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POLITICAL FREEDOM AND INTELLECTUAL PROPERTY RIGHTS: CONFLICT OF VALUES

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Summary: The paper critically observes the current legal and political happenings around the international multilateral Anti-Counterfeiting Trade Agreement (ACTA), including criticism for its rejection by the European Parliament in the year of 2012. This example is treated in the sense of the collision of values in today’s information society, e.g. political freedom on the one hand, and intellectual property rights on the other. The collision of values is balanced fairly by the laws, for example by the statutory licenses and compulsory licenses, too. This text also critically considers some aspects of the contemporary political ideology of information. The author considers the majority of the European public reaction to the Anti-Counterfeiting Trade Agreement as fearful, irrational and populist by politicians. “Electronic Violence” remains violence like any other and everyone must have the courage to face it. The information society itself is based on the same values as any other human society. Likewise, the information society is prone to various vices, such as greed for foreign assets without any compensation. This greed is only masked by political rhetoric about freedom and human rights. Therefore, it is necessary to distinguish between legal ideology of information from legally regulated economic shifts.

Keywords: Anti-Counterfeiting Trade Agreement (ACTA), political freedom, intellectual property, values of the information society, conflicts of values and their context, anonymous protest movement.

"The economic well-being of the Union relies on sustained creativity and innovation. Therefore, measures for their effective protection are indispensable in ensuring its future prosperity."

1 The author presented the basic theses at the plenary session of the Trnava Legal Days conference, held by the Trnava University, Faculty of Law on 20–21 September 2012, on the topic System of values of law and its reflection in legal theory and practice. Formerly published in Czech in Právník, Vol. 152, No. 3, pp. 209–221. [Politická svoboda a duševní vlastnictví: střet hodnot.]

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3 Rec. (1) Regulation (EU) of the European Parliament and of the Council (EU) No. 386/2012 of 19 April 2012, on entrusting the Office for Harmonisation in the Internal Market (Trade Marks and Designs) with tasks related to the enforcement of intellectual property rights.
1 Introduction

This article will provide a critical review of the current legal and political happenings relating to the multilateral international Anti-Counterfeiting Trade Agreement (ACTA), including the critique of disagreement with the conclusion thereof from the side of the European Parliament in 2012. On that example we will elaborate the conflict of values in the current information society, i.e. the conflict between political freedom on one hand and the right to intellectual property on the other one. As concerns legislation, the collision of those values is solved by a relatively well-balanced manner; by legal or official (forced) licences. The text also provides a critical view on certain aspects of the current information ideology and partisan policies originating therein.

The multilateral international Anti-Counterfeiting Trade Agreement, known under the abbreviation ACTA, was signed in 2011 after eleven rounds of proceedings. The Czech Republic added its signature in early 2012. From legal viewpoint, the Agreement does not bring anything new for us in principle. The purpose of the Agreement is more effective enforcement of existing rights, not implementation of new ones. The Trade Agreement facilitates expansion of certain standards of implementation of rights by virtue of the long ratified multilateral international Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) of 1994, (Notification No. 191/1995 Coll.), outside Member States of the world Trade Organisation and at the same time it expands the legal framework of the intellectual property protection, as it has been practised for several years for example in the European Union and its Member States, or in the European Economic Area, respectively, and in several third countries, and other signatory states. This way the Trade agreement, concluded from the trading and legally-political policy of the U.S.A. bolsters, at least indirectly, the importance of the intellectual property protection in the world Trade Organisation. Acceptance of this trade agreement as a part of the Czech legal order would not require, by all accounts, any legislative modifications, or perhaps only immaterial ones. In fact, the rules which the Agreement is based on are internally effective here from 2006 at least, as a result of implementation of Community Law,4 to say nothing about the rules that give similar grounds to the TRIPS Agreement of 1994.


Then, why were there so many media and street storms in Europe in 2012? Why some signatory states came to political “suspensions” of domestic ratifications, governmental retreats from previously agreed grounds and eventually to rejection of the consent for the European Parliament to conclude the trade agreement?

The reader will find the answer to that question in the title of the following chapter.

2 Disinformation, fearfulness, irrationality and political populism

In the European Parliament, composed mostly by legal laymen, the multilateral Anti-Counterfeiting Trade Agreement, submitted by the council, was criticised for its alleged vagueness, possibility of misinterpretation, alleged unbalance between copyright and fundamental rights of Internet users, threat of possible jeopardy to civil liberties, and the like. The reproaches were largely legally ill-

5 See e.g. Schulz, M.: Neúspěch ACTA byl svátkem demokracie (ACTA’s failure was a feast of democracy). MF Dnes, 12. 7. 2012, p. A 13. The author of the quoted journalistic article is the president of the European Parliament. According to Schulz, most of the EP Members and many citizens believe that ACTA is “… much too unclear and it opens space to various misinterpretations, bullying and intrusions into the privacy, civic rights, creativity, innovations and the free flow of information”. “Were it really for the protection of goods from counterfeiting, either of clothes or medicals, neither me not any of my colleagues would refuse ACTA.” In short, perhaps it is a “devil’s work of the U.S.A.”, whose true objective, soon enough revealed by the alert European Parliament Members, should be establishment of the global political totality under the transparent pretext of protection of immovable assets, as we could add sarcastically. It is only pity that the President of the European Parliament did not tell the public that the European Community acceded to a similar agreement, the TRIPS, belonging to the legal pillars of the World Trade Organisation, as early as in 1994. Also similar is the “original” law of the European Union including European Parliament and Council Directives from 2001 and 2004. If the ACTAs failure was a “feast of democracy”, then it was a mourning day for law and justice. The people-ruling power technique, shielded by letters of the frightened part of the people, controlled by negative emotions, prevailed over reason, trade, law, and professionalism, including rational attitude of the European Commission, that (perhaps with some alibism) submitted the international treaty to the court of Justice for assessment of conformity thereof with the Treaty on the functioning of the European Union. However, the European Parliament, perhaps in some kind of the Members’ “plebeian pride” mood did not wait for the result of the legal determination by the addressed EU body. “Since the rejection of ACTA, the European Parliament...
founded. Also, the Trade agreement was criticised for a certain democratic deficit at the preparation thereof. Even would that really be so, decisive is the final content of the legal rule that is no way deviating from what has long been valid in the European Union, European Economic Area and the Czech Republic, anyway.  

We may as well say it is legally dilettantish to criticise a universal international agreement, signed “across the continents”, for lack of details. Agreements of this kind have to leave space for implementation by national bodies of public power, accordingly to the rules of the local legal culture. An opposing view would be almost an anarchistic expression of distrust towards public power bodies.

Not only from the legal viewpoint, but also by common sense the politically presented reproaches were fundamentally groundless. Obviously, anything can be misused, for example a car may become a weapon under certain circumstances. The possibility of incorrect interpretation of law may potentially threaten at everything, though only when we do not know or use reviewable and scientifically grounded methods of interpretation of law, including interpretation of international treaties. However, one must understand that vast majority of the European Parliament members, as well as those of national parliaments, do know absolutely nothing about those methods. Should civil liberties be possibly threatened by fighting back against counterfeiting, there will, of course, apply the use of the jurisprudential method of balancing of colliding principles or values, which is a methodological feature of the juridical science. Therefore, we cannot get rid of

*has been an institution that must be seriously taken into account,* President Schulz concludes his article. Unfortunately, he has a point at that. However, let’s not forget which way election campaigns to the European Parliament (and other bodies) are often led, and what (albeit unrealistic) election vows make it possible (also in a populist manner) to gain votes. The technique of democracy is merely a technique of the quest for power and a technique of performance thereof. Democracy as such does not necessarily bring legitimacy in the system of values as concerns welfare. After all, many authoritarians or even dictators were democratically elected by majority.

The political statement that “borders between commercial and non-commercial use is not completely clear” belongs among “legal jewels”; point 29 of the opinion of the European Parliament Committee for Civil Liberties, Justice and home Affairs of 4. 6. 2012, addressed to the Committee for International Trade. Petitioner Droutsas. Likewise, “important distinguishing” between “non-commercial downloading in small scale and a private one” (ibid.) is irrelevant in the legal sense, since non-commercial downloading from the Internet, regardless its scope (scale), as a rule falls within public domain; i.e. it is a free use. According to Czech law, at least. (source: see below)


*It is important that all preparatory material is made accessible, so as it be possible to use the historic method of interpretation of the international treaty, i.e. interpretation reflecting the history of establishment thereof.*

*In all accounts, the knowledge of the world legal methodology cannot be expected from prevailingly legally lay politicians, when often poorly educated lawyers lack it (in particular in the countries with post-soviet legal education). On the other hand, using of common*
the feeling that the members of parliament who are laymen in law succumbed to the targeted and massive disinformation campaign, considerably supported by political parties united in the Pirate Parties International. Common sense gave way to political populism, suspiciousness, distrust, and irrationalism, where in certain cases the Anti-Counterfeiting Trade Agreement was criticised for what it even does not contain.\(^8\) Hence, the Trade Agreement has become an out-of-law political symbol of the “threat of unfreedom for the Internet”, something that is necessary to fight against, and started to live its own “political life”, outside common economic exchange. It is not necessary to add that within the given context of international trade it has become an inappropriate symbol. The substance and purpose of this Agreement is of an international trade nature and it is not related whatsoever to civic liberties that are otherwise necessary to protect.\(^9\)

In my own experience gained at meetings with Czech university students, many ACTA opponents have not ever read the Agreement, or started reading it but have not finished it, or did not understand its legal text, professional language, legal terminology and context. The less they knew, the more loud they usually shouted, they let themselves get misled by some political party members and demonstrated their political attitudes against something what they could not comprehend, or, against what they may have viewed as a possible civic danger, but what did not have anything in common with the given issue of the Trade Agreement. However, expressions of demonstrations by “vox populi”, irrational and filled with irritated emotions, occur both in the history and today.

Therefore, our citizen’s appreciation belongs to the political attitude of the minority even in the European Parliament that preserved common sense, ability to make its own judgement, orientation in legal issues and did not succumb to mass emotions, fearfulness or political populism. Similarly, the same may be complimentarily said about the European Commission.

Undoubtedly, it is psychologically and politically interesting how some Czech parliamentary or even governmental political parties let themselves get politically influenced, quite irrationally, by negative emotions and ideology of rather marginal political parties like the Česká pirátská strana (Czech Pirate Party) belonging to the Pirate Parties International. It is a political party that has long been enjoying publicly declared support from the ideologically sharp, extreme, and politically mostly demagogic Internet Pirate News, with which the Party is also

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8 For example, ACTA does not include prohibition of the Internet use for the law breaker (“disconnection” from the Internet) or prohibits downloading of so far protected artworks from the Internet and their saving to computer memories for non-commercial personal use. All that was possible in here before ACTA is to be possible after it. And, on the contrary, what was prohibited before ACTA is to be prohibited after it.

9 It is all right, of course, that the question of accordance of ACTA with the EU Charter of Fundamental Rights was on the agenda.
personally interlinked, or from whose ideological and media support it directly extracts political capital.

At least, to the light is brought some amount of social disorientation or even hypocrisy of some parliamentary and governmental parties and their interest in themselves, short-sightedly manifested outwardly by populism. This happens instead of legitimately expectable sustained public interest in public order on the international market, which, however, requires factuality, deliberation, knowledge of the matter and civil courage to call things their proper names. And also a piece of wisdom (and justice). Not only as a political calculation on what may be medially favourable right now (read: catchy for some part of the people) for a certain political corporation.

As regards the political proclamation of the Polish and consequently similarly Czech Prime minister on “suspension” of ACTA ratification due to the need of its “profound analysis“, we may say only the following. Was not ACTA profoundly inspected prior to its official undersigning, to which the President of the Republic authorised the Ambassador, on the basis of recommendation by the government?

If this Trade Agreement had not really been properly examined in advance, then the government would have perpetrated defective administration of public affairs, since upon execution of public power the Government would have acted at least in an irresponsible or non-professional way. However, if ACTA was profoundly examined in advance (of which I am convinced, also with the knowledge of the injured part of the Czech public administration) and recommended for signature, whereas the Czech Prime Minister politically stepped aside only following the electronic violence by the “pirates”, then we would have a weak politician in the head of the government. Or a man who does not trust his own officers, who by all accounts have done a good (and casual) job. In the better case, concerned would be only a tactical manoeuvre until the time that electronic protection of governmental servers against future attacks by the “people” improves. ... In the end, you will not harm anyone by a political promise of “profound analysis”. Even such a promise can be understood in violent times.

It is only pity that we do not have a political party with the political courage to publicly proclaim that ideological objective of the electronic violence on the state and public property may be the thirst for others’ private assets regardless the will of the owner (producer and investor). In other words, almost obsessive desire or immense greed (and immaturity) of some “members of the information society” (some juveniles, in particular) to whenever and wherever comfortably and for free enjoy themselves for other people’s money spent on creative investments, which may be dressed on the surface in politically sexy phrases about “the freedom of information”. We should understand that as “the freedom” of public performance of others’ movies and music for their own profit without payment and
their downloading from the Internet, also free of charge. Furthermore, all this is required under the economic conditions on the market when the same is done to the detriment of those who legally (i.e. under licence) make music or movies accessible to the public against payment by their customers.10

Interesting from political viewpoint is, how far some politicians, even those who declare themselves ‘right-wing’, let themselves get influenced – maybe unwittingly and without the knowledge of social reality – by the current political ideology of e-Marxism. This political ideology is characterised by a high degree of social naivety flowing “out of time and space”, that may recall the naive idea of some city children that “cow is blue”, because they know cows only from the Milka brand chocolate, packaged in blue. We may not be far from truth to say

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10 See e.g. in the Czech lands available Internet music on-line shops like Supraphonline, MusicJet or Bontonline, or foreign iTunes Store or Deezer. Further see also the Czech Supraphon YouTube Channel. On-line video rental shops like Topfun, Voyo and O2 TV: Videotéka also operate on the Czech market.

Further, see officially registered providers of audiovisual services on demand (video on demand) available in the Czech Republic and not only via electronic communication network but also via cable lines. As on June 10, 2012 the Council for Radio and Television Broadcasting officially registered 107 such kinds of services in total. The number of providers is somewhat smaller since some of them provide several such services; see e.g. Video Seznam, t-music, Doc Alliance Films, Cinema.cz, O2 TV: Videotéka etc. Further, in the Czech market there were 130 publishers in 2012 offering e-books and licences to the public use of photographs through internet photo banks; see e.g. Fotobanka ČTK, etc.

The above mentioned cases concern established new business models of the “society of networks” that correspond with the current environment of the “digital and Internet age”. However, the new business models permanently face a rather large unfair competition by some entrepreneurs – providers of storage of information services on the Internet (providers of public storages of videos, etc.) as well as some customers of those services if they have gained the status of sharer of non-licensed foreign products (e.g. full-length movies), unlike the sharers of their own or agreed foreign videos, recordings or photographs generally intended for free sharing in the public.

In addition to the new business models there are, of course, new alternative non-commercial models; see e.g. the Czech versions of Google Maps, Wikipedia, various offers of “open source” or “open access” kind or “non-proprietary software” etc., including offers of free-of-charge use of employees’ scientific works by some institutions, e.g. Masaryk University in Brno, etc. Cf. also the option to use the Czech version of the Creative Commons or the private-law system of little limiting copyright licences.

Therefore, when we hear political calls for “new models”, it is necessary to answer that new models have (in this country, too) been introduced and used both in commercial and non-commercial manner. It is true that we may come across various imperfections as concerns contents or technology, which, however, undergo remedial development and improvement.

Considering the current circumstances, there is no wonder about some (also international) demands for increased repression (cf. e.g. some provisions of ACTA) when these new models (not to mention the “old” ones) are being constantly attacked both on domestic and international markets, sometimes with the support from some information-political ideologists of a communist or anarchistic orientation, or with a direct backup by e.g. the Czech Pirate Party.
that some children would think that acted adventure movies are “born in a computer” by a randomly generated data.

There should be noted though, without improper trivialisation, that at least a part of the current information-political ideology is in principle comparable to some ages-old thoughts of communistic nature. In essence, it is an off-spring of the communist ideology, unrealistically counting with the materialistic “paradise on Earth”. The specific soviet communistic political model of “socialist copyright law” was abandoned in Czechoslovakia immediately after 1989. Under a political force, we tested this “model of tomorrow” for forty years and we eventually found out what should and could have been clear to us all from the very beginning, i.e. that it does not work. The attempts to break away from the soviet model that occurred here in law policy around 1968 were abandoned by the communists shortly afterwards, politically prohibited and ideologically criticised. Exponents of those attempts were politically and professionally cut down and often suffered civil persecution for many years.

3 Values of the society of information (virtues and vices)

Currently, at least in the West, we commonly speak about civic society, information society, or knowledge society, etc. We do so in accordance with our political ideology, through which we express our political opinions, thoughts, theories and ideas on the world or human society. In our context, we will adhere to the term information society and its value anchoring.

What values are typical for the information society?

There are several of them. First, it is the freedom of information and information mutuality or solidarity (“brotherhood”) that may be defined also by common beneficial effect (usefulness) of “information” of all kinds. To be applicable, general usefulness of information requires legally and technically (materially) comfortable access to information. However, not necessarily always free of charge. By far not always is concerned information gained through public means.

From a legal point of view we may say that the prerequisite of easy access to sources was met by the long ago (as early as in the “pre-information” age) introduced system of collective administration of author’s and related right (though not other intellectual property rights).\(^\text{11}\) That system, expressed by law, is based on the simple “jukebox principle”: “insert a coin, get law”.

Both the above mentioned values (information mutuality even more) are based on mutual sharing of information including mutual sharing of human feel-

\(^{11}\) This system has been functioning in the Czech territory for almost a hundred years, since 1915. On some related historic issues, also critically, see Telec, I.: Autorský zákon. Komentář. Praha: C. H. Beck 1997, p. 379–397. Commentary on the previous copyright act of 1965.
ings about it and also on the technology of circulation of information, relatively easy for the consumer. Therefore, there are entwined politics and technology, with publicly accessible (democratised) scholarship in between. Thus we speak about the entire culture of sharing of information, which of course holds its own subcultures, including an information underworld.

Application of the information society values in practice brings along not only expressions of virtues, but also expressions of human vices. In particular, it is an infinite greed, manifested in avarice for others’ property values, connected with others’ talents, others’ personal abilities, expended work, effort and money, under a transparent veil of “information freedom”, while using appropriate ideological phrases. The subject-matter of the issue lays in the fact that the expressions of greed are applied under the conditions when I do not compensate the utilisation of other’s property values by anything. Hence, I only take for myself, without giving anything in return. As if it was done by the communist slogan “to each according to his need”. Such behaviour certainly causes disruptions in the objective natural relation of balance between taking and giving, consequences of which are manifested in various “superficial” economic and social disorders.

If, for example, the followers of various information ideologies – contrary to common sense and general and professional language – consider a song “information”, just like weather forecast or a complex technical invention, they miss, among others, one important fact from the field of morals (and law). If somebody utilises another’s song for his own economic benefit, for example as a jingle for his commercial service, a trailer or at promotion of his goods, then he exploits the results of another’s talent, with which he may not be endowed, for the purpose of gaining his profit; albeit from a purchased recording. In such a case it is honest for the economic user to provide compensation to the composer, (for his exploitation another’s property), usually in the form of an adequate reward (author’s fee or royalty). When exploitation of another’s song is concerned, for the purpose of one’s own profit, then compensation in money is quite adequate, since it corresponds with the nature of profit on the side of an economic value increasor. The author may live on royalty proceeds (or draw for his life and occupation) and continue his music creation as a job while socially secured, and he may offer his works to the public for general benefit as well as economic utilisation (exploitation) for the purpose of others’ profit.

This applies similarly to exploitation of performances by performing artists or of recordings by their makers (producers), which occur parallelly upon using the piece of music from recording.¹²

¹² Some political “recommendations” from the ideological pot of e.g. Czech Pirate Party, that the performing artists should make a living only from live performances, have the nature of social engineering of the rudest kind, politically dictating people how they should behave. The position of e.g. studio musicians is not taken in account here, to say nothing about human freedom in general. On similar issues see the party’s portal at http://www.
In general, there is nothing unfair in the above outlined conditions. Just to the contrary! When you make money from another’s property, you should fairly compensate the one who by his effort enables you to do that! Remember that also the creators and investors intend to gain an adequate profit from their talent or investments in the products. The purchase price paid by the customer for a loaded music carrier, or paid Internet downloading or watching fee does not solve the cases of “next” economic utilisation of others’ products for the market customer’s own profit.

