV of 2011 on Higher Education (hereinafter referred to as Act on Higher Education) excludes the application of the rules on preventing dismissal in the Act on Public Servants in higher education institutions operating as budgetary institutions.⁴² A question: does not the Act on Higher Education violate the difference-making as per the so-called other situation?⁴³ It differentiates between legal subjects in a comparable situation (of public servant legal status) on the basis of which sector they belong to (other situation), in a detrimental way.

6 Remunerations Related to Dismissal – One Budget, Different Expenditures

For starters: employers in the public sector, due to the continuity of services they provide and free from the negative effects of the partly globalised economy, are in a *more stable position* than those in the private sector. Hence, dismissals for causes specified in the legal regulation (e.g. re-organisation, dismissal ordered by the maintainer) are more scarce than in the private sector. I think the *expected legislative reaction* should be something like this: the legal regulation of the public labour law compensates the loss of a job in the public sector with higher compensation than in private labour law.

The *legal regulations on the public service of the change of labour system* support the above assumption, however, in *totally different aspects*. While the Act on Civil Servants

⁴¹ Act on Public Servants pt III ch II s 30/B.

⁴² Act on Higher Education part III pt VII ch s 24 para 6 item b).

⁴³ Fundamental Law of Hungary s XV para 2.

required a six months' termination period⁴⁴ regardless of the time spent in public service, the Act on Public Servants takes the time spent in public service into account. In cases of public service of less than five years, two months (that is, one third of the public servant termination period was given,) and upon 30 years of public employment, the maximum of eight months was granted. There was another distinctive feature between the Act on Public Servants and the Act on Civil Servants. By eroding the common law binding with a private law approach, the former provided the possibility of a longer termination period than specified in Act on Public Servants, but no longer than one year or the employer and the trade union could regulate in accordance with it in the collective agreement.⁴⁵

The Act on Civil Servants provided no possibility for negotiation, making regulation by a collective agreement impossible. That is another example of *legislative inconsistency*: the contradicting legal regulation of using the same budgetary source. However, the contradictory public service regulation provided a *significant comparative advantage regarding the termination period* compared to the earlier period regulated by the Labour Code. The 'initial' termination period (30 days) of the latter was the half of the public servant minimum and one-sixth of the civil servant minimum. The maximum of the private and non-profit sector guaranteed by legal provision after twenty years of employment (90 days)⁴⁶ was the half of the six-month termination period of the similar employment in public service.⁴⁷

The *legal conditions of severance pay meant similar comparative advantages* to the termination period. Again, the Act on Civil Servants was better than the Act on Public Servants: in the case of public employment for less than 5 years (even though only for a few days), the severance pay was two months' salary. The maximum time was twenty years of service, with a severance pay of twelve months' salary.⁴⁸ The severance pay of public servants is much more moderate. One month's severance pay required at least one year of public employment and, in case of at least twenty years of employment, public servants were entitled to two thirds of that offered to civil servants (eight months' salary).⁴⁹ Both legislations, in line with the regulatory function, provided better conditions for severance pay than the previous Labour Code. At least three times more time (three years at minimum) was required for one month's severance pay than in public service, and the severance pay guaranteed by the law after 25 years of employment (six months' salary) was the half that of the severance pay after 20 years of civil servant and three quarters of the public servant.⁵⁰

The benchmark of twenty-five years later remained the same. The regulations of the Labour Code that entered into force in 2012 on the minimum termination period and the

⁴⁴ Act on Civil Servants ch II s 18 para 1.

⁴⁵ Act on Public Servants pt III ch II s 33.

⁴⁶ Earlier Labour Code pt III ch IV 92 para 1–2.

⁴⁷ Act on Public Servants pt III ch II s 33. para 1 item *d*).

⁴⁸ Act on Civil Servants ch II s 19 para 2.

⁴⁹ Act on Public Servants pt III ch II para s 37 para 5.

⁵⁰ Earlier Labour Code pt III ch IV s 95 para 4.

severance pay are the same as the Labour Code of 1992, apart from one exception. This exception is that the dismissed employee, in a detrimental situation, who will retire in five years is entitled to between one and three months' absentee pay above the severance payment, based on the time she/he spent at the employer.⁵¹ *In the relation of the Labour Code and Act on Public Servants*, regarding the similar regulations of the latter, the proportions remained the same, hence the comparative advantage of 1992 survived, namely, the termination period and severance pay in the case of dismissal not attributable to the public servant. Moreover, the employee dismissed from the public job within five years of his/her entitlement to retirement is eligible for more severance pay (four months' absentee pay is added to it).⁵²

However, the Act on Civil Service Officials stipulates otherwise. The beneficial conditions of termination period and severance pay are lost or were significantly reduced, and the tide turned regarding the Act on Public Servants. The termination period was reduced to the third specified in Act on Civil Service Officials (two months).⁵³ Since the legislator disregards the time spent in public service, a public official with long service loses his/her years of service contrary to an employee or a public servant, as his/her termination period is shorter. After twenty years of employment, the termination period is longer by one third and in case of public employment of similar length, the termination period is three times more than that of a government official or civil servant. *The erstwhile privileges of the dismissed employees from public service also disappeared*: the severance pay of public servants and civil servants was reduced to the level of public servants, hence the regulations of the two laws were unified. At least three years spent in public service is required for the minimal severance pay (equal to one month's absentee pay), and twenty years in public service results in eight months' pay.⁵⁴ This means an advantage of three months' severance pay compared to those employees employed for twenty years.⁵⁵

7 The Consequences of Unlawful Termination of Employment by the Employer – Contradictions Keep Going with Disappearing Comparative Advantages

There are significant and *inexplicable differences* in the two laws on public services twenty-five years after the public service regulation entered into force. Regarding *public servants*, in parallel with the introduction of the Labour Code in 2012, the separate regulation of Act on Public Servants regarding the legal consequences of unlawful dismissal of a public servant (sanctioning unlawful termination in a more beneficial way for the employee than the Labour Code) was

⁵¹ Labour Code pt II ch X s 69 para 3–4.

⁵² Act on Public Servants pt III ch II s 33 and 37 para 7.

⁵³ Act on Civil Service Officials pt IV ch III s 68 para 1.

⁵⁴ Act on Public Servants pt III ch II s 37 para 6 and Act on Civil Service Officials s 69 para 2.

⁵⁵ Labour Code pt II ch X s 77 para 3.

*terminated by the legislator.*⁵⁶ Hence, those regulations that are more detrimental than the ineffective ones of the Act on Public Servants are binding.⁵⁷ To demonstrate the *lost comparative advantage*, as a general legal consequence of unlawful dismissal of a public servant, *the Act on Public Servants was more beneficial than the Labour Code for the public servant in four areas:*

- a) Higher amount of compensation for damages (from 2 to 36 months' salary compared to 12 months' at maximum stipulated by the Labour Code).
- b) The court assessed the violation and its consequences for determining the amount of compensation.
- c) Unlike the absentee pay, the average salary shall include all payment made in public service employment.
- d) In the case of violation by the employer other than according to the Labour Code, the Act on Public Servants provided the possibility of further employment in the same position at the request of the employee (if the dismissal was conducted without due practice of law). If the public servant did not request re-employment in the original position, the court could order, by assessing all circumstances including the violation and its consequences, the employer was to pay an amount equal to a minimum of two months' maximum twelve months' average salary.⁵⁸

The invalidation of independent sanctioning Act on Public Servants resulted in *public service employment erroneously gaining private law legal status*. If the public service regulation protects the stability of the legal status of public service employment more than private labour law then it should bring more detrimental legal consequences to the employer than private law in the event of unlawful termination, by doing so, providing the validation of special and general prevention.

Why is the termination of government or civil servant legal status sanctioned more severely in the Act on Civil Service Officials than the termination of public servants' [Act on Public Servants] legal status? The general rule of the Act on Civil Service Officials maximizes compensation for damages at twenty four months' salary that is the double of twelve months' absentee pay. Moreover, there is an unjustified contradiction by the legislator: upon assessing the amount of income-supplementing compensation; the Labour Code, affecting public servant legal status, does not provide judicial discretion as per the Act on Civil Service Officials regarding all aspects of the case, hence the weight of violation and its consequences.⁵⁹ Why does the Labour Code regulate income supplementing compensation and why does the Act on Civil Service Officials talk about lump sum settlement? Regarding the employer of both laws, the general rule of liability is regardless of culpability,⁶⁰ so what is the explanation of applying different measures upon the dismissal of civil servants and public servants?

⁵⁶ Act LXXXVI of 2012 on the enforcement of the Labour Code and transition regulations and amendments s 26.

⁵⁷ Labour Code pt II ch X 82 and 83 para s 82 and 83.

⁵⁸ Act on Public Servants pt III ch II, s 34, in force until June 30, 2012.

⁵⁹ Act on Civil Service Officials pt IV ch III s 193 para 5.

⁶⁰ Act on Civil Service Officials pt IV ch III s 167 para 1 and Labour Code s 166 para 1.

V Partial Erosion of Payment Advancement

Another classic distinctive comparative advantage of the public service besides stability was a calculable salary progression. It could become a comparative advantage, meaning a calculable career element, as the state established an artificial remuneration system by applying legislative measures that were separated from the effects of the labour market. Hence, the price of labour in the public sector is speculative in nature.⁶¹ The mentioned separation, however, may not be interpreted in the literal sense. The economy indirectly affects the salaries in the public sector, as the source for such remuneration is the budget which relies on the incomes from the economy. Therefore, economic stagnation, fall or crisis eventually erodes the career advancement specified by the legislator.

Such processes were observed in the Act on Civil Servants, Act on Civil Service Officials and then in Act on Public Servants. The compulsory minimum salary was increased by a factor of 17.25 between 1992 (HUF 8,000) and 2018 (HUF 138,000).⁶² This affects the lowest grades in the public service jobs (entrant positions or positions not requiring a qualification), as the public sector cannot pay less than the private sector, where employees are in the worst situation. The increase in the minimal wage, for fifteen years from the entering into force in 1992 and the introduction of minimum wage⁶³ in 2006 did not affect the public servant and civil servant salary scheme. The change started in 2008, when the collapse of *Lehman Brothers Holdings* marked the beginning of the crisis of the global economy. Hundreds of banks and companies went bankrupt. Consequences: high rate of unemployment not experienced for decades, increasing budget deficit, recession; all in all, the bankruptcy of capitalism.⁶⁴ As my paper supports it by facts and figures: the effect of the crisis, gradually increasing and affecting more people, has been preserved in the public sector for a decade.

Another reason for the erosion of the function of salary progression is the increase in the minimum wage and guaranteed minimum wage. This raise undermined the budget, which is the source of public service salaries, making the salary scheme increasingly complicated. The rate of increase of the two minimal standards was higher than the performance of the economy. For instance, the minimum wage was increased by double the growth of the national product of Hungary between 1998 and 2013.⁶⁵

⁶¹ Francisco Cardon, *Performance Related Pay in the Public Service in OECD and EU Member States* (SIGMA Support for Improvement in Governance and Management, 2002) 3.

⁶² Government Decree 430/2016. (XII. 15.) on the Mandatory Minimum Wage and on the Guaranteed Wage Minimum.

⁶³ Government Decree 316/2005. (XII. 25.) on the Mandatory Minimum Wage and on the Guaranteed Wage Minimum.

⁶⁴ See <https://index.hu/gazdasag/vilag/2009/09/15/egy_nap_mely_megrengette_a_vilagot/> accessed 1 February 2018.

⁶⁵ See <<http://magyarnarancs.hu/belpol/maganak-emel-minimalberek-negy-kormanyzati-ciklusban-86996>> accessed 1 February 2018.

1 The Fragmentation of Legislation – Two Codification Types

During the twenty-five years since the change of the system of labour law, it became clear that, regardless of the reasons, the legislator was unable to *regulate the remuneration of public servants and civil servants consistently*. ‘Saving’ particular groups in public employment from the devaluation of salary progression *led to the further fragmentation of the present regulatory structure, which is unreasonably divided*. On the whole, this is *not an exclusively Hungarian characteristic*. When the actual trend of public service reforms is taken into consideration, *the fragmentation mentioned may be observed elsewhere, too*.⁶⁶

There is no coherent pattern for national legislation; the idea of unified public service is wasted. Regarding salary advancement, the regulation of Hungarian public service became too complicated, that is to say, obscure.⁶⁷

Concerning the scope of the Act on Public Servants and the Act on Civil Service Officials, fragmentation is *embodied in the two different codification methods*. Regarding Act on Public Servants, the *public service employment legal status remained*, however, the salary advancement of different public service employee groups is regulated by other legal provisions. The first regulatory step, to meet the transparency requirement, remains within the framework of the Act on Public Servants. In 2006, the legislator separated the career and salary advancement of instructors in *public higher education*, teachers and researchers, from the general provisions of the Act on Public Servants, hence independent and special rules applied to these groups within the law.⁶⁸ Subsequent to this, the lawmaker changed the method. By keeping the public servant employment legal status, it ‘took away’ certain professions, by sector-specific laws, from the salary advancement model of the Act on Public Servants, for instance teachers in national public education,⁶⁹ and physicians and public health professionals.⁷⁰

Regarding the Act on Civil Service Officials, the legislator chose a slightly different fragmentation solution. Employees of government offices were excluded from the salary scheme of public service officials (see 2. *Without comparative advantage: equalization of the*

⁶⁶ Christoph Demmke, Timo Moilanen, ‘The future of public employment in central public administration – Restructuring in times of government transformation and the impact on status development’ (Study commissioned by the Chancellery of the Prime Minister of the Republic of Poland, European Institute of Public Administration, 2012, Maastricht, Berlin, Helsinki) 6.

⁶⁷ Hazafi Zoltán, ‘Néhány gondolat a közigazgatás munkaerő-piaci versenyképességéről’ (2015) *Hadtudomány*, <https://www.mhtt.eu/hadtudomany/2015/2015_elektronikus_kulonszam/4_HAZAFI_ZOLTAN.pdf> accessed 16 November 2017.

⁶⁸ Act on Public Servants pt III ch V s 79/B–79/E.

⁶⁹ Act CXC of 2011 on National Public Education 64 para 1: Regarding the employees and public servants of the public education institutions (hereinafter referred to as employee), in parallel with the stipulation of present Act, the Labour Code and the Act on Public Servants shall be applied.

⁷⁰ Act LXXXIV of 2003 on Certain Aspects of Performing Healthcare Activities: This Act specifies the advancement rules in the health care for the public servants, the employed health employees and the health and the load place on the health care workers. (See Annex 1 and 2 for the salary scheme of physicians, specialized health care employees and particular health care employees).

remuneration) and a formally independent legal status was created: The Act on State Officials included state employment legal status. This was required to exclude government office employees from the salary progression of the Act on Civil Service Officials. Apart from the different place of work, there are no distinctive features of state and government employment legal status that could *establish their independent legal status*. However, regarding employees of similar, therefore comparable legal status, the legal requirement would have undermined the principle of equal treatment because of the more beneficial remuneration of government office employees under the effect of Act on Civil Service Officials.

According to the original legislative concept, as of 2018, the more beneficial regulations of state employee legal status would include the ministries and public administration bodies specified by law under the direction of the government or ministries.⁷¹ Due to the lack of money, the legislator *delayed* the extension to central public administration of the career advancement system valid for government offices *by one year*.⁷²

The other example concerning the Act on Civil Service Officials is the *legislation method of the Act on Public Servants*. By preserving the status, Parliament withdraws its own civil servants from the *salary advancement scheme of the Act on Civil Service Officials*. It created provisions for the classification, career and pay advancement of public servants in the National assembly.⁷³ Other public servants, especially those who work in the mayor's office of the local government and common local government office (approximately 200,000 employees) were left alone by the legislator. Therefore, in the beginning of 2018, the public servants in public administration resorted to a measure very uncommon in the public sector: *they went on strike*.⁷⁴

2 Without Comparative Advantage – Equalization of the Remuneration

Besides the jubilee award – which rewards time spent in a longer legal relationship in public or civil service –, there are no comparative advantages of remuneration as per Act on Public Servants and Act on Civil Service Officials. As the result of the global economic crisis that broke out a year before, *the thirteenth months' salary* was taken away from civil servants and public servant in 2009.⁷⁵

Those groups who were not drawn from the effect of Act on Public Servants and Act on Civil Service Officials, lost the *salary advancement acquired as a comparative advantage*, guaranteed by law. On the one hand, the basic salary of civil service officials (HUF 38,650⁷⁶),

⁷¹ Act on State Officials ch III s 37.

⁷² Act LXXII of 2017 on budget planning for 2018, s 93.

⁷³ Act CLXXXVII of 2017 on the modification of Act CXCIX of 2011 on Public Service Officials and Act XXXVI of 2012 on the National Assembly s 124.

⁷⁴ See <<https://24.hu/belfold/2018/01/03/januarban-ket-napra-zarhatnak-az-onkormanyzatok-sztrajk-miatt/>> accessed 3 February 2018.

⁷⁵ See Act CX of 2008 for the modification on the payment rules of thirteen months' salary.

⁷⁶ The amount of basic remuneration is the same in 2018 as it was in 2008. <<https://www.kozszolga.hu/illetmenyalap>> accessed 3 February 2018.

and on the other hand, the decade-long freezing of the amount related to the first pay class of different salary categories serving the similar purpose for public servants, guarantees nothing but the *entitlement to minimum wage or the guaranteed wage minimum* for the employees, under the above legal regulations, who are increasing in number each year, regardless of the educational attainment, qualification and public service time required for the job.

Double effect. One is the long term lack of change in the mentioned amount and the other is the increase in the minimum wage and guaranteed wage minimum at a higher rate than economic growth. The consequences are not only the erosion of salary advancement, but partly also its total losing of function. While the salary advancement of public servants and civil servants has been frozen since the global economic crisis, the minimum wage doubled from HUF 69,000 to HUF 138,000 and the guaranteed minimum wage was raised from HUF 82,800 to HUF 180,500 (2.18 times growth) between 2008 and 2018.⁷⁷

As a result of the disappearance of the comparative advantage due to the flat rate by the Act on Civil Service Officials, an entrant trainee with a degree just earned belonging to category I and a senior counsellor with 14 years of experience are both entitled to the guaranteed minimum wage of HUF 180,500, as a basic salary.⁷⁸ The situation is much worse in category II, in which only high school graduation is required. There is no advancement between the trainee freshly graduated from high school and a senior colleague with more than 37 years of experience.⁷⁹ And the list of the erosion of comparative advantages has not ended yet. Due to the entitlement to a guaranteed wage minimum, a similar basic salary is issued to the entrant trainee in a position requiring a secondary school education and the senior counsellor with a university degree working for more than a decade.

The situation of the *public servants whose salary advancement is regulated by the Act on Public Servants* is similarly awful. 121 of the total 170 salary grades of the 10 salary classes of the salary scheme; that is to say, the 71% of the advancement system based on educational attainment, qualification and the time spent in public service is immaterial.⁸⁰ In financial terms, the following consequences are observed among the two groups of public servants:

There is *no advancement in the lowest salary grade A*, where jobs either or not requiring primary education belong. So both the entrant and the senior about to retire earn the minimum wage. The situation is even worse in the other salary categories. Regarding the two extreme examples: an employee who just graduated from high school in a position requiring a high school graduation (salary grade C) earns the guaranteed wage minimum as per the Act on Civil Service Officials similar to an incumbent in a position requiring a university degree, holding a PhD and with six years of experience.⁸¹

⁷⁷ See <<http://www.munkaugyiforum.hu/munkaugyi-segedanyagok/minimalber-2008-2018-attekinto>> accessed 3 February 2018.

⁷⁸ See Act on Civil Service Officials Annex 1.

⁷⁹ See Act on Civil Service Officials Annex 2.

⁸⁰ See <<http://24ora.eu/kozalkalmazotti-bertabla-2018-fizetesi-fokozatok/>> accessed 3 February 2018.

⁸¹ See Act on Public Servants pt III ch V s 61.

If it is examined through the spectacles of the employment in general, *besides the elimination of advancement*, the public servants and public officials concerned are entitled to the minimum standards of the private sectors as guaranteed or basic salary, that is to say, the minimum salaries legally paid.

Final Remarks

Although my paper disregards them, I cannot hide my *doubts occurred during the drafting* of this study: are not the above-described salary rules against the Fundamental Law of Hungary? Where there is no advancement, it may violate fundamental rights such as:

a) *human dignity is inviolable*;⁸²

b) Hungary provides the fundamental rights to everyone without distinction, namely, without making distinction according to any other situation;⁸³

c) all employees are entitled to working conditions that respect his/her dignity.⁸⁴

Do these regulations violate the above fundamental rights of *employees in a comparable situation* regarding:

– on the one hand, the educational attainment required for the job and the skills and qualification recognised by the state,

– and, on the other hand, the duration of time recognised for the classification; *it does not apply adequate distinction?*

Furthermore, does it not violate the human dignity and the requirement of working conditions respecting dignity when the law orders to pay similar or almost identical salary to the master and apprentice?

⁸² Fundamental Law of Hungary s II.

⁸³ Fundamental Law of Hungary s XV para 2.

⁸⁴ Fundamental Law of Hungary s XVII para 3.

Crucial Point: Several Issues of the Termination of Employment

Abstract

Although the rules of termination of employment have not changed fundamentally in the Hungarian Labour Code of 2012, the provisions of the Act imposed a number of slight changes which gave rise to numerous dilemmas. In this paper, I analyse them as crucial points in the Hungarian system of termination of employment. First, I present the general framework of the termination of employment in the Hungarian Labour Code, then I examine the interpretative framework of the requirement of equitable assessment. In the remainder of the study, I aim to find solutions to the problems regarding the dismissal of indefinite and fixed-term employees, dismissal based on the cessation of the temporary work agency assignment, and questions related to dismissal prohibitions and restrictions.

Keywords: dismissal, dismissal prohibition, dismissal restriction, fixed-term employment, temporary agency work, termination of employment

I Motivations and Objectives – The Regulation of Termination of Employment

The thought of preparing a new labour law code was brought up in October 2006, as a result of which the experts assigned by the Ministry of Social Affairs and Labour completed a draft by the spring of 2007. The so-called *Theses* served as the basis of the regulation concept and were published at the end of 2008;¹ however, after that, the codification work within the ministry came to a halt, therefore the experts originally assigned – then as a private organisation – started to prepare the act. The legislative work gained momentum

* Zoltán Petrovics (PhD) is assistant professor at Eötvös Loránd University, Faculty of Law, Budapest, Department of Labour and Social Law (e-mail: petrovics.zoltan@ajk.elte.hu); ORCID author ID: orcid.org/0000-0001-5683-3624.

¹ Berke Gyula, Kiss György, Lőrincz György, Pál Lajos, Pethő Róbert, Horváth István, 'Tézisek az új Munka Törvénykönyve szabályozási koncepciójához' (2009) 3 Pécsi Munkajogi Közlemények, 147–160, 154–155.

again in June 2011, after the government had published the document titled *Hungarian Labour Plan*, prepared in the frameworks of the *Széll Kálmán Plan*,² which proposed the transformation of employment relations, including the creation of the new labour code. The bill was developed along the lines of the objectives specified in the Hungarian Labour Plan. The main objectives included making the regulation flexible, as well as changing the characteristic of the rules ensuring the protection of employees.³

According to the legislator, the primary reason for the changes concerning the system of termination of employment lay in avoiding the discrepancies occurring in the application of the law, and in satisfying the needs emerging in practice.⁴ Act I of 2012 on the Labour Code (hereinafter referred to as Labour Code) – which entered into effect as of 1st July 2012 – brought about the most significant change regarding this matter in respect of the legal consequences of unlawful termination of employment. In this respect, the primary objective was to eliminate practices which unreasonably increased the burdens of employers, as well as to reduce the number of labour conflicts and employment litigation. The basis of the motivation was that the provisions of Act XXII of 1992 on the Labour Code (hereinafter referred to as 1992 Labour Code) placed the risk of prolonged labour lawsuits essentially entirely onto employers without justification – according to the legislator. As a result, the legal consequences of unlawful termination of employment underwent a serious change.⁵ However, the present study does not wish to analyse these amendments; it intends to examine just some provisions of the relevant legislation that are innovative or entail dilemmas.⁶

II The Changes of the Termination System in General

All in all, the Labour Code did not change the bases of the legal instruments connected to the termination of employment, or their essential regulatory character. Therefore, the imperative character of the legal grounds of termination had not changed either,⁷ although now the act allowed the parties to agree to suspend the right to dismissal for up to one year calculated from

² 'Széll Kálmán Terv. Magyar Munka Terv' (2011) <mcdsz.hu/1_doksik/Nemzetimunkaterv.pdf> accessed 20 February 2020.

³ *Ibid*, 146.

⁴ General reasoning of the Labour Code, 18.

⁵ For the analysis of the rules governing the legal consequences of the unlawful termination of the employment relationship, see Petrovics Zoltán, 'A jogellenes munkajogviszony-megszüntetés jogkövetkezményeinek margójára' in Horváth István (ed), *Tisztelgés: Ünnepi tanulmányok Dr. Hágelmayer Istvánné születésnapjára* (ELTE Eötvös 2015, Budapest) 367–380.

⁶ For the regulation and practice of termination, see Kulicity Mária, *A munkaviszony megszűnése és megszüntetése* (Wolters Kluwer 2014, Budapest), Lőrincz György, *A munkaviszony megszűnése és megszüntetése* (HVG-ORAC 2017, Budapest).

⁷ Labour Code pt II ch X s 85 para 1 item *a*) and *b*).

the commencement of employment.⁸ The formal requirement applicable to the termination of employment – the requirement of its written form – persisted as well, such as the rule that the – unilateral – legal statement regarding the termination of the employment shall include notification of the manner of enforcing the claim and the deadline for its enforcement.⁹

However, renaming the legal grounds for termination brought an obvious terminology innovation. The Labour Code replaced the name ordinary dismissal with dismissal,¹⁰ while it changed the name extraordinary (summary) dismissal to dismissal with immediate effect.¹¹ The reason for this is not completely clear, not even if dismissal with immediate effect covers not only the legal statement retaining the function of the extraordinary dismissal since, according to the new rules, there are three forms of dismissal with immediate effect: dismissal with immediate effect subject to reasoning,¹² dismissal of employment during the probationary period,¹³ and premature dismissal of fixed-term employment with immediate effect.¹⁴ However, termination with immediate effect of a legal relationship based on an invalid agreement was still not specified among the cases in the Labour Code¹⁵ – similar to the 1992 Labour Code – although it would have been justified to insert a reference clause in Chapter X of the Labour Code regulating termination, in order to facilitate the application of the law. Unlike the previous regulation, the Labour Code allowed fixed-term employment to be terminated through dismissal and specified partly separate grounds for it. In addition – returning to the solution used before the Second World War – the Labour Code provided the right to withdrawal to both parties during the period between the conclusion of an employment contract and its commencement, although this legal ground is not included in the chapter regulating terminations either.¹⁶

The Labour Code modified the rules of severance pay in several respects as well. Therefore, for example, deviation from the statutory provisions to the disadvantage of the employee is allowed in collective agreements or works council agreements of normative effect. The reference point of the right to severance pay was changed as well; now the communication of dismissal shall be taken into account in this respect, and not the expiry of the notice period. The base of the severance pay was changed as well and, instead of the previous average wage, the narrower – and practically lower – absentee pay became the basis of the calculation. In the case of dismissal for reasons related to the conduct of the employee and not to the employee's

⁸ Labour Code pt II ch X s 65 para 2.

⁹ Labour Code pt I ch II s 15 para 4, s 22 para 5. The case-law analysis group of the Curia of Hungary held that the previous regulation in respect of the general issues could be upheld. See Kúria, 'A felmondások és az azonnali hatályú felmondások gyakorlata' (2014) <http://www.lb.hu/sites/default/files/joggyak/a_felmondasok_es_azonnali_hatalyu_felmondasok_gyakorlata_-_osszefoglalo_jelentes.pdf> accessed 20 February 2020.

¹⁰ Labour Code pt II ch X s 65–67.

¹¹ Experience shows that labour practices still often use the terms rooted in the last 20 years.

¹² Labour Code pt II ch X s 78.

¹³ Labour Code pt II ch X s 79 para 1 item *a*).

¹⁴ Labour Code pt II ch X s 79 para 1 item *b*) and s 2.

¹⁵ Labour Code pt I ch IV s 29 para 1.

¹⁶ Labour Code pt I ch II s 15 para 2; ch VII s 49 para 2.

abilities related to health factors, after July 2012, the employee is no longer entitled to severance pay, while in the case of employment relationships established with publicly owned employers, neither the collective agreement, nor the agreement of the parties may deviate from the rules applicable to severance pay.¹⁷

In respect of temporary agency work – unlike the 1992 Labour Code – the Labour Code stipulates the payment of the severance pay, although in practice, due to the short terms of employment, and the eligibility conditions, severance pay is paid very rarely. The condition of eligibility for severance pay is not connected to the duration of employment but to the duration of the last temporary agency work, which, according to certain opinions, makes a distinction between those with employment for temporary agency work and those who are employed in typical employment without a sensible reason.¹⁸ As *István Horváth* noted, through this rule the Labour Code ‘depreciated’ the time spent in employment necessary for severance pay since, in order to avoid paying severance pay, one just has to assign the employee to another user undertaking for several days before the dismissal of the temporary work agency.¹⁹

The minimum duration of the notice period in case of dismissal by the employer is thirty days, which – similarly to the provisions of the 1992 Labour Code – increases gradually depending on the length of that employment. Unlike the previous regulation, in the case of dismissal of the employee, the notice period does not increase together with the duration of the employment, since it is uniformly thirty days. However, with regard to temporary agency work, the notice period was uniformly reduced to fifteen days.²⁰ However, the parties may agree that the notice period may be up to six months, while collective agreements may stipulate any notice period without express statutory limitation. Contrary to the above, with regard to public employers, neither the collective agreement, nor the agreement of the parties may deviate from the duration of the notice period specified in the Labour Code.²¹

Another important rule is that, in the employment contract of executive employees, the parties may essentially ‘opt out’ from the termination system of the Labour Code, except for certain dismissal prohibitions.²²

¹⁷ Labour Code pt II ch X s 77; pt II ch VX s 205 para 1 item b).

¹⁸ Labour Code pt II ch VX s 222 para 5. See Kártyás Gábor, *Munkaerő-kölcsönzés Magyarországon és az Európai Unióban* (Wolters Kluwer 2015, Budapest) 320.

¹⁹ Horváth István, *Hazai kölcsönzés – európai szemmel. A munkaerő-kölcsönzés magyar szabályozása – európai összehasonlításban, figyelemmel a 2008/104/EK irányelv jogharmonizációs követelményeire* (2013, Budapest) 193.

²⁰ Labour Code pt II ch X s 69 para 1 and 2; pt II ch VX s 220 para 2. For the critics of this provision, see Kártyás (n 18) 319.

²¹ Labour Code pt II ch X s 69–70; pt II ch VX s 205 para 1 item a) and para 2 item a).

²² Labour Code pt II ch VX s 209 para 2. The parallel can also be drawn with some recent developments in English law. See Jeremias Prassl, ‘Employee Shareholder ‘Status’: Dismantling the Contract of Employment?’ (2013) 42 (4) *Industrial Law Journal*, 307–337 DOI: <https://doi.org/10.1093/indlaw/dwt018>; Jeremias Prassl, ‘Mindannyiunkat egyformán érint?’ Az Egyesült Királyság koalíciós kormányának munkaerő-piaci reformja’ (2014) 1 *Magyar Munkajog e-folyóirat*, 30–31 <hllj.hu/letolt/2014_1/02.pdf> accessed 20 February 2020; Astrid Sanders, ‘The changing face of “flexicurity” in times of austerity?’ in Nicola Countouris, Mark Freedland (eds),

III Dilemmas Related to Dismissal

1 The Equitable Assessment Requirement and Dismissal by the Employer

The Labour Code introduced principles and requirements of conduct to labour law which had previously been unknown in the Hungarian regulations. Such a provision was the equitable assessment requirement, according to which employers shall take into account the interests of employees under the principle of equitable assessment; where the manner of performance is defined by a unilateral act, it shall be done so as not to cause unreasonable disadvantage to the employee.²³ According to the intentions of the legislator, it intended to transpose the restriction of the definition of unilateral performance known in German law into Hungarian labour law.²⁴ After the Labour Code had entered into effect, the question arose as to whether the equitable assessment requirement shall govern in the assessment of the lawfulness of the termination of employment by the employer. Considering the grammatical and logical interpretation, as well as the taxonomical position of the equitable assessment requirement, in theory it was possible that the equitable assessment requirement, as a general expectation for measures taken within the discretion of the employer, was expanded by the judicial practice beyond a scope wider than the unilateral performance definition, and the scope of enforcement thereof was thereby expanded.

Based on grammatical analysis, it can be established that the provisions is made up of two clauses: on the one hand, it stipulates that the employer shall take into account the interests of employees under the principle of equitable assessment, while on the other hand the provision stipulates that the unilateral definition of the manner of performance shall not cause unreasonable disadvantage to the employee. The logical interpretation provides two interpretations. According to the first, the second clause merely clarifies, explains or amends the first clause, thus the employer is obliged to take into account the interests of employees under the principle of equitable assessment only in the course of its unilateral definition of the manner of performance. Pursuant to the second interpretation, the two clauses contain two separate statements; namely that the employer shall take into account

Resocialising Europe in a Time of Crisis (Cambridge University Press 2013, New York) 314–332, 327–328 DOI: <https://doi.org/10.1017/CBO9781107300736.019>.

²³ Labour Code pt I ch II s 6 para 3.

²⁴ According to this principle of the German private law, if the performance is defined by one of the contracting parties then, if there is any doubt, it shall be presumed that the definition of the performance shall comply with the requirement of equitable assessment. The other party is bound by such performance definition only if that complied with that the requirement of equitable assessment – in the absence thereof, performance shall be established judicially. See Bürgerliches Gesetzbuch s 315 para 1 and 3: ‘Soll die Leistung durch einen der Vertragsschließenden bestimmt werden, so ist im Zweifel anzunehmen, dass die Bestimmung nach billigem Ermessen zu treffen ist.’ ‘Soll die Bestimmung nach billigem Ermessen erfolgen, so ist die getroffene Bestimmung für den anderen Teil nur verbindlich, wenn sie der Billigkeit entspricht. Entspricht sie nicht der Billigkeit, so wird die Bestimmung durch Urteil getroffen; das Gleiche gilt, wenn die Bestimmung verzögert wird.’

the interests of employees under the principle of equitable assessment in general and, in addition, the unilateral definition of the manner of performance shall not cause unreasonable disadvantage to the employee. Based on a systematic interpretation, it can be established that the provision is located in Part One of the Labour Code (*General provisions*), and within that in the chapter titled '*Common rules of conduct*', which undoubtedly provides guidance that it is a general rule. The general character of the provisions is also supported by the finding of *György Lőrincz*, according to whom the Labour Code 'elevates this principle to the general level, thus the Labour Code considers it a prevailing requirement for all unilateral measures to be taken by the employer'.²⁵

If the second interpretation specified above is correct, it could be possible that the equitable assessment requirement would also have to be applied with regard to the termination of the employment by the employer. Based on all this, it was also questionable whether the requirement should be applied in cases of redundancy and, consequently, whether the interests of the employees shall be taken into account when selecting the employments to be terminated and, if yes, whether a dismissal violating this requirement could be unlawful.²⁶ Undoubtedly, during the preparatory work, the issue of strengthening the protection of employees arose – in particular in connection with group redundancies – and the idea of so-called socially justified dismissal by the employer (which could also be interpreted as a kind of equity requirement), according to which the employees affected should have been selected by taking their social circumstances into consideration as well (for example, length of service, age, support obligations and financial situation).²⁷

However, it seems like that the case-law analysis group of the Curia of Hungary put an end to the debate since, after roughly presenting its opinions, it held that although the wording of the Labour Code is unfortunate, the narrower interpretation shall prevail among the possible interpretations. The equitable assessment requirement may be answered by taking the purpose of the act and the common rules of conduct into consideration. Pursuant to these, the equitable assessment requirement, the prohibition of causing unreasonable damage shall prevail in respect of only those unilateral employer's measures which affected the fulfilment of the employee's obligations arising from the employment. However – as the case-law analysis group of the Curia of Hungary continued – it does not preclude that collective agreements stipulate their wider application (for example, in the case of redundancies).²⁸

²⁵ Lőrincz György, 'Általános rendelkezések' in Kardkovács Kolos (ed), *Az új munka törvénykönyvének magyarázata* (HVG-ORAC 2012, Budapest) 29.

²⁶ Petrovics Zoltán, 'A munkaviszony megszűnése és megszüntetése' in Gyulavári Tamás (ed), *Munkajog* (ELTE Eötvös 2012, Budapest) 200–201. See also Bankó Zoltán, Berke Gyula, Kajtár Edit, Kiss György, Kovács Erika, *Kommentár a munka törvénykönyvéhez* (Wolters Kluwer 2014, Budapest) 311.

²⁷ Berke, Kiss, Lőrincz, Pál, Pethő, Horváth (n 1) 154.

²⁸ Kúria (n 9) 21.

2 Ideas Related to the Dismissal of Indefinite Term Employment

The regulation of dismissal from indefinite term employment had not changed fundamentally compared to the 1992 Labour Code. The right to dismissal specified in the Labour Code may be exercised on the same grounds (the conduct or ability of the employee related to the employment of the employee, and reasons related to the operation of the employer),²⁹ and with the same content and quality requirements (true, clear and substantiated reasoning) as specified by the 1992 Labour Code for ordinary dismissal.³⁰ Consequently, the case-law analysis group of the Curia of Hungary held that Opinion No. 95 of the Labour Law Division of the Supreme Court may continue to be considered as governing, and the previous judicial practice in this respect may be maintained.³¹

In this regard, we shall note the dismissal by the employer of the indefinite term employment of employees considered as pensioners, for which the employer – similarly to the 1992 Labour Code – is not obliged to provide a statement of reasons.³² The traditional legal policy reason behind setting aside the reasoning is that, in these cases, the employee is not left ‘without allowance’; the existential need for protection of the employee is essentially bypassed considering their pension. Despite the lack of obligation to provide reasoning, the employee may seek legal remedies against this employer’s legal statement as well, based on the requirement of equal treatment or proper application of the law, as the case may be. Thus, although the regulation does not leave the employee to his own resources completely, protection against arbitrary termination may be enforced through these legal instruments with significantly lower effectiveness. There is some cause for concern that the relevant provisions considered those employees as pensioners as well – and thereby render essentially defenceless – who actually receive no pension allowance at all, but only fulfilled certain eligibility criteria for it, i.e. who are not actually ‘beneficiaries’.³³ The legislator did not connect the lack of reasoning to any employment policy, labour market or vocational training objective,³⁴ although, according to Council Directive 2000/78/EC of 27 November 2000 on establishing a general framework for equal treatment in employment and occupation, differences of treatment on the grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, and if the means of achieving that aim are appropriate and necessary.³⁵ If the dismissal on the grounds of being considered a pensioner and communicated without reasoning causes long-

²⁹ Labour Code pt II ch X s 66 para 2.

³⁰ Labour Code pt II ch X s 64 para 2 s 66 para 2.

³¹ Kúria (n 9) 16, 18 and 49.

³² Labour Code pt II ch X s 66 para 9, pt V s 294 para 1 item *ga*).

³³ Kiss György, ‘A Domnica Petersen ügy tanulságai a kor szerinti diszkrimináció versus igazolt nem egyenlő bánásmód körében – hazai összefüggésekkel’ (2010) 1 Pécsi Munkajogi Közlemények, 105–118, 118.

³⁴ *Ibid.*

³⁵ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L 303, art 6 para 1.

term and substantial loss of income to the employee, without however becoming entitled to a reasonable amount of pension (i.e. the amount of the pension does not cover the apparent needs of the pensioner), then the different treatment can hardly be justified.³⁶ Considering all of the above, the compliance of the rule with European Union law is doubtful.

Neither in respect of the dismissal, nor in respect of the dismissal with immediate effect does the Labour Code contain the provisions according to which the employee should be given an opportunity in certain cases to defend himself against the objections raised against him. According to the General reasoning of the Labour Code, the employee was often not heard by the employer because the employer was afraid that the employee would become incapacitated for work during the period between the hearing and the communication of the legal statement of termination, and the employee would thereby become subject to prohibition of dismissal. In addition, the legislator also mentioned that, in labour lawsuits, the lack of hearing had not been considered as a material fault that would have resulted in unlawful termination anyway. It is evident that the argument referred to actual infringements by the employer, as well as to the judicial practice which did not sanction it, in order to support the lack of the important rule which otherwise served as a guarantee for fair proceedings, albeit the right to defence of the employee may be considered as one of the minimum and also substantive elements of protection against dismissal.³⁷

3 Certain Issues Related to the Dismissal of Fixed-term Employment

With regard to fixed-term employment, the grounds for dismissal specified by the Labour Code are partially different to those of indefinite term employment. The employer may terminate fixed-term employment by notice on grounds based on the abilities of the employee, if the employer is undergoing compulsory liquidation or bankruptcy proceedings, or if it is impossible to maintain the employment for any unavoidable external reason.³⁸ While the first case is connected to the person of the employee and is identical to the ground for dismissal regarding indefinite term employment, the second case belongs to the sphere of interest of the employer, and the third case may be traced back to circumstances which are beyond the employer. In the following, I will analyse the latter two reasons.

Dismissal during the period of compulsory liquidation or bankruptcy proceedings has a unique place in the systems of grounds for dismissal. Namely, this is a special ground for termination, which may be traced back to an objective reason connected to the operation of the

³⁶ Case C-499/08 *Ingeniørforeningen i Danmark, acting on behalf of Ole Andersen v Region Syddanmark*, EU:C:2010:600, Case C-515/13 *Ingeniørforeningen i Danmark acting on behalf of Poul Landin v Tekniq acting on behalf of ENCO A/S – VVS*, EU:C:2015:115. See Hős Nikolett, 'Igazolhatja-e a nyugdíjra való jogosultság a végkielégítés megvonását nyugdíjas munkavállaló esetén? A C-515/13 sz. Landin-ügy elemzése' (2015) 5 Pázmány Law Working Papers, 6–7 <https://plwp.eu/docs/wp/2015/2015-05_Hos.pdf> accessed 20 February 2020.

³⁷ *K. M. C. v. Hungary*, no. 19554/11. ECHR, 10 July 2012.

³⁸ Labour Code pt II ch X s 66 para 8.

employer. There is essentially no opportunity to examine substantiality in this respect, and it may be understood as if the Labour Code did not specify the actual ground for dismissal, but the time frames applicable to communicating the dismissal. Since the Labour Code does not stipulate further content requirements for this ground for dismissal, it is sufficient to merely refer to the fact of the compulsory liquidation or bankruptcy proceedings in the dismissal.

The impossibility of maintaining employment for unavoidable external reasons raises multiple questions. Based on the grammatical interpretation of the provisions, it can be established that the impossibility shall be created by any objectively unavoidable circumstance beyond the employer, which makes it impossible for the employee to fulfil their employment. Unavoidable external reason may be any event or circumstance beyond the person of the employer which the employer cannot foresee, and which the employer is unable to influence or prevent for objective reasons. In my opinion, it is possible that these circumstances also include those which may be considered as inherent in the person of employee, regardless of whether those are attributable to the employee or not. Therefore, it begs the question whether a circumstance which may actually be traced back to the conduct of the employee could also provide ground for their dismissal.

In respect of the ground for *dismissal*, a unique comparison can be made with the *frustration* (impossibility) concept of English law, which legal instrument is similar in multiple respects to this solution of the Hungarian labour law, despite the fact that frustration is not a ground for dismissal but a legal ground resulting in cessation of the employment. According to the English law, the employer may refer to frustration if the employee, for no fault of his own, is unable to fulfil his or her obligations arising from the employment due to any unforeseeable event which causes substantial changes in the conditions of fulfilling the employment contract.³⁹ In the judicial practice – depending on all circumstances of the case – among others the permanent, long illness of the employee, the imprisonment of the employee, or any unforeseeable situation (for example, natural disaster) may serve – among others – as a basis for this legal ground of cessation. Since the burden of proof is borne by the employer, in this respect it is very important – for example – how long the employee is entitled to paid sick leave if there is reference to permanent illness, since frustration cannot be cited during that period. As the case may be, the job function of the employee may also be relevant since, if the employee is employed in an especially key position, there is a higher chance that frustration shall be established. Upon the adjudication of frustration, the judicial practice takes into account the nature of the illness or the health-related damage, the duration of the absence and the chances of recovery, as well as the duration of the employment at the employer. In the case of the employee's imprisonment – for example –

³⁹ Gwyneth Pitt, *Employment Law* (Sweet and Maxwell 1993, London) 143–145; Simon Honeyball, John Bowers, *Textbook on Labour Law* (Oxford University Press 2004, Oxford, New York) 86.

the duration of the absence is examined, and the economic interest of the employer is also considered, as well as if the employee could be substituted during his/her absence.⁴⁰

In my opinion, the solution of the English law may offer a lot of lessons to be learned by Hungarian practice as well. In theory, the cases of frustration developed by the English law may be inserted in the subject matter specified by the Labour Code. Such cases may be if the employee is employed in the framework of any activity subject to an administrative permit, but the permit is withdrawn during the employment for any reason beyond the employer. In theory, it may also result in impossibility if the employee is unable to fulfil his obligations arising from the employment for any unforeseeable reason which the employee cannot avert (for example, the employee is taken into pre-trial detention, sentenced to imprisonment, or suffers from any permanent illness which makes it impossible to maintain the employment further). However, the question remains that, since the Labour Code stipulated unavoidable external reason, is the employer obliged to – using the standard of reasonably expected conduct under the given circumstances⁴¹ – take all measures resulting from this in order to avoid the dismissal? Essentially, can the employer be expected to preserve the employment of the employee who is permanently ill or in pre-trial detention and employ a substitute worker? If it can be expected, how long is the period which the employer is bound by within the reasonably expected frameworks? In my opinion, as general rule of conduct, the employer is bound by the requirement of reasonably expected conduct under the given circumstances in such case as well. The duration of the obligation depends on other circumstances, such as those English law considers when adjudicating *frustration*. At the same time, undoubtedly, these questions await answers from the judicial practice.