4 Political freedom and intellectual property

Let’s start with a rather different issue that concerns the Internet in general.

I mean the public subjective “right to Internet access” which is a part of the constitutionally guaranteed freedom of expression and opinion and right to seek, receive and impart ideas and information, as well as a widely conceived right to freedom of assembly, regardless of frontiers through any media, therefore including technical assistance by the electronic communication network (Article 17 of the Charter).

Some states like France, Finland, Estonia, Greece or Spain recognise the right to Internet access as a human right. The Czech Constitutional Court has touched this constitutional question only marginally. In brief, the “right to Internet access” is understood as a right to communicate with other people (or the State) in a certain, nowadays common technical way, through electronic networks. Therefore, ‘disconnecting from the Internet’ shall mean a non-inconsiderable restriction of execution of that right. Rather exceptionally, in a person reliant completely or mostly on this means of communication with the surrounding world, (e.g. sick or handicapped people), even an obstacle form execution of right could be considered.

Of course, like anything else, the political freedom of expression and political right to seek and impart information may be constitutionally restricted. Among others, by the protection of the rights and freedoms of others. Political, technical and legal environment of an “information society” itself does not change anything in possible constitutional restriction of political rights, as well as of “digital” political rights. This is given by the fact that all well-established general human ‘pre-information’ and ‘out-of-information’ values remain valid in an ‘information society’. These concerns, for example or maybe in particular, the protection of privacy.

pirati.cz/, [quoted on 25. 1. 2013].

13 Cf. the Constitutional Court Senate judgement of 7. 4. 2010, file No. I. ÚS 22/10. While the high court in Olomouc ruled that Internet and cable TV fees are of an entirely dispensable nature, the Constitutional court concluded that such an interpretation would lead to encroachment upon personal right of the petitioner. Cf. concurring opinion by Constitutional Court justice Janů.
The opposite of the idea of limitation of the political right is usually information – political ideology that is in some respects distinguished by almost ‘fetishisation’ of a mere technical instrument, which is the Internet (network of electronic communications), and which in extreme variants aspires to a ‘new world’, relatively close to certain communist visions.

Obviously, human rights do exist in the contemporary information society. The exercise thereof is in particular distinguished by increased level of moral and legal responsibility, because misuse of e.g. freedom of expression to the detriment of others is especially in an information society ‘unbearably light’ and spread worldwide. It is in the technical ‘lightness’ where the ‘unbearability’ of temptation lies. In its essence, concerned is nothing but temptation of our ‘technical’ reason, or cool reason, sometimes inducing us up to the misuse of one of human instruments at one’s pleasure and greed, to the detriment of others. Or, we may say, concerned is the temptation of ‘technical’ reason towards heartlessness and ruthlessness. In other words, towards suppression of one’s own soul and its inner perception through conscience.

The political right to impair information of all kind, also in the world-wide technical network of electronic communication and by the technical means thereof, is temporarily constitutionally restricted, by preferred protection of intellectual rights of others. However, this is done only for a limited period of time, during which those rights apply, while it is necessary to distinguish the particular kinds of rights.14

Similarly, intellectual property enjoys constitutional protection; Art. 11 and 34 section 1 of the Czech Charter; see also Art. 17 section 2 of the EU Charter of Fundamental Rights, within the right to property. The constitutionally permitted restrictive measures in relation to political freedoms or rights in favour of intellectual property rights of others, are in a democratic (or other) society essential in particular so that intellectual property of others, often very fragile, could arise at all and exist undisturbed, thus bringing fruit and broad benefit not only to their creators and investors, but consequently to the whole society, whose culture, science and technology it enriches and develops.

Obviously, political freedoms and rights are apparent values which are in particular politically emphasised in a ‘democratic’ (people-governed) society, in which everyone has the opportunity to participate in administration of political (public) issues. However, political freedoms and rights cannot be (either in a democratic society) artificially lifted out of the constitutional context that is distinguished by cohesiveness, thoughtfulness and balance.

14 For example, trademark law privilege is renewable always after ten years, also repeatedly, which means a potential option of permanency of the privilege, which corresponds with the protection of the public from the possible mistaking of trademarks. On the contrary, the industrial law privilege of applied design lasts for only four years with the possibility of renewal up to twice by always three years; it may therefore last maximum ten years in total.
I definitely may seek information about the new entertaining movie and freely impart such information, perhaps as concerns casting of the female lead role, in a discussion with my janitor or at the barber’s, or on the Internet. However, this does not mean that I may make the artwork as such accessible to the public. By doing so I would have crossed the threshold of another’s private autonomy. There applies that “all kinds of information are alike”.

A temporary limitation of the right to impart information as a consequent effect of intellectual property rights is not without exceptions.

The legal order lays down a number of events where it is reasonably permitted to encroach upon another’s intellectual rights, even against the will of the owner of the right and regardless his will. He may not even learn about it. Concerned are numerous special cases where in legal balance the lawmaker gave preference to general or public interests (e.g. to general benefit from science development or to otherwise generally important arrangement of conditions) over temporary subjective private rights exercised for commercial purposes. For example, the Czech copyright law recognises such cases (in addition to the free use of the work for non-commercial personal need); e.g. legal licence for the disabled or for social care facilities. We may also mention experimental legal licence in copyright law, the use of which plays an important role at research, etc.

Besides these legally permitted and determined cases there exist penetrations into temporary private industrial rights on the basis of official (forced) licences in general interests, for example for the purpose of the protection of public health, or for the benefit of developing and least developed countries, etc. Also, international copyright law enables introduction of official translator’s licence to foreign works (in here abandoned in early 1990’s due to both non-use in practice and a certain political inappropriateness towards foreign countries).

In this context we must mention the already well-established European institute of exhaustion of subjective intellectual property rights that represents restriction of their execution (while continuation thereof being preserved) in favour of general benefit from the single market within the European economic space. Even though world-wide exhaustion of those rights does not exist, we may come across with it in some non-European bilateral trade agreements. In essence, there is nothing in it but a result of balancing the conflict of territorial subjective private rights (including temporal trade monopolies in industrial property) with

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15 For an overview see the author’s lecturing slides concerning Intellectual property rights in information society, presented in the electronic communication network at Elportál, operated by Masaryk University in Brno, in addition to author’s previous slides and texts.


17 See e.g. bilateral international exhaustion of the copyright and related rights, based on the Free Trade Agreement between the non-communist China (Republic of China) and Panama of 2003, (Art. 16.03).
the supranational general benefit of the unified (or mutual) market. At least indirectly, exhaustion of intellectual property rights thus contributes to the freedom of information.

Therefore, from a long-term view, the whole system of intellectual property is in principle well balanced and just as concerns legislation.

Obviously, details, possible errors or extension of exceptions may be further discussed from both legal and political viewpoints. I myself have several long-term professional inducements in this field for the benefit of the public, for example the Czech introduction of copyright legal licence to parodies etc., which reflects the general need of the execution of the right to free expression (even in the case of artistic parody), also as concerns expression of a political content, which EU law expressly admits.

I emphasise that intellectual property rights are absolute property rights, which are limited both in time and territory, which means that the political right to impart information is not prejudiced permanently and usually not everywhere. Moreover, the political right to impart information inclines, in is content and meaning, toward communication, receiving and exchange of political opinions (in a broad sense), for the reason that from the constitutional viewpoint it is a „political“ vertical right of a citizen toward the state, which is, at least indirectly and potentially, related to political competition for the state power.

In addition, some intellectual property is, due to its nature, determined to public use from the beginning. We therefore speak about public goods, such as designation of origin (České sklo), geographical indications (Hořické trubičky) or guaranteed traditional speciality (Špekáček), accompanied with scientific inventions open to the public. Even though they are subjects of law, intangible assets in the legal sense of the new Civil Code, no-one may enjoy any subjective private (or public) rights toward them, since they are no-one’s assets. In a legal sense, publicly (generally) shared well-being is concerned, grounded in the special nature of indication of geographical origin in particular, and of traditional origin of goods. ‘Only’ prohibition of deception applies here.

5 Politics, art, science and technology

As concerns intellectual property rights (in private property) with horizontal effect, unlike political rights with vertical effect, there applies that they are proprietary rights – beside natural human personal rights – , that are not related to policy whatsoever.

On the other hand, what is related to the non-political proprietary rights, is economic competition in the struggle for market power. Not the political competition in struggle for state or other public power. The „struggle for power“ itself, no mater how threateningly the expression may sound, does not have to be anything
wrong, if performed in a decent, respectful way, for the benefit of the public and one’s own, and in a legal and right manner.\textsuperscript{18} The gained power is binding then.

*Individual conflicting cases* from the practice, as for example dissemination of a documentary film (artwork), in which *the content of temporal political message in its meaning prevails* over film (artistic) rendering and over economic investment, are legally treated in a predictable manner, with respect to circumstances of the particular case. It means with the use of generally recognised and reviewable *methodology*, such as jurisprudent *assessment* (test) of *symmetry between the objective and means*, which is based on legally and methodologically grounded *consideration* of the colliding values (rights).

Here belongs, for example, *the particular case* of colliding *preference of the freedom of expression* (debate on a public issue of general political nature), concerning the placement of an American radar in the Czech Republic, over the *subjective private copyright* to artwork, which was affected by a political satire within a political debate on the public issue, in which the artist participated at his freely expressed political will.\textsuperscript{19}

Therefore, we may speak about *generally balanced constitutional system* that considers common coexistence of various rights and freedoms in the environment of *cultural diversity*, i.e. rights and freedoms that may possibly collide otherwise. The reason is the necessity of *mutual respectful coexistence* of people. Potential misuse of the market power (or political power) is prosecuted by usual legal (or political) means.

Let’s in our thoughts *distinguish policy* (in a broad sense) on one hand, and *art, science and technology* on the other hand. If we use, not quite rationally though, the general term “information” for all that, we get an entirely *heterogeneous mixture* and we are very likely to face many social misunderstandings.

However, I am not at all trying to avoid moral and consequently legally-political discussions, for example as concerns shortening the period of protection of some proprietary rights of intellectual property, even though the modern lawmakers political tendency in Europe goes in the opposite direction.\textsuperscript{20}

\textsuperscript{18} The struggle for market power as such is not autotelic, since at least indirectly it is determined by general benefit (usefulness) of products and services.


\textsuperscript{20} For example, the fact that the legal fiction of literary artworks applies to computer programmes means materially (technically) absurdly long duration of the author’s proprietary rights to them, seventy years after the programmer’s death.
6 Digression to popularisation of a piece of art

The outlined issue of free circulation of information may be rather close to the question of so far protected works of art that, however, have become popular, generally known or generally characteristic (not only for the author’s creative handwriting) or have become famous or even merged with the cultural countryside which it has co-created, etc. I mean not only various songs or their lyrics like the compositions by Fanoš Mikulecký (Vínečko bílé, etc.), but also a specific architectural work, as it is expressed by the building of the television transmission tower and hotel on mount Ještěd in northern Bohemia and its two-dimensional, artistically impressive image, placed in one partition of the coat of arms and flag of the Liberec Region (and not only there).

In such cases the author must take in account that the published “famous piece of art” may live “its own separate life”, through which a certain author’s “tax for fame” may appear, as a part of the author’s creative destiny.

On the other hand, there ought to be explained why the author of a so far protected artwork, that has (“unfortunately”) become “national wealth” or became popular whatsoever, should suffer from another’s commercial or economic exploitation of his generally known or popular work, without being entitled to a fair share in another’s economic revenues which the author has helped to generate, at least indirectly, not to mention respect to the free will of the author’s, who does not necessarily have to be willing to be related (even through his personal creation) to another’s economic, political or other activity. The public may come to believing that the author ideologically identifies himself with this foreign activities or even directly supports them.

7 Anonymous protest movement

In conclusion, let’s go back to the introduction of this paper that concerns the Anti-Counterfeiting Trade Agreement (ACTA) and its wider social context.

I would like to remind another important and current issue which concerns various protest movements on the Internet and in the streets. From time to time I cannot get rid of the impression of mass psychosis, almost hysteria of still immature people, to whom the “evil States” and “evil corporations” told that they would have to pay for their toys and save up for them from their pocket money. Off the topic, I recall the “traditional” street violence at the summits of the International Monetary Fund and World Bank Group. However, I do not claim that the establishment critics cannot be right in some points. Therefore, it is necessary to listen also to the outragers.

For example, what bothers me about the Anonymous Western Internet protest movement is the fact that it is anonymous. The fact is that the freedom of

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21 A wide insight to the Anonymous movement, see Olson, P.: Jsme anonymní. Prague: Práh 2012. The English original (We Are Anonymous) was published the same year.
expression is often exercised anonymously over the Internet, or under code names. I consider such an attitude an expression of personal irresponsibility and immaturity of personality. Instead of a piece of nobleness, at least.

Perhaps with the exception of an anonymous petty factual note, everyone should openly hold his ground as concerns one's political or other opinions and should bear the responsibility even for his possible publicly expressed errors or mistakes. On one hand, we often hear quite correct calls for openness of the Internet and we worry about it. On the other hand, we hide ourselves in comfortable anonymity, because we do not want to be responsible for our actions. The Internet issues are public issues; the same applies to every Internet movement.

The movements like the Anonymous are socially and morally characteristic by escape from personal responsibility through hiding in an anonymous crowd. Unfortunately, some movements at the same time do not avoid violence on the State or public property. Their victims are often private entrepreneurs, for example administrators of intangible property or other’s rights protectors, whose free attitudes and actions ideologically bother the movements. If we want our own freedom, we must first recognise the freedom of our neighbours.

I remind the violent attack on the Slovak government server in early 2012, led by the political motif to scare off the state from a political step, which was the accession to the Anti-Counterfeiting Trade Agreement.22 Fortunately, the attack lasted only for about two hours and happened during the weekend. Nonetheless, the next wave of violence happened in the Czech Republic and France. A part of Poland was in a rage as well. However, the future violence may last longer and may cause public disturbances, affecting everyone. Perhaps this is the very purpose – to raise chaos in the “society of webs” and drive a wedge between parts of the ordinary human society. For example, at the moment when the State refuses to act by somebody’s political ideology. The State that is not alert as concerns the Internet is a considerably weaker party in the cyberspace. Every weak one must be protected provided that he has not caused such conditions by his own incompetence and negligence; e.g. by negligent public administration.

The recent violence on the State including the Czech Chamber of Deputies and some private entrepreneurs has nothing in common with the constitutionally guaranteed political right of resistance (Art. 23 of the Charter). On the contrary, under defined and quite extreme circumstances the right of resistance could be used against the attackers on the State. It is of no importance that the scope of the violence is low so far and rather an exhibitional one. It is definitely a demonstration of power over the State administration bodies and over the Constitution. Technical tools are a weapon of its kind. After all, also the Communists, who are ideologically close to some intellectual property opponents, demonstrated their political strength by marching with weapons during the Czechoslovak political crisis in February 1948. Only the kinds of weapons differ.

I am afraid that the outlined topic is rather a serious one.

22 Slovakia did not sign the Trade Agreement.
Crimean conflict – from the perspectives of Russia, Ukraine, and public international law

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Summary: The article presents the Crimean conflict from Russian and Ukrainian standpoints, confronting them with international law analysis. It is worth to mention, that Crimean crisis is still extremely controversial, since both parties are justifying their actions with norms of international law. This article starts with brief introduction of historical background of the Crimean crisis. Second chapter assesses the Crimean secessionist movement claiming the right of self-determination, and its compliance with Ukrainian law. Third chapter examines Russia’s position and its actions on the basis of Russian law. Fourth chapter presents the international law analysis of events in Crimea and its current legal status. Results of the analysis are presented in a conclusion.

Keywords: Crimea, Ukraine, Russia, Annexation, Intervention, International Law

1 Historical background

The Crimean Peninsula has a great strategic and military value, because of Sevastopol – warm water port, natural harbor and important naval base, access to which is giving control in and around the Black Sea, as well as provides with easy access to the Mediterranean Sea, Atlantic and Indian Oceans.

For over three centuries (1427–1783) the whole territory of peninsula was ruled by the Khanate of Crimea, which was part of the Ottoman Empire, and under its rule Crimea was inhabited mainly by Crimean Tatars. Due to expansion of Russian Empire, the peninsula was annexed into Russia in 1783. As a consequence, the territory of Crimea was gradually settled by ethnic Russians and Ukrainians².

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The 20th century brought essential changes in ethnic, political and legal situation of Crimea. In 1919 the peninsula was occupied by the Red Army and in 1921 was reorganized as the Crimean Autonomous Soviet Socialist Republic – integral part of the USSR. During the World War II, in years 1941 – 1944 the Crimean Peninsula remained under Nazi occupation. At the beginning of 1944 the Red Army performed a successful military operation and as a result USSR re-captured the territory of Crimea.

On 11 May 1944 USSR State Defense Committee passed the Decree No. 5859-ss “On the Crimean Tatars”3, according to which Crimean Tatars were accused of collaborating with Nazis during World War II. This enabled Soviet authorities banning Tatars from the territory of peninsula and the extensive deportation action was conducted. Approximately 200 thousands of Tatars were forcibly displaced4.

As a consequence of the deportation of Crimean Tartars to Central Asia, and forcible displacement of other national minorities – among them Armenians, Bulgarians and Greeks5 – the economic and ethnic situation of the peninsula had changed significantly. The property left by deportees were given to Russian settlers arriving to Crimea and, as a result, in the post-war period Russians comprised majority of the Crimean population. The ethnic cleansing and havoc after World War II led to an economic collapse of the peninsula. The situation improved only in the second half of the 20th century.

In 1946 Crimea was downgraded from an autonomous republic to an “oblast” (region) of the Russian Soviet Federated Socialist Republic (RSFSR)6.

The turning point in forming the ethnic, economic and legal situation of peninsula was its transfer from Soviet Russia to the Ukrainian Soviet Socialist Republic (UkSSR). The decision of Soviet authorities was made to commemorate the 300th anniversary of signing the Pereyaslav Agreement7. On 19 February

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4 Crimea. Encyclopaedia Britannica [online].: rep. ref. 
7 Pereyaslav Agreement was signed by the council of Cossack Army and emissaries of the Russian tsar Alexis in 1654 and established Russian rule over Ukraine. Pereyaslav Agreement. Encyclopaedia Britannica. [online]. 4.23.2014 [accessed 2015-08-25]. Available on:
1954 the Presidium of the USSR Supreme Council adopted a decree authorizing the transfer\(^8\). On 26 April 1954 the USSR Supreme Council adopted the Bill “On the transfer of the Crimean Oblast’ from the RSFSR to the UkSSR”\(^9\). The act approved the decree of 19 February, and ordered the implementation of amendments into the article 22 and 23 of the 1936 USSR Constitution\(^10\), due to changes of the border between the RSFSR and the UkSSR. The amended article 23 of the USSR Constitution enumerated the Crimean Oblast’ as one of 26 UkSSR regions. The further step of adapting the Soviet law to the transfer of Crimea was taken on 2 June 1954, when the Bill “On entering changes and amendments into the article 14 of the RSFSR Constitution” was passed. Due to its provisions the Crimean Oblast’ was removed from the list of the RSFSR regions\(^11\).

The transfer of Crimea to the UkSSR affected the social and economic situation of peninsula. The increased inflow of the Ukrainian population influenced the improvement of infrastructure, industry and general situation of the peninsula.

In the beginning of 1990s, due to Soviet Union’s disintegration, Ukraine increased its efforts to become an independent state. On 24 August 1991 the Verkhovna Rada (Supreme Council) of the UkSSR proclaimed the independence of Ukraine\(^12\). On 1 December 1991 the referendum and presidential elections were held\(^13\). The USSR recognized the independence of Ukraine on 26 December 1991\(^14\).