It is necessary to raise another issue related to the grounds for dismissal. Namely, it is important to make the distinction the phrasing of this subject matter and the phrasing of the dismissal with immediate effect based on objective impossibility.⁴² Namely, the latter is similar in multiple respects to the above-mentioned ground for the dismissal of the fixed-term employee. Dismissal with immediate effect is possible in cases of conduct which makes it impossible to maintain the employment relationship. Upon first glance, it could be an obvious basis for the distinction that, in the case of dismissal with immediate effect, only the employee's conduct may substantiate the termination, while in case of dismissal of fixed-term employment, all circumstances beyond the control of the employer may appear as grounds for dismissal as well. Consequently, the dismissal of the fixed-term employee may prevail in

⁴⁰ John McMullen, 'Frustration of the Contract of Employment and Statutory Labour Law' (1986) 6 *The Modern Law Review*, 785–790; Honeyball, Bowers (n 39) 86–88, Deborah J. Lockton, *Employment Law* (Palgrave Macmillan 2006, Houndmills, Basingstoke and New York) 239–241; Simon Deakin, Gillian S. Morris, *Labour Law* (Hart Publishing 2009, Oxford and Portland, Oregon) 418–420, Hugh Collins, Keith D. Ewing, Aileen McColgan, *Labour Law* (Cambridge University Press 2012, New York) 812–815 DOI: <https://doi.org/10.1017/CBO9781139227094.025>; Richard W. Painter, Ann E. M. Holmes, *Cases and Materials on Employment Law* (Oxford University Press 2012, Oxford) 337–340.

⁴¹ Labour Code pt I ch II s 6 para 1.

⁴² Labour Code pt II ch X s 78 para 1 item b).

a wider scope compared to the case of dismissal with immediate effect related to objective impossibility. However, this finding in itself does not provide a satisfactory answer to the legitimate expectation that the two cases shall show that one of them allows the special, but still more traditional way of cancelling – i.e. dismissal – employment, while the other is a more strict, sanction-like legal ground for termination, which is enforced with immediate effect. Consequently, the basis of dismissal with immediate effect related to objective impossibility shall only be a situation that is related to the conduct of the employee, which causes the ‘impossibility’ of maintaining the employment with ‘instant’ effect.

4 The Cessation of a Temporary Work Agency Assignment as Ground for Dismissal

In the case of employment for temporary agency work, the Labour Code discarded the previous, separate legal grounds for cancellation and grounds for termination, and also no longer used the rules specifying the unique legal consequence of unlawful termination. However, a special ground for dismissal is still included; namely that the Labour Code considers the termination of the employee’s assignment as a reason related to the operation of the temporary work agency.⁴³ This provision brought significant change compared to the previous legal provision and the judicial practice, since if the user undertaking did not request a new or additional workforce, this was not considered previously as a reason related to the operation of the temporary work agency, and employment could only be terminated after a thirty-day period on this ground.⁴⁴

In practice, the cessation of the assignment and ground for dismissal means the end of employment for temporary agency work as well in most cases, while simplifying the reasoning obligation of the employer to the bare minimum. Since, if the ground for the dismissal is the cessation of the assignment, the employer does not have to reveal the actual supporting motivation or actual reason for dismissal, and the court cannot review it either.⁴⁵ Consequently, the temporary agency worker may dispute the dismissal on the merits only if the assignment did not actually cease, or if the termination violates any of the principles (for example, the requirement of equal treatment, or the prohibition of abuse of rights). As *Gábor Kártyás* pointed out, the cessation of the assignment may be induced by the temporary work agency itself, for example, by dismissing the employee or by terminating the temporary agency work contract with the user undertaking.⁴⁶ It also follows from the above that ‘with the appropriate cooperation’ of the temporary work agency and the user

⁴³ Labour Code pt II ch XVI s 220 para 1.

⁴⁴ Supreme Court Mfv.I.10.035/2007/4. See *Kártyás* (n 18) 317.

⁴⁵ Budapest-Capital Labour Court 4.M.503/2013/9. See Kovács Szabolcs, ‘A kikölcsönzés megszűnése mint felmondási indok – egy bírósági ítélet tükrében’ (2014) 5 HR & Munkajog, 27–28.

⁴⁶ *Kártyás* (n 18) 318.

undertaking, termination with essentially any background ‘is feasible’ through the cessation of the assignment.⁴⁷

In the opinion of *Kártyás*, regulating the cessation of the assignment as a ground for termination essentially results in termination without reasoning.⁴⁸ In this respect, *Kártyás* makes a comparison between the former rules of dismissal of public servants without giving reasons, which was held unconstitutional by the Constitutional Court in several respects.⁴⁹ In its resolutions, in connection with public service, the Constitutional Court held that the obligation to provide reasoning for the unilateral termination by the employer has constitutional relevance, and – deduced from the right to work – it belongs to the obligation of the state to protect the institutions. In my opinion, since these arguments of the Constitutional Court are ‘industry-neutral’, the protection against arbitrary termination shall prevail in both public service and private labour law, and in respect of both typical and atypical employments. If the employer is allowed to terminate the employment for work performed in subordination without providing reasons, then it violated the right to work, as well as the protection against arbitrary and unlawful termination.⁵⁰ Without reasoning, effective legal protection cannot be ensured either, therefore such a regulation unreasonably restricts the right to judicial legal protection. Meanwhile, due to the lack of reasoning, the subsistence of the employer and the family of the employee may be jeopardised in an unpredictable way, which creates absolute subordination and dependency for the workers, which contradicts human dignity.⁵¹

Contrary to the above, the Curia of Hungary stated in a recent case that ‘the reasonableness and validity of the dismissal based on the operation of the employer cannot be examined’,⁵² so the cessation of the assignment as a ground for dismissal by the temporary work agency is an objectively justified reason. The temporary work agency cannot influence the economic and organisational decisions of the user undertaking, including the intention to cease the assignment, so the temporary work agency shall not be liable for these decisions.

5 Questions Related to the Dismissal Prohibitions

The Labour Code brought numerous modifications to the system of dismissal prohibitions and restrictions. Multiple dismissal prohibitions disappeared compared to the previous

⁴⁷ Horváth (n 19) 201.

⁴⁸ According to Jácint Ferencz this provision of the Hungarian Labour Code is a ‘lifelike’ solution. See Ferencz Jácint, *Atipikus foglalkoztatási formák* (Dialog Campus 2015, Budapest–Pécs) 122.

⁴⁹ See Decision 8/2011. (II. 18.) of the Constitutional Court of Republic of Hungary, ABH 2011., 49., Decision 29/2011. (IV. 7.) of the Constitutional Court of Republic of Hungary, ABH 2011, 181.

⁵⁰ See Petrovics Zoltán, ‘Miért kell védeni? A munkajogviszony munkáltató általi megszüntetésével szembeni védelem egyes kérdéseiről’ (2017) 1 Munkajog, 4–11.

⁵¹ See Decision 22/2004. (VI. 19.) of the Constitutional Court of Republic of Hungary, ABH 2004., 367, 374–375., Decision 8/2011. (II. 18.) of the Constitutional Court of Hungary, ABH 2011., 49, 74., Decision 29/2011. (IV. 7.) of the Constitutional Court of Hungary, ABH 2011, 181, 192.

⁵² Curia of Hungary Mfv.X.10.103/2020.

regulation, while others survived as dismissal restrictions; moreover, a new type of protection against dismissal also appeared, which had not previously been regulated in Hungarian labour law.⁵³ The regulations continues to allow collective agreement (works council agreements of normative effect) and the agreements of the parties to specify additional prohibitions and restrictions.⁵⁴

In certain cases of dismissal prohibitions (pregnancy, maternity leave, leave of absence without pay taken for the purpose caring for children,⁵⁵ any period of actual reserve military service, as well as women while receiving treatment related to a human reproduction procedure, for up to six months from the beginning of such treatment) the employer cannot lawfully terminate their employment by notice.⁵⁶ In addition to the reduction of the duration of protection, it is a significant change related to human reproduction procedure that – unlike the 1992 Labour Code – the dismissal prohibition extends to women exclusively, despite the fact that men may undergo such treatment as well. The regulation is cause for concern, and it qualifies as direct sex-based discrimination, it makes a distinction between men and women without objective and reasonable reason, based merely on their sex.⁵⁷ Although the Labour Code reduced the number of prohibitions compared to the previous legislation, the Labour Code extended those to pensioner employees as well. The dismissal prohibition based on leave of absence without pay taken for the purpose of caring for children includes two cases. The employee is entitled to leave of absence without pay until the child reaches the age of three, and until the child reaches the age of ten – for the duration of being paid childcare allowance.⁵⁸ The employee may be entitled to protection regardless of his or her sex; however, if both parents use the leave of absence without pay taken for the purpose of caring for children, then only the mother shall be entitled to the protection. In my opinion, this rule violates the requirement of equal treatment, since it makes a distinction between the mother and the father based on the sex of the employee, without any objective and logical reason.⁵⁹

Although part of the prohibitions continued to retain their absolute character, according to the wording of the Labour Code entered into effect on 1st July 2012, the employee could only refer to the protection existing based on pregnancy and treatment related to a human reproduction procedure if the employee had notified the employer of this prior to the communication of the dismissal.⁶⁰ It followed from this that if the employee had no

⁵³ See the so-called relative dismissal prohibition.

⁵⁴ Labour Code pt II ch X s 85 para 2 item *b*).

⁵⁵ Labour Code pt II ch X s 65 para 3 item *c*).

⁵⁶ Labour Code pt II ch X s 65 para 3.

⁵⁷ See Göndör Éva, 'A nőket érintő felmondási tilalmak munkajogi fejlődéstörténete' in Horváth (n 5) 101–117, 112.

⁵⁸ Labour Code pt II ch XI s 128 and 130.

⁵⁹ See Göndör Éva, A családi és a munkahelyi feladatok összehangolását segítő és gátló jogintézmények a munkajogban (Széchenyi István Egyetem Állam- és Jogtudományi Doktori Iskola 2012, Győr) 150.

⁶⁰ Labour Code pt II ch X s 65 para 5.

knowledge of her pregnancy, and the employer terminated her employment, the employee could not subsequently claim the existence of prohibition of dismissal.

It is probably no coincidence that the Constitutional Court decision related to the Labour Code was related to the constitutional assessment of this notification obligation. In the matter of the prior notification obligation, the Constitutional Court based its opinion on that the intention to start a family, and the treatment related to a human reproduction procedure undertaken to this end, as well as the pregnancy – so far it has no external signs – belong to the private sphere and are excluded from any and all state intervention. Considering this, the statutory provision stipulating the mandatory provision of the data related thereto represents interfering with the private sphere in itself.⁶¹

In the opinion of the Constitutional Court, the notification obligation in itself is necessary in order to enforce the dismissal protection, and this would follow from the cooperation and notification obligation of the employee even without a separate provision. However, the Constitutional Court held that notification regarding data which belong to the private sphere is only necessary if any event relevant in terms of the enforcement of the dismissal protection occurs – i.e. the communication of the dismissal – but at least if the employer’s intention to terminate the employment is apparent.⁶² The rule stipulating the notification obligation before the communication of the dismissal obliges the woman intending to have children to notify the employer of circumstances within the private sphere of the employee, regardless of the communication of the dismissal. Consequently, the notification obligation is separated from the employer’s intention to terminate the employment, thus the employee is forced to provide the employer with the notification prescribed by the disputed provision, on the day the human reproduction procedure is started, or immediately after becoming aware of her pregnancy;⁶³ however, this restricts the right of the party concerned to human dignity and private sphere without a constitutional reason.

The Constitutional Court explained that if the expectant woman herself does not know about her pregnancy then the violation of the private sphere is out of the question. However, the Labour Code prescribes a notification obligation prior to the communication of the dismissal in all cases, regardless of whether the employee had become aware of her condition giving rise to dismissal protection. Consequently, those women who are not aware of their pregnancy before the communication of the dismissal will not be able to enforce the dismissal protection later either. Through this provision, in respect of these employees, the legislator set an impossible condition for enforcing dismissal protection. In addition, by disregarding the individual aspects, the legislator made a distinction between expectant women in terms of the enforcement of the dismissal protection, for an illogical reason in

⁶¹ Decision 17/2014. (V. 30.) of the Constitutional Court of Hungary, ABH 2014., 406.

⁶² Ibid.

⁶³ See Bankó Zoltán, ‘A munkáltatói hatalom korlátai a munkajogviszony megszüntetése során – a felmondási tilalmak és korlátozások a magyar munkajogban’ (2015) 2 Jura, 5–10; Göndör (n 57) 110–111.

terms of objective consideration.⁶⁴ Considering all of the above, the Constitutional Court repealed the ‘before the communication of the dismissal’ wording.

In criticising this decision, it shall be noted that the interpretation of the Constitutional Court is incorrect, in that the regulation did not force the employee to notify the employer on the day the human reproduction procedure is started, or immediately after becoming aware of her pregnancy. In my opinion, it could only be deduced from the repealed regulation that it was sufficient for the employee to notify the employer of the subject matter substantiating protection, if – for example – the employee became aware that the employer intended to terminate her employment. Regardless of this, the employee was entitled to give their notification at another time as well, but the act could in no way be interpreted as obliging the employee to disclose these circumstances immediately. In addition to the above, in some cases, the employee is obliged to disclose the fact of pregnancy in accordance with the work safety rules, and – subject to the working conditions – in the interest of protecting her health and the health of the foetus.

Although the Constitutional Court referred to the relevant rules of the effect of the legal statement and the fulfilment of the notification obligation correctly, the Constitutional Court drew partially mistaken conclusions from those since, according to the Labour Code, unless any rule applicable to the employment provides otherwise, the notification shall be made at the time and in the manner that enables the right to be exercised and the obligation to be fulfilled.⁶⁵ In my opinion, until the amendment which entered into effect on 18th June 2016, the same result followed from the provision that remained after the Constitutional Court decision – which merely stipulated the employee’s notification obligation – as during the period before the decision. Namely, if the employer gave its dismissal then that became effective by virtue of the communication. Thereafter, the eventual notification by the employee could not affect the termination of employment, since, according to the general rules, the employee shall make the notification at a time and in a manner which allows the employer to decide in awareness of the facts as to whether it exercises the right to termination or not. However, this is only conceivable if the employee’s notification is given in advance. Although the employer could withdraw its legal statement, this required the consent of the employee; however, if there was no employee consent then the termination of employment would continue to be unlawful, and it could only be settled finally in a labour lawsuit.

According to the amendment of the Labour Code which entered into effect on 18th June 2016, within fifteen days of the employee’s notification following the communication of the dismissal, the employer may withdraw the dismissal in writing. The rights acquired in the meantime are settled by the provision for the interim period, as well as stipulating the payment of unpaid wages and other benefits, and the compensation for damages.⁶⁶ The purpose of the amending provision is commendable; at the same time since, according to the amendment, it is in the sole discretion of the employer to withdraw the legal statement,

⁶⁴ Decision 17/2014. (V. 30.) of the Constitutional Court of Hungary, ABH 2014., 406, 412–413.

⁶⁵ Labour Code pt I ch II s 18 para 2.

⁶⁶ Labour Code pt II ch X s 65 para 5–6, s 83 para 2–4.

the amendment does not necessarily finally settle this situation for the employee. Namely, without the employer's legal statement of withdrawal, the employee may only obtain the same result after initiating a labour lawsuit. Maybe it would be more appropriate to eliminate the employer's right to discretion in order to protect the employee, and connect those legal effects mentioned above to the mere notification by the employee, pursuant to which the consequences related to the employer's legal statement on the termination would lapse by the power of the law. In such cases it would be justified to consider all interim periods as periods of employment in terms of labour law and social security law, in addition to the reimbursement of unpaid wages and possible damages.

6 Questions Related to the Dismissal Restrictions

The Labour Code regulates three types of dismissal restrictions. In the first case, the employer may terminate the employment by notice only if the employer complies with the conditions and additional criteria specified in the relevant rules applicable to the employment. In the second case, the validity of the dismissal is subject to the consent of a third party.⁶⁷ The third case does not restrict the exercise of the right to dismissal, but it puts a time constraint on evoking the legal effects thereof by postponing the start of the notice period. The legal literature refers to these as exemption restrictions or relative dismissal prohibitions as well. The latter creates contrast with the absolute dismissal prohibitions, considering that the employment is terminated only after a specific prohibition period.⁶⁸ The point of this is that although the employer may communicate the dismissal even during certain protected periods, the notice period may however start only upon the expiry of such protected periods. Therefore, in reality, the incapacity to work due to illness, but no more than one year after the expiry of the sick leave, the duration of the absence from work for the purpose of caring for a sick child and the leave of absence without pay for providing home care for a close relative only provide relative protection, and do not affect the communication of the dismissal, only the effective date of its legal effects.⁶⁹

With regard to employees of a so-called protected age – i.e. during the five-year period before the date when the employee reaches the age limit for old-age pension – the Labour Code introduced a completely new solution instead of the rule of special justification, which was difficult to interpret in practice and which provided hardly any protection. The personal scope of the dismissal restriction does not extend to fixed-term employees and those employees who are considered pensioners,⁷⁰ or to executive employees.⁷¹ At the same time, based on

⁶⁷ Labour Code pt III ch XX s 260, s 269; ch XXI s 273.

⁶⁸ Bankó, Berke, Kajtár, Kiss, Kovács, (n 26) 309–310, 333.

⁶⁹ Labour Code pt II ch X s 68 para 2.

⁷⁰ Labour Code pt V s 294 para 1 item *g*).

⁷¹ Labour Code pt II ch X s 66 para 4; ch XV s 210 para 1 item *b*)–*c*).

the arguments explained above,⁷² it is doubtful whether this group of employees could be precluded from protection – in compliance with the requirements of equal treatment – based only on being considered a pensioner or on the fixed term of their employment.

Pursuant to the Labour Code, the extent and content of the dismissal restrictions related to the protected age depends on the reason based on which the employer wishes to terminate the indefinite term employment. If the employer intends to terminate the indefinite term employment of any employee of the protected age on the grounds of the employee's behaviour in relation to the employment relationship then the employer may do so only if the reason is so severe that it would substantiate dismissal with immediate effect subject to a statement of reasons (the former extraordinary termination) as well.⁷³ The higher criteria also mean that dismissal and dismissal with immediate effect are competing with each other, therefore choosing either one belongs to the power of discretion of the employer, as the case may be. This essentially leads to a duplication that is difficult to justify. However, in my opinion, this rule is questionable, not primarily for this reason, but because it overextends the limits of mandatory tolerance of the employer in respect of the problems related to the behaviour of the employee. This is because, in the case of any serious behavioural problem, which in itself is attributable to the employee but does not go beyond the threshold of the dismissal with immediate effect, it cannot be terminated by the employer unilaterally. In my opinion, this overshadows the enforcement of legitimate employer's interests without justification.

If dismissal becomes necessary for any reason related to the ability of the employee or the operation of the employer, then the employment of the employee of 'protected age' may be terminated only if the employer has no vacant position available at the workplace specified in the employment contract (or in the lack of one, the usual workplace of the employee) suitable for the employee affected in terms of skills, education and experience required for his or her previous job, or if the employee refuses the offer made for his or her employment in that job.⁷⁴ In my opinion, the obligation to offer a job is a progressive provision in terms of the job security of the employee, in particular in respect of the reasons related to the operation. The necessity for it is questionable only in case of dismissals based on the employee's abilities, where the employer would have to offer another suitable job to the employee who is unfit or less fit to fulfil his or her job function. However, such a job function shall be adjusted not to the actual abilities, qualifications and practice of the employee, but to the abilities, qualifications and practice necessary to fulfil the 'unsuccessfully' fulfilled job function.

⁷² See above 3. Certain issues related to the dismissal of fixed-term employment.

⁷³ Labour Code pt II ch X s 66 and s 78 para 1.

⁷⁴ Labour Code pt II ch X s 66 para 5.

Closing Remarks

It can be established in general that, apart from the legal consequences of unlawful termination, the Labour Code did not change the rules of the termination of employment fundamentally, thereby ensuring continuity between the old and the new provisions.

However, the new regulation did not completely realise the primary legislative objective – i.e. avoiding the discrepancies occurring in the application of the law – in all cases. On the one hand, the Labour Code does not contain the theoretical premises developed by the judicial practice, the establishment of which would have been justified as the case may be and would have promoted the application of the law. Therefore, for example, the more specific determination of the content requirements of true, clear and substantiated termination interpreted in Opinion No. 95 of the Labour Law Division of the Supreme Court, or – for instance – that the Labour Code does not refer to those defects of the termination by the employer which do not result in the unlawfulness of the termination of employment (for example, mistake in determining the notice period, failure to pay the severance pay or other allowances). On the other hand, the Labour Code gave rise to numerous dilemmas that the judicial practice is only expected to be able to settle at the cost of long years, and in certain cases, the intervention of the legislator would be necessary.

Food Law in the Context of Agricultural Law

Abstract

Agricultural and food law are cross-lying fields of safety laws, penetrated by private and public law, and by European and international law. They show common mixed regulatory concepts, including political, economic and science-based ones. The three pillars of the concept of subject-oriented regulation are consumers, business operators and authorities in a multilevel interaction. There is the same priority of protecting interests by favouring consumers and over business operators. There are naturally interconnections between the two fields of law, first of all to mention is the lifeblood foodstuffs-producing character of agriculture. Protecting the interests of consumers and the concept of food safety connects the two fields of law. The concept of 'from soil to table' agri-regulation model directly influences both environmental and food safety and the biological and chemical safety of agriculture. The harmonisation and integration of laws has taken place in different and in the opposite directions. The basic principles of food law are penetrating the conceptual model of agricultural law.

Keywords: mutual interdependence, product safety, large amount of rules, opposite way of Europeanization, safety of consumer and production, precaution, agri-food law, agri-environmental preconditions, passing through safety law

Introduction

In the last fifty years the subject matter of agricultural and food law has substantially changed in Europe. First of all to mention is the appearance of an international and European regulatory framework, beyond the traditional national agrarian and food laws.

* Mihály Kurucz (PhD) is professor at Eötvös Loránd University, Budapest, Department of Agricultural Law (e-mail: kurucz@ajk.elte.hu).

For more than twenty years we can characterise the agricultural and food law as being modified by a cumulative process of ‘internationalisation and Europeanisation’.¹

International agricultural and food law clearly has a contractual character,² but European agricultural and food law has an institutionalised and autonomous character. Nowadays, both of them are to be considered as *sui generis* fields of law,³ aiming at primacy over member state’s law,⁴ and with exclusionary or subsidiary competence of its own.

European agricultural law is focusing not only to the products and production processes and marketing business,⁵ but it also comprises the preservation of its natural environment, and protection of plant, animal and consumer safety.

The requirements of soil, water, plant and animal protection and animal welfare have become decisive factors both in agricultural and in food law, being built into the new regulatory model of foodchain security.⁶

As a result of successive reforms of agricultural and food law at European level, the two branches of law seem to be approaching to each other in many ways as regards the subject matter of regulation.

Nevertheless, there are eye-catching differences concerning the subject, content and manner of regulating the two fields of law at European level.

The vigorous unification of law under common market regulation has been perceptible in European agricultural law from the beginning of common agricultural policy of EEC. In this regard, the Europeanisation of food law seems to be progressing a little slower, but nowadays stronger, than in agriculture.

From the beginning of CAP until its reforms of 2007, the direct unification of agricultural law has been narrowed to regulating the agricultural products and products made from them. Other areas, such as the agri-food, and agri-environmental law, consumer, animal and plant protection law have remained areas for the approximation of national laws.

Internal market regulation for agricultural products was introduced in 1962, through the CAP. The CAP enabled the development of the most integrated and unified law in the single agrimarket. Since entering into force, the Single European Act has substantially

¹ See Alois Leidwen, ‘Die Internationalisierung des Agrarrechts’ in Gottfried Holzer (ed), *Agrarrecht im Lichte des öffentlichen Rechts. Festschrift für Univ.-Prof. Dr. Gottfried Holzer zum 60. Geburtstag* (Neuer Wissenschaftlichen Verlag 2007, Wien–Graz) 33–49.

² See the The Agreements under WTO on agricultural and food products annexed to the Marrakesh Agreement. See more Globalgap management system for farm produce <https://www.globalgap.org/uk_en/for-producers/globalg.a.p./> accessed 5 October 2021.

³ Wojciech Sadurski, *Rights Before Courts: A Study of Constitutional Courts in Central-Eastern Europe* (Springer 2005, Dordrecht) 146; Vörös Imre, ‘Európai jog – magyar jog: konkurencia vagy koegzisztencia?’ (2011) (7–8) *Jogtudományi Közlöny*, 396–399.

⁴ Jan Klabbers, *An Introduction to International Institutional Law* (Cambridge University Press 2002, Cambridge) 61–63.

⁵ The so-called negative integration.

⁶ The principle of ‘from soil to table’.

changed the content of the regulation of national and European agricultural law, a number of new areas have appeared at European level, such as harmonised laws on foodstuffs, feedstuffs, veterinary issues, plant protection, the protection of seeds and use of fertilisers, not to mention environment-related agricultural law.

Since 2002, through the introduction of General European Food Law (henceforth: GFL), has been created a strong process of unification of food and feed law in EU, rather than simple approximation of national food laws.

In this study, I focus on the appearance and partial integration of food law into agricultural law and the the parallel, but adverse procession of unified european regulations into both fields of law.

I The Specific Characteristics of Food and Agricultural Law (Agri-food Law)

Looking at the material of agricultural and food law, we have at once to appreciate the infinitely large number of rules. As a consequence, it sometimes seems impossible to put all the provisions into a well-ordered structure.⁷ In the absence of basic principles and such a structure, it is impossible to understand the law. The systematisation of food and agricultural law means structuring its material regulation (aims, principles, rules and their explanation etc.) into a comprehensive model. This is the precondition for understanding and exploring the two fields of law.⁸

If we consider food and agricultural law in the context of the different classic branch of laws, both of them seem to be structured as cross-lying, or doubled interlaying fields of law, penetrated by private and public law, and by European and international law at the same time.

There are authors, who are convinced of the private law origin of food and agricultural law, penetrated with public law institutions. Others interpret them as part of public law, with private law institutions emerging from it.

Common regulatory concepts, including political, economic, and science-based ones, appear in the regulation of the food and agricultural sector. The mixed, sometimes integrated interpretation approach of food policy appears naturally in the regulatory manner as well.

In the science-based approach, we can conclude that food and agricultural law are functional areas of law; they are researched and taught academic disciplines in their own right. This interpretation is based on their social phenomena and dogmatic distinction.

⁷ The quantity of national and European food and agricultural laws makes it one of the most heavily regulated sectors in the EU. Both fields of law seem to be up to now an annoyingly fragile legal branch.

⁸ Observing the manner of provisions on the basis of what and how to regulate, and who is addressed in regulation. See Bernd M. J. van der Meulen, 'The Structure of European Food Law' (2009) 14 (2) *Deakin Law Review*, 305–339.

According to the material of the food and agricultural legislation, we can group the legislative acts into five categories:

- legislation on production in the internal market,
- legislation on the process and marketing of products,
- legislation on the different items of protection of and subsidies of producers,
- legislation on the protection of consumers.

Agricultural law focuses on

- subsidies to agricultural producers as entrepreneurs,
- protection of consumers,
- animal and plant protection,
- ruling on the competence of European and member state authorities,
- the protection and preservation of the natural and social environment.

EU food law focuses on

- the protection of consumers,
- legislation on the processing and marketing of food products,
- legislation on the process and marketing of additives and technological excipients in foods,
- legislation on food safety: traceability of certain elements of producing foods,
- responsibility of entrepreneurs, and
- ruling on the tasks and competence of authorities.

Both the agricultural and food law legislation have common central essential sorting basic rules (pillars of activity and legislation), emerging from the general contractual rules of all Treaties of the Community.

First, we can refer to the autonomous latitude of the producer, as an entrepreneur. The producer as a business operator is free to produce, process and trade agricultural and food products, under the obligation of preventive and precautionary behaviour. The first margin of free latitude is the general prohibition of abusive behaviour, so long as no certain requirement of law to be applied.⁹

The second pillar is the prohibition of producing or bringing into the common internal market unsafe or potentially risky products.¹⁰

The third basic pillar is, if prior authorisation is to be obtained to produce or to bring the products (food etc.) to the market, the activity is prohibited before getting permission and if is withdrawn or elapses.

The fourth basic maxim is to provide full disclosure to intermediate producers and consumers on the attributes of its products produced (traceability).

The fifth and new maxim is the environmental and social sustainability of production. Both fields of law are penetrated by the requirements of different sectors of safety law, first of all by the chemical, biological and genetic safety.

⁹ Article 17, Section 1 of GFL.

¹⁰ Article 14 of GFL.

At the same time, food and agricultural law differ from each other in addressing the basic subject groups and regulating the subject matter. However, there are similarities in their cardinal approach to regulating the food chain, in particular in product related regulation and in the protection of consumers and the environment. The protection of consumers covers all the elements of the food chain, to maintain:

- life,
 - health,
 - the right to be informed of relevant information concerning the content, quality and quantity, as well as any potential danger of the foodstuff,
 - other interests,
- of consumers.

There are particularities in the two branch of law, but the two areas of law simultaneously protect consumers' interests, in every stage of the food chain, from the soil to the consumer's table. The CAP regime, due to the prescription of the TFEU, serve the vital interests of protection of consumers through compliance measures.

Both agricultural and food law now focus primarily on the protection of consumers, but they do not pass the direct protection of food producers' income stability over. Horizontal, non-product-related regulation, and the free trade in food commodities, subordinated to public safety, has been maintained.

II Mutual Interdependence of Agricultural and Food Law through the Safety of Consumers and Production Concerning Foodstuffs and Production Process

There are naturally interconnections between the two fields of law; the first to mention is the character of agriculture as producing the essentials for human and animal life and health.

Protecting the interests of the consumer and the concept of food safety connect the two fields of law. The concept of food includes unprocessed raw materials containing the minerals, vitamins and nutriment necessary for the life of individuals.¹¹ Agricultural production provides the food supply in a quantitative and qualitative sense.¹² Different institutions guarantee the security of food supply and different systems of rules guarantee the safety of food products. Agriculture must work under a coherent demand-oriented food mission, to provide a wide choice of foods at reasonable prices to consumers.

¹¹ The concept of food regulated by general food regulation of European Parliament and Council from 2002.

¹² In practice, EU agriculture should guarantee the security of food supply and safety of food products for over 500 million European citizens.

Food security and food safety are among the most important tasks of agricultural production.¹³ National governments and regional and global institutions have a role in maintaining such a policy of agriculture and food production.

III Indirect Regulation of the Security of Food Quality through Agri-environmental Law

The problems of climate change, the degradation of biodiversity, deterioration of the soil and arable lands, influence of plant-protecting chemicals and the appearance of genetically modified organisms in the environment are endangering the security of food supply at a worldwide level. The technologies of large-scale and standardised food production are the key economic factors influencing the quantity and quality of food supply. As a response to these factors agricultural law has been modified at European level, involving the regulation of protecting environmental, human, animal and plant health in the course of production.

The environmental protection requirements are more and more integrated into agricultural law.¹⁴ The integrated model of 'sustainable agriculture' is low-input farming systems producing healthy food, while preserving the natural ecosystem and ignoring genetically modified or engineered agriproducts and foods to preserve biological security.¹⁵

The theoretical basis of agri-environmental law¹⁶ is based on the concept of ecological sustainable development, which implies meeting the needs of the present without compromising the ability of future generations to meet their own needs, should become a central guiding principle of the United Nations, governments and private institutions, organizations and enterprises.¹⁷

Agricultural production is to be harmonised with the sustainable form of development, when agricultural exploitation has served the human right to a healthy environment¹⁸ and

¹³ One of the greatest problem of the 21st century is that 794.6 million people suffer from gnawing pains of hunger, while the number suffering from illnesses is radically increasing (e.g. diabetes, sickly sensitivity to gluten as well as to lactose and other food intolerances and allergies). The State of Food Insecurity in the World. FAO, Rome, 2015. <<http://www.fao.org/3/i4646e/i4646e.pdf>> accessed 5 October 2021.

¹⁴ See Article 3 of the Treaty Establishing the European Community, listing its goals.

¹⁵ Sustainable agriculture and rural development, Report of the Secretary-General Economic and Social Council, Commission on Sustainable Development, Eighth session, E/CN.17/2000/7, point 35 and 57.

¹⁶ The 'integration principle' of environmental law is the connecting link between sustainability and agri-environmental efforts.

¹⁷ General Assembly Resolution 42/187, 11 December 1987.

¹⁸ See Principle 1 of the Stockholm Declaration of the United Nations Conference on the Human Environment. Stockholm Declaration, part II (Principles), Principle 1.

to the right to healthy food.¹⁹ A clean environment provides the integration of environment and agricultural production in every part of food chain.²⁰

IV Parallel but Different Ways of Regulation for the Harmonisation of Agricultural and Food Law

In the agricultural and food law from the beginning of EEC can be seen in the policy making and in regulation the parallel, but different approximation of national laws, acting in opposite way. During the first years of the EEC, the legislature developed the common agricultural policy (CAP) and the first single internal market for agricultural products. The main motivation, setting out the aims in Article 39 of the Treaty of EEC, was the desire to gain self-sufficiency in food supply and income stability of producers. Foods derived from agricultural products fell within the concept of agricultural product and were directly subject to the CAP. In this way, this section of the entire food chain became under common market organisation.

1 Dual Method of Harmonisation with Regard to Agri-food Products

From the beginning of EEC up to now, there has a strong legal basis for the integrated regulation of the common market for producing and marketing agricultural and food products by the CAP, based on the relevant rules of the Treaty of Rome.

Nevertheless, there is a mixed territory between the two subjects of law, namely among the so-called agri-food products, as feed- and foodstuffs produced directly for animal and human consumption. In this mixed field of law, the rules of common agricultural law are penetrated by food law. Agricultural law contains the regulatory scheme based upon the CAP regulation of Treaty of EEC, namely through the common market-organisation regulation. The products concerned are primarily agricultural products, produced directly for human consumption, and are considered as foods up to the first degree of processing, but originating directly from agricultural production, such as fruits and vegetable, eggs, milk and dairy products, rice, butter and powdered milk and grain.

In this regulation, the agricultural and food law were harmonised in parallel, but in different ways, under either Art 43 EEC or Art. 100 EEC. The two forms of the legal basis for the harmonisation of law were of a different character. The content of harmonisation according to Art 100 EEC was considered an approximation of law, while in the agricultural fields under

¹⁹ The right to food as a fundamental right, as precondition of biological existence, bears the characteristics of the human rights of third generation, appeared the 20th century. See 'The Right to the Adequate Food' (2014) 2 (4) *Acta Humana: Communications on Human Rights*, 55–64.

²⁰ Report of the Expert Group Meeting on Identification of Principles of International Law for Sustainable Development, Geneva, Switzerland, 26–28 September 1995, paragraph 31.

Art. 43 EEC was as a unification of law. Both of them primarily covered product-related quality requirements, safety, health protection and the consumer of agricultural produce.

2 Direct Harmonisation in Food Law

In the first years of the EEC, the EC's legislation regarded foodstuffs as simple commodities in the market.²¹ From the early 1960s until the mid-1990s, European food law was principally directed by the basic rules of the internal market for goods. Only the wine law is to be considered an exception, as it was covered by the Council Regulation of 1962.²² There were three different phases in the approximation of national laws.

In the first years, Community legislation aimed primarily at facilitating the internal market through the harmonisation of national product standards.²³ Early attempts to establish a common market for food products was the market-oriented phase when, in connection with the exceptions of protecting the health and life of humans, animals or plants, the free movement of goods, became the vital element of food law. This market-oriented phase could be divided into two stages.

The first was the harmonisation of national product standards through vertical directives.²⁴ The directives were issued on the composition of certain specific food products, such as recipe, compositional or technical standards legislation. The prescription for product compositions faced two substantial obstacles. The first was the rule of procedure; all legislation required unanimity in the Council, which gave each Member State a virtual right of veto over new legislation. The second was the impossibility of dealing with all foodstuffs.²⁵ The so-called Dijon and Sandoz decisions transformed market-oriented food law into mutual recognition²⁶ oriented food law, without compromising consumer protection. The principle of mutual recognition has resulted in product quality standards based on the lowest common denominator in the Community: the prohibition of quantitative restrictions on imports and all measures having equivalent effect,²⁷ but without implying consumer protection.²⁸ One

²¹ The first legislative Acts was initiated by the Directorate General responsible for agriculture, but eventually by the DGs responsible for industry, enterprises and the internal market.

²² See the regulation of Council, 4 April 1962, Nr. 24/1962.

²³ The vertical type of regulation has not disappeared in food law. The basic rule, the Codex Alimentarius until now regulates certain foods in a product-specific manner.

²⁴ Direct integration of food commerce and production through European Recipe Principle.

²⁵ Nevertheless, a few products have remained subject to European rules on compositional standards, as a part of legacy of the first phase of EU food law. They are being updated or replaced when necessary. (For example, the definition of gin, rum, whisky, the content of fruit juices etc.).

²⁶ The most relevant European courts cases were the following judgement: C-120/79 (*Cassis de Dijon*), C-174/82 (*Sandoz*) and C-176/84 (*Beer*).

²⁷ Now to be read in Article 34 of the Treaty on the Functioning of the European Union (TFEU).

²⁸ This will be shown later on in this article. In the meantime, the protection of consumer safety has been concentrated at EU level.

outcome of this decision has significantly changed the content of harmonisation: it had to serve to alleviate the consequences of the system of mutual recognition.²⁹

The second stage of harmonisation³⁰ was the conversion from product-specific legislation to horizontal legislation for additive substances and excipient materials. In 1969,³¹ the Council adopted the programme to eliminate technical barriers to trade in foodstuffs. The Council regulation described 50 areas of food law for approximation by December 1970.

An important part of horizontal harmonisation was the regulation of a positive list of accepted additives and excipient materials having contact with foodstuffs, to avoid any contamination of them.³² The additives could have been used due to previous official approval if they corresponded to a reasonable technological need and presented no hazard to the health of the consumer. The legislation setting limits on the presence of undesirable substances (contaminants, toxins, residues of pesticides or veterinary drugs) or organisms in food were set on the basis of scientific risk assessment

V The Integrated European Food Law as an Autonomous Body of Law

The beginning of third phase is the formation of sui generis EU food law does not seem to be conceptualized in advance. It seems to be as an urgent response and reaction to major food scandals³³ ‘developing’ in the European food market. The social effects of great food scandals have led to a new approach in the regulatory system: preserving the internal food market but subordinated to European food safety law. In May 1997, the European Commission published its Green Paper on the general principles of food law in the EU and sketched the outlines of a new legal system giving consumer protection as the main priority, with strengthened food safety control.

The White Paper on Food Safety was published in January 2000, focusing on high levels of food safety in European food law. There was an Annex to the White Paper, the Action Plan on Food Safety, with a list of 84 legislative steps, submitted by the Commission to create a regulatory framework for ensuring a high level of protection of consumers and public health.³⁴ The new regulatory framework of food law has resulted in regulations taking the lead role in unifying of European food law instead of approximative directives, although the horizontal

²⁹ See the ‘Communication on the free movement of foodstuffs within Community’ published by the Commission in 1989 (OJ No 271. of 24 January 1989).

³⁰ The German translation of Article 100 of the Treaty of Rome refers to *Angleichung*; the English text uses the word Approximation. There are differing definitions of these words.

³¹ OJ No C 76. 17 June 1969.

³² Now are the Regulation 1935/2004 Food contact materials; Allergen labelling requirements included in Directive 2000/13 and Regulation 1924/2006 Nutrition and health claims.

³³ Subsequent food safety scares, outbreaks of animal diseases, such as BSE epidemic and scandals over fraudulent practices led to taking urgent protective measures.

³⁴ Most of the 84 steps were taken.

form of harmonisation has survived the reforms of food law, and is still an important part of its regulation.³⁵

Having passed the food scandals of the final decades of the last century, Regulation 178/2002 of the European Parliament and of the Council, defining the regulatory scope of GFL, was published. The new law introduced a new holistic approach in interpreting food safety, as integrated safety law with basic maxim of laws: ‘food security embraces every stage of the food chain, including protection of the primary sector of food production such as soil, water, plants, feed for food producing animals: “from farm to fork”’. This integrated body of GFL should apply directly in the European Union and its Member States.³⁶ It establishes the common basis for food law in Member States and includes common definitions, general provisions and specific requirements and, lays down the procedures in matters of food safety. The GFL is essentially based on centralised regulatory power and ruled by regulations rather than directives.³⁷

The Regulation of of GFL has become the foundation of the new European food and feed law. It sets out an overarching and coherent framework for the development of food and feed legislation, both at Union and national level. The GFL expresses the objectives of EU food law in Article 5. Food law shall pursue one or more of the general objectives of

- a high level of protection of human life and health and³⁸
- the protection of consumers’ interests, including fair practices in food trade, taking account of, where appropriate,
- the protection of animal health³⁹ and welfare, and
- the protection of plant health.⁴⁰

³⁵ Article 3(2) (a) Regulation 1333/2008 on food additives. Note that this concept of food additives is much less wide than the one applied in the USA. See Federal Food, Drug and Cosmetics Act § 201 (21 USC § 321).

³⁶ Consolidated Version of Regulation (EC) No 178/2002, implemented by Commission Regulation (EC) No 2230/2004 (OJ L 379, p64, 24/12/2004) of 23 December 2004 and Commission Implementing Regulation (EU) No 931/2011 (OJ L 242, p2, 20/09/2011) of 19 September 2011. The Commission has published a Guidance Document on the Implementation of Articles 11, 12, 16, 17, 18, 19 and 20 of Regulation EC/178/2002 on General Food Law. The document aims to assist all players in the food chain to better understand the requirements of the Regulation and to apply it correctly and in a uniform way.

³⁷ There are very important fields of food law, retaining the indirectly horizontal control devices of integration, such as the directives for food-additives.

³⁸ Protection of consumers from unsanitary, unwholesome, mislabelled, or adulterated food.

³⁹ The first elements of EC regulation can be found in December 1992, when the Council abolished intra EC frontier controls. It followed the Directive 89/662 which aimed to ensure veterinary checks on the place of dispatch of animals. A number of measures were adopted to control and prevent various livestock diseases, such as brucellosis and tuberculosis in cattle and swine fever.

⁴⁰ Plant health control is part of the security of the food chain of primary importance. The protection system has to prevent the harmful organisms from getting into and spreading in animal feed and human food. The harmonisation of plant protection law is similar to veterinary control; it introduced the health-check system at the place of production and dispatch, before the product gets into the market. It covers protection from the introduction and spread of harmful organisms to plants too. Plant health standards were established within the EC through a framework directive, which extends to the regulation of a positive list for applicable plant

It is obvious that there are natural overlapping territories with agricultural law, in particular within the regulatory framework of food chain. We can see the similarity in product related regulation of food and agricultural law there are significant overlaps as to the scope of food law.

The GFL covers all sectors of the food chain, including important areas of agricultural law too:

- feed production,
- primary production,
- food processing, storage,
- transport, and
- retail sale.

1 European Food Law as Science-based Law

European food law seems to be based on an explicit science-based decision-making procedure. This prescription of risk analyses (composed of risk assessment, risk communication and risk management) eventually raises the science-grounded decision makings mechanism to the eminence of a principle of food law. The European Food Safety Authority (EFSA) was established to ensure the science basis of risk analysis.⁴¹ The science-oriented requirements extend to the content of labels; protecting human health should be based on risk analysis.⁴² When risk assessment is inclusive in its procedure, but gives scientific reasons to suspect a food safety risk then public authorities are entitled to take protective measures.

2 European Food Law as Food Safety Law

The Regulation has laid down the general principles and requirements of food law.⁴³ The main objective of the GFL is to secure a high level of protection of public health and consumer interests with regard to food products. The concept of food is at the centre of the regulation. If the product in question meets the legal definition for food, the regulatory system of the GFL should apply to it.⁴⁴ The term food involves food and food ingredients, therefore both of them are subject to the GFL.

protection substances and prescribes maximum levels of pesticide residues in different plants, cereals, fruits and vegetables and other foodstuffs of animal origin and feed.

⁴¹ Article 6 of 2002 Regulation 178/2002 (General Food Law, abbreviated to GFL).

⁴² Article 5 Section 3 of GFL '[w]here international standards exist or their completion is imminent, they shall be taken into consideration in the development or adaptation of food law, except where such standards or relevant parts would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives of food law or where there is a scientific justification, or where they would result in a different level of protection from the one determined as appropriate in the Community'.

⁴³ The conceptualisation of GFL emphasises the primacy of regulation by decree and at European level.

⁴⁴ The GFL defines the positive and negative terms of 'food' (Article 2 of GFL) as the subject matter of regulation. The general descriptive determination in certain cases is to be interpreted according to the product relevant definition of Codex Alimentarius. See the Article 7 of GFL.

The new food law does not exclude certain other interests, so the free movement of food and feed manufactured or marketed in the internal market is preserved, but it primarily focuses on the protection of consumers. The GFL Regulation declares that only safe food and feed can be placed on the Union market or serve as feed to food-producing animals. The Regulation establishes basic criteria for establishing whether a food or feed is safe or unsafe.⁴⁵

GFL is essentially based on centralised regulatory power, and ruled by regulations, rather than directives.⁴⁶ Its regulatory model is based on three pillars:

- legislation on food products,
- legislation on the manufacture of food products, and
- legislation on the presentation and marketing of food products.

3 Passing Theoretical Model of European Food Law through to Agricultural Law

The theoretical model of establishing the basic principles of food law is derived from the hierarchy of the three main actors in the food market, the consumer, the food business operator⁴⁷ and authority. Food business operator means the natural or legal persons responsible for ensuring that the requirements of food law are met within the food business under their control.

First in the hierarchy is the consumer, followed by the of food-business entrepreneurs, and finally the tasks and competence of authorities in multilevel administration.

Corresponding to these basic pillars are built the principles of food legislation, as follows.

a) The precautionary principle

Consumers must have confidence and assurance that the food they buy will do them no harm or have an adverse effect. In the Commission's approach, the aim of precautionary principle is to establish Commission common guidelines for understanding of how to assess, appraise, manage and communicate the risks in the food production that science is not yet able to evaluate fully, and avoid unwarranted recourse. The safety of food is of critical importance.

The so-called precautionary principle has been implemented to prevent uncertainty and overwhelming risk from occurring in the food market.

The precautionary principle is an integral part of the decision-making process leading to the adoption of any measure for the protection of human health. Under the precautionary

⁴⁵ Article 14 of Regulation (EC) No 178/002 sets out food safety requirements. It requires that food must not be placed on the market if it is unsafe.

⁴⁶ As an important exemption is to be mentioned the so-called horizontal rules of food additives.