In 1991, shortly before the dissolution of the USSR, Soviet authorities restored the autonomy of Crimea. Since the independence of Ukraine was expected, most

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14 On 26 December 1991 USSR Supreme Council adopted the declaration of forming the Commonwealth of Independent States (CIS). Ukraine was among its members. This declaration is perceived as the final dissolution of the Soviet Union and the recognition of all CIS member states.
of the ethnic Russian population of the peninsula supported claims for the seces-

dion from Ukraine and re-joining Russia. On 4 September 1991 the Crimean

Supreme Council declared independence\(^\text{15}\) and on 26 February 1992 it passed

a bill on changing the name of the autonomous republic to the Republic of

Crimea\(^\text{16}\).

In order to stop the independence movement on the peninsula the Verkh

hovna Rada of Ukraine granted Crimea with wide autonomy. The change of its

legal status was confirmed by the implementation of several amendments into

Ukrainian law.

The political crisis in Ukraine in the end of 2013 and beginning of 2014

played a substantial role in initiating the Crimean conflict. Ukrainian president

Yanukovych suspended the negotiation on signing the association agreement

with the European Union, what caused protests and demonstrations against

his politics. The opposition accused Yanukovych of pro-Russian position and

demanded his resignation.

Anti-governmental and pro-European demonstrations of Ukrainian citi-
zens were held in Kiev, on the Independence Square (so-called Maidan). Brutal

police action against the protesters on 30 November 2013 caused intensification

demonstrations, even among the opponents of the European integration\(^\text{17}\). A

crucial moment in the development of the situation was escalation of the crisis

in February 2014, when street fightings took place, resulting in death of over

a hundred people. The pro-government security forces used live ammunition

against protesters. Shooting at civilians caused the widespread condemnation of
government’s actions by Ukrainians and the international community.

On 20 February 2014 the Verkhovna Rada of Ukraine adopted a resolution,

which condemned the “anti-terrorist action” of security forces and demanded

them to withdraw from the Maidan. On the same day president Yanukovych

left Kiev. Two days later the Verkhovna Rada adopted a resolution dismissing

the president and setting earlier presidential elections on 25 May 2014. Further-

more, the Verkhovna Rada decided to restore the Constitution of 2004. It also

demanded the withdrawal of security forces from the center of Kiev.

The Verkhovna Rada began immediate transformation of political structure

of Ukraine. It dismissed the government, the general prosecutor, the head of the

security service and the head of general prosecutor’s office, the president of the

\(^\text{15}\) Declaration on Crimea’s State Sovereignty, Crimean ASSR (Crimean Autonomous Soviet

Socialist Republic) Supreme Council, 4 September 1994. [online].

\(^\text{16}\) Bill on the Republic of Crimea as the official name of a democratic state of Crimea, Crimean


\(^\text{17}\) Marxsen, Christian. The Crimea Crisis – An International Law Perspective. Heidelberg

National Bank, suspended judges of the Constitutional Court. The head of the Verkhovna Rada Oleksandr Turchynov was appointed the acting president (due to article 112 of the Constitution of Ukraine). Newly formed Ukrainian government was immediately recognized by the United States and European Union. However, Russia stated that the change of Ukrainian authorities was illegal and refused to recognize them as a legal government of Ukraine\(^\text{18}\).

On 1 March 2014 the prime minister of Autonomous Republic of Crimea submitted a petition to Russian authorities asking to secure peace and order in Crimea. President Putin immediately applied to the Federation Council of Federal Assembly for approval to send Russian military forces to Ukraine for stabilization of social and political situation\(^\text{19}\). He justified his request with extraordinary situation which constituted the threat for lives and health of Russian citizens, in particular members of Russian military forces stationing on the territory of Ukraine. On the same day the extraordinary session of the Federation Council took place. The resolution authorizing the Russian armed forces to be sent to the territory of Ukraine was adopted\(^\text{20}\).

It is worth to mention that the intervention of Russian military forces in Crimea started much earlier than it was officially claimed. Along with intensification of the political crisis in Ukraine, Russia sent additional number of soldiers to the Crimean military base, claiming it to be compliant with bilateral agreements with Ukraine. On 21 February 2014, after the escape of president Yanukovych, unidentified armed military personnel started taking control over strategic points of the Crimean Peninsula\(^\text{21}\).

After the Russian authorities’ decision from 1 March 2014, the Russian armed forces began undercover intervention and in a short time took control over the territory of peninsula, pretending that it was done without the direct use of the military force\(^\text{22}\). Furthermore, until half of April 2014 in all official state...
ments, Russian authorities denied that Russian soldiers are outside their bases\(^ {23}\). Only on 17 April during the interview for leading Russian broadcasters Putin confirmed the presence of Russian military forces all over the territory of the peninsula in order to “guarantee the appropriate conditions for expressing the free will by residents of Crimea”\(^ {24}\). Moreover, he stated that Russian authorities never denied their intention to provide nations of Crimea with the possibility to express their will and for that reason Russian soldiers stood behind the “Crimean self-defense units”.

Russian military forces took control of Simferopol (the capital of Crimea), as well as all Crimean strategic positions and infrastructure, in particular airports, buildings, intersections. Russian troops blocked Ukrainian military bases because Ukrainian personnel refused to surrender. On 27 February masked armed troops occupied the buildings of Crimean parliament and government in Simferopol. On the same day Crimean authorities called a special session of parliament, during which the debate on the independence referendum took place and Sergey Aksyonov was elected as a new prime minister. The vote was carried in the presence of armed soldiers. Ukrainian authorities called this election invalid, because of violation of constitutional norms, according to which the choice of the prime minister can take place exclusively with approval of the president of Ukraine\(^ {25}\).

On 6 March 2014 the Supreme Council of Crimea, in presence of masked armed troops, adopted a resolution on holding the all-Crimean referendum on the status of Crimea, scheduled for 16 March 2014\(^ {26}\). Council decided to put two questions on a vote. First one was about the secession from Ukraine and reunification with Russia as a federal subject of the Russian Federation. Second question was concerned with the restoration of the 1992 Constitution of Autonomous Republic of Crimea and staying within the borders of Ukraine.

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tion provided, that the option supported by the majority of votes shall be deemed a direct expression of will by the Crimean population.

On 11 March 2014 the Supreme Council of Crimea adopted the declaration on the independence of Crimea and the city of Sevastopol. Provisions of the declaration stated that all decisions and actions taken by the Crimean authorities are based on the Charter of the United Nations and several other international legal acts. The preamble of the declaration invoked the advisory opinion of the International Court of Justice of 22 July 2010 “On the accordance with international law of the declaration of independence of Kosovo”. The Council strongly emphasized that the ICJ ruled that the unilateral declaration of independence made by the part of a state territory doesn’t violate general international law. Therefore, bearing in mind such a position of the Court, the Supreme Council made a decision to proclaim the sovereign and independent state – the Republic of Crimea, if its residents will vote in favour of joining the Russian Federation during the referendum. Furthermore, the Council decided to send a request to the Russian authorities for signing the international agreement on this matter.

The Crimean independence referendum was held on 16 March 2014. According to official results, 96.77% of voters have supported joining the Russian Federation. Ukrainian government announced that the referendum was illegitimate, unconstitutional, and its results could not be recognized. Ukraine questioned the official outcome of the referendum, because of the suspected falsification of votes, and because of the presence of armed soldiers and paramilitary groups on the peninsula.

On 17 March 2014 the Supreme Council of Crimea proclaimed independence and appealed for accepting the independent state of Crimea as a new member of the international community. Crimean parliament applied to the Russian authorities for accepting Crimea as a new subject of the Russian Federation with the status of a republic. On the same day president Putin signed the Decree No. 147 “On the recognition of the Republic of Crimea” with immediate effect.

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According to its provisions, due to the outcome of Crimean referendum, Russian Federation had recognized the Republic of Crimea as an independent state with a city of Sevastopol which had a special status.

One day later, the agreement on accession of the Republic of Crimea to Russia was signed\(^{31}\). Its preamble invoked the principle of equality of all nations, and a right for self-determination, according to which every nation has the right to determine its political status, social, cultural and economic development while other states are obliged to respect its decision.

On 21 March 2014 the agreement was ratified by Federal Assembly of the Russian Federation. Due to its provisions, Crimea and Sevastopol acquired the status of federal subjects of the Russian Federation and the border between Crimea and Ukraine became the national border of Russia. All residents of the peninsula acquired \textit{ipso iure} Russian citizenship, unless they filed the declaration of keeping Ukrainian citizenship\(^{32}\). Elections of the new Crimean and Sevastopol authorities were scheduled for second Sunday of September 2015.

International organizations, in particular UN, OSCE, EU and the European Council, condemned the armed interference of Russia and demanded the Russian authorities to stop violating the international law. The Council of the EU imposed personal sanctions – asset freeze and travel restrictions – on over 130 Russian citizens, mainly politicians and businesspeople. Moreover, the EU applied economic sanctions which limited the access to west capital markets for largest Russian banks, and targeted exchange with Russia in several economic sectors\(^{33}\).

As a result of applying restrictive measures Russia has been experiencing the international isolation, nevertheless it didn't bring expected effects. Russian authorities haven't changed their policy on the Crimean Peninsula, but just the opposite – they applied retaliatory sanctions, enforcing ban on the import of some groups of agricultural raw materials, food and goods from several EU countries.


\(^{32}\) People wanting to keep Ukrainian citizenship have met with numerous obstacles – beginning from very short term for application (1 month), by very few institutions accepting applications (during first days – only 2 for the whole peninsula), to the lack of the clear procedure. See Проблемы жителей Крыма. president-sovet.ru [online]. 22.4.2014 [accessed 2015-08-25]. Available on: http://president-sovet.ru/members/blogs/bobrov_e_a/problemy-zhiteley-kryma-./.

2 The Independence of Crimea and its Compliance with Ukrainian Law

In February 2014 Ukrainian authorities, facing the political crisis, made some efforts to prevent the escalation of conflict on the Crimean Peninsula. Major changes in the Ukrainian legal order were planned. Nevertheless, the authorities of Crimea had continued preparations for the independence referendum.

On 11 March 2014 the Verkhovna Rada of Ukraine passed a resolution\(^34\), which stated that the decision of the Crimean Supreme Council on holding the all-Crimean referendum was unconstitutional and therefore invalid. The Verkhovna Rada demanded the decision to be changed and if not, Crimean Council would be dissolved. Therefore, on 15 March the Verkhovna Rada of Ukraine formally dissolved the Crimean parliament for the violation of Ukrainian Constitution and ordered pre-term elections\(^35\).

After the referendum was held and Crimea proclaimed its independence, Ukrainian authorities asked the members of international community not to recognize the Republic of Crimea. Ukraine rejected the legal validity of the Crimean referendum and its declaration of independence and as a consequence has not recognized the incorporation of the peninsula into Russian Federation. Ukrainian authorities consider Crimea and the city of the Sevastopol as a temporarily occupied territory.

2.1 The compliance of All-Crimean Referendum with Ukrainian Law

On 6 March 2014 the Supreme Council of the Autonomous Republic of Crimea adopted a Decree No. 1702-6/14 “On holding of the all-Crimean referendum”\(^36\). In the preamble Council has stated that the social and political situation in Ukraine had been destabilized due to an unconstitutional transition of power, conducted by nationalistic groups, which tend to violate the basic human rights. The Council has also stated that nationalistic group tried to destabilize the situation in Crimea and to take control over the peninsula. Therefore, in order to preserve fundamental values and human rights, and to enable the population of Crimea to express their free will, Crimean authorities decided to hold a referendum.


Most of provisions of the decree deal with the procedures for conducting the referendum, „technical” and organizational issues. The decree also includes statements on accession of the Republic of Crimea into the Russian Federation. The Supreme Council has decided to join the Russian Federation and to make a request to president Putin and Russian parliament to start the procedure of incorporating the Autonomous Republic of Crimea into the Russian Federation.

The Supreme Council based the legality of its decision concerning the referendum on a compliance with constitutional norms. Council states that – according to provisions of the 1998 Constitution of the Autonomous Republic of Crimea\(^37\) (in particular article 18 and article 26) – the decision on holding and conducting a local referendum is within a competence of the Crimean Supreme Council. Such competences are also confirmed in article 138 of the 1996 Constitution of Ukraine\(^38\). Nevertheless, it is worth noticing that these competences are limited to local issues, whereas the decision on secession is an act with legal implications for the whole territory of Ukraine.

For the assessment of validity of the Crimean referendum three more articles of the Ukrainian Constitution have to be mentioned: it’s article 2 which establishes the indivisibility of the Ukrainian state territory, article 134 due to which Ukraine is a unitary state, while the Autonomous Republic of Crimea is an integral part of it and, finally, article 135 according to which all acts of the Crimean authorities must be in accordance with constitutional law and other national laws.

To summarize, any changes to the territory of Ukraine (in particular secession) can be resolved exclusively by the all-Ukrainian referendum (article 73 of the Constitution of Ukraine). Therefore, Crimean referendum on the secession from Ukraine should be considered as a violation of Ukrainian constitutional norms, and in effect should be deemed as invalid.

Another issue causing serious doubts about validity of the referendum are the questions for voters. The most controversial is the fact that both questions reflected choosing a serious change in the functioning of the Autonomous Republic of Crimea, and none of the questions enabled voting for preserving current legal status of peninsula.

First option for voters was a choice for secession from Ukraine and incorporation into the Russian Federation. As presented above, such solution constituted a violation of the Constitution of Ukraine and the legal status of Autonomous Republic of Crimea as an integral part of the territory of Ukraine.


Second option, which was presented for voters, was restoring of the 1992 Constitution of the Autonomous Republic of Crimea, and remaining within borders of Ukraine. Such a solution was not violating the constitutional norms of Ukraine and Crimea, and could be presented on a referendum, but only in case of presenting other, legally valid options for voters.

The validity of Crimean referendum and it's compliance with the Constitution of Ukraine was examined by the Ukrainian Constitutional Court. The examination procedure was initiated by the acting president, the speaker of parliament, and by Ukrainian parliamentary commissioner for human rights. They filed a petition on 7 March 2014 putting a question whether the decision of Crimean authorities on conducting the referendum is in accordance with constitutional norms.

In the judgement of 14 March 2014 the Constitutional Court has stated: “The Constitutional Court of Ukraine considers that the Verkhovna Rada of the Autonomous Republic of Crimea, by adopting the Resolution, which provides accession to the Russian Federation as its subject, addressing to the President and Federal Council of the State Duma of the Russian Federation to initiate the procedure of accession to the Russian Federation as a subject of Russian Federation, putting to the referendum mentioned questions, violated constitutional principle of territorial integrity of Ukraine and exceeded its authorities, and thus the Resolution does not comply with Articles 1, 2, 5, 8, paragraph 2 of Article 19, Article 73, paragraph 3 of Article 85, paragraphs 13, 18, paragraph 20 of Article 92, Articles 132, 133, 134, 135, 137, 138 of the Constitution of Ukraine”.

The Court has concluded that the state’s sovereignty over the whole territory, and the territorial integrity are the most important values for the state. It also emphasized that the Constitution of Ukraine is the highest law in the country and all legal acts must be in compliance with it. The Court has ruled that the Autonomous Republic of Crimea remains an integral part of the state territory of Ukraine and that all changes of the country borders can be validated by an all-Ukrainian referendum, since the constitutional status of administrative units, including the Autonomous Republic of Crimea, can be changed only by the all-Ukrainian level decisions.

Therefore, the Court has decided to recognize the decision of Crimean authorities as non-conforming with the Constitution of Ukraine and to terminate the work of the Council of the Autonomous Republic of Crimea on holding of an all-Crimean referendum.

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Both the provisions of the Ukrainian Constitution, and the provisions of the Constitution of the Autonomous Republic of Crimea clearly point to the fact that sovereignty and territorial integrity are basic values for the legal system of Ukraine.

At this point it is worth to mention the report of the European Commission for Democracy through Law (Venice Commission)\textsuperscript{40}. The Commission has made an assumption that a state which emphasizes unity and territorial integrity as basic values of its legal system, in fact does not include the issue of secession among the available legal solutions in the country’s legal order. The Ukrainian law does not prohibit the secession \textit{explicite}, but – in the light of the mentioned report – its provisions confirming the territorial integrity of the state shall be interpreted as prohibiting secession.

Summing up, it shall be emphasized that the legal system of Ukraine does not enable territorial changes by a local referendum. All changes in this matter can be done only by an all-Ukrainian referendum. Also, it must be mentioned that the integrity and unity of the Autonomous Republic of Crimea and the rest of Ukrainian territory is one of basic constitutional values. It means that any changes of this situation would require a prior amendment of the Constitution. However, such alterations would be invalid, as its article 157 prohibits any changes violating the principle of territorial integrity of Ukraine.

Taking into consideration the basic values of the Ukrainian legal system, the decision of the Crimean Supreme Council on holding the referendum regarding secession is a serious violation of constitutional norms. Moreover, during the period of holding the referendum, Crimea didn’t have legal authorities, as the Verkhovna Rada of Ukraine has dismissed them on 15 March 2014. As a result, the Crimea referendum does not meet the requirements for validity by a state law, and it constitutes an act with no binding legal results.

2.2 The Circumstances of Referendum and the issue of its validity

The Crimean referendum, as it was shown above, is invalid due to violation of constitutional norms. However, there is one more circumstance affecting the evaluation of its binding force. That is the presence of armed troops in the period before the referendum and as well as on the day of holding it. The occupation of the peninsula raise serious concerns about the credibility of voting.

On 16 March 2014 UN Assistant Secretary-General for Human Rights Ivan Simonovic said that “the presence of paramilitary and so-called self-defence groups, as well as soldiers in uniform but without insignia, was not conducive to

an environment in which voters could freely exercise their right to hold opinions and the right to freedom of expression”41.

This was also confirmed by the Venice Commission in its opinion, dated 21 March 2014, regarding the compatibility of the Crimean authorities’ decision with constitutional principles42. Commission has stated that “circumstances in Crimea did not allow the holding of a referendum in line with European democratic standards. Any referendum on the status of a territory should have been preceded by serious negotiations among all stakeholders. Such negotiations did not take place”.

To summarize, the presence of armed troops during the referendum has to be treated as a reason to dismiss the validity of the referendum. Nevertheless, despite all reports about irregularities and allegations of fraud, the outcome of all-Crimean referendum could not be verified. Therefore, we cannot exclude that a wide support for secession from Ukraine and for integration with Russia would be real among the population of Crimea.

3 Russia’s Position and its Actions on the Basis of Russian Law

Russian authorities are referring to international law and to Russian legal acts to justify their position on the status of Crimea. Russia states that there was a legal basis for its intervention on the peninsula, i.e. the right of Crimean people to self-determination expressed by the outcome of all-Crimean referendum and as a consequence the right of Crimea to secede from Ukraine, as well as two principles of international law: intervention upon invitation and the protection of nationals abroad.

3.1 Russia’s Assessment of Events in Ukraine

The position of Russia on the situation in Ukraine was presented by the Russian authorities in numerous statements, interviews and press conferences.

The detailed assessment of Ukrainian crisis and events in Crimea was expressed by president Putin during his interview with media representatives on 4 March 201443. Putin called the situation in Ukraine an unconstitutional take-o-

43 See Владимир Путин ответил на вопросы журналистов о ситуации на Украине: rep. ref.
ver and forced seizure of power. In his opinion, newly elected Ukrainian authori-
ties were only partially legitimate and the acting president was definitely not
legitimate, as the procedure of impeachment wasn’t carried out, therefore, from
a legal standpoint, Yanukovych stayed the only legitimate president of Ukraine.
Putin told about the decision to provide financial aid for Crimea, which had
turned asked Russia for humanitarian support. He denied that Russian troops
were deployed on the Crimean Peninsula and asserted that armed groups taking
control of Crimea are members of local self-defense groups. He stressed addi-
tionally that there was not a single gunshot or a single armed conflict. Moreover,
president Putin claimed that the use of force in Ukraine would be the very last
resort. However, he also mentioned that there was the legal basis for Russian
intervention which was a direct appeal of legitimate Ukrainian president Yanu-
kovych, asking Russia to use the armed forces to protect citizens of Ukraine.
Moreover, president Putin claimed that people from eastern regions of Ukraine
also asked Russia for help because of uncontrolled crime spread, what would be
the next reason for armed intervention. He declared that Russia would do every-
thing to protect these people. It is worth to mention, Putin told journalists, that
Russia did not consider the possibility of Crimea joining the Russian Federation,
nevertheless the people of Crimea had the right for self-determination, so they
could make such a decision.

The position of Russia on events in Ukraine was also presented by Russian
prime minister Medvedev during the interview for Bloomberg Television. Med-
vedev stressed that Russia considered current Ukrainian government as only de
facto authority, not legitimate because of an unconstitutional way of appoint-
ing it. Medvedev denied that Russia has annexed the Crimean Peninsula and
stated that Crimean authorities held the referendum, therefore have exercised
their right to determine the social, economic and political status of the region.
According to the prime minister’s opinion, the process of “secession” of the pen-
insula was in full compliance with international law – at first Crimean residents
held the referendum and voted in favour of secession from Ukraine, next step
was the proclamation of independence of Crimea, which was immediately rec-
ognized by Russia and only then the incorporation took place44.

Currently there are no significant changes in the position of Russia, which
claims that no violation of international law in Crimea took place. Although
president Putin has confirmed the presence of Russian military forces on the
Crimean Peninsula during February and March events, as well as admitted that
Russia was considering to incorporate Crimea into Russia before the referendum
was held and before its outcome was known45.

44 See Dmitry Medvedev: The Bloomberg Interview. bloomber.com [online]. 22.5.2014
45 Putin revealed Russia’s plans on Crimea in the TV documentary “Crimea. The way to
homeland”. See Кондрашов, Андрей. Крым. Путь на Родину. vesti.ru [online]. 15.3.2015
3.2 Russia’s arguments presented to authorize its actions

Russian authorities have referred to several legal acts and legal principles to justify their actions. Main arguments and their legal evaluation will be presented below.

3.2.1 Invalidity of the transfer of Crimea

First of all, Russia claims that historically and legally Crimea and the city of Sevastopol had never belonged to Ukraine, as its cession in 1954 was illegal and therefore it had no legal effect⁴６. In early 1990s this issue was a subject of the research conducted by one of the governmental committees. Its report was a basis for the Supreme Council of the Russian Federation to adopt several legal acts in 1992. According to their provisions, Council has decided to continue the research on legal acts that were passed in 1954. The committee presented also the legal opinion on a decree of the Presidium of the USSR Supreme Council concerning the transfer of Crimea, adopted on 19 February 1954. Committee regarded it uncompliant with the Constitution of RSFSR and therefore having no legal effect from the very beginning⁴７.

President Putin in his speech on 18 March 2014 on the occasion of Crimea joining the Russian Federation said that “Crimea has always been an inseparable part of Russia”, and the decision on its transfer in 1954 “was made in clear violation of the constitutional norms”⁴８.

First of all, we should examine whether the act on transfer of Crimea into the UkSSR was compliant with the 1936 USSR Constitution and the 1937 RSFSR Constitution, which were binding in 1954. According to article 14 of the USSR Constitution, the right to change the structure and borders of federative republics were reserved exclusively for main organs of the state and due to article 30 of the USSR Constitution, the Supreme Council was one of them. Regions of the USSR and the UkSSR were listed in articles 22 and 23 of the USSR Constitution. Therefore, every change in this matter required also the amendment of the Constitution, whereas article 146 stated that only the USSR Supreme Council could make such a decision. It's exactly what was done on 26 April 1954, when a

bill on the transfer of Crimea was passed. Therefore, only the decree adopted by the Presidium of the USSR Supreme Council on 19 February 1954 had violated constitutional norms and could be considered as having no legal effect. Nevertheless, it is worth noticing, that two months after the decision of the Presidium, the USSR Supreme Council passed a bill and authorized the transfer of Crimea in compliance with constitutional norms.

Next issue which has to be examined is whether the transfer of Crimea violated the 1937 RSFSR Constitution. According to its article 16, the territory of the RSFSR could not be changed without an acceptance of the republic, expressed by its authorities. All changes required also the amendment of the Constitution. There was no direct decision of the RSFSR Supreme Council on the acceptance of the cession of Crimea, but the bill on the revision of article 14 of the RSFSR Constitution was passed on 2 June 1954, what had to be considered as the implied acceptance.

Due to presented above, Russian position on the invalid transfer of Crimea to Ukraine seems to have no legal basis.

3.2.2 Sevastopol was Never Officially Transferred to Ukraine

By the 29 October 1948 decree of the Presidium of the RSFSR Supreme Council⁴⁹, the city of Sevastopol was declared a separate administrative RSFSR subject. On the same day the Presidium of the RSFSR Supreme Council has adopted a Decree No. 1082⁵⁰, which regulated the special way of financing the city from the federal budget of the RSFSR.

The legal acts on the transfer of Crimea did not include any decisions regarding Sevastopol, which constituted an administrative unit separate from Crimea. Moreover, after the transfer of Crimea into Ukraine, the city of Sevastopol was still financed from the federal budget of the RSFSR. Only 14 years later, the Cabinet of the RSFSR has cancelled the 1948 decree, but this decision could not be treated as a de iure transfer of Sevastopol into the UkSSR, especially due to the fact that the Cabinet had no competences to cede a part of the RSFSR territory.

Due to a new Constitution of the UkSSR, adopted in 1978⁵¹, Sevastopol was considered a part of Ukraine, despite the lack of legal bilateral regulation of this


issue. The RSFSR government did not contest that fact, and had not issued any territorial claims towards Ukraine.

On 9 July 1993 the Supreme Council of the Russian Federation has adopted the resolution „On the legal status of Sevastopol”\textsuperscript{52}, which recognized the Russian sovereignty over the city within its borders of December 1991, and has recommended the amendments to the Russian Constitution. However, the constitutional changes regarding that matter had not been done.

To summarize, the city of Sevastopol was a \textit{de facto} part of Ukraine since mid-20th century. It seems that despite the lack of bilateral agreements or other legal acts determining the status of Sevastopol, it was considered a Ukrainian territory. In 2003 a delimitation agreement between Russia and Ukraine was signed and as a consequence, the legal and national status of the city were determined. The Russian Federation in a distinct and explicit way recognized the Sevastopol as a part of Ukraine.

\textbf{3.2.3 No Delimitation and Demarcation of Ukraine Border was conducted}

In order to authorize Crimea’s annexation Russian authorities claim that no agreement on inter-state border between Ukraine and the Russian Federation was signed. However, it is worth mentioning, that the Verkhovna Rada of Ukraine started the process of setting its borders immediately after seceding from the Soviet Union. On 12 September 1991 the Verkhovna Rada passed a bill on legal succession\textsuperscript{53} and on 4 November 1991 adopted a bill on a national border\textsuperscript{54}. According to article 5 of the bill on legal succession, the UkSSR border of 16 July 1990, separating it from the Belarussian SSR, the RSFSR and the Republic of Moldova, as well as the USSR border separating the UkSSR form the remaining states, became the state border of Ukraine.

The key role in determining the Ukrainian national border plays a bilateral agreement, signed between Russia and Ukraine in Kiev on 28 January 2003\textsuperscript{55}. Precise maps illustrating the inter-state border were attached to this agreement. The demarcation procedure thus was conducted only 7 years later when appropriate agreement between Russia and Ukraine was signed.

It is worth to mention, that Russian authorities accepted these bilateral agreements as the approval of existing border, due to which the Crimean Peninsula

\textsuperscript{52} Мочалов, Э.А.: rep. ref., p. 106.
has stayed within Ukraine. President Putin in his speech on 18 March 2014 confirmed, that these agreements should be considered as de facto and de iure recognition of Crimea as the part of the Ukrainian state territory. All doubts on the border, the national status of Crimea and Sevastopol were definitely settled\textsuperscript{56}.

### 3.2.4 Unconstitutional change of authorities

Russia considered the dismissal of president Yanukovych as unconstitutional and violating the Ukrainian law. Russian authorities claimed that newly elected Ukrainian government was not legitimate.

In fact, the impeachment procedure was not carried out in compliance with Ukrainian constitutional norms. Primarily, according to article 111 of the Ukrainian Constitution, the initiation of impeachment procedure requires the 75\% majority of constitutional number of parliament members (450). Only 73\% have voted on removal of Yanukovych. Secondly, an investigation commission would have to be established to examine the case. Results of investigation should be presented to the parliament, which votes on bringing up the charges. The decision had to be taken by two thirds of the majority. There was no commission established in Yanukovych case. Finally, the decision of parliament had to be confirmed by three quarters of members of the Ukrainian Constitutional Court. Neither of these provisions were respected. Therefore, the removal of Yanukovych violated the Constitution of Ukraine\textsuperscript{57}.

Nevertheless, Yanukovych fled to Russia and de facto lost his position. Moreover, a new government was elected and was recognized by many states as representatives of Ukraine. Ukrainian military and security forces supported the new government.

### 3.2.5 Intervention on Invitation

Russian authorities attempted to legitimize the use of forces on the Crimean Peninsula by stating it was an intervention upon the invitation of president Yanukovych and Crimean authorities. An intervention on invitation is acceptable under international law, however, the Russian authorities’ actions do not meet their basic conditions.

The requirement for such intervention is, first of all, a consent of the state’s highest authorities, recognized by the international community as state legitimate representatives. The consent should be expressed in a clear, direct way, without any external pressure, and should be given prior to the intervention. There is no possibility to examine whether the invitation expressed by Yanukovych fulfilled requirement concerning clear and free consent, furthermore, there are no evidences that his letter to Russian authorities exists at all. Moreover, a


\textsuperscript{57} Marxen, Ch.: rep. ref., pp. 7–8.
main issue is that Yanukovych, after his dismissal, cannot be considered a state representative entitled to make such an invitation, while the Crimean government is not state's highest authority, therefore is not entitled to give a consent for Russian intervention.

Consequently, justifying the Russian intervention with an invitation from president Yanukovych, or from Crimean authorities is groundless, so the presence of Russian military troops in Crimea constitutes unlawful use of force.

3.2.6 The Right to Protect Nationals

Another claim justifying the Russian military intervention was the alleged need for protecting the lives and health of Russian citizens and of ethnic Russians in Crimea. According to international law, the reason for such actions may only be a real, serious threat for citizens' lives and health, with grave violation of people's rights by government, and in situation of exhaustion of all peaceful measures. Such reasons have not been met in Crimea, as the Ukrainian authorities did not pose any threat to the population of Crimea, what was confirmed by international observers.

Russian national law provides Russian authorities with a right to use force when the protection of its citizens is needed, however national law is not applicable in inter-state conflicts and under international law a right to use armed force to protect own citizens does not include the protection of ethnic minorities on the territory of another state.

Consequently, Russian intervention cannot be considered the protection of its citizens. It was an act of armed aggression and cannot be treated as self-defense under article 51 of the UN Charter.

4 The international law analysis of events in Crimea and the current legal status of the peninsula

The international community considers Russia’s actions in Crimea as a serious violation of international law. Russia broke several bilateral and multilateral agreements regulating her relations with Ukraine.

The referendum on the peninsula was invalid, therefore Crimea has not become an independent state. International law does not allow to intervene in the territory of other state in order to rescue nationals, or to intervene upon

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58 Marxen, Ch.: rep. ref., pp. 7–10.
59 Владимир Путин внёс обращение в Совет Федерации.: rep. ref.
60 It shall be observed that Russia tried to adapt the actual situation to the requirements of international law, especially by introducing a fast-track procedures of granting the Russian citizenship.
61 Article 51 of the UN Charter grants every country with a right to self-defense in case of military attack. However, Ukraine did not started any actions which could be treated as an act of aggression against Russia.
the unauthorized invitation. The Crimean authorities could not invite Russian military troops and to secede from Ukraine. Therefore, from the perspective of international law, Crimea remains the territory of Ukraine.

4.1 General Principles of International Public Law

Russia, by annexing the Crimean Peninsula, has violated several general principles of international law, i.e. territorial integrity, sanctity of state borders, non-use of force, and non-intervention into other state’s internal affairs.

The actions of the Russian Federation shall be treated as a direct aggression against Ukraine. According to the UN General Assembly Resolution No. 3314 of 1974, aggression is an act of using armed force by one state against another state’s sovereignty, territorial integrity, and political independence. The resolution lists examples of activities considered acts of aggression, in particular naval blocking of ports or coastline, using of armed forces stationed on the state’s territory with violating the agreements regulating that stationing, and refusing to pull back troops after the agreement was terminated.

The above examples reflect exactly the actions of the Russian Federation on Ukrainian territory. The illegal character of Russian conduct in Crimea, constituting an act of aggression, and the lack of legal basis for secession of Crimea from Ukraine creates a situation obliging the international community to treat the Crimean Peninsula as an occupied territory, and to consider the Russian annexation of Crimea an illegal action.

4.2 Multilateral and Bilateral Agreements between Russia and Ukraine

On 5 December 1994 in Budapest the United States, Russian Federation, United Kingdom, and Ukraine have signed three agreements in connection to Ukraine’s joining the Treaty on the Non-Proliferation of Nuclear Weapons. One of them is the Budapest Memorandum on Security Assurances. In exchange for becoming the non-nuclear-weapon state, Ukraine has received security assurances from the United States, Russian Federation, and United Kingdom. These states have assumed obligation to respect sovereignty, territorial integrity, and existing borders of Ukraine, in accordance with the Helsinki Final Act, and declared they would not use force or a threat of force against territorial integrity and political independence of Ukraine. The only exception would be self-defense, or actions based on the UN Charter.

After the annexation of Crimea, many countries have accused Russia of breaking the obligations assumed in the Budapest Memorandum. However,

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64 See Oral statement to Parliament. UK’s response to the situation in Ukraine. gov.uk
the Russian authorities have rejected that claim by stating that secession of the Crimean Peninsula is a result of an internal political conflict and of social and economic crisis, while the Russian Federation is not obliged to force a part of Ukraine to remain a part of its territory.

To conclude, the Russian Federation has clearly violated its obligations under the Budapest Memorandum. It broke the security assurances, violated the borders and the territorial integrity of Ukraine.

4.2.1 Bilateral agreements

Relations between Russia and Ukraine have been regulated under several bilateral agreements, with the important treaty, dated 31 May 1997, “On the friendship, cooperation, and partnership between the Russian Federation and Ukraine”\(^\text{65}\), and three agreements of 28 May 1997 "On the Status and Conditions of the Black Sea Fleet of the Russian Federation Presence on the Territory of Ukraine"\(^\text{66}\). On 21 April 2010 the parties prolonged the treaty for the next 10 years, while the three agreements on the Black Sea Fleet was prolonged for 25 years.

The treaty of 31 May 1997 was based on the principle of equality and sovereignty of both states, mutual respect and trust, strategic partnership, and friendly cooperation. Therefore, the military activities of the Russian Federation on the Crimean Peninsula gravely violated many provisions of this treaty.

By conducting an armed intervention in Crimea, Russia had also broken the agreements on stationing the Black Sea Fleet of 28 May 1997. Under its provisions Russia was permitted to station a maximum of 25,000 troops, 132 armored combat vehicles and 24 pieces of artillery at military bases in Crimea. Russian armed forces were obliged to respect the sovereignty of Ukraine and not interfere into its internal affairs.

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It is worth mentioning, that on 31 March 2014, after the annexation of Crimea, the Federal Assembly of Russian Federation has adopted a law No. 38-F3 “On termination of the agreements on stationing the Black Sea Fleet of the Russian Federation on the territory of Ukraine\textsuperscript{67}. The law came into effect on 3 April 2014.

5 Conclusion

The Crimean conflict is called a \textit{“frozen conflict”}. It’s a type of conflict present in Abkhazia, Southern Ossetia, or Nagorno-Karabakh. The situation of Crimea is however different because the main reason for the secession drive and secession process was the military intervention of Russian armed forces which was both initiating and influencing the conflict.

The case of Crimea is a unique situation, which has no match in contemporary international relations. Such issues like the: secession process, implementing the self-determination right by creating a new state, have been observed several times by the international community. However, the events in Crimea cannot be considered any of the above, as it was not the result of internal initiative. The decisive actions were conducted by a foreign power.

The Russian influence on social and ethnic situation of the Crimean Peninsula is undisputed. As it was stated before, by long-term rule over the territory and by deliberate activities including the mass-expulsion of whole ethnic groups, the Russian and Soviet authorities played a decisive role in creating the social, economic and demographic situation of Crimea.

Russian authorities claim that incorporation of Crimea and Sevastopol to the Russian Federation is based on the right of self-determination of nations, and on the right of Crimean population to choose their form of government. However, secession without the mother state’s consent, even in case of self-determination, is considered highly controversial, and treated as illegal activity by the doctrine of international law.

Russian authorities and Russian representatives of international law doctrine bring Kosovo’s case to justify the actions of Russia. President Putin has used the Kosovo’s case and the opinion of International Court of Justice in that matter. Most important, he accused the United States and western countries of double standards and hypocrisy, as they supported actively Kosovo’s secession from Serbia, while refusing the same right for Crimea. The president of Russia also emphasized the ICJ advisory opinion, which recognized the legality of unilateral declaration of independence. That was also mentioned by the Crimean authorities when proclaiming independence on 11 of March.

To address the above we need to point that international law does not consist of clear rules justifying, or prohibiting the unilateral declaration of independence by a part of state's territory. However, the neutral approach of international law to unilateral declaration of independence cannot be considered an argument in analysis of Crimean conflict, due to using of armed forces by the Russian Federation. International law clearly prohibits changing the legal status of a territory by force or by a threat to use armed forces. The proclamation of independence in situation of a threat of armed conflict is invalid according to international law, and as such cannot be considered a legal act bearing legal consequences.

It cannot be denied that a significant number of residents of Crimea had supported the „integration” with Russia. However, due to the military intervention of Russia in Crimea, the real judgement of views expressed by local population seems to be impossible to reach. Russian military intervention has become an initiating, and developing factor, as it ignited the secessionist actions and calls for joining the Russian Federation. As a result, it became impossible to determine how many inhabitants of Crimea in fact supported actions of Russia, and what would be the development of situation in Crimea without Russian intervention.

From the perspective of international law, the armed intervention of the Russian troops into Crimea constitutes the breach of basic international legal norms, what results in illegal situation of occupying the territory of other state. This brings an obligation for members of the international community to non-recognition of such situation.
Autonomy Principle and Fraud Exception in Documentary Letters of Credit, a Comparative Study between United States and England

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Summary: Despite the fact that Documentary Letters of Credit are involved in process of International Trade for many centuries, but their legal personality is very new and their life span is much shorter than their existence. In the middle of Eightieth Century, Lord Mansfield introduced legal aspects of LC operation for the first time to the Common Law System. Later, International Chamber of Commerce started to codified regulations regarding international operation of Documentary Letters of Credit in 1933 under the title of Uniform Customs and Practices for Documentary Letters of Credit and updated them constantly up to current date. However, many aspects of LC operation including fraud are not codified under the UCP which subjects them to national laws. Diversified nature of National Laws in different countries can be source of confusion and problem for many businessmen active in international operation of Documentary Letters of Credit. Such differences are more problematic in Common Law countries as a result of following precedent. For Example, legal aspects of International LC transactions under British Law are only based on case law, however, American Law addresses Letter of Credit Operation under Article 5 of Unified Commercial Code. Due to important role of English and American law in practice of international trade, current paper will try to compare their approach to autonomy principle of in LC operation, fraud rule as a recognized exception to it and search for answer to following questions what is definition of fraud, and what are standards of proof for fraud in LC operation, under English and American law?

Keywords: Documentary Letters of Credit, Autonomy Principle, Fraud Rule, English Law, American Law, UCC.

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1 Introduction

Involvement in international trade has always been a temptation for businessmen. Although, doing business overseas has relatively high risks also providing higher level of profit in comparison with local market. Financial risks are well-known among other kinds of risk in international trade. Unlike doing trade in national markets, most of overseas traders have no information about the financial standing of other party and as result, it will be risky for exporter to part from goods before receiving payment and also importer will assume the risk of receiving non-conforming goods in case of making the payment before delivery of goods and checking. In the course of mercantile history, different methods of payment have been developed on the basis of market demand and goal of reducing financial risk for either party involved in international sales of goods. Among different existing methods of payment, Documentary Letters of Credit have a significant role in conduct of trade internationally by removing the outstanding risk of payment from a natural person (importer) and shifting it to the guarantee of legal person (a bank) for payment of purchased goods by importer against tender of complying documents by exporter. For many centuries Documentary Letters of Credit are in usage for the purpose of facilitating payments in international trade. However, their legal character has relatively short life span. Raymond Jack believes that entrance of Documentary Letters of Credit into the English legal system goes back to desire of Lord Mansfield in the middle of eighteenth century to include them in the Common Law practice. Currently, relevant legal aspects of Documentary Letters of Credit are regulated via internationally accepted Unified Customs and Practices for Documentary Letters of Credit which is prepared by International Chamber of Commerce. According to UCP, operation of documentary credits is subjected to two well recognized principles of independence which separates credit from its underlying contract and strict compliance which limits the responsibility of bank to honor the credit after tender of complying documents by beneficiary rather than being concerned about actual fulfilment of underlying contract. Despite warm welcome of trade society to UCP, still many legal aspects of Letter of Credit operation are regulated by national laws, including fraud and other exceptions to independence principle which are regulated by common law principles in England and Unified Commercial Code in United States of America. Current research will try to review the legal aspects of Principle of Autonomy in Documentary Letters of Credit while taking a comparative approach to fraud as the main exception to principle of autonomy in England and United States of America. Therefore, paper will try to find answers to questions regarding definitions, standards of proof, and legal remedies under English and American law.