⁴⁷ The European Commission has published a poster on the Key Obligations of a Food Business Operators. Regulation (EC) No 178/2002 defines food as any substance or product, whether processed, partially processed or unprocessed, intended to be, or reasonably expected to be ingested by humans.

principle, the Commission or the Council may take protective measures without having to wait for the reality of risks and danger to be fully demonstrated.

The analysis of and support for best practice in the application of the precautionary principle in different areas of policy making and in the assessment, management and communication of uncertainty and risk.

b) Regulation on information by producers

In the presentation of certain foods, entrepreneurs must provide suitable information to consumers regarding the attribution and quality of their product, through labelling and advertising.

Labelling implies ‘any words, particulars, trade marks, brand name, pictorial matter or symbol relating to a food and placed on any packaging, document, notice, label, ring or collar accompanying or referring to such food’.⁴⁸ Labelling and other food information may not be misleading.⁴⁹ The information to consumers must be labelled in a language that is easily understood all pre-packaged food products.

Specific labelling requirements demand that the presence of additives, novel ingredients and GMOs be mentioned on the label. In 2006, a Regulation on nutrition and health claims was published. Nutrition claims must conform to the annex to the regulation.⁵⁰

The Regulation provides opportunities for small-scale producers to use quality symbols⁵¹ as a means of promoting their products, without the long and costly process of obtaining a trademark for their product.

The origin of a product must be labelled if omitting this information would mislead the consumer. In most other situations, this is voluntary. Some designations of origin are protected. Regulation of agricultural indications establishes rules for the protection of certain designations of origin (PDO) and geographical indications (PGI) on agricultural products. The regulation extends to the recognised traditional specialties, and to the use of terms referring to the ‘organic’ production method (such as ‘eco’ and ‘bio’).

c) Traceability of food and feed throughout the food chain and trade

Tracing food and feed throughout the food chain is very important to protect the consumers, particularly when food and feed seem to be found faulty.⁵² The General Food Law Regulation

⁴⁸ Article 2 section 2 of Regulation 1169/2011.

⁴⁹ Article 7 section 1 of GFL. Article 16 of Regulation 1169/2011.

⁵⁰ The annex states among other things that the expression ‘light’ may be only used in case of a reduction of at least 30% of certain nutrients or energy. Health claims, e.g. claims about the effects of a certain food on health, must be science based and approved. Foods bearing health claims are sometimes called ‘functional foods’.

⁵¹ Names or signes used on their certain products which corresponds to a specific geographical location or origin, according to the list of the Union’s GIs.

⁵² Traceability Article 18 of GFL. See the Factsheet on Traceability Regulation (EU) No. 931/2011.

defines traceability as the ability of the producer or authority to trace and follow food, feed and their ingredients through all stages of production, processing and trade.⁵³ The concept of traceability extends to the ability to trace the substances intended to be, or expected to be incorporated into a food or feed, through all stages of production, processing and distribution.⁵⁴

The aim of traceability is to be able to identify the source of a food safety problem quickly and to conduct the case in question properly by the withdrawal of affected products from the market.

Traceability enables step by step, in a back and forward manner, to identify and reconstruct the various elements of food-chain, and

- identify the critical elements of production, processing, distribution including by whom the product was produced, processed, exported, of its origin,
- facilitate withdrawal of faulty food/feed from the market,
- provide consumers with accurate information on food and feed,
- affects importers to be able to identify the origin of the product in question,
- obliges producers to be able to identify at least the immediate supplier and the immediate subsequent recipient of the product in question.

If a food safety incident occurs, this information must enable the authorities to identify the origin of the problem and its dispersal swiftly in order to eliminate the cause and take care of the consequences. Finally, entrepreneurs that have reason to believe that a food they have brought to the market may not be in conformity with food safety requirements are under obligation to withdraw it from the food chain and recall it from consumers.⁵⁵

d) The entrepreneur's responsibility

The Regulation establishes the principle that the primary responsibility for ensuring compliance with food law, rests with the food business operator. producers as entrepreneurs bear the primary responsibility for ensuring that foods or feeds satisfy the requirements of food law.⁵⁶ If they have reason to believe that their food or feed is unsafe, they shall immediately inform the competent authorities and withdraw the food or feed from the market and – if need be – recall it from the consumers.⁵⁷

If the food or feed in question is unsafe, the producer as a market operator is simultaneously obliged to withdraw or recall it, and to notify the competent national authorities, to take appropriate measures to reduce or eliminate a food safety risk. The science-based European law

⁵³ More detailed traceability requirements in the context of the General Food Law Regulation are laid down for certain specific sectors; Foods of animal origin: Commission Implementing Regulation (EU) No 931/2011; Sprouts and sprout seeds: Commission Implementing Regulation (EU) No 208/2013.

⁵⁴ Article 3 section 15 of GFL.

⁵⁵ Article 19 of GFL.

⁵⁶ Article 17 Section 1 of GFL.

⁵⁷ Withdrawal, recall and notification for food and feed (Articles 19 and 20) in relation to food and feed safety requirements (Articles 14 and 15).

making has international effects too.⁵⁸ For situations of scientific uncertainty, the precautionary principle is to be applied.

Primary responsibility for ensuring compliance with safety requirements of food law rests with food-entrepreneurs. To complement and support this principle, the competent authorities of the Member States must assure adequate and effective controls.

Instead of Completion

The correlation of regulation in two fields of law is well demonstrated as legislation of having a consumer and environmental protective character. These naturally joining areas represent the significant element of integrated agri-food legislation, as a part of safety law in recent years.

⁵⁸ Commercial connections to WTO, regarding to judgement the impacts of growth-promoting hormones and genetic modification of concerned foods.

Articles

Consumer Protection in the Light of Smart Contracts

Abstract

This article aims to evaluate how common forms and methods of protecting the rights and legitimate interests of consumers are applicable in the area of smart contracts. The author highlights the potential negative effects of smart contracts on consumer protection. In this regard, barriers to deploying smart contracts are considered in the article. The article concludes with a brief appraisal of the judicial role in the application of smart contract rules and contends that technical modifications are needed in order to see whether smart contracts could be more efficient than traditional contracts.

Keywords: smart contracts, consumers, consumer rights, contract terms, consumer protection

Introduction

The current stage of social and economic development is characterised by the serious impact of technologies. In order to keep up with technological progress, the legal system is constantly developing and improving: new norms are being created and existing ones are being changed; gaps and contradictions in legislation are being eliminated. However, sometimes economic and social relations develop more rapidly than the legal norms regulating them. The most striking example is blockchain technology, contributing to the current rise of smart contracts. Smart contracts are not really 'contracts' in the true sense of the word, understood by most as negotiated terms in an arms-length transaction (or 'meeting of the minds').¹

* Marina Kasatkina is a PhD Candidate at Maastricht University (Netherlands) as well as Lecturer Assistant at Lobachevsky State University of Nizhny Novgorod (Russia). (e-mail: marina_demidyuk@mail.ru; m.kasatkina@maastrichtuniversity.nl).

¹ Schmitz, Amy J. and Rule, Colin, 'Online Dispute Resolution for Smart Contracts (June 26, 2019)' (2019) 103 Journal of Dispute Resolution, University of Missouri School of Law Legal Studies Research Paper No. 2019-11, <<https://ssrn.com/abstract=3410450>> accessed 11 January 2021.

Initially, the concept of a smart contract was introduced by a well-known American scientist, a specialist in the field of law and cryptography, Nick Szabo, in 1994. According to him, a smart contract should be understood as ‘a computerized transaction Protocol that fulfils the terms of the contract’.² Herewith, the general objectives of smart contract design are to satisfy common contractual conditions (such as payment terms, liens, confidentiality, and even enforcement), minimise exceptions both malicious and accidental, and minimise the need for trusted intermediaries.

Due to the nature of this new phenomenon and the complex technology with which it is associated, there is no consensus in legal science on the definition of smart contracts and their legal nature. Nevertheless, generally speaking, the ‘smart contract’ category can be defined in the technical and legal sense. In other words, smart contracts may be 1) computer code that does not represent any legal contract but simply executes a predefined logic; 2) computer code that has certain legalese properties, i.e. a program with a predefined logic based on legal structures that is expected to act in a certain way or the (partial) execution of legalese (e.g. a contract) through computer code, where the code resembles the legalese.³

The exciting development of the smart contracts theory, which includes legal and technical provisions, has led to some simplification of the activities of individual subjects. In other words, smart contracts allow human and material resources to be saved and provide a certain independence.

According to the status of subjects, the digital product market is divided into such segments: as 1) Business-to-Business (B2B) – trade between entrepreneurs; 2) Business-to-Consumer (B2C) – trade between an entrepreneur and a consumer (citizen, household); 3) Consumer-to-Consumer (C2C) – trade between citizens (households); and 4) Business-to-Government (B2G) – trade between an entrepreneur and the state (public authority). However, this raises the problem of effective legal protection of consumers in such relationships.

The peculiarity of relations with the participation of consumers is that the legislation establishes a number of preferences for consumers as an objectively weaker party in the relevant legal relations, who need additional guarantees to protect their own rights and interests. Effective protection of consumer rights is crucial for creating a fair, transparent and competitive market based on the use of modern digital technologies. The question arises of how common forms and methods of protecting the rights and legitimate interests of consumers are applicable in the area of smart contracts.

Generally speaking, there are significant barriers in the consumer finance space to deploying smart contracts. They have the potential to avoid protecting consumer rights,⁴

² Nick Szabo, ‘The Idea of Smart Contracts’ (1994) <<http://www.fon.hum.uva.nl/rob/Courses/InformationInSpeech/CDROM/Literature/LOTwinterschool2006/szabo.best.vwh.net/smart.contracts.html>> accessed 11 January 2021.

³ Lennart Ante, ‘Smart Contracts on the Blockchain – A Bibliometric Analysis and Review’ (April 15, 2020). <<https://ssrn.com/abstract=3576393> or <http://dx.doi.org/10.2139/ssrn.3576393>> accessed 14 January 2021.

⁴ Joshua A.T. Fairfield, ‘Smart Contracts, Bitcoin Bots, and Consumer Protection’ (2014) 71 (2) Wash. & Lee L. Rev. Online, 36, <<https://scholarlycommons.law.wlu.edu/wlulr-online/vol71/iss2/3>> accessed 14 January 2021.

therefore the potential negative effects of smart contracts on consumer protection have to be highlighted. The obstacles are primarily related to consumer behaviour, their bargaining power and difficulties with consumer rights enforcement.

The aim of harmonised legislation includes the elaboration of a set of system-forming legal norms which could balance, in a timely manner, the interests of consumers and entrepreneurs for the effectiveness and viability in practice of smart contracts. In this regard, it is essential to give a detailed analysis of each problem.

I Specific Characters of Consumer Behaviour

It is known that counterparties in consumer financial contracts are humans. This assumption implies that consumers and regulators expect the parties to be imperfect and then expect flexibility around those imperfections.⁵ This is reflected in a number of cases as described below.

First, in most transactions, a consumer has no incentive to read a whole standard form contract: The consumer will most likely not understand the legal language anyway and knows that the risk of the contract terms being invoked is very low.⁶ Many contracts terms generally remain unread.

Second, Russell Korobkin, for instance, argues that ‘the reason form terms deserve scrutiny is that buyers are not fully rational, but rather make decisions in a boundedly rational manner’. Korobkin focuses on the psychological finding that people often focus on salient information at the expense of less salient but relevant information. In the standard form contract context, he argues that consumers may focus heavily on more salient terms – such as price – while ignoring other less salient terms – such as boilerplate arbitration clauses or financing terms.⁷

It is also argued that consumers are subject to optimism biases. In general, psychological studies have shown that adults are systematically over-optimistic and tend to downplay (or mispredict) the likelihood of negative future events. Besides, consumers are subject to what is known as the availability heuristic. This leads them to place disproportionate weight on easily available information when making decisions and to underemphasise less available – but perhaps more relevant – information.⁸

⁵ Peter S. Goodman, ‘U.S. Will Push Mortgage Firms to Reduce More Loan Payments’ (November 28, 2009) N.Y. Times, <<https://www.nytimes.com/2009/11/29/business/economy/29modify.html>> accessed 20 January, 2021.

⁶ Robert A. Hillman, ‘Online Boilerplate: Would Mandatory Website Disclosure of E-Standard Terms Backfire?’ (2006) 104 (5) Michigan Law Review, 837, 853.

⁷ Russell Korobkin, Bounded Rationality, ‘Standard Form Contracts, and Unconscionability’ (2003) 70 (4) The University of Chicago Law Review, 1203–1230. <<https://doi.org/10.2307/1600574>> accessed 19 October 2021.

⁸ Amos Tversky, Daniel Kahneman, ‘Availability: A Heuristic for Judging Frequency and Probability’ in Daniel Kahneman et al. (eds), *Judgment under uncertainty: Heuristics and biases* (Cambridge University Press 1982, Cambridge) 163, 166. <<https://doi.org/10.1017/CBO9780511809477.012>> accessed 19 October 2021.

However, in smart contracts, there is no one on the company side to exercise the kind of discretion consumers sometimes seek.⁹ Sellers can therefore include inefficient and self-serving boilerplate terms, because consumers are likely to underestimate the risk of future default. These open the door for the seller to include the onerous terms and increase the likelihood of abusing consumer confidence.

The informality of contracting in the online world, the difficulty of reading them, and the extraordinary complexity of terms make it a possibility that consumers can be bound to unfair terms. For instance, some internet sellers in the last several years have attempted to impose non-disparagement clauses on consumers through their clickwrap and browsewrap contracts,¹⁰ although no reasonable consumer would knowingly agree to pay thousands of dollars in liquidated damages merely for publicly complaining about a product or service.¹¹

What this means is that producers – sophisticated parties with strong access to legal expertise and control over contract terms offered to consumers – are able to take advantage of relatively archaic contract principles that are still wedded to a commercial model of contract behaviour in which both parties are expected to guard their own interests in the transaction. The result is that producers are generally able to use classic contract doctrines such as the common law’s ‘duty to read’ and the objective theory of contracts to create an appearance of assent that fully satisfies the legal requirements while providing none of the protections of consumer interest that are presumed by the classical models.¹²

For this reason, it is important to inform the consumer adequately in the context of mandatory website disclosure of contract terms. With the help of smart contract disclosure, the issuer must ensure that the consumer has a copy of all of the terms of the contract before entering into it. The main purposes of disclosure in relation to using a consumer smart contract are to:

- explain the operation and effect of the smart contract mechanism to the consumer to comply with its disclosure obligations;
- discourage issuers from using a smart contract to enforce an ‘unreasonable’ fee.

⁹ Danielle Frances D’Onfro, ‘Smart Contracts and the Illusion of Automated Enforcement’ (November 7, 2019). Washington University Journal of Law and Policy, Forthcoming, <<https://ssrn.com/abstract=3470975>> accessed 21 January 2021.

¹⁰ The browse-wrap contracts (an agreement accepted by browsing the website) refers to situations where the terms of the agreement are available for review via a link on the website, but the user does not explicitly agree to its terms. Browse-wrap contracts are terms of use that are published on a website (or in other ways through which the terms are available to the user in digital form). On most websites, they are listed as a hyperlink at the top or bottom of the page, titled as ‘Legal Terms’, ‘Terms of Use’, or ‘Terms of Use’. Browse-wrap contracts do not require users to express their consent unconditionally. In most cases, the browse-wrap contains a statement that the user’s continued use of the website or downloaded software constitutes acceptance of these terms. The user is considered to have consented if he remains on the website after receiving notification of the terms of use of the website.

¹¹ Daniel D. Barnhizer, ‘Contracts and Automation: Exploring the Normativity of Automation in the Context of U.S. Contract Law and E.U. Consumer Protection Directives’ (November 30, 2016). <<https://ssrn.com/abstract=2878162> or <http://dx.doi.org/10.2139/ssrn.2878162>> accessed 21 January 2021.

¹² Barnhizer (n 11).

Smart contracts represent a stage of maturity for electronic agreements over time. They present significant benefits for commerce. The use of smart contracts in consumer transactions can give rise to practical issues due to the self-executing and immutable nature of the technology, shifting the burden of issuing proceedings from a party looking to enforce a set of conditions to a party looking to be freed from them.¹³

II Consumers Cannot Bargain

Most definitions of ‘contract’ focus on such a term as ‘agreement’. A contract is ‘an agreement giving rise to obligations which are enforced or recognised by law. Agreement is the factor which distinguishes contractual from other legal obligations. Much of the definitional burden is thereby shifted: if a contract is an agreement that has a particular legal effect, what is an agreement?’¹⁴

The Oxford English Dictionary defines agreement as the act of coming to a ‘mutual understanding,’ or (understood as a legal term) ‘an arrangement [...] made between two or more parties and agreed by mutual consent’.¹⁵

According to article 1321 of the Italian Civil Code, ‘[t]he contract is the agreement of two or more parties to establish, regulate or terminate a legal patrimonial relationship between them’.

The French Civil Code gives the following definition: ‘The contract is an agreement by which one or more people undertake, towards one or more others, to give, to do or not to do something.’¹⁶

‘A contract is concluded upon the mutual and congruent expression of the parties’ agreement intended to give rise to obligations to perform services and to entitlements to demand services.’¹⁷

Article 420 of the Civil Code of Russian Federation states that ‘The contract shall be recognised as the agreement, concluded by two or by several persons on the institution, modification or termination of civil rights and duties.’

It is therefore possible to define an agreement as a matching of opinions, meeting of the minds between two or more parties in respect of some future performance, which gives rise to corresponding bilateral rights and duties in respect of that performance.

¹³ Ingle, Laurence, ‘Smart Contracts in Consumer Law: Does New Zealand Need to Wise Up?’ (October 9, 2019). Victoria University of Wellington Legal Research Paper, Student/Alumni Paper No. 23/2019, <<https://ssrn.com/abstract=3466523>> accessed 04 March 2021.

¹⁴ Joseph Raz, ‘Promises and Morality in Law’ (1982) 95 Harvard Law Review, 916, 930–931 [reviewing P. S. Atiyah, Promises, Morals, And Law (1981)]. <<https://doi.org/10.2307/1340782>> accessed 19 October 2021.

¹⁵ ‘Agreement’, Oxford English Dictionary, <<https://www.oed.com/view/Entry/4159?rkk,kjhh,ju8ht>> accessed 04 March 2021.

¹⁶ French Civil Code, art 1101.

¹⁷ Hungarian Civil Code, section 6:58.

Smart contracts – automated programs that transfer digital assets within the block-chain upon certain triggering conditions – represent a new and interesting form of organising contractual activity.¹⁸ The current problem with consumer smart contracting is that consumers cannot bargain. Under the current regime, consumers have no choice but to click the ‘I Accept’ button. For that reason, the smart contract is the law of company-dictated exchange, without any ability for the consumers to negotiate.

In this regard, it seems necessary to introduce a format in which consumers can express their preferences to automated agents. Particularly, the consumer’s software agent could offer specific contractual terms stating the terms on which the consumer is willing to deal.

For example, the consumer may have informed the web server that she is only willing to deal with that server if the server respects her desire not to sell her personal data, by setting a ‘do not track’ flag. The corporate web server, having been apprised of those terms but programmed to take no notice of them, concludes a purchase. In this way, the consumer’s right to negotiate their own contract terms can be realized.¹⁹

However, automated agents have problems concerning their complex and expensive system. That is, they offer a consensus system for maintaining a decentralized list of who owns what. The coordination problem is addressed by a proof-of-work system, which makes it expensive and difficult to compromise the list.

According to Joshua A.T. Fairfield, ‘trustless public ledger’ (TPL) systems could be a solution to the problem of expensive intermediaries, at the same time simplifying enabling consumer-driven automated agents. TPL are online lists, maintained by no one and available to everyone, that are maintained by a consensus protocol.²⁰

TPLs completely remove a major source of consumer hesitancy and complexity by eliminating the need for consumers to entrust automated agents with their personal information. A consumer setting up an autonomous agent would not even need to designate with whom the contract would be concluded. A price, a quantity, and warranties would do. The consumer could protect against software malfunction by funding the agent with limited amounts.²¹

III Consumer Rights Enforcement

Consumer contracts are characterised by an imbalance between parties. One party is usually a large retailer. The other is a consumer with few resources. The legislature has traditionally

¹⁸ David Morris, ‘Bitcoin Is Not Just Digital Currency. It’s Napster for Finance’ (Jan. 21, 2014) *Fortune*, <<http://fortune.com/2014/01/21/bitcoin-is-notjust-digital-currency-its-napster-for-finance>> accessed 22 January, 2021.

¹⁹ Fairfield (n 4) 46.

²⁰ See Barrett Sheridan, ‘Bitcoins: Currency of the Geeks’ (June 16, 2011, *Bloomberg Businessweek*, <http://www.businessweek.com/magazine/content/11_26/b4234041554873.htm> accessed 22 January 2021.

²¹ Joshua A.T. Fairfield (n 4) 47.

acted to minimise this gap through consumer legislation to protect the consumer as the weaker party. These protections include the information duties of sellers, shifting the burden of proof related to remedies, withdrawal rights and disclosure rules.²²

However, as already highlighted by many scholars, using smart contracts as an enforcement mechanism distorts the effectiveness of these measures. In this regard, the main obstacle to consumer protection lies in the absence of clearly defined enforcement regulation. In many cases, consumers are discouraged by the effort required to find out whether they are entitled to make a claim.

Against this background, an automated self-performing process could improve the systematic functioning of the consumer rights protection apparatus if those rights are accurately coded.²³ Smart contracts could be coded to take into consideration the most common breaches of contract or violations of consumer rights in order to stipulate the contract's self-performing mechanism. In this way, consumers would not need to spend resources to ascertain whether they are entitled to any compensation or have to sustain additional expenses arising from dispute resolution procedures. In this regard, it is necessary to determine which consumer rights can be properly optimised through smart contracts.

First, only consumer rights that do not rely on ambiguous or abstract terms can be translated into code. Second, consumer rights cannot be dependent on any relational expectations between the parties. Third, the rights must be implemented on a large scale and in an identical (or, at least, standardised) form. In addition, it would be necessary to perform an in-depth analysis of the proper functioning of the smart contract before making it available on the market.²⁴

Meanwhile, whenever the conditions stated by law are fulfilled, the smart contract would automatically trigger the related rights and procedure in order to reimburse each entitled consumer on their behalf.

In the light of all the above, it is worth stating that a standard smart contract and its surrounding circumstances could be oppressive for consumers. Even though smart contracts are a major step forward in many ways, they will not take over the core ideas of fairness and discretion to protect consumers without technical improvements. For that reason, for maintaining balance between the parties when regulating smart contracts in the consumer context, the-above mentioned changes need to be taken into account and implemented.

²² Ewoud Hondius, 'The Protection of the Weak Party in a Harmonised European Contract Law: A Synthesis' (2004) 27 *Journal of Consumer Policy*, 245–251. <<http://10.1023/B:COPO.0000040520.48379.60>> accessed 19 October 2021.

²³ Oscar Borgogno, 'Usefulness and Dangers of Smart Contracts in Consumer Transactions' in L. DiMatteo, M. Cannarsa, C. Poncibò (eds), *The Cambridge Handbook of Smart Contracts, Blockchain Technology and Digital Platforms* (Cambridge Law Handbooks 2019) 288–310. <<https://doi.org/10.1017/9781108592239.016>> accessed 19 October 2021.

²⁴ Borgogno (n 23) 295.