2 Malek, A, Quest, D, Jack. Documentary credits: the law and practice of documentary credits including standby credits, and demand guarantees, Tottle, 2009
2 Principle of Autonomy

Alongside with principle of strict compliance in operation of letters of credit and cornerstone of current article is Principle of Autonomy. Independence principle has been recognised and appreciated in national and international law. The principle of autonomy of letters of credit has been considered as “the engine behind the letter of credit” and “cornerstone of the commercial validity of the letters of credit”. Principle of Independence has been clearly mentioned in Article 4 of UCP 600:

“Article 4 Credits v. Contracts
a. A credit by its nature is a separate transaction from the sale or other contract on which it may be based. Banks are in no way concerned with or bound by such contract, even if any reference whatsoever to it is included in the credit. Consequently, the undertaking of a bank to honour, to negotiate or to fulfil any other obligation under the credit is not subject to claims or defences by the applicant resulting from its relationships with the issuing bank or the beneficiary.”

According to Article 4 of the UCP 600 and by referring to principle of independence, the beneficiary exporter receives the guarantee that he will be paid after tender the complying presentation of documents to the issuing bank. Neither bank nor the account party will be able to withhold payment with relevant arguments to the quality of delivered goods or other issues related to performance of underlying contract. Therefore, even in case of conflict on performance of underlying contract account party and issuing bank have no other choice rather than paying beneficiary upon presentation of complying documents and seek remedy by suing him for the breach of underlying contract. As a result, Autonomy Principle has been considered a means of promoting international trade by following the logic of “pay first, argue later.”

The autonomy principle also has been considered as the foundation for smooth operation of letter of credits by many scholars.

In order to completely address the essence of autonomy principle, article 5 of UCP 600 specifies: "banks deal with documents and not with goods, services or performance to which the documents may relate."
2.1 Principle of Autonomy and Common Law Position

The principle of autonomy has been recognized in many common law cases. Particularly, the importance of autonomy principle has been recognized by Lord Diplock in *United City merchants (Investment) Ltd v Royal Bank of Canada*.

‘The whole commercial purpose for which the system of confirmed irrevocable documentary credits has been developed in international trade is to give to the seller an assured right to be paid before he parts with control of the goods that does not permit of any dispute with the buyer as to the performance of the contract of sale being used as a ground for non-payment or reduction or deferment of payment’

*Trans Trust SPRL v Danubian Co Ltd* is other English case which raise the importance of autonomy principle when Denning LJ refers to necessity for seller to finance his own suppliers and as a result relies on provided LC by buyer for honouring his own account payables to the third party.

Ameircan Case law also illustrates the importance of autonomy principle. For Example in *Semetex Corporation v UBAF Arab American Bank*, US District court granted Semtex a summary Judgement against the UBAF on the basis of autonomy principle of Irrevocable Letters of Credit despite the fact that underlying contract was not performed due to the Executive Order which blocked all Iraqi assets in USA after Iraqi invation to Kuwait on August 2, 1990. *Power Curber International Ltd v. National Bank of Kuwait SAK* is another case which prohibits applicant and issuing bank from dishonoring the credit based on non performance of the underlying contract.

2.1.1 Uniform Commercial Code of USA

In United States of America, Documentary Letters of Credit are governed by Article 5 of Uniform Commerical Code. Unlike earlier version of Article 5 of UCC did not point at the autonomy principle revised vesion of UCC Article 5 clearly separates the undertaking of issuer in documentary letter of credit from existence, non-existance, performance or non-perforance of underlying contract.

‘the rights and obligations of an issuer to a beneficiary or a nominated person under a letter of credit are independent of the existence, performance, or non-performance of the contract or arrangement out of
which the letter of credit arises or which underlie it, including contracts or arrangements between the issuer and the applicant and between the applicant and the beneficiary\textsuperscript{15}

‘an issuer is not responsible for the performance, non-performance of the underlying contract, arrangement, or transaction’\textsuperscript{16}

2.2 Exceptions to the Autonomy Principle

The autonomy principle provides beneficiary with the guarantee of the bank for payment against any issue within of the terms of documentary Credits\textsuperscript{17}. Such guarantee desires payment to the beneficiary regardless to any dispute on the underlying contract, upon tender of complying documents. Therefore, the autonomy principle creates a weaker position for account party against abusive demands of beneficiary and his fraudulent claims. On such occasions, relying on strict compliance principle and rejection of non-complying documents by bank will be the only defence of applicant. However, this defence might not work when the beneficiary is determined to obtain payment on the basis of presenting fraudulent Documents. On the other hand, the beneficiary has the upper hand against the issuing bank and account party in which regardless to any dispute on the contract of sales, he is entitled for payment upon tender of complying documents. Such upper hand can be an incentive for abusive demand for payment or presentation of fraudulent documents by beneficiary. For a long period of time the general belief was supportive towards the absolute nature of independent principle\textsuperscript{18}. However, it became clear that exceptions are needed to deal with abusive and fraudulent demands. As result, the fraud exception has been established which is recognized by all common law and many civil law countries. In cases of fraud, court has the obligation to decide between respecting the principle of autonomy and grating injunction to stop payment after considering public policy, statutes, public interest and third party rights\textsuperscript{19}. Despite the fact that Fraud rule is a recognized expectation to principle of autonomy of documentary credits, but there is no standard\textsuperscript{20} regarding time and circumstances in which it should supersede the autonomy principle\textsuperscript{21}. Later it become clear that exercising the public interest requires application of exceptions in case of illegal underlying

\begin{thebibliography}{9}
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\bibitem{Enonchong} Enonchong, N. (2011). \textit{The independence principle of letters of credit and demand guarantees}. Oxford University Press\textsuperscript{93}
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\bibitem{Garcia RLF 'Autonomy principle of the letter of credit'} Garcia RLF ‘\textit{Autonomy principle of the letter of credit}’ (2009) \textit{Mexican Law Review} 69
\bibitem{Gao X ‘The Fraud Rule in the Law of Letters of Credit: A Comparative Study'} Gao X ‘\textit{The Fraud Rule in the Law of Letters of Credit: A Comparative Study}’ (2002) is the most comprehensive study as regards the issue of the fraud rule;
\end{thebibliography}
Therefore, clear evidences show that English Legal system is ready to recognize other exceptions to the principle of autonomy.

3 Fraud Exception

In fact, Fraud is very old and well-known phenomenon in the business world. “As long as there have been commercial systems in place there have been those who have tried to manipulate these systems.” Fraud has been considered as the “the most controversial and confused area” as it “goes to the very heart” of the letter of credit by providing the bank to look at the facts behind complying presentation of beneficiary and stop payment in cases of fraud in transaction.

3.1 The meaning of Fraud

According to the Article 5 of UCP 600, “bank deals with documents not goods or services” which means that “banks deal in written presentations not facts.”

Therefore, beneficiary does not have to prove fulfilment of his obligations in underlying contract and only presentation of complying documents will entitle him to receive payment from issuing bank. As a result, strict implementation of autonomy principle will create three distinctive scenarios regarding presentation of documents by beneficiary.

First, beneficiary presents complying documents and performs his obligations under the sales contract with account party. As a result, bank will allow payment after checking documents.

Second, beneficiary presents non-complying documents while performing his obligations under the contract of sales with account party. In such situation, bank may or may not authorize payment to the beneficiary (bank may ask for waiver from account party or corrections from beneficiary).

Third scenario takes place when beneficiary presents complying documents to the terms of credit but does not perform his obligations under sales contract with account party. In such occasion, strict application of autonomy principle might lead us to fraud by beneficiary and injustice towards account party who has to bear the loss as the last person in the chain of transaction.

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23 Trade Finance Fraud –Understanding the Threats and reducing the Risk, A Special Report prepared by the ICC International Maritime Bureau (Paris) 2002, p. 9
25 Gao X & Buckley RP (2003), p. 293
26 UCP600, Article 5
In such occasions and in order to prevent fraud, the law of letters of credit has created fraud exception to the autonomy principle of letters of credit. However, fraud expiations has been approached by different scholars and national laws in different ways. UCP 600 as the most popular set of applicable rules to documentary letters of credit take an absolute silent position towards fraud rule while leaving it open to the relevant municipal law which show a drastically non harmonious approach to the subject matter. Even the provided definitions for fraud rule are not harmonious. Gao Xiang considers fraud exception in documentary credits as “an extraordinary rule as it represents a departure from the cardinal principle of the law of letters of credits – the principle of independence. It allows the issuer or a court to view the facts behind the face of conforming documents and to disrupt the payment of a letter of credit when fraud is seen to be involved in the transaction”28. Schmitthoff mentions that fraud rule “permits a court to consider evidence other than the actual terms and conditions of the credit and is founded on the maxim ex turpi causanonoritur actio”29. Conveying the message that fraudulent beneficiary will not be able to find an action based on his wrongdoing. Raymond Jack refers to fraud rule as “exception to the rule that the contracts made in connection with credits are autonomous”30

3.2 Rational for the Fraud Rule

Gao has defined three rational for establishment and enforcement of fraud rule31:

1. **Closing the loophole in law**: Strict application of autonomy principle and providing absolute guarantee for payment to beneficiary upon presentment of complying documents might provide an opportunity for perpetrators of fraud to harm the system of international trade and operation of documentary credits by presenting forged or fraudulent documents to the bank which comply on their face with terms of credit, but do not perform their obligations under the contract of sales with account party32. There are doubts about capability of fraud rule to prevent any injustice resulted from fraud, but definitely it will reduce the loophole which has been created by the autonomy principle.33

2. **Public Policy**: The second rational for fraud exception is the result of public policy’s concern over controlling and defying fraud. There should not be a possibility for fraudster beneficiary to benefit from autonomy

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31 Gao X (2002) 29 and 98
32 Ibid 30
33 Ibid
principle while trying to obtain payment by presentation of forged documents." The interest of public policy in prevention of fraud has been reflected in many authorities. Also in United City Merchants (Investment) Limited v Royal Bank of Canada, Lord Diplock comments on ex turpi causa non oritur, intention of court not to allow its process to be used by dishonest person to carry out the fraud as basis for the fraud rule.

3. To Maintain the Commercial Utility of Letters of Credit. Documentary letters of credit act towards balancing the contradictory interests of beneficiary and applicant. Tendered documents including the bill of lading not only play a significant role in operation of the Letters of Credits but also provide security for the bank before being reimbursed by account party. Therefore, bank's security interest will be abused in case of beneficiary's fraud. As a result the balance in the operational scheme of documentary letters of credit will be undermined while neither of users will have faith in commercial utility of documentary letters of credit anymore.

In response to critics of Fraud Rule who argue about capability of issuing bank and account party to take legal action against beneficiary based on the breach of the underlying contract, supporters of application of fraud rule consider such legal action as a valuable alternative because, fraudulent beneficiary "absconds before the fraud or forgery is discovered."

3.2.1 Sztejn v Henry Schroder Banking Corporation

The American case of Sztejn v Henry Schroder Banking Corporation had a significant role in development of the Fraud rule in documentary letters of credits. Sztejn is considered landmark cases as it has been used in codification of the 1962 version of UCC as well as being basis for judgment in following cases of fraud in documentary credits inside and outside United States of America. According to Gao, “It shaped the fraud rule in 'virtually all jurisdictions'.

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34 Ibid
36 Ex turpi causa non-oritur actio can be translated as 'no action can be based on a disreputable cause, Law J & Martin EA 'A Dictionary of Law’ 7 ed (2009)
38 Ellinger P 'Documentary Credits and Fraudulent Documents' in Chinkin CM, Davidson RJ et al.eds. 'Current Problems of International Trade Financing' (1983) 191
39 Sztejn v Henry Schroder Banking Corporation 31 NYS 2d 631 (1941)
40 Buckley RP & Gao X (2003) 676
41 In 1964 version of UUC fraud rule was under Article 5 section 5-114 but after revision of 1995 it is under Article 5, section 5-109.
In case of Sztejn, underlying contract of sale was between Sztejn (buyer) and Transea Traders Ltd (seller). The payment was due under the letter of credit issued by Schroder by drawing a draft to the Chartered Bank (presenting bank). Sztejn asked for injunction before presentation of documents for payment on the basis of dispatching “cow hair, other worthless material and rubbish with intent to simulate genuine merchandise and defraud the plaintiff”\(^{43}\). Sztejn also mentioned Chartered bank as colleting bank for Transea Trades not the holder in due course for the draft. However, Chartered Bank defended that the presenting banks “is only concerned with the documents and on their face these conform to the requirements of the letter of credit”\(^{44}\). In the course of hearing, all allegations of cases were considered as true by Justice Shientag who rejected the motion to dismiss the complaint of plaintiff by Chartered Bank based on two arguments: allegation that fraud has been commented and established fact that fraud has been committed in the underlying transaction. However, in continuation, he pointed at necessity for overruling the principle of autonomy in case of fraud:

„Of course, the application of this doctrine [the principle of independence] presupposes that the documents accompanying the draft are genuine and conform in terms to the requirements of the letter of credit.”\(^{45}\)

The Justice Shientag held that motion of Chartered Bank for dismissing complaint of plaintiff is dismissed as well as injunction was granted to the Sztejn on the basis that:

„Transea was engaged in a scheme to defraud the plaintiff... that the merchandise shipped by Transea is worthless rubbish and that Chartered Bank is not an innocent holder of the draft for value but is merely attempting to procure payment of the draft for Transea's account“\(^{46}\).

Apart from the beneficiary's fraud, two other issues where discussed in the hearing\(^{47}\):

First was bank's security interest as one of the supporting reasons behind application of fraud rule. The Justice Shientag mentioned:

„While the primary factor in the issuance of the letter of credit is. The credit standing of the buyer, the security afforded by the merchandise is also taken into account”\(^{48}\).

Second issue was exemption of the holder in due course from being subjected to the application of fraud rule.

\(^{43}\) Sztejn v Henry Schroder Banking Corporation 31 NYS 2d 631 (1941) 633
\(^{44}\) ibid, 632.
\(^{45}\) Ibid 633
\(^{46}\) Ibid
\(^{47}\) Lu, Lu. "The Exceptions in Documentary Credits in English Law." (2011). 75
\(^{48}\) Sztejn v Henry Schroder Banking Corporation 31 NYS 2d 631 (1941), 634–635
“On this motion only the complaint is before me and I am bound by its allegation that the Chartered Bank is not a holder in due course but is a mere agent for collection for the account of the seller charged with fraud. Therefore, the Chartered Bank’s motion to dismiss the complaint must be denied, if it had appeared from the face of the complaint that the bank presenting the draft for payment was a holder in due course, its claim against the bank issuing the letter of credit would not be defeated even though the primary transaction was tainted with fraud.” 49

Therefore, decision of Sztejn established the basic principles of the Fraud Rule which can be listed as below: 50

1. The payment process and autonomy principle of the letters of credit can be superseded only in case of fraud. However, the fraud should be established and only allegations of fraud will not suffice for interruption of payment.

2. The payment to the holder of due course or presenter with similar status will not be interrupted even in case of established fraud.

However, it should not be forgotten that in cases of Sztejn all allegations were considered as fact and as a result issue of the standard of proof for fraud was left open to be one the most controversial issues in application of fraud rule in documentary letters of credits. 51 Therefore, it is possible to conclude that “Shientag J was only making decision for Sztejn case where the fraud had been already proved from the beneficiary side and there was doubt about it” 52.

3.3 Application of Fraud Exception

In this section, focus will be on application of fraud rule in documentary credits in different Common Law Jurisdictions. Namely, United States of America and England. Although many legal problems have the same symptoms wherever they occur, but their consequences and approaches to solve them can be drastically different from jurisdiction to jurisdiction. 53 In such situation, comparative study of legal problems like fraud rule in documentary letters of credit can be a good approach to find similarities and differences among common law jurisdictions and try to harmonize them. Although, English Law is strongly influenced by developments of American Law in field of documentary credit’s fraud, but comparative studies which have been done in this area show the significant devi-

49 Ibid
50 Gao X (2002) 42
51 Ibid

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ations in application of fraud rule between United States of American, England and other common law countries.34

3.3.1 Fraud Rule in American Law

Development of fraud rule in United States of American law can be categorized under three main time periods: Pre-UCC, The previous UCC Article 5 and Revised UCC Article 5.35

The period of pre UCC was governed by the case law and it was mostly influenced by the case of Sztejn as it has been discussed in previous section.

Revised UCC Article 5

In 1995 the UCC article 5 went through revision mostly to overcome existing weaknesses, gaps and errors of the original statute as well as challenges which were the result of constant development of letters of credits. After revision, fraud rule was embodied in UCC article 5 sub – sections 109.

By coming into effect of revised UCC article 5 fraud rule went through a significant changes and received moderation from different aspects including:

1. According to Article 5-109, discovery of fraud will disrupt the normal process of documentary letter of credit. Refusing to honour the credit at presentation by issuing bank, and request of account party from court to grant injunction in order to prohibit payment.

2. Article 5-109 provides guidance for two of the most controversial aspects in fraud rule. Firstly, it sets the standard of proof as materiality of fraud and also it provides that fraud exception covers fraud in documents as well as underlying contract.

3. In section 5-109 (1) four groups of people are considered immune against application of the fraud rule. “A) Nominated person with good faith who has paid without notice of fraud. B) Confirmer who has honoured its confirmation in good faith C) The holder in due course of the document.”

References:
35 Gao X & Buckley RP (2003) 294
36 Gao Xiang (2002) 45
37 UCC article 5 sub – sections 109
38 Buckley RP & Gao X (2002) 686
39 UCC .Section 5-109(a)(2)
40 Section 5-109(b); Gao X (2002) 46
draft drawn under the letter of credit which was taken after acceptance by the issuer or nominated parson D) an assignee of the issuer or nominated person's deferred obligation that was taken for value and without notice of forgery or material fraud after the obligation was incurred by the issuer or nominated person”62. Therefore, all four groups of protected people against fraud rule under revised article 5-109 are relevant unlike three groups of protected people under article 5-114 in which only one group was protected. 63

4. The article 5-109 (b) defines four preconditions for court in order to award injunction. “Revised UCC Article 5, Section 5-109 now stands as the most comprehensive code of the fraud rule in the law of letter of credits in the common law world”64.

3.3.2 The Fraud Rule in English Law

Fraud rule is governed under the common law in England. Therefore, it has been recognized and considered in British cases.65 Despite such recognition, traditionally English courts show reluctance in application of fraud rule and take a strict approach towards intervention with autonomy principle. In study of Fraud Rule in English Law, we will review some of the leading cases in this area as well as analysing scope of the application fraud rule under English law.

Hamzeh Malas and Sons v British Imex Industries Ltd

The case of Hamzeh Malas and Sons v British Imex Industries Ltd66, is a good example for showing the strict historical approach of the English Courts on intervening in autonomy principle of documentary credits. The case is about buyers who signed a contract of sales for Steel Rods with the defendant seller. Payment was due by two confirmed letters of credits. After making the first payment, plaintiff buyer asked for injunction relief against the beneficiary on the basis of defectives of the first instalment67

While rejecting to award injunction in the court of appeal, Jenkins LJ commented on the autonomy principle:

"An elaborate commercial system has been built up on the footing that bankers’ confirmed credits are of that character, and, in my judgment, it would be wrong for this court in the present case to interfere with that established practice [...] That system [...] would break down completely if

62 section 5-109(a)(1)
63 Buckley RP & Gao X (2002) 687
65 Buckley RP & Gao X (2002),687
66 Hamzeh Malas and Sons v British Imex Industries Ltd [1958] 2 QB
67 Ibid
a dispute as between the vendor and the purchaser was to have the effect of “freezing,” if I may use that expression, the sum in respect of which the letter of credit was opened”\textsuperscript{68}

*Harbottle (RD) (Mercantile) Ltd v National Westminster Bank Ltd*

In the case of *Harbottle (RD) (Mercantile) Ltd v National Westminster Bank Ltd\textsuperscript{69}, Judge Ker reemphasized in the strict approach towards autonomy principle for another time:

“It is only in exceptional cases that the courts will interfere with the machinery of irrevocable obligations assumed by banks. They are the life-blood of international commerce. Such obligations are regarded as collateral to the underlying rights and obligations between the merchants at either end of the banking chain. Except possibly in clear cases of fraud of which the banks have notice, the courts will leave the merchants to settle their disputes under the contracts by litigation or arbitration as available to them or stipulated in the contracts […] Otherwise, trust in international commerce could be irreparably damaged”\textsuperscript{70}

*Edward Owen Engineering Ltd v Barclays Bank International Ltd*

The case of *Edward Owen Engineering Ltd v Barclays Bank International Ltd\textsuperscript{71} is one of the most frequently cited on principle of autonomy in English law. An English supplier in 1976 contracted the sale of greenhouse and their insulations with a Libyan party, Agricultural Development Council of Libya. According to the contract of sales, payment was supposed to be made in the format of an irrevocable documentary credit in favour of the plaintiff at local Libyan bank (Umma Bank). In return, the defendant bank (Barclays) issued a demand guarantee without proof or condition upon the advice of the plaintiff which was sent to the customer. However, the letter of credit opened in favour of seller by Libyan bank was not confirmed. As a result of failing to convince the Libyan party to confirm the letter of credit, plaintiff repudiated the contract of sales. Libyan party raised claims for demand guarantee.

“… The performance guarantee stands on a similar footing to a letter of credit. A bank which gives a performance guarantee must honour that guarantee to its terms. It is not concerned in the least with the relations between the supplier and the customer; nor with the question whether the supplier has performed his contracted obligations or not; nor with the question whether the supplier is in default or not. The bank must pay according to its guarantee, on demand, if so stipulated, without proof or

\textsuperscript{68} Ibid
\textsuperscript{69} Harbottle (RD) (Mercantile) Ltd v National Westminster Bank Ltd [1978] 1 QB 146.
\textsuperscript{70} Ibid
\textsuperscript{71} Edward Owen Engineering Ltd v Barclays Bank International Ltd. [1978] 1 Lloyd’s Rep. 166
condition. The only exception is when there is a clear fraud of which the bank has notice.\textsuperscript{72}

\textit{Discount Records Ltd. v. Barclays Bank Ltd}

The case of \textit{Discount Records Ltd. v. Barclays Bank Ltd}\textsuperscript{73} can be considered the first English case which cited and approved \textit{Sztejn}.\textsuperscript{74} The contract of sales was signed between English buyer and French seller for the purchase of gramophone records and cassettes. According to the sales contract, buyer applied to Barclays bank for a letter of credit in favour of the seller. After shipment of goods by seller, he tendered the draft and other documents to the confirming bank in Paris and received the payment. However, in presence of the bank’s representative, buyer found goods as non-complying and rubbish. As a result, he applied for injunction against honouring presentation by the issuing bank by referring to the case of \textit{Sztejn} while claiming that seller has perpetrated fraud\textsuperscript{75}. In the course of hearing, Judge Megarry considered the case different from \textit{Sztejn} and rejected injunction against bank. According to the Megarry J, fraud was established in cases of \textit{Sztejn} while in present case, there was mere allegation of fraud\textsuperscript{76} “because it is unlikely that any action to which the seller was not a party would contain the evidence required resolving this issue”\textsuperscript{77}

In the decision of \textit{Discount Records Ltd. v. Barclays Bank Ltd} it was also held that bank’s payment has no effect on the buyer's interest as buyer has possibility to claim damages from bank in case of bank’s wrong payment to seller\textsuperscript{78}. Such approach complies with common law practice that court will only issue injunction at the time that it is the final solution and applicant has no other legal resources.\textsuperscript{79}

\textit{United City Merchants (Investment) Limited v Royal Bank of Canada}

The case of \textit{United City Merchants (Investment) Limited v Royal Bank of Canada}\textsuperscript{80} is one of the most important and well-known English cases of fraud rule in documentary credits.\textsuperscript{81}

\begin{thebibliography}{9}
\bibitem{72}Ibid, 171–172
\bibitem{73}Discount Records Ltd. v Barclays Bank Ltd [1975] 1 Lloyd’s Law Reports 444
\bibitem{74}Zhang, Y. \textit{Approaches to Resolving the International Documentary Letters of Credit Fraud Issue}. University of Eastern Finland, 2011.
\bibitem{75}Discount Records Ltd v Barclays Bank Ltd [1975] 1 Lloyd’s Law Reports 444–446
\bibitem{76}Ibid 447
\bibitem{77} Ibid
\bibitem{78}Zhang, Y,( 2011) 81
\bibitem{79} Tóth, Z. “\textit{DOCUMENTARY CREDITS IN INTERNATIONAL COMMERCIAL TRANSACTIONS WITH SPECIAL FOCUS ON THE FRAUD RULE}”. 2006, 102
\bibitem{80}United City Merchants (Investment) Limited v Royal Bank of Canada [1979] 1 Lloyd’s Law Reports 267
\bibitem{81}Ibid
\end{thebibliography}
The Facts:

The contract of sales was established between Peruvian buyer Vitrorefuerzos SA (Vitro) and Glass Fibres, English seller on December 1975. According to the contract the method of Payment was to be irrevocable, transferable letter of credit. The credit was opened by Peruvian bank Banco Continental SA and received confirmation by Royal Bank of Canada. The seller on 2\textsuperscript{nd} December 1976 informed the freight forwarding agent about necessity to ship goods latest on 15\textsuperscript{th} December. However, as the result of the cancelation of original vessel, goods were replaced in another vessel (American Accord) and shipped on 16 of December 1976. The bill of lading was made out by Mr. Backer the employee of the carrier on the date of shipment. The agent changed the date on the face of bill to 15 of December 1976. Bill of lading also mentioned the port of departure as London while in fact goods were shipped from Felixstowe.\textsuperscript{82} Credit was dishonoured after presentation of documents by United City Merchants, assignee of the seller to the bank on the basis that commercial invoice did not comply with terms of credit and also banks information about forged nature of the bill of lading\textsuperscript{83}. Plaintiff initiated a legal action against defendant based on wrongful dishonouring of the credit and claiming about their lack of knowledge about incorrect date of the face of bill of lading. In the trial court Justice Mocatta ruled for beneficiary\textsuperscript{84}. In the court of appeal, judgement was changed in favour of the bank by taking the concept of “Half Way House” which was explained as “between fraud and accuracy namely in inaccuracy in material particular” \textsuperscript{85} In the House of Lords, Lord Diplock was delivering the leading speech. He started with describing the nature of autonomous contracts in the framework of the letter of credit’s operation while emphasizing the dispute in the goods are not relevant to the right of seller for payment. \textsuperscript{86}

“To this general statement of principle [of independence] […] there is one established exception: that is, where the seller, for the purpose of drawing on the credit, fraudulently presents to the confirming bank documents that contain, expressly or by implication, material representations of fact that to his knowledge are untrue. Although there does not appear among the English authorities any case in which this exception has been applied, it is well established in them American cases of which the leading or “landmark” case is Sztejn v. J. Henry Schroder Banking Corporation. […] The exception for fraud on the part of the beneficiary seeking to avail himself of the credit is a clear application of the maxim ex turpi causa

\textsuperscript{82} Ibid
\textsuperscript{83} Ibid
\textsuperscript{84} Ibid
\textsuperscript{85} Malek A & Quest D ‘Documentary Credits – The Law and Practice of Documentary Credits Including Standby Credits and Demand Guarantees’ (2009) , 264
\textsuperscript{86} United City Merchants (Investment) Limited v Royal Bank of Canada [1979] 1 Lloyd’s Law Reports

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non oritur actio or, if plain English is to be preferred, “fraud unravels all.” The courts will not allow their process to be used by a dishonest person to carry out a fraud”

Since seller had no information about fraudulent act of Mr. Baker in manipulating the true date of shipment on face of the bill of lading and their honest belief in “that it was true and the goods had actually been loaded on or before the 15th of December 1976, as required by the documentary credit” the beneficiaries held innocent and as the final judgment, the House of Lords ruled that: “the instant case … does not fall within the fraud exception”

_United Trading Corporation SA and Murray Clayton Ltd v Allied Arab Bank Ltd_

The case of _United Trading Corporation SA and Murray Clayton Ltd v Allied Arab Bank Ltd_ introduced the test of “only realistic Inference”. The test of only realistic inference received acceptance by deferent judges as a standard of establishing fraud. In the _United Trading Corporation SA and Murray Clayton Ltd v Allied Arab Bank Ltd_, Justice Ackner defined the standard of evidence as:

The evidence of fraud must be clear, both as to the fact of fraud and as to the bank’s knowledge. The mere assertion or allegation of fraud would not be sufficient. [...] We would expect the Court to require strong corroborative evidence of the allegation, usually in the form of contemporary documents, particularly those emanating from the buyer.”

### 3.4 English position on the Fraud Rule in Documentary Letters of Credits:

Overall observation shows the English courts have restrict and narrow approach towards intervention in autonomy principle of letters of credit. In general scope for the fraud rule under English legal system can be summarised as:

Material representation of the fact that is untrue, Knowledge of the beneficiary, Documentary Fraud versus Fraud in the Underlying contract

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87 Ibid, 301
88 Ibid, 302
89 Ibid, 303
90 _United Trading Corporation SA and Murray Clayton Ltd v Allied Arab Bank Ltd_ [1985] 2 Lloyd’s Law Reports 554 (CA)
92 _United Trading Corporation SA and Murray Clayton Ltd v Allied Arab Bank Ltd_ [1985] 2 Lloyd’s Law Reports 554, 561

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3.4.1 Material representation of the fact that is untrue

In the case of United Trading Corporation SA and Murray Clayton Ltd v Allied Arab Bank Ltd, Lord Diplock comments on material misrepresentation when considering the third party fraud.

“To this general statement of principle [of independence] as to the contractual obligations of the confirming bank to the seller, there is one exception: that is, where the seller, for the purpose of drawing on the credit, fraudulently presents to the confirming bank documents that contain, expressly or by implication, material representations of fact that to his knowledge are untrue.”

Accordingly, material misrepresentation to Lord Diplock is a sort of fraud which can invoke the fraud rule under English Law. In an interpretation close to interpretation of the material fraud in official comment on Revised UCC article 5-109, Jack states on meaning of the word Material:

“Material to the bank's duty to pay, so that if the document stated the truth the bank would be obliged to reject the documents.”

However, interpretation of Jack does not match with the interpretation of Lord Diplock:

“[T]he answers to the question: “to what must the misstatement in the documents be material?” should be: “material to the price which the goods to which the documents relate would fetch on sale if, failing reimbursement by the buyer, the bank should be driven to realise its security.”

It has been suggested that, Lord Diplock’s interpretation on material misrepresentation goes back the value of goods. Therefore, in his view predating the bill of lading will not constitute misrepresentation as it has no effect on value of goods. However, Jack’s interpretation considers the effect of presentation on duty of bank to pay as material. As a result, statement of true date of shipment in case of predated bill of lading will result in rejection of document by bank. It has been submitted that Jack’s interpretation is much stronger argument than interpretation of Lord Diplock.

Material Misrepresentation has been considered as the standard of proof for fraud in documentary credits under English Law and it has been accepted in

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94 (1983) 1 A.C. 168, 183
95 Buckley RP & Gao X (2003) , 324
96 Malek A & Quest D 'Documentary Credits – The Law and Practice of Documentary Credits Including Standby Credits and Demand Guarantees' (2009) , 254
97 (1983) 1 A.C , P.118
98 Buckley RP & Gao X (2003) , 324
99 Ibid
subsequent cases like Themehelp Ltd. v. West\textsuperscript{100} and Banco Santander S.A. v. Bayfern Ltd\textsuperscript{101}.

3.4.2 Knowledge of the beneficiary

According to the United City Merchants, beneficiary was not held responsible for misrepresentation of documents and in fact he was not aware of them\textsuperscript{102}. Therefore, it can be interpreted from Lord Diplock's approach that preventing beneficiary from claiming payment will not only include the situation that he was responsible for the fraud, but also at the time of presentation, he should be aware of misrepresentation in tendered documents even if he is not responsible for them\textsuperscript{103}.

In this respect, degree of beneficiary’s knowledge of fraud before being infected by fraud exception can be a concerning problem\textsuperscript{104}. “This is likely to require actual knowledge rather than constructive knowledge based on what the beneficiary as a reasonable man should have known. The question of what constitutes actual knowledge should be approached cautiously: a wilful shutting of one’s eyes to the truth may in practice lead a court to make a factual finding that the beneficiary did know of the falsity.”\textsuperscript{105}

3.4.3 Documentary Fraud versus Fraud in the Underlying Transaction.

Despite the fact that Lord Diplock in United City Merchants emphasized that fraud should be relevant to documents, it is not possible to comprehend whether his lordship raised the issue of documentary fraud only due to the facts of the current case or he wanted it to the requirement for all relevant cases to fraud in documentary credits. Later English cases do not show strong adherence to this issue.\textsuperscript{106} For example, in Czarnikow-Rionda Sugar Trading Inc v Standard Bank London\textsuperscript{107}, in Court of Appeal, Rix J discharged the obtained interim injunction by buyer to prevent issuing bank from honouring the presentation based on issues other than fraud allegation not being based on documents.

Scholars argue that as fraud Rule follows the rational of preventing fraudulent beneficiary from benefiting from his own wrong, there is a merit of extending the exception to underlying transaction. However, it must be clearly established that fraud is in connection with credit transaction like fraudulent demand of beneficiary under the credit.\textsuperscript{108}

\textsuperscript{100} Themehelp Ltd. v. West, (1995) 4 All E.R. 215
\textsuperscript{102} Ellinger, P., Noe, D., The Law and Practice of Documentary Letters of Credit, (2010), 142
\textsuperscript{103} Ibid
\textsuperscript{104} Ibid
\textsuperscript{105} Ibid
\textsuperscript{106} Ibid
\textsuperscript{107} Czarnikow-Rionda Sugar Trading Inc v Standard Bank London (1996) 1WRL 1152, 1161
\textsuperscript{108} Ellinger, P., Noe, D., The Law and Practice of Documentary Letters of Credit, (2010), 143
tions show extension of Fraud Rule to the underlying contract. In United States of America, Revised UCC Article 5-109 extends the fraud rule to documents as well and underlying contract.\footnote{109}

“Requires that the fraudulent aspect of a document be material to a purchaser of that document or that the fraudulent act be significant to the participants in the underlying transaction.”\footnote{110}

In Canada, Le Dain J from Supreme Court of Canada in case of \textit{Bank of Nova Scotia v. Angelica–Whitewear Ltd}\footnote{111} extended the application of fraud rule to the underlying contract.

In contrast, Singaporean courts have taken a narrow approach to the application of fraud rule by limiting it only to fraud in documents. The court of Appeal of Signature In the case of \textit{White and Co Inc vs Chamet Handel Training (S) Pte Ltd}\footnote{112} emphasized that fraud sufficient for constituting the exception to the autonomy of irrevocable documentary letters of credit was fraud in presentation of required documents to the bank while obligations of issuing or confirming banks towards the beneficiary will not be affected by the fraud in underlying contract.\footnote{113}

4 Conclusion

Reason de Etre of the documentary letters of credit can be mentioned as the need of market to an instrument of payment in international business which can mitigate the commercial risk between buyer and seller who do not have any information from financial capacity of each other. As a result, we can witness the development of documentary letters of credits in the course of history as an improvised act of market which has been regulated by customs and usages of the same market. According to UCP, operation of Documentary Letters of Credits is subjected to two main principles of autonomy and strict compliance. While principle of Autonomy tries to protect rights of seller by separating the underlying contract of sales from credit and by requiring buyer to pay first and argue later in case of any problems in fulfilment of underlying contract, the principle of strict compliance protects rights of buyer by requiring seller to provide genuine documents which comply with terms of credit. Interestingly, among common law countries only USA has naturally applicable statute for operation of documentary letter of credits while other countries including England follow the case law system.

\footnote{109} Buckley RP & Gao X (2003):317
\footnote{110} Official Comment to Article 5 of the Uniform Commercial Code, para. 2.
\footnote{111} Angelica-Whitewear Ltd v Bank of Nova Scotia 36 D.L.R. (4th) 161, EYB 1987-67726
\footnote{112} White and Co Inc vs Chamet Handel Training (S) Pte Ltd(1993) 1 SLR 65
\footnote{113} Ibid
There is still long way to be taken by common law courts, particularly English Judges should show a harmonized approach to problem of fraud and other exceptions to the principle of autonomy of documentary letters of credit. Current research took a critical view to such divergent approach of English courts to the relevant issues to fraud rule and compared it with American approach to the same problem based on Article 5 of the Unified Commercial Code. In the course of study, efforts were made to analyze reasons behind historical reluctance of English courts towards intervention into the operation of autonomy principle, absence of harmonized standard of proof for fraud, difficulties in obtaining interim relief from the court and non-recognition of other exceptions. The outcomes of study in this field are of the high importance as existing problems of fraud as the main exception to principle of autonomy may have negative effect on the perception of businessmen at global level on capability of Documentary Letters of Credit in mitigating the commercial risk of international trade.

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Appraising the Role of African Union: the New Partnership for Africa’s Development in Conflict prevention and Management in Africa

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**Summary:** The New Partnership for Africa’s Development is the latest in a long line of initiatives or framework intended by African leaders to place African continent on a path of growth and sustainable development. The development challenges that face Africa are enormous and varied. The crisis of political instability, bad governance, lack of peace and security, poverty and diseases like HIV/AIDS. NEPAD recognized peace and security as condition for good governance and sustainable development. Therefore, in absence of peace and security, democracy and good governance cannot strive and where there is no good governance, we cannot witness sustainable development. This paper argues that peace and security has been elusive in much of Africa. The failure of the Organisation of African Unity to ensure peace and security in Africa and to address Africa’s post-cold war legion of challenges, the successor organisation, the African Union and its attendant development programme, the NEPAD were established. The first issue which is critical to NEPAD is, solving armed conflict and civil unrest on the continent. Currently, twenty percent of the people of Africa are living in condition of conflict. These conditions cause terrible suffering and hold back economic development in the affected countries. The extent of conflict is so great that the whole continent is affected and this creates a major barrier to inward investment. On the resolution, NEPAD is in a position to make considerable progress. It was learnt in Sierra Lone that with concentrated international effort, conflict can be successfully ended and institutions of a properly functioning state can begin to be rebuilt. The paper therefore examines the origin of the NEPAD, NEPAD and challenges of peace and security in Africa and involvement of AU/NEPAD in Darfur and Cote D’Ivoire crises. It further discusses the AU/NEPAD conflict mechanisms for conflict prevention, management and resolution and draw conclusion.

**Keywords:** NEPAD, African Union, ECOWAS, development, conflict prevention, resolution, conflict management, peacekeeping, intervention, peace and security

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69
1 Introduction

NEPAD has been hailed as perhaps the boldest new initiative in recent times on the appropriate path which the African continent should be taking towards its long-term development. With its successful democratic transition, South Africa emerged during the second half of the 1990s as a new political factor in the continent. In the late 1990s, the South African President Thabo Mbeki coined and popularized the African Renaissance. While the notion never materialized as a fully fledged, concise new paradigm, it managed to rally policy-makers, bureaucrats and intellectuals alike behind an idea still highly relevant as a concept of African self-respect, dignity and pride. Inspired by earlier notion of self reliance in the sense of African ownership over Africa's affairs, the African Renaissance provided a philosophical basis for any policy formulation. Parallel to this philosophical dimension efforts aimed to position South Africa in terms of its foreign and economic policy in a leadership role within the African continent. Within this process, Mbeki’s foreign policy approach could be characterized as ‘a complicated and sometimes contradictory mixture of ideology, idealism and pragmatism.’ This blend competed with ambition for a leading role displayed by other countries, in particular, the agenda by Libya’s Col. Gaddafi in transformation of the Organisation of African Unity (OAU) into African Union (AU). This latter effort reactivated, though somehow distorted the popular rhetoric of Pan Africanism associated with anti – imperialism during the early days of decolonization – an ideology used to counteract the motion of African Renaissance as the approach reflected in NEPAD. South Africa’s Finance Minister, Trevor Manuel, in a keynote address to the German Foundation for International Development as early as December, 1998 characterised the emerging in a revealing way by asserting ‘there is a new resilience and a new will to succeed in the African continent’ We the South Africa have called it a renaissance, a new vision of political and economic renewal. It takes the global competitive market place as a point of departure.