IV Judicial Protection of Consumers in Smart Contracts

The present situation requires the courts to resolve disputes right now, at the present time. In contrast to the coding of the online and real-world contract formation experience, the legal and dispute resolution contexts are only minimally automated. In this regard, the two important questions in the context of judicial intervention need to be answered.

In the first place, one should ask whether completely abandoning the main legal principles of legality, justice, good faith and protection of the weaker party is possible. For instance, A. Savelyev notes that a computer is ‘indifferent’ to the fundamental legal principles of law. Instead, the main principles of forming the terms of the contract are certainty and efficiency.²⁵ Despite the complexity of judicial protection of the parties to a smart contract, courts must respond to the violations of the parties during its conclusion and fulfilment, regardless of the correctness or inaccuracy of technical programs. In this regard, the protection of the parties to the smart contract must be carried out in accordance with the fundamental principles of civil law; first of all, the legal equality of subjects and good faith. According to V. G. Golubtsov, that incorporation into the civil law criteria of fairness contributes to the elimination of the problem of unpredictability of judicial decisions in applying the principle of good faith.²⁶

A special case of the application of the principle of good faith to the situation with smart contracts may be the principle *contra proferentem*, allowing that, in the case of unclear contract terms and the absence of establishing a valid common will of the parties, the condition is interpreted by the court in favour of the counterparty of the party that prepared the draft of the agreement. Under article 4.6 of the UNIDROIT Principles of International Commercial Contracts (2016) if contract terms supplied by one party are unclear, an interpretation against that party is preferred.

Nowadays, the principle of *contra proferentem* is well known and applied by almost all developed jurisdictions, including the USA and England.²⁷ The justifications for this principle of contract interpretation are the prevention of uncertainty (to determine ambiguities); compulsion to disclose information by a counterparty with a stronger negotiating position (penalty default rule); and the correction of injustice (to correct unfairness). The first justification is based on the thesis that the developer of the text has full control over the ‘language’ of the contract, and therefore must bear the adverse consequences of contractual uncertainty. The second rationale for the rule encourages a more informed counterparty to disclose information to a party with a weaker negotiating position. The interpretation of *contra proferentem* becomes a kind of sanction for the violation of such a duty. From the point of view

²⁵ Alexander Savelyev, ‘Contract law 2.0: «Smart» Contracts as the Beginning of the End of Classic Contract Law’ Higher School of Economics Research Paper No. WP BRP 71/LAW/2016, 16–17.

²⁶ V. G. Golubtsov, ‘The principle of good faith as an element of the legal mechanism for stimulating the debtor to properly fulfill obligations and guarantee the interests of creditors: analysis of judicial and arbitration practice’ (2016) 32 (2) Perm University Herald. Juridical Sciences, 183.

²⁷ *Chitty on Contracts*, Vol. 1 General Principles (29th edn, 2004, London) 915–916.

of the third justification, the *contra proferentem* rule serves as a means of judicial control of the fairness of standardised contractual terms (model contracts). It aims to restore de facto equality between the counterparties and creates obstacles for the dominant party to impose unfair contractual terms.²⁸

It should be noted that, in some countries, the scope of this principle is limited to a specific range of agreements. For example, in Italy it applies only to standardised contracts, in France it applies to contracts with consumers or non-professionals. On the contrary, in Russia, there is no such restriction; the principle of *contra proferentem* is applied both in the interpretation of consumer contracts and in the interpretation of contracts concluded by economically equal entities, where both are professionals in the relevant field.²⁹

It is worth pointing out the structural components of the legal act, while analysing possibility of applying good faith to smart contracts. First, and by definition, a legal act contains what its author has wished, classically called the negotium. This will is usually recorded in a document or an instrument named the instrumentum. The instrumentum is the 'container'. Depending on the type of legal system (common or civil law systems) there is a fundamental difference in assessing the importance of each of these components.

Common law is held to be concerned with preserving the parties' freedom to contract and to ensure that their contracts are performed accurately according to their precise wording. On the contrary, the civil law judge has more power to evaluate the fairness of the contract and intervene to reinstate the balance of interests between the parties; he or she is more concerned with creating justice in the specific case than with implementing the deal in the most predictable manner. In doing so, the civil law judge is guided by general clauses and principles of good faith and fair dealing. Within the civil law, a further division is possible between the systems that are based on German law (also including the Nordic systems) and those based on French law. The systems based on French law have a more formalistic approach to the interpretation of contracts than the Germanic systems and are thus closer to the English literal interpretation.³⁰

Purposive interpretation of the Germanic law, in this regard, protects the consumer's rights in smart contracts to a greater extent. This is explained by its consideration of all circumstances that may be relevant to the assessment of the rights and obligations, while literal interpretation of the contract according to English law excludes changes in circumstances,

²⁸ David Horton, 'Flipping the Script: Contra Proferentem and Standard Form Contracts' (2009) 80 University of Colorado Law Review, 6, 7; Michelle E. Boardman, 'Contra proferentem: The Allure of Ambiguous Boilerplate' (2006) 104 (5) Michigan Law Review, 1105–1128.

²⁹ N. E. Sosipatrova, A. Kabanova A., 'Interpretation of the contra proferentem: experience of application in russian law' (2016) Vestnik UNN, 160. <<https://cyberleninka.ru/article/n/tolkovanie-dogovorov-contra-proferentem-opyt-primeneniya-v-rossiyskom-prave>> accessed 04 May 2021.

³⁰ Giuditta Cordero-Moss, 'Which state law governs an international contract?' in *International Commercial Contracts: Applicable Sources and Enforceability* (Cambridge University Press 2014) 134–209. <<https://doi.org/10.1017/CBO9781139248815.006>> accessed 19 October 2021.

failed assumptions or considerations relating to the balance of interests between the parties without a specific provision in the smart contract.

In general, concluding a brief discussion of the problems of protecting the parties to a smart contract, we should express the hope that the judicial practice on the application of smart contract rules will not deny the possibility of using the fundamental principles of civil law and apply it appropriately. Otherwise, smart contracts can be actively used by unscrupulous participants in civil turnover for various abuses.

The second question concerns the terms of the smart contract that a court would likely deem as unfair and offending good faith. Particularly, automatically renewing a contract or subscription without taking sufficient steps to inform the customer beforehand may be unfair. For instance, there has long been a practice of recognising concluded and valid 'clickwrap' agreements, according to which consumers click on a button 'I accept the agreement'. However, in some situations, when determining whether there was an agreement, it was carefully examined whether the consumer received notification of the terms of the contract before agreeing to them.³¹

Additionally, while determining unfairness, the court must also consider the extent to which certain terms are transparent. If a term is not clearly expressed in the details of the agreement, a court should be more inclined to see it as unfair. For instance, using the website to enter into a contract without explicit notice of the terms, which were simply posted on the home page, is also considered insufficient acceptance of these terms.³²

To summarise, a seller must be able to prove that a robust explanation of the contract's terms were provided. The provisions have to be explained to the customer so that the seller could prove that there was a real and voluntary meeting of the minds and not merely an objective transaction meeting. Augmented reality facilitates such proof because digital technologies inherently permit tracking access. Thus, for example, it would be quite simple to track and record whether a consumer watched a video embedded in a paper contract. The seller's computer servers could log when and to whom each video was played, and how long the consumer spent accessing that video.³³

Conclusion

It is worth pointing out that, with regard to the quantity and quality of information available to contracting parties, is likely to speak about the advantage of smart contracts in consumer

³¹ *cM.: Inc. v. Verio, Inc.*, 356 F.3d 393, 403 (2d Cir. 2004).

³² *Ticketmaster Corp. v. Tickets.com, Inc.*, No. CV-997654, 2003 WL 21406289 (C.D. Cal. Mar. 27, 2000).

³³ Scott R. Peppet, 'Freedom of Contract in an Augmented Reality: The Case of Consumer Contracts' (29 August 2011); (2012) *UCLA Law Review*; U of Colorado Law Legal Studies Research Paper No. 11-14, <<https://ssrn.com/abstract=1919013>> accessed 27 February 2021.

finance. Consumers can now sort firms and their contracts at lower cost and more efficiently, and firms can now signal their consumer-friendly contract terms to consumers.

However, smart contract deployment will require the joint effort of policymakers, regulators and consumers to improve the enforcement of consumer rights. In such respect, regulators should make some technological development. The procedural terms and conditions embodied within a smart contract should be coded to include mandatory provisions of consumer protection. In this respect, smart contracts could become a useful self-help remedy for consumers who have been rather defenceless against the unilateral practices of businesses.³⁴ Technical modifications are needed to see whether smart contracts could be more efficient than traditional contracts.

However, it is necessary to mention that consumer protection law is a set of overlapping obligations from several layers of regulators. The volume of consumer protection laws, and their tendency to change over time eliminates the prospect of coding smart contracts for perfect compliance *ex-ante*.

By contrast, in the era of rapid technological change, traditional approaches to consumer rights in the context of smart contracts should remain constant. Some intrinsic nature of the contract, autonomy, consent, good faith and bargaining power are fundamentally contingent and should apply to the smart contracts in the light of consumer protection. For that reason, courts should distrust standard form consumer contracts and police them using doctrines such as unconscionability and the main principles of law.

³⁴ Borgogno (n 23) 295.

The Judicial Approach to Cohabitation: A Comparative Study of the Law of England and Wales and Kenya

Abstract

The article is a comparative, doctrinal study of how two common law jurisdictions, Kenya and England and Wales have recognized cohabitation as a presumption of marriage and any right extended to the partners and property and wealth among cohabitants are dealt with in case the relationship ends. The rules of the countries studied have been addressed in terms of how they govern unmarried persons living as a couple in this type of structure. The similarities in the two legal systems in dealing with cohabitants' rights have been examined. Finally, the paper has suggested a mechanism that Kenya's courts should establish for dealing with property conflicts between cohabitants, which attempts to meet both the criteria of theory and pragmatism.

Keyword: comparative study, England and Wales, Kenya, family law, cohabitation, judicial approach

Introduction

The matter that affects cohabitants and everyone the most regarding legal issues is the property, most so in land and housing.¹ Unmarried couples living together without formalising their status have sprung up in the Western world over the years; the trend of cohabitation

* Kenneth Kaunda Kodiyo is a PhD Student in Law at the University of Pécs, Faculty of Law, Department of Private Law (e-mail: kennethkodiyo@gmail.com).

¹ Lorna Fox O'Mahony, 'Property Governance through Resistance: Subversive Property Explores Progressive Potential for Property Outsiders to Re-Create Spaces of Belonging and Propriety Reviews' (2017) Jotwell: The Journal of Things We Like (Lots), 71–73. <<https://heinonline.org/HOL/P?h=hein.journals/jotwell2017&i=71>> accessed 25 May 2021.

began to gain momentum in England in 1970.² The trend of cohabitation relationships has sprung up in Kenya as well. What brings two heterosexuals together and the reason behind it varies;³ it is usually the period of courtship as the couple get ready to tie the knot but in some cases, the period could be extended and lead to procreation and raising children⁴. During this time, the couple could pool their resources together and purchase a home, which can be both a financial investment and family accommodation;⁵ this trend has been going on in Nairobi, Kenya; it has been the case in London as well. According to Kabebri and Dr. Ann, this is due to the increase in urbanisation and migration from rural to urban areas by young people and the Kenyan marriage laws' reorganisation of customary marriage, and the practice has been embraced by couples who want the benefits of marriage without having to go through the legal procedure of making their union legally recognised under either customary or civil law.⁶ However, in most cases, the cohabitant fails to deal with family home-ownership and with what happens if the relationship fails to arrive at marriage or some other formalisation of their union. Cohabitation is generally a starting point before the parties finally settle down as married couples; in other words, it is a pathway to marriage, it is considered as the period when the parties get to know each other well and develop feelings and attachment that leads to marriage;⁷ however, cases of cohabiting for a long time and having children are widespread.⁸

For married couples, the end of a relationship has laws that govern them. The courts have clear rules and laws to follow when dealing with the division of property. In matters of 'come-we-stay' or cohabitation, they usually lack a clear path on how the property acquired during the relationship is to be dealt with. The court usually has to intervene to protect the weaker party's financial interest, which in most cases is the woman.⁹

² Cynthia Grant Bowman, 'Social Science and Legal Policy: The Case of Heterosexual Cohabitation' (2007) 9 *Journal of Law & Family Studies*, 1. <<https://heinonline.org/HOL/P?h=hein.journals/jlft9&i=9>> accessed 25 May 2021.

³ Nicole Hiekel, Aart C Liefbroer and Anne-Rigt Poortman, 'Income Pooling Strategies among Cohabiting and Married Couples: A Comparative Perspective' (2014) 30 *Demographic Research*, 1527. <<https://www.demographic-research.org/volumes/vol30/55/default.htm>> accessed 28 May 2021.

⁴ Gerry McNeilly, 'The Property Rights of Cohabitees: An Analysis of Equity's Response in Five Common Law Jurisdictions THE BOOKSHELF' (2002) 40 *Family Court Review*, 533. <<https://heinonline.org/HOL/P?h=hein.journals/fmlcr40&i=516>> accessed 29 May 2021.

⁵ Bruno Jeandrier, '[Commentaries]: Should There Be a System of Alimony for Unmarried Couples Who Separate?' (2016) 71 (3) *Population*, (English Edition, 2002) 494. <https://www.researchgate.net/publication/320487469_The_Fig_Leaf_of_Economic_Theory> accessed 1 June 2021.

⁶ Martin Chanock, 'Signposts or Tombstones: Reflections on Recent Works on the Anthropology of Law' (1983) 1 *Law in Context: A Socio-Legal Journal*, 107, 125. HeinOnline, <<https://heinonline.org/HOL/P?h=hein.journals/lwincntx1&i=113>> accessed 1 June 2021.

⁷ Jessica Cohen, Wendy Manning, 'The Relationship Context of Premarital Serial Cohabitation' (2010) 39 (5) *Social Science Research*, 766–776. <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3874393/>> accessed 20 August 2021.

⁸ Wendy D Manning, Jessica A Cohen, 'Teenage Cohabitation, Marriage, and Childbearing' (2015) 34 *Population Research and Policy Review*, 161. <<https://shibbolethsp.jstor.org/start?entityID=https%3A%2F%2Fidp.pte.hu%2Fsaml2%2Fidp%2Fmetadata.php&dest=https://www.jstor.org/stable/43671559&site=jstor>> accessed 1 June 2021.

⁹ Gillian Douglas, Julia Pearce and Hilary Woodward, 'Cohabitants, Property and the Law: A Study of Injustice' (2009) 72 *The Modern Law Review*, 24. <<https://shibbolethsp.jstor.org/start?entityID=https%3A%2F%2Fidp.pte.hu%2Fsaml2%2Fidp%2Fmetadata.php&dest=https://www.jstor.org/stable/20533222&site=jstor>> accessed 1 June 2021.

I Principle and Pragmatism: A Jurisprudential Tension

The judiciary in the common law jurisdiction has heightened efforts in navigating the new trends by coming up with rules to regulate the right that the parties to the cohabitation should be accorded, and as Atiyah puts it, the function of the judicial process in dealing with the rights of cohabitants is twofold, that is either to discourage or encourage the trend of cohabitation and to be fair to both parties while dealing with the matter, and the function can be summarised as about pragmatism and principle. A judgment on principle is one in which the court emphasises the possible effect of its decision over doing right at the time. A pragmatic decision is when the court seeks to pursue individualised justice in a situation, regardless of the eventual impact.¹⁰ Interaction between people and the relationships that ensue must be governed by law. People should organise their lives in accordance with the laws in place; a decision of a court that is individualised has the potential to deny others justice, and it would be a usurpation of legislative authority by the judiciary which is to make laws, especially in matters which are not under the guidance of laws and the judges are left to use their wisdom in making decisions; at the same time, overzealous application of the law may result in a harsh judgment that fails to resolve the conflict fairly.¹¹

In principle, the judicial process should satisfy the need for pragmatism, mainly when dealing with a case involving land, as it is still seen as a measure of wealth in common law nations.¹² In England, the laws dealing with land are described as '*a closed scheme of logic*' in which 'perfection of pure rationality is most closely attainable'.¹³ Hayne J of the high court in Australia implored judges in the commonwealth to decide in accordance with the laws and, while doing so, they have to follow the established precedents.¹⁴ Matters of cohabitation should be dealt with in such a way that the autonomy of the parties is respected and the weaker party protected; the two parties who have decided not to tie the knot but have somehow subjected their relationships to matrimonial laws should be dealt with in accordance with the laws as it is.¹⁵

¹⁰ Patrick S. Atiyah, 'From Principles to Pragmatism: Changes in the Function of the Judicial Process and the Law Essay' (1979) 65 Iowa Law Review, 1249.

¹¹ Kenneth Hayne, 'Letting Justice Be Done without the Heavens Falling Address' (2001) 27 Monash University Law Review, 12. <<https://heinonline.org/HOL/P?h=hein.journals/monash27&i=18>> accessed 1 June 2021.

¹² Andrew R Rutten, 'Review of The Political Institution of Private Property' (1998) 60 The Journal of Politics, 1233. <<https://www.jstor.org/stable/i345538>> accessed 1 June 2021.

¹³ Kevin Gray, 'Human Property Rights: The Special Edition Property Law Conference' (2005) 16 Stellenbosch Law Review, 398. <<https://heinonline.org/HOL/P?h=hein.journals/stelblr16&i=492>> accessed 1 June 2021.

¹⁴ Douglas Payne, 'Hedley Byrne &(and) Co. Ltd. v. Heller &(and) Partners, Ltd.' (1963) 6 University of Western Australia Law Review, 467. <<https://heinonline.org/HOL/P?h=hein.journals/uwatlw6&i=525>> accessed 1 June 2021.

¹⁵ Alison Diduck, 'Autonomy and Family Justice' (2016) 28 Child and Family Law Quarterly, 133. <<https://heinonline.org/HOL/P?h=hein.journals/chilflq28&i=137>> accessed 1 June 2021.

This article is broken down into four sections:

- The first section is concerned with the introduction, methodology, scope, and approach of the study.
- The second part discusses the systems in England and Wales, including the judicial approaches to cohabitation. The study will delve into the development of judicial precedents in dealing with the property rights of cohabitants.
- The third part outlines the judicial approach to recognising cohabitation relationships in Kenya and the laws in place that deal with cohabitants.
- The final part will compare and contrast the judicial approach to cohabitation in the countries studied, and the conclusion will also cover the suggested that courts in Kenya can use to guide them in dealing with cohabitation.

II Scope and Approach of the Study

The study is about how two countries under common law deal with the financial and property cases of heterosexual couples who are cohabiting instead of becoming officially married; the countries covered are England (including Wales) and Kenya. The assessment has been carried out based on the idea of principle and pragmatism, and the common theme in these areas have been analysed and, based on the study, a proposal has been made for Kenyan courts to come up with a framework for solving disputes relating to the cases of cohabitation in a way that strikes a balance between principle and pragmatism.

The focus of the article is unmarried couples of the opposite sex but residing together as a married couple. The reason is that sometimes the disagreements between cohabitants are combined with other family members who have contributed to purchasing the property.¹⁶ Thus, the study is mostly concentrated on how the court has developed a mechanism to deal with cohabitants.

III England and Wales

1 Introduction

In the olden days in England, there was no definition of marriage or formalities to make a union legal.¹⁷ Before the 13th century, the canon laws of the church of England did not govern

¹⁶ Malcolm Merry, 'Family Arrangements, Constructive Trusts and the Home Ownership Scheme Analysis' (2014) 44 Hong Kong Law Journal, 391. <<https://heinonline.org/HOL/P?h=hein.journals/honkon44&i=393>> accessed 25 May 2021.

¹⁷ Alan MacFarlane, 'Review of The Family, Sex and Marriage in England 1500-1800' (1979) 18 History and Theory, 103. <<https://doi.org/10.2307/2504675>> or <<https://shibbolethsp.jstor.org/start?entityID=https%3A%2F%2Fidp.pt.ehu%2Fsaml2%2Fidp%2Fmetadata.php&dest=https://www.jstor.org/stable/2504675&site=jstor>> accessed 25 May 2021.

marriages,¹⁸ and monogamous union was not fully practiced.¹⁹ Lord Hardwicke codified laws dealing with the legalisation of marriage in England in 1753, which required a clergyman to preside over the legalisation of marriages, making only church weddings legal.²⁰ This went on until 1836, when the Marriage Act became operational in England, permitting civil marriages.²¹ Although at the onset of the 20th century, a relationship without proper documentation was considered prostitution and stigmatised,²² over the years into the 20th century, the popularity of marriage has declined which, according to Freeman and Lyon²³ are consequences of divorce rates going up,²⁴ feminist movements and the expectations that come with marriages.²⁵ As a result, people became delusional about marriages but still needed companionship, and the only recourse is cohabitation, since it does not involve formalisation. In the 1970s, cohabitation became common in Britain; it was termed a '*classless phenomenon*'.²⁶ Extra-marital affairs and out-of-wedlock children became widespread; this was the time that common-law marriages originated, which is where cohabitation leads to marriage.²⁷

Nonetheless, cohabitation has skyrocketed across the Western world due to the transforming structure of marriage, the advancement of women's social status, and increased cultural recognition of premarital partnerships; this has primarily come at the expense of marriage as an institution.²⁸ Still, there is confusion in regards to the rights of the parties to cohabitation. Inequalities are

¹⁸ Mark Lunney, 'Marriage Disputes in Medieval England Book Reviews' (2001) 6 Ecclesiastical Law Journal, 406. <<https://heinonline.org/HOL/P?h=hein.journals/ecclej6&i=422>> accessed 25 May 2021.

¹⁹ Michael M Sheehan, 'Review of Marriage Litigation in Medieval England' (1977) 52 Speculum, 983. <<https://www.journals.uchicago.edu/doi/10.2307/2855421>> accessed 5 June 2021.

²⁰ John Bossy, 'The Counter-Reformation and the People of Catholic Europe' [1970] Past & Present, 51. <<https://academic.oup.com/past/article-abstract/47/1/51/1510831>> accessed 5 June 2021.

²¹ Dulcie Groves, 'Michael Freeman and Christina Lyon, Cohabitation Without Marriage: An Essay in Law and Social Policy, Gower, Aldershot, 1983. Vii + 228 Pp. £15.00.' (1985) 14 Journal of Social Policy, 581. <<https://bd.booksc.eu/book/41516881/589644>> accessed 5 June 2021.

²² Michael Freeman, 'Family Justice and Family Values in 1995 England' (1995) International Survey of Family, Law 141. <<https://heinonline.org/HOL/P?h=hein.journals/intsfal2&i=163>> accessed 5 June 2021.

²³ Groves (n 21).

²⁴ MDA Freeman, 'Marriage and Divorce in England Special Symposium on International Marriage and Divorce Regulation and Recognition' (1995) 29 Family Law Quarterly, 549. <<https://shibbolethsp.jstor.org/start?entityID=https%3A%2F%2Fidp.pt.ehu%2Fsaml2%2Fidp%2Fmetadata.php&dest=https://www.jstor.org/stable/25740042&site=jstor>> accessed 5 June 2021.

²⁵ William I Fine, 'Marriage in an Age of Possibility: Joseph Epstein's Divorced in America' (1974) 2 Iustitia, 90. <<https://www.repository.law.indiana.edu/iustitia/vol2/iss2/8/>> accessed 5 June 2021.