7 Taylor I., Globalisation and Regionalisation in Africa: Reactions to Attempts at Neo-Liberalism and Regionalism, 10:2, Review of International Political Economy, 310–330 (undated).
The first introduction of preliminary results to the international arena can be dated to the briefing on the ‘Millennium Africa Renaissance Programme’ (MAP or MARP) can offered by president Mbeki to the World Economy Forum Meeting in Davos on 28th January, 2001. The MAP document originated during a process that begun in 1999 when the South African, Nigerian and Algerian Presidents were mandated by the Extra ordinary of the Organisation of African Unity (OAU) Summit in Sirte (Libya) to approach Africa’s creditors on the total cancellation of Africa’s external debt. The presidents were tasked further in April, 2000 by the South Summit in Havana to convey the concerns of the South to the G8 Summit in Okinawa in July, 2000. The OAU Summit in Togo in July, 2000 further mandated the Presidents to prepare the Millennium African Recovery Programme. In his presentation at Davos, Thabo Mbeki (who had the support of fellow heads of state, Olusegun Obasanjo of Nigeria, Ben Mkapa of Tanzania and Abdoulaye Wade of Senegal) qualified MAP for the sustainable economic development of the continent.

At the Conference of Ministers of the United Nations Economic Commission for Africa (UNESCA) in Algeria (8–10 May, 2001), the South African government presented the Millennium Partnership for African Recovery Programme (Pretoria, March, 2001) as the updated and final version of this joint effort. At same occasion, President Wade presented an Omega Plan for Africa and the UNECA, a Compact for Africa’s Recovery. While the Omega Plan was largely a technocratic reduction of the challenges and the Compact, a mainly operational handbook, the MAP represented a comprehensive attempt to bring the developmental challenges into a historical, cultural, political and economic framework. It was decided that the documents should be tabled in a merged version at the OAU Summit in Lusaka. This diplomatic compromise prevented the initiative(s) from ending in a cul-de-sac at this early stage. The final draft was adopted by the Heads of state at their OAU Summit meeting on 11th July, 2001 as a New Africa’s Initiative (NAI). Subsequently, at the end of the meeting in Abuja on 23rd October, 2001, an Implementation Committee of the Heads of state renamed the document as the New Partnership for Africa’s Development (NEPAD).

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9 Only hard bargaining managed to prevent Wade’s Omega Plan from sabotaging African Unity before it had even begun, particularly when Wade began claiming that his plan was ‘a practical initiative for overcoming Africa’s economic difficulties’, while the MARP was ‘more of manifesto’. Yet, Wade’s plan was extremely problematic and did not deserve the status that it was given though no doubt satisfying the ego of its author. Also see the full text in Taylor,L., and Nel, P., New Africa, Globalisation and the Confines of Elite Reformism: Getting the Rhetoric Right, Getting the Strategy Wrong 23:1, Third World Quarterly, 163–180, (2002).

10 The full text and related information is accessible at the NEPAD web site (http://www.nepad.org). The document and an excellent detailed critical annotation is also included in Bond, P (ed.) (2002b) “Fanon’s Warning. A Civil Society Reader on New Partnership for
The initiative had by then, matured and consolidated under a sort of power-sharing arrangement between the more influential African countries – Nigeria, South Africa, Algeria, Egypt and Senegal, at least nominally uniting the main portion of the continent's total annual GDP.\textsuperscript{11}

Since October, 2001, the NEPAD secretariat is based at the Development Bank of Southern Africa in Midrand (South Africa), With President Mbeki's economic adviser Wiseman Nkhulu acted as the first Chief Operating Officer. NEPAD has sought increasingly close co-operation with existing institutions like the African Development Bank (ADB), the Economic Commission of Africa (ECA) and the African Union (AU) secretariat to counteract suspicions of running its own show. It advocates confirmed the aim to ultimately incorporate NEPAD offices into the African Union (AU) Headquarters.\textsuperscript{12} The composition of NEPAD's steering committee confirmed the current power-sharing arrangement by uniting Algeria, Egypt, Nigeria, Senegal and South Africa, the five states involved in the initiative since its early stages.

Other ten African countries have been appointed to an Implementation Committee and selected on a regional representation basis. More recently, as part of the integration of NEPAD into the newly consolidated AU structures and with the aim of reflecting ownership over the initiative by all African states, more countries and their political leadership from NEPAD critical faction, originally dismissing the initiative as an outward oriented sell-out strategy (such as Libya, but even Zimbabwe) have been either less critical or even co-opted into the NEPAD club, which offers voluntary association.\textsuperscript{13} Notwithstanding the permissive structures and pragmatic efforts to compromise, NEPAD remains controversial among leaders of African states. It has equally not being given proper recognition by many stakeholders in African societies like churches and mosques, grassroots organisations, trade unions and part of academia who considered the initiative as ideological plunder of a neo-liberal submission toward the powerful in this world.
2 Rationale for the Establishment of the New Partnership for Africa’s Development in Africa

All of Africa’s regions have been afflicted by political tension, civil unrest or violent conflict. In addition, in task of resolving existing conflicts, the continent is also confronted with the challenge of promoting post-conflict reconstruction and peace building. This paper assesses the policy framework which the African Union (AU) and its programme for economic recovery, the New Partnership for Africa’s Development (NEPAD) have developed to address and resolve some security problems confronting most African countries. The African Union has the primary responsibility for peace and security on the continent. NEPAD’s role is in supporting post – conflict reconstruction and mobilization of resources for the African Union peace fund.\textsuperscript{14}

On a continent where about half of the countries are still at serious risk of violent conflict and instability since decolonization, the New Partnership for Africa’s Development (NEPAD) is an African-led programme of action to end Africa’s global marginalization – a welcome vision for promoting better government, ending Africa’ wars and reducing poverty. Good governance is the key focus for ensuring peace and security, without which sustainable development – people-centered economic growth is not possible.

It is conceived that through democracy, macro-economic stability and sustainable socio-economic programmes, all Africa’s people can benefit through national cooperation and unity and for drawing international investments to uniquely African assets that will enhance locally sustainable development. Major areas to address are democratic governance, conflict resolution and peace keeping with an emphasis on human rights and inclusivity of civil society institutions and diversity of people. The imperative to promote peace and security in Africa is critical. The political and social vulnerabilities on which conflict is premised need to be addressed urgently. African regional institutions need to be unskilled to make and keep peace and to deal with reconciliation, rehabilitation and reconstruction. The combating of illicit proliferation of arms and weapons is dangerous, as is support for African states to find their own lasting solutions to existing conflicts and threats to security.\textsuperscript{15}

Conflicts, with their attendant problems of massive human displacement and destruction of lives and properties, constitute the greatest challenge currently facing the African continent. Issues of identity, governance, resource allocation, State sovereignty and power struggle, sometimes coupled with the personality question, have all conspired, not only to cause staggering losses of human lives and environmental degradation but also to make Africa have the unenviable

\textsuperscript{14} Nkhulu W., \textit{The New Partnership for Africa’s Development: The Journey So Far}, 9, Midrand; NEPAD Secretariat, (June, 2005).

record of having the biggest numbers of uprooted communities in the world: 7 million refugees, 18 million internally displaced persons.

Of course, conflicts have existed since the beginning of recorded history and there had been various attempts by previous sub-regional Organisation like Economic Community of West African States (ECOWAS), Continental Organisations such as Organisation of African Unity (OAU) and International Organisations like United Nations Organisation (UNO) to resolve conflicts in Africa. Therefore, it may not be possible to treat in isolation, the activities of the New Partnership of Africa’s Development in ensuring peace and security in Africa, rather in conjunction with its founding father, the Organisation of African Unity now African Union that has been in existence in maintaining peace and security in African states for decades before the birth of the New Partnership for Africa’s Development (NEPAD). Therefore, as long as there is interaction between human beings, conflicts will continue to exist. At any rate, most of the good things that people always yearning for in life generate conflicts either because they are in short supply or because they are badly managed. One example that comes immediately to one’s mind is the question of economic reform: a concept that has been prescribed as the best cure for Africa’s current economic malaise. But appealing as that concept may be, economic reform can turn societies upside down. It raises expectations which, if not fulfilled, may widen the gap between rich and poor which, in turn, can generate conflicts between the haves and the have-nots. Sometimes, politicians have opened up closed economies but not policies that go with it. But by so doing, people have come to realize that the only way to win political concessions is not through peaceful negotiations but rather through the power of the gun.¹⁶

It follows therefore that if you give people a free economy, you will one day have to give them other related freedoms: the freedom to identify their leaders, the freedom to express themselves on issues affecting their lives and the freedom to associate with those they choose to represent them. By offering people those other freedoms, you will be averting the war of unmet expectations; and this is good governance. Democracy is yet another cherished ideal in Africa which paradoxically can tear societies apart if not properly handled. As an expression of democracy, elections can, indeed act as an effective tool for conflict management. But at the same time, elections can also deepen the degree of dissent and instability, if not properly managed.

The above two examples help to demonstrate four things. Firstly, conflicts are not simply an academic issue. They are a practical reality and the role of socio-economic forces either in generating them or in helping to resolve conflicts is

quite discernible. Secondly, as long as people continue to rub shoulders with one another, conflicts will continue to exist in human institutions. One cannot, therefore, think of eliminating them altogether. But, as a result of their intensity and multiplication, it is imperative for us to create mechanisms for managing conflicts or scaling them down to acceptable proportions. Indeed, as Professor Ali Mazrui put it on one occasion, “... without a minimum of peace, development is impossible; and without development, peace is not durable.” Thirdly, all good things in nature have a price tag. If we have to develop, we must be prepared to deal with the trade-offs relating to the process of development, namely conflicts. Fourthly, bad policies or lack of good governance can legitimize the birth of conflicts. It follows building critical capacities in Africa in the area of conflict management have never been as compelling as it is today.

For while increased cooperation between various African countries has, fortunately, helped to reduce inter-State conflicts which were the order of the day during the cold war era, the post-cold war period has ushered in its wake an upsurge of conflicts along regional, ethnic, religious, clan and even sub-clan lines within nations. From Liberia to Somalia, we have seen some African nations almost disintegrate. From Angola to Burundi and Rwanda, we have witnessed death and destruction as a result of conflicts and instability. As the twenty-first century approaches, the imperative for Africa itself in alliance with its friends outside the continent to take a hard look at the scourge of armed conflict, and to come up with viable mechanisms for conflict-resolving or management capacities becomes more pressing. Put most simply, for Africa to remain relevant in the new international order, international organizations such as the Organization of African Unity (OAU) now African Union/NEPAD must fill in the vacuum left behind by cold war engagements in tackling the scourge of conflicts.17

The Executive Secretary of the Economic Commission for Africa pointed out that in May 1993,18 “The people of Africa have become chronically vulnerable and dependent on international charity, not only for survival but also for the containment and solution of the conflicts perpetrated by the Africans themselves.” Our future generations will not forgive us, when they come to learn of the use of Africa’s limited resources for self-destruction. Moreover, we will remain in the Intensive Care Unit (ICU) of the international community if we do not utilize our limited resources for meaningful development or if we fail to create the conditions for peace and justice, by ruling with the consent of the governed; ensuring respect for human rights, equitable distribution of resources, suppression of egoism and, above all, establishing a democratic culture that promotes advancement of mankind on merit. Indeed, we all agree that Africa is a continent in transition but we should not turn this transition into a permanent feature. We

18 Id.
must assiduously work towards getting to our destiny as soon as possible. For Africa to achieve economic success and avoid being marginalized by the rest of the world, it is imperative that we build an enabling political environment capable of managing conflicts.

Therefore, it is imperative to examine the involvement of the AU and NEPAD in resolving crises in at least two African countries.

3 The Role of African Union/NEPAD in Conflict Prevention, Resolution and Management of Conflict

For the purpose of this paper, conflict management will be taken to mean a process embracing three main areas of activity. In their descending order, these areas are: (a) Conflict prevention or peace promotion; (b) Conflict control or abatement; and (c) Conflict resolution. This approach assumes that there is a baseline of relative peace and harmony in inter-personal relations but due to endogenous or exogenous factors such as shortage or mismanagement of resources, causes of friction may be introduced in a social system. It is the duty of the community in question to immediately identify those causes and prevent them from erupting in a conflict. Where prevention fails and a full-blown conflict emerges, then the second stage is reached called conflict management by which efforts aimed at diffusing, controlling or abating the conflict are deployed. If that conflict persists to the extent that people’s existence as a harmonious community is visibly threatened, then the third stage is reached called conflict resolution, characterized by peace-keeping efforts as well as intensive and extensive negotiations to settle all the fundamental issues involved in the conflict. Once the fundamental issues are resolved, conflict management is said to have gone full circle, by which the relationship between the individuals concerned is back to tolerable proportions.19

Based on the above analysis, it is wrong to think that the majority of the common citizens in Africa are not managing their conflicts. Indeed, everywhere in Africa, people on a daily basis are busy addressing situations of domestic tension of immediate concern to them. But the causes of tension have become so many, so complex and so intolerable that without outside assistance, especially in terms of financial resources, conflicts resulting from such tension cannot be meaningfully tackled even with the use of available mechanisms.20

It is equally wrong to think that AU/NEPAD has not been concerned with the issues of conflicts. Indeed, as the Secretary-General of OAU as clearly stated in his “Report on the establishment of a mechanism for conflict prevention, management and resolution” [CM/1767(LVIII)] submitted to the fifty-eighth Ord-

20 Id.
nary Session of the OAU Council of Ministers, held from 21 to 26 June 1993, in Cairo, Egypt, “... conflict resolution and the issue of peace, security and stability have been a major concern of our Organization from its inception.” It is also noted in the same report that the Commission of Mediation, Conciliation and Arbitration, which was set up as the official organ charged with the responsibility for peaceful settlement of disputes among Member States never became fully operational. The question of financing its staff and operations, for instance, remained an academic exercise. Nor were other ad hoc arrangements such as Defence Commission later put in place to deal with inter-State disputes and conflicts without shortcomings. However, one would argue that they did have a positive impact on stabilizing situations of conflict among Member States.21

3.1 Involvement of African Union in Darfur Crisis

The root of the Darfur conflict is a struggle over controlling an environment that can no longer support all the people who must live in it. Casual observers from around the world will be forgiven for having reached a disjointed picture of events and the root causes of events in Darfur over the past two years. Something which has led to similarly disjointed conclusions and unrealistic solutions. A combination of lazy and often sensationalist media coverage and the activities of an already active anti-Sudanese campaign have sought to reduce the incredibly complex Darfur issue to one of an attempt by an Arab-dominated government in Khartoum to wipe out its black citizens in Darfur. Some, who know a little better, accept the fact that the Darfur rebels are the ones who started the conflict by attacking police stations, army garrisons and nomadic leaders and communities and so doing murdering hundreds of policemen and precipitating a break down in law and order.

As can be ascertained from any reliable source on Darfur, it is a region inhabited by Arabs and non-Arabs alike. They are bound by blood through centuries of intermarriage. The two rebel groups are drawn from three tribes: Zagawa, Fur and Masalit. There are more than eighty different tribes and ethnic communities in Darfur. Any solution that would reward those who carry arms in a deliberate attempt to destabilize Africa's largest country will become a recipe for a full scale war that will spill over the border of Sudan.22

The African Union, (AU) formed in 2002 from the vestiges of the Organization of African Unity (OAU), aims to protect the security of the continent rather than the sovereignty of individual states. Though, the African Union still, is struggling to reform its governing bodies, it plays an increasingly high-profile role in peacekeeping. Most recently, the African Union has sent peacekeepers to Somalia and Darfur, the latter in an unprecedented joint peacekeeping operation

21 Id,1–2.
22 The Root Causes of the Darfur Conflict: A Struggle over Controlling an environment that can no longer support all the people who must live on it.
with the United Nations. Experts said that the African Union has a long way to
go before it is fully functional and expressed concerns about the burdens and
expectations that have been placed on the body thus far.\textsuperscript{23}

In 2002, the Organization of African Unity transformed itself into the Afri-
can Union (AU). The OAU, founded in 1963 on the principles of state sover-
eignty and noninterference, drew criticism throughout the 1990s for its lack of
intervention as crises unfolded in Rwanda, the Democratic Republic of Congo
and Somalia. Frustration at its ineffectiveness led African leaders spearheaded by
Libyan leader, Muammar el-Qaddafi, to launch the African Union, a body with
a structure modeled on that of the European Union. Fifty – three countries in
Africa are members of the African Union (Morocco is the only African country
that does not belong), which has its headquartered in Addis Ababa, Ethiopia.\textsuperscript{24}

The African Union/NEPAD seeks to increase development, combat poverty
and corruption and end Africa’s many conflicts. “The AU/NEPAD is the world’s
only regional or international organisation that explicitly recognizes the right
to intervene in a member state on humanitarian and human rights grounds.”
AU drew these guidelines based on the recommendations of a 2002 report from
the International Commission on Intervention and state sovereignty entitled The
Responsibility to protect. The report asserts that “sovereign states have a respon-
sibility to protect their own citizens from unavoidable catastrophe – from mass
murder and rape, from starvation but that when they are unwilling or unable to
do so, that responsibility must be borne by the broader community of states.”\textsuperscript{25}

A joint AU/UN peacekeeping force was deployed to Darfur in the beginning
of 2008. About 13,500 soldiers as of July, 2009 were already present in the region
as part of an AU/NEPAD peacekeeping force. It remained in the region and was
incorporated into the joint AU/UN force officially deployed in early 2008. That
force is still far from its authorized strength of about 20,000 personnel.

The African Union/ NEPAD has had a peacekeeping role in Darfur since
2003, when it helped broker a cease-fire between the government of Sudan and
rebel groups. Initially had fewer than one hundred observers in Darfur to moni-
tor the agreement but gradually increased its presence to include soldiers and
police. By 2005, The AU/NEPAD had nearly 7,000 troops in Darfur and in Sep-
tember, 2006, with the Sudanese government refusing to accept a 20,000-strong
UN-mandated peacekeeping force, the AU/NEPAD extended its mandate.

\textsuperscript{24} Ibid.
\textsuperscript{25} See generally Roberta Cohen, Senior fellow at the Brookings Institution, and Lawyer Wil-
liam G. O’Neill in the Bulletin of the Atomic Scientists; in Africa, International Organi-
sations, International Peace and Security @http://www.cfr.org/Africa/African-union/
Prior to the deployment of the joint peacekeeping force, experts had serious reservations about the ability of the AU peacekeepers to work effectively. Everyone knows this has been undermanned, understaffed, undertrained and under-resourced force. With the joint force on the ground, experts say some of the same problems remain. While the focus has a more robust mandate than the previous AU force, it still lacks important equipment and a critical mass of troops. The United Nations says its goal is to have 97 percent deployment by the end of 2009. Some experts said that even once full deployment is reached; the troops will not be able to end the crisis. Even if the force consisted of the finest elite troops in the world, they could not have resolved the problem.