²⁶ Fae Garland, 'Gender Imbalances, Economic Vulnerability and Cohabitation: Evaluating the Gendered Impact of Section 28 of the Family Law (Scotland) Act 2006' (2015) 19 Edinburgh Law Review, 311. <<https://ore.exeter.ac.uk/repository/handle/10871/18601?show=full>> accessed 5 June 2021.

²⁷ Pascoe Pleasence, Nigel J Balmer, 'Ignorance in Bliss: Modelling Knowledge of Rights in Marriage and Cohabitation' (2012) 46 Law & Society Review, 297. <<https://onlinelibrary.wiley.com/doi/full/10.1111/j.1540-5893.2012.00490.x>> accessed 5 June 2021.

²⁸ Kathleen Kiernan, 'Unmarried Cohabitation and Parenthood in Britain and Europe Special Issue on Family Law and Policy: Cohabitation and Marriage Promotion' (2004) 26 Law & Policy, 33. <<https://onlinelibrary.wiley.com/doi/full/10.1111/j.0265-8240.2004.00162.x>> accessed 5 June 2021.

increasingly introduced into intimate domestic relationships, mainly where children are involved. Inherent disadvantages, such as weakened economic positions and domestic violence, cannot be expected ahead of time. As a result, there should be solutions available to meet the needs of these situations as they occur.²⁹

Of all aspects of law, property, especially as it pertains to housing and home, has the most constant and direct impact on individuals. In modern days, cohabiting couples tend to pool their resources together and purchase a family home, which is considered a place for family residence and as capital for business in England.³⁰ Houses are mainly purchased on a mortgage and, according to the statistics of the Law Commission in England, in 2007, a large percentage (70%) of homes were owned by more than one person, and cohabitation relationships and shared properties have become very common in England as well.³¹ A survey conducted by Slater and Gordon showed that a substantial percentage of young cohabitants show love and commitment to each other by purchasing a house together, and that one in five of those asked showed their willingness to purchase a house together within a year of first dating.³²

The International Social Survey Programme, undertaken between 1994 and 2002, indicated that most people cohabit for a maximum of three years, then the relationship either becomes legalised or dissolves, during the period in which the partners have children, which is the main deciding point for either continuing a relationship or ending it.³³

Matters relating to family home-ownership in England and Wales are governed by *common intention constructive trust*. However, following the court's decision in *Jones v Kernott* (Leung, 2019) and *Stack v Dowden* (Qc et al., n.d.), the law dealing with family properties is not straightforward. The courts have left the issue to the government, which is reluctant to develop a proper law to govern cohabitation.

²⁹ Anne Barlow, 'Cohabitation Law Reform – Messages From Research' (2006) 14 *Feminist Legal Studies*, 167. <<https://core.ac.uk/download/pdf/43093609.pdf>> accessed 5 June 2021.

³⁰ Joanna Miles, 'Property Law v. Family Law: Resolving the Problems of Family Property' (2003) 23 *Legal Studies*, 624. <<https://www.cambridge.org/core/journals/legal-studies/article/abs/property-law-v-family-law-resolving-the-problems-of-family-property/153FD4DBB1F3ACF40563846AE70E4B75>> accessed 5 June 2021.

³¹ Anne Sanders, 'Cohabitants In Private Law: Trust, Frustration and Unjust Enrichment In England, Germany And Canada' (2013) 62 *The International and Comparative Law Quarterly*, 629. <<https://www.cambridge.org/core/journals/international-and-comparative-law-quarterly/article/abs/cohabitants-in-private-law-trust-frustration-and-unjust-enrichment-in-england-germany-and-canada/11FB2F968804A253D9F142292FA18718>> accessed 5 June 2021.

³² Jackie M Burkhardt, 'The Perils of Cohabitation: The Unmarried Father's Struggle for Rights in Ireland Note' (2010) 9 *Washington University Global Studies Law Review*, 535.

³³ Wolfgang Ludwig-Mayerhofer and others, 'The Power of Money in Dual-Earner Couples: A Comparative Study' (2011) 54 *Acta Sociological*, 367. <<https://journals.sagepub.com/doi/abs/10.1177/0001699311422091> or <https://doi.org/10.1177/0001699311422091>> accessed 5 June 2021.

2 The Laws

a) Presumptions of resulting trust and advancement

As the government is yet to come up with laws to deal with the property rights of cohabitants against each other, the courts have developed the presumption of resulting trust and advancement, which means that a trust is formed when one person distributes property to another without receiving anything in return. When a person transfers property to a child or spouse, the property is assumed to constitute a gift through advancement.

In the *Stack v Dowden* case,³⁴ the parties were cohabitantes who jointly purchased a house but failed to declare their beneficial interest in the property; Ms. Dowden paid the majority part in the acquisition of the house but, upon separation, Mr. Stack brought a suit for an equal share of the benefits from the sale of the house, the court allowed Ms. Dowden a 65% share of the property.³⁵

*Jones (Appellant) v Kernott (Respondent)*³⁶ were cohabitantes as well; they contributed their money and purchased a house and had two children, they separated, and Ms. Jones was left to take care of the bills for running the house. However, when the house's value increased, Mr. Kernott claimed his beneficial interest in the house: the court held that it was upon itself to infer or impute an intention of the parties as to the share of beneficial interest of the house, and a decision was made that Mr. Kernott was entitled to just 10% of the proceeds of the sale of the house.³⁷ In *Jones and Stack*, most jury members disagreed with the presumption of trust in dealing with the family residential home.³⁸ Because of the presumption of human purpose, which is insufficient to determine beneficial interest in a domestic case,³⁹ the lower courts in England have however embraced this assertion and, as pointed out by Pearce, '*resulting trust*' can work along with '*constructive trust*' in dealing with cohabitant properties.⁴⁰ Furthermore, the English doctrine was used to establish the presumptions of resulting trust and development in Kenya. It therefore makes sense to discuss the English '*resulting trust*' here.

A *presumed resulting trust*⁴¹ occurs in circumstances in which it is presumed under the law that a contributor to the purchase of a property, or if they transfer it to another person's

³⁴ [2007] 2 AC 432 House of Lords.

³⁵ 'Stack v Dowden' <<https://e-lawresources.co.uk/Land/Stack-v-Dowden.php>> accessed 21 August 2021.

³⁶ [2011] UKSC 53 On appeal from the Court of Appeal [2010] EWCA Civ 578.

³⁷ The Supreme Court, 'Jones (Appellant) v Kernott (Respondent) – The Supreme Court' <<https://www.supremecourt.uk/cases/uksc-2010-0130.html>> accessed 21 August 2021.

³⁸ Sanders (n 31).

³⁹ Yee Ching Leung, 'Rethinking the Common Intention Constructive Trusts in Stack v Dowden and Jones v Kernott – Should the Resulting Trusts Be Preferred?' (2019) 6 IALS Student Law Review, 26. <<https://doi.org/10.14296/islr.v6i1.4962>> accessed 5 June 2021.

⁴⁰ Douglas, Pearce and Woodward (n 9).

⁴¹ J.E. Penner, 'Purposes and Rights in the Common Law of Trusts Colloquie Du Centre Paul-Andre Crepeau de McGill Portant Reflexions Sur l'Affectation' (2012) 48 Revue Juridique Themis, 579. <<https://heinonline.org/HOL/P?h=hein.journals/revjurns48&i=605>> accessed 6 June 2021.

name, never had an intention to get rid of their whole ownership interest in that property;⁴² it is also assumed that the share of the beneficial interest is equal to the contribution made in the purchase of the property and the amount includes the price of the property, the legal costs that ensued and the discount, if any, based on the status of the buyer.⁴³ For example, suppose a person takes out a loan or, through a mortgage, acquires property and pays back the loan; in that case, he is also considered to have contributed to the purchase of the property and receives a beneficial interest in the property to the extent of his ability to repay the loan. On the other hand, a settlement of mortgage instalments under no obligation, unless it is just a reduction in accumulated monetary debt, is insufficient to indicate a direct contribution. Contributions to ordinary home or relocation expenses, on the other hand, are insufficient.⁴⁴

Moreover, a presumption of gift occurs when the transferee intended the transferor to have it as a gift without the transferee retaining any interest that is of benefit to him in the property; this can also be referred to as ‘a presumption of advancement’, and it can arise in the following cases.⁴⁵

- a) A father transferring or purchasing a property to benefit his child, and a parent in this scenario can be anybody, including those in *loco parentis*; that is, when a third party accepts to be obligated in providing for a child as a parent of that child would: this can still be presumed when the child concerned reaches majority age.⁴⁶
- b) A transfer or donation made by a husband to support his wife. This also applies to cohabiting couples.⁴⁷

Other than *loco parentis*, a transfer made by a mother to her child⁴⁸ does not come under the ‘*presumption of advancement*’, and the same is not considered when a man transfers property to his mistress.⁴⁹ It suffices to note that section 199 of the English Equality Act 2010,

⁴² Robert Chambers, ‘Westdeutsche Landesbank Girozentrale v. Islington LBC Case Note’ (1995) 20 Melbourne University Law Review, 1192. <<http://www.alastairhudson.com/trustslaw/westdeutsche.pdf>> accessed 6 June 2021.

⁴³ Simone Wong, ‘The Iniquity of Equity: A Home-Sharer’s Tale’ (2008) Singapore Journal of Legal Studies, 326. <<https://shibbolethsp.jstor.org/start?entityID=https%3A%2F%2Fidp.pte.hu%2Fsam12%2Fidp%2Fmetadata.php&dest=https://www.jstor.org/stable/24870267&site=jstor>> accessed 6 June 2021.

⁴⁴ Andrew Hayward, ‘Family Values in the Home: Fowler v Barron Case Commentary’ (2009) 21 Child and Family Law Quarterly, 242. <<https://heinonline.org/HOL/P?h=hein.journals/chilflq21&i=242>> accessed 6 June 2021.

⁴⁵ Juliet Chevalier-Watts, ‘The Presumption of Advancement: Is It Time to Relegate This Doctrine to the Annals of History’ (2016) 2 Lakehead Law Journal, 15. <<https://heinonline.org/HOL/P?h=hein.journals/lkdj2&i=17>> accessed 6 June 2021.

⁴⁶ ‘Family Law Week: Laskar v Laskar [2008] EWCA Civ 347’ <<https://www.familylawweek.co.uk/site.aspx?i=ed1279>> accessed 9 May 2021.

⁴⁷ Jody Freeman, ‘Defining Family in Mossop v. DSS: The Challenge of Anti-Essentialism and Interactive Discrimination for Human Rights Litigation’ (1994) 44 The University of Toronto Law Journal, 41. <<https://heinonline.org/HOL/P?h=hein.journals/utlj44&i=47>> accessed 6 June 2021.

⁴⁸ William H Jr Robinson, ‘Hiram Pits Bennet’ (1932) 10 Dicta, 356. <<https://heinonline.org/HOL/P?h=hein.journals/denlr10&i=380>> accessed 6 June 2021.

⁴⁹ ‘Issue 22’ (1959) 103 Solicitors’ Journal, 417. <<https://heinonline.org/HOL/P?h=hein.journals/monash26&i=80>> accessed 6 June 2021.

got rid of the doctrine of 'presumption of advancement'. It is also worth noting that these two doctrines were used in cases where there was no credible witness, and they could easily be refuted or ignored if evidence to the contrary existed.⁵⁰

b) Common intention constructive trust

This strengthens the premise that the parties have a shared desire for the property to be beneficially divided equally among them; the parameters for dealing with the *common intention* was formulated in the case of *Stack v. Jones*, in which the cohabitants were the legally recognised owners of the properties and the disagreement was on the calculation of the benefits of each party to the agreement.⁵¹ The following were laid down as the guiding principles of *common intention constructive trust*;

- a) The principle of equity follows the law; it is assumed in cases of cohabitants that, when they agreed to pool their resources together, they accepted to share the benefits as joint owners of the property equally so, in the event of separation, they should receive equal benefits in the division of the property. Still, if just one person is the legally registered owner, it would be assumed that the other cohabitant does not have any beneficial interest in the property.⁵²
- b) It is then left to the court to decide whether the parties involved had a different *common intention* regarding the shared benefits from the property beyond the legal interest recognised by the law in the title deed and whether it was at the time of buying the property or after. In joint ownership, the presumption of *common intention constructive trust* is dispensed with if it can be shown that the cohabitants had the intention to have a share of the property in a such way that does not entail it being done equally. In contrast, in the case of a sole name on the title deed, the other party must prove that they have a beneficial interest in the property. The intention would be based on the evidence adduced by the party alleging *common intention constructive trust*.⁵³ Identifying whether the parties intended for their beneficial interest to differ from the legal interest requires cohabitants to keep their finances separate from one another, as happened in the *Stack* case and, beyond the financial contribution, the side alleging a shared purpose must also show a negative dependence on it, which is usually easy to do.⁵⁴
- c) When the mutual purpose is shown, the court calculates each party's beneficial interest in the property; however, if the beneficial interest cannot be assessed, the

⁵⁰ 'Lavelle v Lavelle & Ors [2004] EWCA Civ 223' <<https://familylawhub.co.uk/default.aspx?i=ch3424>> accessed 9 May 2021.

⁵¹ Brian Sloan, 'Keeping up with the Jones Case: Establishing Constructive Trusts in Sole Legal Owner Scenarios' (2015) 35 *Legal Studies*, 226. <<https://heinonline.org/HOL/P?h=hein.journals/legstd35&i=230>> accessed 6 June 2021.

⁵² Leung (n 39).

⁵³ Sanders (n 31).

⁵⁴ 'Curran v Collins [2015] EWCA Civ 404 (29 April 2015)' (Practical Law) <[http://uk.practicallaw.thomsonreuters.com/D-0325892?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](http://uk.practicallaw.thomsonreuters.com/D-0325892?transitionType=Default&contextData=(sc.Default)&firstPage=true)> accessed 10 May 2021.

court may ascribe to the parties a purpose that they did not have, to be equal to all parties concerned.⁵⁵

There are difficulties involved in determining the common intention; the assumption that, for parties to have ‘*common intention*’ at the time of buying properties, they must have had an agreement of the minds which must have involved a lot of back and forth discussion before making a decision as cohabitants to own property jointly,⁵⁶ even though cohabitation is usually based on love and a focus on the future: the thought of separation at any time is not seriously entertained when investing into a family house, so they rarely discuss the rights and contribution of the parties in the acquisition of the property for fear of irking each other.⁵⁷ In a study conducted by *Slater and Gordon*, ninety percent of respondents said they had not discussed the possibility of separation and how they would divide their property, should it come to that.⁵⁸ However, even though cohabitants might have different intentions on how the property should be dealt with in separation, *their common intention* must be part of it.⁵⁹

In practice, to ensure that everyone gets a fair share of the property in accordance with their contribution to its acquisition, judges in the U.K. tend sometimes to dispense with the ‘*common intention*’; however, where there are excuses for omitting a partner’s name from the title deed, the judges apply the doctrine in order to be fair to the weaker party, as happened in the cases of *Grant v Edwards* [1986] 3 WLR 114 and *Eves v Eves* [1975] 1 WLR 1338., where the person whose name appeared as the legal owner gave excuses as to why the other parties name were not on the document: the judge applied the doctrine of ‘*common intention*’ and stated that the ‘*excuse*’ showed that the other party had an interest as well. However, as Gardner pointed out, not all excuses lead to applying the doctrine of ‘*common intention*’. He states that, instead of courts coming up with the doctrine, the court should decide based on proprietary estoppel.⁶⁰

⁵⁵ Sloan (n 51).

⁵⁶ John Mee, ‘Joint Ownership, Subjective Intention and the Common Intention Constructive Trust’ (Social Science Research Network 2007) SSRN Scholarly Paper ID 2833359 <<https://papers.ssrn.com/abstract=2833359>> accessed 10 May 2021.

⁵⁷ Susan L Brown, Alan Booth, ‘Cohabitation versus Marriage: A Comparison of Relationship Quality’ (1996) 58 *Journal of Marriage and Family*, 668. <<https://shibbolethsp.jstor.org/start?entityID=https%3A%2F%2Fidp.pte.hu%2Fsaml2%2Fidp%2Fmetadata.php&dest=https://www.jstor.org/stable/353727&site=jstor>> accessed 10 May 2021.

⁵⁸ Ann Berrington, Brienna Perelli-Harris and Paulina Trevena, ‘Commitment and the Changing Sequence of Cohabitation, Childbearing, and Marriage: Insights from Qualitative Research in the UK’ (2015) 33 *Demographic Research*, 327. <<https://www.demographic-research.org/volumes/vol33/12/33-12.pdf>> accessed 10 May 2021.

⁵⁹ Wong (n 43).

⁶⁰ R. J. Probert, ‘A Review of “Cohabitation: The Financial Consequences of Relationship Breakdown,” *Law Com. No. 307* (HMSO 2007)’ (2007) 41 *Family Law Quarterly*, 521. <<https://shibbolethsp.jstor.org/start?entityID=https%3A%2F%2Fidp.pte.hu%2Fsaml2%2Fidp%2Fmetadata.php&dest=https://www.jstor.org/stable/25740625&site=jstor>> accessed 10 May 2021.

Since the articulated or expressed intention is not always documented, the behaviour of the parties may reveal the parties' common intention, and this is done when a party shows a contribution made towards the acquisition of a property.⁶¹ In the cases of *Morris v Morris*, 1 [2008] EWCA Civ 257., and *James v Thomas* [2007] EWCA Civ 1212., the court entirely relied on the conduct of the parties in relation to the acquisition of the property to decide on the common beneficial intention.⁶² The parties' discussion that contributed to the financial commitment and exchange of ideas toward the purchase of the property guided the court in reaching a judgment with the *parties' common intention*. This is highly dependent on the witnesses' integrity.⁶³

Academicians have criticised the doctrine of common intention and dubbed it a myth⁶⁴ that can lead to making the wrong judgment by the court as to the division of the property by the cohabitants. However, in order to settle a disagreement between cohabitants reasonably, the court relaxes the standards for, or even invents, a common intention from the evidence, which shows the disparity in the application of the law and the way the law is stated. Thus, the use of fiction avoids the 'coherent construction of the law in conformity with the theory' and can impair the court's didactic role.⁶⁵

3 Evaluation

a) Development inconsistent with precedents

The development of the doctrine of common intention in England has been argued to be indifferent to the land and trust laws. The courts in England have argued that it is duty-bound to look for the common intention in the parties' case and action and give the intention an effect.⁶⁶ The court's role is to declare constructive trust from the facts presented before it without any discretion.⁶⁷ Even though citation can be utilised at the quantification phase, it is only employed when the court is required to provide a remedy after the trust has developed.

⁶¹ Sloan (n 51).

⁶² Mark J Bennett, 'Harvey v Beveridge: Common Intention Constructive Trusts in New Zealand' (2015) 46 Victoria University of Wellington Law Review, 959. <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2914721> accessed 10 May 2021

⁶³ Zhuang-Hui Wu, 'The Search To Ascertain The Parties' Imputed Intentions: Kernott v. Jones' [2010] Singapore Journal of Legal Studies, 571. <<https://shibbolethsp.jstor.org/start?entityID=https%3A%2F%2Fidp.pte.hu%2Fsaml2%2Fidp%2Fmetadata.php&dest=https://www.jstor.org/stable/24870512&site=jstor>> accessed 10 May 2021.

⁶⁴ Nicola Glover, Paul Todd, 'The Myth of Common Intention' (1996) 16 Legal Studies, 325. <<https://onlinelibrary.wiley.com/doi/full/10.1111/j.1748-121X.1996.tb00533.x>> accessed 20 May 2021.

⁶⁵ Terence Ehterton, 'Constructive Trusts: A New Model for Equity and Unjust Enrichment' (2008) 67 Cambridge Law Journal, 265. <<https://shibbolethsp.jstor.org/start?entityID=https%3A%2F%2Fidp.pte.hu%2Fsaml2%2Fidp%2Fmetadata.php&dest=https://www.jstor.org/stable/25166406&site=jstor>> accessed 20 May 2021.

⁶⁶ Sloan (n 51).

⁶⁷ Ehterton (n 65).

As a result, common purpose constructive trust is compatible with the conventional view that constructive trusts, as institutional trusts, focus on vindicating a pre-existing property interest.⁶⁸ Instead of simply giving effect to the claimant's fundamental property rights, common intention constructive trust becomes a discretionary remedy, depending on the court's judgment of fairness. Indeed, Etherton contended that the Stack judgment might be viewed as a corrective constructive trust, in which the court grants discretionary proprietary remedy for unjust enrichment.⁶⁹

b) Pragmatism

ba) Failure to consider the reality of family life

In the case of *Stack*, the parties (cohabitants) jointly owned the family residential home and, since the parties separated their finances, the court concluded that they never intended to share equal ownership of the family home.⁷⁰ However, the court's assumption has been criticised, in that the parties could have separated their finances for other reasons, which has nothing to do with their relationship.⁷¹ According to Rebecca Probert, while criticising the decision of the court, the partners can have separate bank accounts while at the same time equally contributing to their joint life.⁷² It has been furthered argued that having children together is not always a reliable indicator of intention of commitment, most so if the pregnancy was not planned.⁷³

c) Uncertainty causing injustice

Uncertainty and partiality in the implementation of *common intention positive* trust often contribute to discrimination in particular situations. Because of the intricacies of family life and the broad number of non-exhaustive elements that the court might examine in *Stack*, judges can reach very different conclusions from the same reality. Many judges are unable

⁶⁸ David Wright, *The Remedial Constructive Trust* (Butterworths 1998, Sydney) 3–4.

⁶⁹ Terence Etherton, 'Constructive Trusts: A New Model for Equity and Unjust Enrichment' (2008) 67 *The Cambridge Law Journal* 265, 279. <<https://shibbolethsp.jstor.org/start?entityID=https%3A%2F%2Fidp.pte.hu%2Fsam12%2Fidp%2Fmetadata.php&dest=https://www.jstor.org/stable/25166406&site=jstor>> accessed 20 May 2021.

⁷⁰ Leung (n 39).

⁷¹ Thomas Leung Yu Hang, 'Property Rights of Cohabitants: A Comparison of Four Jurisdictions' (2018) 48 *Hong Kong Law Journal*, 837. <<https://heinonline.org/HOL/P?h=hein.journals/honkon48&i=841>> accessed 11 May 2021; *Sharing Lives, Dividing Assets/ An Inter-Disciplinary Study* (Hart Publishing 2009) <<http://www.bloomsburycollections.com/book/sharing-lives-dividing-assets-an-inter-disciplinary-study>> accessed 11 May 2021.

⁷² Rebecca Probert, 'Cohabitation in Twentieth Century England and Wales: Law and Policy Special Issue on Family Law and Policy: Cohabitation and Marriage Promotion' (2004) 26 *Law & Policy*, 13. <<https://onlinelibrary.wiley.com/doi/full/10.1111/j.0265-8240.2004.00161.x>> accessed 11 May 2021.

⁷³ Douglas, Pearce and Woodward (n 9).

to embrace Stack's obiter that the law has progressed since Rosset and that non-financial contributions should be used to conclude collective purpose in single-name situations.⁷⁴

To summarize, *common intention constructive trust* is vulnerable to criticisms from a variety of perspectives. In general, *common intention* cannot be detected in the majority of cases. Judges may be obliged to rely on flimsy fact-finding and erroneous legal reasoning to achieve a conclusion that the court finds logical. As a consequence, the doctrine of *common intention constructive trust* is made spurious and contradictory to precedents. In terms of pragmatism, the court exaggerates some facets of family life to infer advantageous control of the family house, resulting in unfairness. Uncertainty over the results of a civil procedure often discourages litigation, stopping the court from pursuing individualised justice.

III Kenya

1 Introduction

Cohabitation has a long tradition in our culture and around the world. Despite religious condemnation, these unions have become more common in recent times, especially among young people, from the 1980s to date. The current state of affairs has also been the accepted standard. Most young Kenyan couples cohabit,⁷⁵ and the situation cannot be overlooked or ignored any longer. Furthermore, those who do not have the financial means to enroll in traditional or civil partnerships⁷⁶ have taken advantage of the circumstances to enter these relationships to replace a formal marriage. As a result of the prevalence of cohabitation, the rule has been recognised. There is a held belief among Kenyans that cohabitation for an extended period leads to an automatic marriage governed by the common laws,⁷⁷ because of this, there is the belief that couples do not have to go through the formalization of their union. However, this is not the case and this section deal with cohabitation rights in Kenya.⁷⁸

⁷⁴ Probert (n 60).

⁷⁵ Isabel Pike, Sanyu A. Mojola and Caroline W Kabiru, 'Making Sense of Marriage: Gender and the Transition to Adulthood in Nairobi, Kenya' (2018) 80 *Journal of marriage and the family*, 1298. <<https://onlinelibrary.wiley.com/doi/full/10.1111/jomf.12525>> accessed 11 May 2021.

⁷⁶ Traditional marriage involves the payment of a bride price by the groom to the mother of the bride; civil partnerships is a legal relationship entered into by a couple which is registered and provides them with similar legal rights to married couples. There are a variety of reasons why couples choose not to marry; for example, those who have been married before may have personal or religious beliefs for not repeating the process, whereas others object to the patriarchal or religious associations of a traditional marriage and marriage ceremony.

⁷⁷ 'Presumption Of Marriage Under Kenyan Law – Begi's Law' (31 July 2020) <<https://www.begislaw.com/presumption-of-marriage-under-kenyan-law/>> accessed 18 August 2021.

⁷⁸ Joshua Nyawa, 'Presumption of Marriage in Kenya; Contribution of English Law into Kenya's Family Law' <https://www.academia.edu/30218609/presumption_of_marriage_in_kenya_contribution_of_english_law_into_kenyas_family_law> accessed 18 August 2021.

2 Presumption of Marriage

In Kenya, there are no statistics related to cohabitation; the Marriage Act does not recognise cohabitation as marriage; it recognizes five categories of the marriage ceremony;⁷⁹ as follows; *Civil Marriages, Christian Marriages, Customary Marriages, Islamic Marriages, and Hindu marriages*.⁸⁰

Section 3 of the Marriage Act defines marriage thus: 'Marriage is defined as the consensual union of a man and a woman, whether monogamous or polygamous, that is registered under this Act.' Therefore, it suffices to state that a relationship not registered under the Marriage Act is not considered marriage. However, section 2 of the Marriage Act refers to; '...an arrangement in which an unmarried couple lives together in a long-term relationship that resembles a marriage'. This shows that a marriage cannot be presumed under the Act; it must go through one of the statutory procedures.⁸¹

Cohabitation is similar to marriage because the partners, in most cases, pool their resources together, divide their household responsibilities and have sexual exclusivity. The partners in this kind of relationship have usually consented to it. In the event of desertion by one partner, mainly when they have invested together and have children, one partner can refer the matter to the conciliatory body⁸². Due to lack of recognition of any cohabitation type of union, there is no right extended to them in Kenya; they do not have obligations towards each other as with married partners, the matter was decided in *Winderler v Whitehall* (1990)2 FLR 505.⁸³

In *Hortensiah Wanjiku Yaweh versus Public Trustee* (Civil Appeal 13 of 1976),⁸⁴ the court of appeal for East Africa determined that cohabitation extended for a long time must be established before a marriage can be presumed. The court stated the following: 'The presumption is not based on the statute or a marital system. The presumption is simply an assertion dependent on the parties' long cohabitation and reputation as husband and wife.'

In 2014, the matter came up for decision, in *Joseph Gitau Githongo versus Victoria Mwihaki* (2014) eKLR, and the decision of the court was 'It (presumption of marriage) is a phrase that arose from an awareness of the necessities of life's reality when a man and woman cohabit for a long length of time without solemnizing that union by going through a recognized marriage procedure, therefore a presumption of marriage occurs.' If the lady is abandoned by her 'husband' or dies as a result of his desertion, the statute, according to the

⁷⁹ 'The Marriage_Act 2014.' s. 6(1) <http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/TheMarriage_Act2014.pdf> accessed 23 May 2021.

⁸⁰ See *ibid* sec. 6.

⁸¹ 'The Marriage_Act 2014.' (n 79).

⁸² *Ibid*, 84(2).

⁸³ 'Winderler v Whitehall; [1990] 1 FCR 268' (BPRO) <https://www.bloomsburyprofessionalonline.com/view/family_court_reports/ID1990_1_FCR_0268.xml> accessed 23 May 2021.

⁸⁴ 'Hortensia Wanjiku Yawe v Public Trustee Summary.Docx – Hortensia Wanjiku Yawe v Public Trustee Court of Appeal for East Africa Civil Appeal Number 13 of 1976, Course Hero' <<https://www.coursehero.com/file/68186127/Hortensia-Wanjiku-Yawe-v-Public-Trustee-Summarydocx/>> accessed 18 August 2021.

necessary evidence, bestows the status of 'wife' on her for her to petition for maintenance or a piece of her late 'husband's' inheritance.' In the preceding examples, the underlying premise is a presumption of marriage, which is frequently an issue of fact and evidence that a person must demonstrate.

3 Statutory and Judiciary Interpretation of Cohabitation

a) Statutory Recognition of Cohabitation in Kenya

The Judicature Act in Kenya recognises common law,⁸⁵ which in turn acknowledges cohabitation as marriage. The Judicature Act accepts common laws as part of the prevailing laws in Kenya; this essentially includes cohabitation through the backdoor as a form of marriage in Kenya, even though it is not recognized under Marriage Act 2014, Section 3(6). The Evidence Act, in Kenya, which is the basis for the presumption of marriage, states that

The court may presume the occurrence of any fact that it believes is likely to have occurred, taking into account the usual course of natural events, human behaviour, and public and private business in connection to the circumstances of the particular case.⁸⁶

Therefore, when the courts are presented with cohabitation cases in Kenya, they usually consider the length of the cohabitation and the parties' reputation.

The Children's Act recognises cohabitation in its definition, which declares,

Where a child's father and mother were not married at the time of his birth but cohabited for a period or periods totaling at least twelve months after his birth, Alternatively, if the father has recognized paternity of the kid or has maintained the kid, he has gained parental responsibility for the kid, regardless of whether a parental duty exists.⁸⁷

This has the effect of safeguarding the parentage of children born from a cohabitation relationship.

b) Judicial Recognition of Cohabitation

Kenyan laws are not clear on cohabitation; marriage must comply with the Marriage Act of 2014 to be considered legal under the laws of Kenya. The judiciary has therefore taken

⁸⁵ 'JudicatureAct_Cap8. 1967' s 3(1) (c) <http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/JudicatureAct_Cap8.pdf> accessed 23 May 2021.

⁸⁶ 'Evidence Act. 2008' s 119 <https://www.tanzania.go.tz/egov_uploads/documents/EVIDENCE%20ACT.pdf> accessed 23 May 2021.

⁸⁷ 'ChildrenAct_No8of2001.' s 25 <http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/ChildrenAct_No8of2001.pdf> accessed 23 May 2021.

centre stage in cohabitation matters and looked to the English common-law system to help decide on cohabitation cases. The courts have ruled that anyone wishing to prevail with a petition for the presumption of marriage must demonstrate that the couple cohabited for a lengthy period of time and acted in such a way that marriage might be inferred. The following section is about judicial decisions regarding cohabitation.

ba) The duration of the cohabitation

The judiciary defined the length of cohabitation in *Phylis Njoki Karanja & 2 others v Rosemary Mueni Karanja & another Civil Appeal No. 313 of 2001[2009]eKLR*. The Court of Appeal stated that cohabitation must be extended and there must be a general reputation for presumed marriage in Kenya. It should not be just friendship or a concubine relationship. The court's statement was as follows

Long cohabitation may give rise to the assumption of marriage. Before a marriage can be presumed, a party must sustain protracted cohabitation and deeds of general repute; that the extended cohabitation is more than just fondness or that the lady is more than just a concubine, but that the long cohabitation has crystallized into a marriage and that the presence of marriage may be assumed. We believe that since the presumption is an expectation, such ceremonial rites are not required to be performed.⁸⁸

The length of cohabitation was presented for interpretation in *Milka Githikia Kamau v Faith Wangechi Kamau 2008)eKLR*, where the court presumed the applicant to be the deceased's wife. While making this decision, the court stated that

It would be unreasonable to conclude that the claimant was just a forger out to benefit herself. During the applicant's cohabitation with the deceased from 1990 to 1999, she may have believed she was the deceased's rightful wife and therefore entitled to a portion of the deceased's estate.⁸⁹

In Tanzania, Bramble J. dispensed with the length of the cohabitation while deciding, in *In R vs. Fita s/o Mihayo Crim. Sass. 173-Shinyanga-69, 8/10/69*, Bramble J. In this case, the suspect had killed a man he caught sleeping with his lady: he and the lady had cohabited for between four and eight months, the accused defended himself by saying that the action of the other man provoked him and that, because he had cohabited with the lady, it could be presumed to be marriage. The court, in considering if the relationship of the lady and the accused could be regarded as marriage, the two having cohabited for just between four and eight months,

⁸⁸ 'Civil Appeal 313 of 2001 – Kenya Law' <<http://kenyalaw.org/caselaw/cases/view/53980>> accessed 24 May 2021.

⁸⁹ Paul Musyimi, 'Lawyer-Kenya: Presumption Of Marriage By Cohabitation' (Lawyer-Kenya, 30 May 2008) <<http://lawyer-kenya.blogspot.com/2008/05/presumption-of-marriage-by-cohabitation.html>> accessed 23 May 2021.

held in a surprising judgment that it could be considered as a presumption of marriage, even though the period was very short.⁹⁰

bb) Desire to establish a man-wife relationship

In the matter of *Kisito Charles Machani vs. Rosemary Moraa HCCC MISC. NO. 364 OF 1981 NAIROBI*, a plaintiff sought court help in nullifying a claim of marriage with the defendant because he had not paid dowry or performed any customary rites as required by his Kisii tribe in Kenya, even though he had cohabited with the lady (defendant) for several years and they had three children together. The court, while deciding on this matter, stated that

Although none of the formal rituals that would usually be supposed to be conducted in a Kisii Customary Marriage were performed, the purpose in the plaintiff and defendant's relationship was to create the relationship of man and woman, and both families understood and acknowledged this.⁹¹

bc) Need for quantitative and qualitative cohabitation

In the matter of *Mary Njoki v John Kinyanjui Mutheru & others CA71 of 194*, the applicant and the deceased dated during school days and even after graduation but never cohabited: nevertheless, upon the death, Ms. Njoki sought to be included as a dependent of the deceased, arguing that they were cohabiting in a manner that could lead to the assumption of marriage. However, after examining the testimony of witnesses, the court found that marriage could not be assumed. The judge based his opinion on the lack of a qualitative and quantitative cohabitation partnership; that is, the couples never lived together, pooled their money to purchase a home or any property, or had a child.⁹²

In the matter of *B.C.C. vs. J.M.G. [2018]eKLR*, the dispute was about the burial of one L.C. who died on June 10 2017; the deceased's mother and the respondent, who claimed to be the deceased's husband, were quarrelling on who was to bury the remains of the deceased. The respondent and the deceased had cohabited since 2011 and had written in a love letter that they were married (without legalising their union); they had two children. The deceased and the respondent had lived together as a married couple, and everyone who knew them, including the respondents' relatives, recognized them as a couple. The court relied on the facts and evidence presented to decide that the two cohabited to presume a marriage.⁹³

When the judiciary was again petitioned to decide on cohabitation in *Mary Wanjiku Githatu v Esther Wanjiru Kiarie [2010]eKLR*, the following statements were made to pronounce the recognition of cohabitation in Kenya

⁹⁰ 'R vs. Fita s/o Mihayo Crim. Sass. 173-Shinyanga-69, 8/10/691970 HCD 204 <<http://elibrary.judiciary.go.tz/cgi-bin/koha/opac-retrieve-file.pl?id=07ed825f4ca0fb0255926cf910a9c26d>> accessed 23 May 2021.

⁹¹ 'Kenya Family Law: Come We Stay Marriage' <<https://kenyalawsonline.blogspot.com/2013/06/kenya-family-law-come-we-stay-marriage.html>> accessed 23 May 2021.

⁹² 'Civil Appeal 71 of 1984 – Kenya Law' <<http://kenyalaw.org/caselaw/cases/view/8531>> accessed 23 May 2021.

⁹³ 'Civil Appeal 10 of 2018 – Kenya Law' <<http://kenyalaw.org/caselaw/cases/view/155630/>> accessed 24 May 2021.

The existence or non-existence of a marriage is a matter of fact. Similarly, whether a marriage can be believed is a matter of fact. It is not reliant on any legal scheme, except as expressly prohibited by written statute. For example, by law, a marriage cannot be inferred in favour of either party in a relationship in which one of them is married. However, in situations where the partners can marry, a marriage will be presumed if the facts and conditions prove that the parties, by long cohabitation or other circumstances, manifested a desire to live together as husband and wife.⁹⁴

The judiciary again cemented the presumption of the marriage decision in the case of *Rosemary Aoko v Noel Namenya Munjal* [2015]eKLR. The dispute concerned the estate of Chrispin Munjal Ndege, the deceased in the case. Noel, who had cohabited with him and they eventually married to him, even though he was still married to Rosemary, claimed the estate of Chrispin, and Rosemary claimed the property too, as the deceased's wife. Noel and the deceased had stayed together for over 6 years and were blessed with four children. Because of the separation of the deceased and Rosemary, the deceased moved his then cohabitant (Noel) to his house and lived together as a married couple without legalising their union. The court determined that the deceased and Noel had a presumption of the marriage. The court took into account that they had been cohabiting for a long time and that their relationship was well-known by the relatives of both partners.⁹⁵

In the matter of *S.W.G V H.M.K* [2015]eKLR, the presumption of marriage based on long cohabitation came up for decision before the court. The lady alleged that she had cohabited with the man and oversaw the construction of the man's house, participated in buying the family car, and contributed by giving the man moral support and supervising his house while he was out of the country on military duties. On the other hand, the man claimed that he never dated the woman; they had a brief relationship and went their separate ways; the woman did not help him acquire the properties or supervise his house while he was away. The court held that, due to failure on the part of the woman to prove long cohabitation of general reputation, the marriage could not be presumed. While making the decision, the court made the following statements.

Where a marriage fails to meet the relevant formalities outlined in the Marriage Act or by common law, it can be saved by the assumption of marriage by cohabitation. The inference may be made when a man and woman have cohabited for a long enough period of time, and under such situations, they have earned the distinction of becoming man and wife. However, a legitimate union between them can be believed to have occurred in the absence of any positive proof of such a marriage, and this assumption can be rebutted only through clear and weighty evidence...⁹⁶

⁹⁴ 'Probate & Administration Cause 244 of 2002 – Kenya Law' <<http://kenyalaw.org/caselaw/cases/view/119374>> accessed 24 May 2021.

⁹⁵ 'Succession Cause 4 of 2008 – Kenya Law' <<http://kenyalaw.org/caselaw/cases/view/109603>> accessed 24 May 2021.

⁹⁶ Stephen Cretney, 'The Family and the Law – Status or Contract Special Issue: Seminar at All Souls College, Oxford 30 June 2003' (2003) 15 Child and Family Law Quarterly, 403. <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2030915> accessed 25 May 2021.

The court emphasised the considerations that the courts would weigh in determining whether or not there is cohabitation.

A marriage could be assumed if the evidence and conditions prove that the parties evinced a desire to live together as husband and wife by long cohabitation or other circumstances.⁹⁷

In summary, in Kenya, once cohabitation has been established to meet the criteria for it to be presumed as marriage, the division of property is governed by the Matrimonial Property Act 2013. Where a property acquired during the marriage is presumed to belong to both of them and both monetary and non-monetary contributions in the acquisition of the property are recognised.⁹⁸

IV Comparison and Contrast

Based on the above analysis, it is clear that the two jurisdictions find it a challenge to deal with cohabitants and their property rights if the relationship fails to formalise into marriage. The courts in the two jurisdictions have developed rules to guide the presumption of cohabitation as marriage and have acknowledged the unique domestic sense of a cohabiting partnership. Cohabitants are lovers, not business partners.⁹⁹ In terms of pragmatism, courts must reach a fair judgment in individual instances by balancing the need to respect autonomy with the necessity to protect the weak. Concerning the contradiction between principle and practicality, the courts must provide personalised justice without jeopardising the coherence of the law. The courts analyse a wide range of intellectual choices, and various themes may be found.

Neither the English and Kenyan laws nor judicial decisions dealing with cohabitation are harmonious. The power given to the judiciary in dealing with the matter is enormous; it is a direct usurpation of the legislative power of law-making. Nevertheless, people adapted creatively to everyday issues in circumstances where 'previous cultural and institutional limitations have lost their sting.'¹⁰⁰ As analysed in the above discussion, the increase in cohabitation is not without criticism; it is perceived as a perversion of marriage. Furthermore, current case laws dealing with cohabitation are confusing, with a tendency toward injustice, compared to plain regulations dealing with married spouses in the event of marital break-up. Furthermore, most cohabiting couples have suffered at the hands of the law, not because

⁹⁷ 'Civil Case 13 of 2010 – Kenya Law' <<http://kenyalaw.org/caselaw/cases/view/112551>> accessed 24 May 2021.

⁹⁸ Marital Property Act 2013 (Kenya ss 13 & 14 <<https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/97351/115471/F-540095358/KEN97351.pdf>> accessed 31 May 2021.

⁹⁹ Laura Weinrib, 'Reconstructing Family: Constructive Trust at Relational Dissolution Note' (2002) 37 Harvard Civil Rights – Civil Liberties Law Review, 207. <https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=10209&context=journal_articles> accessed 24 May 2021.

¹⁰⁰ H Jay Folberg and William P Buren, 'Domestic Partnership: A Proposal for Dividing the Property of Unmarried Families' (1975) 12 Willamette Law Journal, 453. <<https://heinonline.org/HOL/P?h=hein.journals/willr12&i=459>>

they intentionally attempt to avoid it, but because they believe they are subject to it, as is the pervasive common-law marriage myth.

The courts in both England and Kenya have developed a system that can be replicated in dealing with cohabitants; in Kenya, it is the length of cohabitation and the reputation of the cohabitants, while in England it is the common intention of resulting trust, but the difference is that in England the cohabitants are treated as so and not presumed as married. However, upon fulfilling the threshold in Kenya, the cohabitants are presumed to be married and then brought under the matrimonial property that deals with them in the same way married couples are treated.

V Proposed Framework for Kenya

Kenyan courts have to prepare to deal with the influx of cohabitation cases, as it has taken centre stage in relationships and replaced marriages. However, society is still largely opposed to the ‘come we stay’ relationship, making it unlikely for legislation on this issue.¹⁰¹ Furthermore, as illustrated by the failure of a comparable legislative reform in England and Wales, there are several practical obstacles in defining the scope and power of the Act.¹⁰²

A legal framework that includes several legal doctrines might be the solution needed to deal with financial and property rights amongst cohabitants. By including good legal ideas in clearly defined connections, the framework attempts to compromise principle and practicality. In general, a framework regulating rights between cohabitants should be based on set principles and should not allow undue judicial discretion; clarity and consistency are critical in property law.¹⁰³ To guarantee that the judgments determined under the framework may be deduced logically or analogically from the precedents, broad discretion should be avoided.¹⁰⁴

To be pragmatic, the court must find a balance between preserving autonomy and safeguarding the disadvantaged. Cohabitation is not the same as marriage. Cohabitants are best positioned to define their rights in a partnership. This can be accomplished by the court maintaining cohabitants’ common understanding within the legal boundaries. However, if the parties have failed to make arrangements, the court should step in to give a just remedy.¹⁰⁵

The court should give regard to the parties’ living arrangements if they have formalised them. A cohabitation agreement, where the parties clarify their separate rights against one other, should be recognised. If a *common intention constructive* trust can be formed at this

¹⁰¹ F Nii-Amoo Doodoo and Megan Klein, ‘Cohabitation, Marriage, and “Sexual Monogamy” in Nairobi’ (2007) 64 *Social science & medicine*, (1982) 1067. <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1866302/>> accessed 24 May 2021.

¹⁰² Joanna Miles, ‘Property Law v. Family Law: Resolving the Problems of Family Property’ (2003) 23 *Legal Studies*, 624, 57.; *Lc278.Pdf* 57–61 <<http://www.lawcom.gov.uk/app/uploads/2015/04/lc278.pdf>> accessed 31 May 2021.

¹⁰³ O’Mahony (n 1) 420.

¹⁰⁴ Hayne (n 11) 20.

¹⁰⁵ See Probert (n 60) 295 for a similar view.

point, the court should firmly infer that the parties have provided for themselves, since it represents the parties' understanding of how beneficial ownership of the family property should be shared between them.

The presence of vitiating elements, such as fraud and undue influence invalidates, the cohabitation agreement (or prevents finding a common intention in such an analysis). Therefore, the doctrines of the length of cohabitation and reputation of the cohabitants should be retained in Kenya. At the same time, the Kenyan courts should embrace the common intention of a constructive trust in dealing with cohabitants' property rights, especially in cases where the relationships have not met the threshold for the presumption of marriage.

If no genuine cohabitation agreement or common intention constructive trust can be identified, the court should step in to provide the parties with a remedy. At this point, the court has three options: unjust enrichment, presumptions of consequent trust and advancement, and proprietary estoppel.

Conclusion

'Come we stay' marriages are a new form of arrangement which has infiltrated Kenyan society. Many reasons have been outlined in this document as to why couples prefer to remain in unions similar to marriage without formalisation. In the African traditional society, cohabitations were not allowed due to the majority's strict adherence to societal values. However, society is dynamic, and this family arrangement has been embraced in various parts of this country. In addition to that, common law also recognises this type of marriage, and courts have developed and applied a test to decide whether a certain arrangement can be presumed that marriage exists. This is evident in the court cases mentioned in this document. Come we stay marriages are here to stay, and therefore courts should be reluctant to ignore them. Courts in Kenya need to take judicial notice of their existence, and they should also be included as a form of marriage in the Marriage Act 2014.

ELTE LAW JOURNAL

CONTENTS

SYMPOSIUM

ELTE Faculty of Law 350th Anniversary Conference Series

ISTVÁN ERDŐS: The Non-application of Foreign Law under the General Part of the New Hungarian Private International Law Act

BALÁZS RIGÓ: Ancient Roman History as a Means for Legitimacy in the English Early Modern Political Thought

ISTVÁN HORVÁTH: Looking for the Disappeared Comparative Advantages in the Public Service

ZOLTÁN PETROVICS: Crucial Point: Several Issues of the Termination of Employment

MIHÁLY KURUCZ: The Food Law in the Context of Agrarian Law

ARTICLES

MARINA KASATKINA: Consumer Protection in the Light of Smart Contracts

KENNETH KODIYO: Judicial Approach to Cohabitation: A Comparative Study of the Law of England and Wales and Kenya