3.2 Crisis in Cote D’Ivoire and AU/NEPAD Intervention

The current crisis in Cote D’Ivoire is a severe test for the regional body, ECOWAS and the much for touted NEPAD. For the umpteen time, the West African sub-region and Africa as a whole have been called to duty to halt the continuing bloodbath and carnage that often plaques the continent. Cote D’Ivoire, the latest in the long list of African countries best with military adventures is still reeling under a mutiny that has led to the death of hundreds of people including a former Head of state, General Robert Guei. Cote d’Ivoire’s political problems intensified after the death of its founding President, Houphouet Boigny, on 7 December 1993. Prior to his death, the country enjoyed relative stability and economic prosperity in a general unstable African continent over a period of three decades after its independence in 1960. The vibrant economy attracted a large number of foreign workers, mainly from Burkina Faso, Mali and Ghana as well as investors. Lacking any political institutional structure, the passing of Houphouet Boigny, plunged the country into period of protracted power struggle, owing to its long one-party rule (despite the presence of his protégé, Konan Bedie). Former President Konan Bedie, who replaced the country long term leader, enunciated the policy of Ivoirite and succeeded in eliminating his key political opponents, including Allasssane Quattara of the Rally of Republicans (RDR). The power struggle centred on nationality laws and eligibility criteria for elections which favoured mainly, inhabitants from southern Cote d’Ivoire to the detriment of the northerners. The interplay of complex political issues related to the identity and citizenship, he quest for power and eventual political exclusion of political opponents from elections led to an unconstitutional change in government by late General Robert Guei in 1999. These undercurrents include a revolt from ranks of the General’s loyalist, specifically about 800 men who were demobilized from the national army known as Forces Armees Nationals de la Cote d’Ivoire (FAANCI) in September 2002.


27 Flying Officer Hakeem Olayiwola Sarki, Nigerian Air Force, The ECOWAS: Challenge of
The bloody revolt led to the death of General Guei and some members of his family in the process. An ill-equipped and ill-prepared Ivorian army eventually mobilized its rank and file, and in a few days of fighting repelled the rebels from Abidjan but lost the northern cities of Bouake and Korhogo. The conflict has since grown in scope and intensity.

With the emergence of three different rebel groups: the Patriotic Movement of Cote d’Ivoire (MPCI), the Movement for Justice and Peace (MJP) and the Movement of Great West (MPIGO) which are, collectively known as the ‘New forces.’ The outbreak of the Ivorian crisis in September 2002 led initially to the signing of two peace agreements under the auspices of ECOWAS. These are the 18 October ceased fire agreement signed in Abidjan and the Lome Agreement, signed on 1 November 2002 in Lome, Togo. The peace effort leading to the brokering of both agreements were led by Cheikh Tidiane Gadio, Foreign Minister of Senegal, and Gnassingbe Eyadema of Togo respectively. The Abidjan ceased fire agreement paved the way for further negotiations and the signing of the Lome peace agreement. Other accords and ceased fire agreements brokered, include the Linas-Marcoussis accord (January, 2003), Accra (March, 2003), Accra (July, 2004), Pretoria (April, 2005) and Pretoria (June, 2005). President Gbagbo’s original mandate as president expired on October 30, 2005 but due to lack of disarmament, it was deemed impossible to hold an election and therefore his term in office was extended for a maximum of one year according to a plan worked out by the African Union, this plan was endorsed by the United Nations Security Council. With the late October deadline approaching in 2006, it was regarded as very unlikely that the election would be held that time, and the opposition and the rebels rejected the possibility of another term extension of Gbagbo’s term on November 1, 2006, however, resolution provided for the strengthening of Prime Minister Charles Konan Banny’s powers. Gbagbo said the next day that elements of the resolution deemed to be constitutional violations would not be applied. A peace deal between the government and the rebels, or ‘New process’ was signed on March 4, 2007 and subsequently Guillaume Soro, leader of the ‘New Forces’, became Prime Minister. These events have been seen by some observers as substantially strengthening Gbagbo’s position.28

Although, African leaders failed miserably in their bid to resolve the conflict that emerged after the Madagascar elections early that year, the current interest and resolve to come to grips with the Ivorian situation become therefore very

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What makes the present circumstance so stimulating is the resolve of both Economic Community of West African States (ECOWAS) and African Union to push ahead with their new-found desire of riding the continent of poor governance, coups and corruption among others. It also falls in line with their aversion for undemocratic institutions and governments and to champion their commitment to the defence of democracy, good governance and the rule of law. These concerns are explicitly enshrined in the version of the New Partnership for Africa’s Development (NEPAD) being forged by African leaders in collaboration with their development partners. The New Partnership for Africa’s Development (NEPAD), adopted by African leaders in 2001, places strong emphasis on achieving the political conditions necessary to help sustain the continent’s development. “African leaders,” say NEPAD “have learnt from their own experiences that peace, security, democracy, good governance, human rights and sound economic management are conditions for sustainable development. They are making a pledge to work both individually and collectively to promote these principles in their countries, sub-region and the continent.”

NEPAD recognizes not only that peace and security can create more favourable conditions for development but also that greater development and reduced poverty can in turn make armed conflict less likely. Long-term condition for ensuring peace and security in Africa require policy measures to address the political and social vulnerabilities on which conflict is premised.

The African continent remains despicably volatile. It is already swirling with hundreds of thousands of refugees from earlier wars in Sierra Leone and Liberia. Even within the otherwise nominal peaceful states, internal conflicts as well as ethnic and religious sentiments are fanning a trend with the potential of tearing these countries apart.

Until recently, Cote D’Ivoire used to be a peace haven, stability and prosperity in the continent. It showcased how stability could lead to prosperity, but this has now been gravely undermined due largely to military insurgency which began in 1999. That was the first time that the country tested the bitter pill associated with the removal of many governments in the continent.

The conflict which began on September 19, 1999 has thrown the country into a bloodbath with ethnic clashes between the people in the south and northerners. It has also pitted political activists against their perceived foes. General Guei, military ruler from December, 1999 to October, 2000 was killed during the action by government forces to suppress the uprising. Guei, had earlier been accused of involvement in the uprising which has brought death to the streets of

31 Id.
Abidjan, Bouake and the northern town of Korhogo. Guei staged the first and only successful coup d’eta in the country’s history in 1999. Until then, it had never experienced military rule. The coup had since changed Ivorian politics by politicizing soldiers, who got a taste for power. Since then, each year, Côte d’Ivoire has experienced an uprising or attempted coup of some sort.

The uprising which started in Ivory Coast on 19 September, 1999 has been called both coup and a mutiny. The soldiers who took up arms against the government denied that it was a coup. They claimed that they were fighting against dictatorship and ill-treatment. More than 750 soldiers started the conflict in protest against the decision of the government headed by Laurent Gbagbo, to demobilize them from the Ivorian army. Following the emergency talks held in Accra on September 29 by ECOWAS members and the then African Union Chairman, Thabo Mbeki of South Africa, a six-nation mediation group has since been formed by ECOWAS to mediate in the conflict in order to help find peaceful solution to the crisis. The group has since prevailed upon the rebels to immediately cease all hostilities in order to restore normalcy to the occupied towns. The emergency meeting provided African Union with an opportunity to protect constitutional governments and help advance democracy in the continent. The opening statements by ECOWAS Chairman, President Abdoulaye Wade of Senegal, who advocated the recourse to dialogue in the bid to resolve the problem and those of the then president Olusegun Obasanjo of Nigeria, who preferred the use of collective military force to crush the rebels were very contrasting. But collectively, it showed that the resort to unconstitutional means to stake a claim to political power on the Africa continent is outmoded, unjustifiable and therefore unacceptable now. Indeed, such disruptions to the constitutional order, many believed, must be rejected because it is in the supreme interest of the continent and its peoples to do so, particularly within the context of the globalization that Africa is functioning.

The then Ghana’s President, John Kufuor says, “It is a matter of great distress to leaders of ECOWAS that Côte d’Ivoire is being dragged into what may be unhappily described as the ‘West African disease’ of coups, mutinies and instability.” Kufour is emphatic that Africa cannot hope to develop and join the rest of the advanced world unless and until there is peace in all the component nations. Like Kufuor, the Executive Secretary of ECOWAS, Dr Mohammed Ibn Chambas, says; event in Côte d’Ivoire if uncontrolled will be a major setback for the implementation of NEPAD in the West African sub-region. NEPAD advocates the building of a culture of democracy, respect for human rights and rule of law as essential conditions for creating stable conditions for sustainable development.

33 Id.
Dr Chambas observed as follows: „Today, all our lofty objectives of building peace, stability, democracy and integration in the sub-region so as to better fight poverty and improve the lives of our peoples stand threatened by the escalating violence and disloyal activities of certain elements of the Ivorian army. These rebellious troops are in breach of their sacred oath to protect and defend the constitution of Cote D’Ivoire.“

Both the Algiers Declaration of the African Union which was affirmed at the Lome Summit of 2009 and the ECOWAS Protocol on Democracy and Good Governance are emphatic that there will be no recognition for any government which comes to power by unconstitutional means. Dr Chambas advocates for zero tolerance for coups and military interventions saying, Africa must remain steadfast in defending the principle as a demonstration of commitment to build democracy and good governance in the respective countries. ‘We must set a clear and unambiguous message out, not only to the rebellious troops, but also, to all the armed forces of our sub-region that the days of coup d’états are gone,” he stressed.

4 AU/NEPAD Mechanism for Conflict Prevention, Management and Resolution

It may be recalled that since the turn of the 1980s, there has been a growing understanding among the OAU Member States that the Organization must show more responsiveness to new challenges, particularly in the field of economic integration and development on the one hand and, especially, that of conflict prevention, management and resolution on the other. In the case of the former, the decision was reached in 1991 to house the secretariat of the African Economic Community in the then General Secretariat of OAU. In the case of the latter, the Secretary-General’s proposal in 1991 for the creation of a Division for Conflict Management in the Political Department was approved. This proposal was based on the July 1990 “Declaration of the Heads of State and Government of the Organization of African Unity on the Political and Socio-Economic Situation in Africa and the Fundamental Changes Taking Place in the World,” in which the Heads of State and Government reiterated their “… determination to work together towards the peaceful and speedy resolution of all the conflicts” in Africa – both internal and inter-State. Such resolution, they stated, would be “… conducive to the creation of peace and stability in the continent,” and would “also have the effect of reducing expenditures on defence and security, thus releasing additional resources for socio-economic development.” Indeed, they recognized that it is “only through the creation of stable conditions that Africa can fully harness its human and material resources and direct them to development.”

34 Id.
35 Id.
Following this, the then OAU Secretary-General submitted to the fifty-sixth Ordinary Session of the Council of Ministers and the twenty-eighth Ordinary Session of the Assembly of Heads of State and Government, in Dakar, in June/July 1992, a report entitled “Report of the Secretary-General on conflicts in Africa: Proposals for an OAU mechanism for conflict prevention, management and resolution.” That report outlined a number of options on the form and nature of such a mechanism. The Assembly then adopted, in principle, such a mechanism for preventing, managing and resolving conflicts in Africa.

Subsequently, the Secretary-General submitted to the fifty-eighth Ordinary Session of the OAU Council of Ministers and the twenty-ninth Ordinary Session of the Assembly of Heads of State and Government, in June 1993, in Cairo, yet another report reflecting on all aspects relating to the mechanism, including institutional and operational details as well as its financing. The report was entitled “Report of the Secretary-General on the establishment, within OAU, of a mechanism for conflict prevention, management and resolution.” On the strength of that report, the Assembly adopted its “Declaration ... on the Establishment, within the OAU, of a Mechanism for Conflict Prevention, Management and Resolution.”36

The adoption of such a mechanism signaled Africa’s determination to resolve its own problems. Furthermore, by establishing within OAU a Mechanism for Conflict Prevention, Management and Resolution, the Heads of State and Government have avowedly given concrete expression to their commitment made in July 1990, to work together towards the peaceful and speedy resolution of conflicts on the continent. This Mechanism, as provided for by the Declaration establishing it, has in brief the following structures:

It is built around a Central Organ composed of the States which are members of the Bureau of the Assembly of Heads of State and Government, the State of the outgoing Chairman and, where known, that of the incoming Chairman, with the Secretary-General and the Secretariat as its operational arm. The Central Organ assumes the overall direction and coordination of the activities of the Mechanism, between Ordinary Sessions of the Assembly of Heads of State and Government and functions at the level of the Heads of State and Ministers as well as that of Ambassadors accredited to OAU now AU or duly authorized representatives;

The Secretary-General, under the authority of the Central Organ and in consultation with the parties involved in the conflict, is mandated to focus efforts on conflict prevention, peace-making and peace-building. Indeed, it is much cheaper to concentrate on diffusing tension and instability than to wait for situations of tension to turn into full-blown conflicts and then rush in to put out the flames of war. Peace-keeping, thus, does not constitute a priority activity for OAU then. However, by force of circumstances, the Organization may be com-

pelled to deploy small-scale peace-keeping operations, mainly of an observer-
mission character, as exemplified by the OAU/AU Neutral Military Observer
Group which was placed in Rwanda in 1993. In his efforts, the Secretary-General
may, in consultation with the authorities of their countries of origin, and relying
heavily on their cumulative experience and deep-seated knowledge of the Afri-
can historical, socio-economic and cultural condition, also resort to the use of
eminent African personalities. Where necessary, he may make use of other rel-
evant expertise, send special envoys or special representatives as well as dispatch
fact-finding missions to conflict areas;

In addition, within the context of the Mechanism, OAU is expected to closely
coordinate its activities with African regional and sub-regional organizations
and cooperate, as appropriate, with neighbouring countries with respect to con-
flicts arising in the different sub-regions of the continent, it being understood
that these regional organizations and countries are more familiar with the local
issues within the sub-region in question;

Similarly, OAU cooperates and works closely with the United Nations, not
only with regard to issues relating to peace-making but and especially, also those
relating to peace-keeping. In like manner, the Secretary-General of OAU main-
tains close cooperation with other international organizations; and

Finally, an OAU Peace Fund, governed by the relevant OAU Financial Rules
and Regulations, has been established for the purpose of providing financial
resources to support exclusively OAU operational activities relating to conflict
management and resolution. It will be made up of financial appropriations of 5
per cent of the regular budget of OAU, voluntary contributions from Member
States as well as from other sources within Africa. The Secretary-General may,
with the consent of the Central Organ and in conformity with the principles and
objectives of the OAU Charter, also accept voluntary contributions from sources
outside Africa.

With the establishment of the Mechanism, OAU’s capacity to deal with con-
flicts in Africa has been strengthened and enhanced in order for the Organiza-
tion to make effective contribution to the cause of peace, security and stability
on the continent.37

Mention may also be made at this point of the fact that AU/NEPAD, at the
invitation of the authorities concerned, has also been involved in election mon-
toring with the objective of assisting Member States in the peaceful management
of change and in the building of democratic cultures and institutions capable
diffusing tensions arising from rival political groups. AU/NEPAD has now
established an Electoral Unit within the Political Department, following the July
1990 Declaration already referred to in this work, which re-affirmed the right of
African States to decide which form of democratic government might be most
appropriate for them, given the existing socio-cultural values and current socio-

37 Organisation of African Unity, Id, 11, E/ECA/CM./20/7.
economic realities. Since 1990, OAU has monitored or observed presidential and parliamentary elections/referenda within 24 Member States.

As regards OAU’s involvement in the work of the United Nations, it is to be recalled that cooperation between OAU and the United Nations in all fields, including peace and security, has existed since the establishment of OAU in 1963. Indeed, the OAU Charter stipulates in Article 2 one of the purposes of its establishment as the promotion of “international cooperation, having due regard to the Charter of the United Nations and the Universal Declaration of Human Rights.” Such cooperation derives its existence not only from the complementarily between the purposes and principles of the two organizations but also on the basis of a number of resolutions and decisions adopted by the respective legislative organs of both organizations. In this connection, special reference may be made to the Cooperation Agreement concluded on 9 October 1990, which provided for mutual cooperation in all fields: political, economic and social, scientific and cultural.

It is the understanding of OAU that the coordination of the efforts of regional organizations with those of the United Nations, in the context of pacific settlement of disputes and the maintenance of international peace and security, as provided for in Article 52 of the Charter of the United Nations, implies that that relationship must be conducted in such a way that the comparative advantage of the regional organization on the one hand, and that of the United Nations on the other, optimally come into play. Thus, though OAU recognizes that the United Nations, being the world body, has the primary responsibility for international peace and security and that it is endowed with greater materials and financial resources, OAU brings to such a partnership its political salience as the pre-eminent, continent-wide regional organization in Africa, deriving from its proximity to and better knowledge of local African conflict situations, the shared historical experience and culture of its Member States and the political will to resolve its own problems.

A review of recent developments in Africa clearly demonstrates that the respective roles of AU/NEPAD and the United Nations have been complementary and mutually reinforcing. To this end, special reference may be made to the successful mediation efforts relating to the Liberian conflict jointly conducted by the two organisations through the OAU Eminent Persons and the United Nations Secretary-General’s Special Representative, together with the Executive Secretary of ECOWAS whose collective efforts culminated in the signing of a Peace Agreement for Liberia, in Cotonou, Benin, on 25 July 1993, by the parties concerned. In the case of South Africa, Mozambique and Burundi, the observer missions deployed by the two organizations cooperated closely in efforts to facilitate the reduction of political violence and the democratization process in those countries. In the case of Rwanda, the Neutral International Force set up in 1993 by the United Nations to implement the Arusha Peace Agreement on Rwanda incorporated the OAU Neutral Military Observer Group (NMOG II) in
its structure, which it found on the ground. As regards Somalia, OAU has fully cooperated with the United Nations in the efforts to bring about an end to the conflict and, in particular, in support of the process of national reconciliation. It has to be noted that President Meles Zenawi of Ethiopia was designated by the OAU Heads of State and Government to facilitate the peace process in that country on behalf of OAU. Indeed, on this issue of coordination, it is pertinent to note that the Mechanism requires OAU to cooperate and work closely with the United Nations not only with regard to issues relating to peace-making but, and especially, also those relating to peace-keeping. Further, where necessary, recourse could be made to the United Nations to provide the necessary financial, logistical and military support for the OAU's activities relating thereto, in keeping with the provisions of Chapter VIII of the Charter of the United Nations on international peace and security.38

It is also to be noted that although, OAU is short of logistical, material and financial resources, it is well disposed to providing, through its Member States, human resources for peace-keeping operations in Africa to add to the efforts deployed by the United Nations.

Furthermore, attention should be drawn to the need to strengthen AU/NEPAD's capacity to deal with conflict situations in Africa. In this respect, the Assembly of Heads of State and Government in their Declaration on the Mechanism directed the Council of Ministers „... in consultation with the Secretary-General, to examine ways and means in which the capacity within the General Secretariat can be built and brought up to a level commensurate with the magnitude of the tasks at hand and the responsibilities expected of the Organization.“

Concerning the level of cooperation between AU/NEPAD on the one hand and sub-regional organizations on the other, within the context of the AU/NEPAD Mechanism for Conflict Prevention, Management and Resolution, it must be noted that the establishment of that Mechanism is not aimed at marginalizing those sub-regional organisations and arrangements. On the contrary, AU/NEPAD works in close coordination and cooperation with those sub-regional organizations and arrangements, which it sees as constituting building blocks for its Mechanism. The reasoning behind that cooperation is that the interrelationship between human rights, democracy, security, stability and development in Africa necessitates effective networking and cooperative action between AU/NEPAD and the sub-regional groupings. Those groupings are at close proximity to conflict situations; they have innate knowledge of the local conflict situations; they have shared historical experience and culture; and they have the political will to resolve their local problems because being in the region of the conflict, they too, in one way or the other, can be affected.

Two recent examples may help. Firstly, OAU’s cooperative action in Liberia through its Eminent Person in the name of Professor Canaan Banana of Zimba-

38 Id.
ew was not aimed at supplanting ECOWAS but rather supplementing the commendable efforts of that sub-regional grouping. Similarly, under the flag of OAU and through H.E. Mr. Daniel Arap Moi, President of Kenya, the conflict in the Sudan is now being addressed by the Intergovernmental Authority on Drought and Development (IGADD).  

It should be noted that the main focus of the existing sub-regional groupings in Africa is economic development. However, quarrels, disputes and conflicts within and even between the member States of those sub-regional groupings have slowed down their pace of integration. For those sub-regional organizations to serve as useful instruments for a conflict management network in Africa, they need to be properly structured for such a role. There is therefore, the need to identify specific and cost-effective ways to assist sub-regional organizations in their efforts to enhance their capacity to maintain peace, security and stability within their respective member States.

5 Conclusion

The failure of the Organisation of African Unity and previous development programmes to ensure peace and security in Africa has place high expectation on the African Union and the New Partnership for Africa’s Development. NEPAD is said to represent a new development agenda based on partnership with other organisations like African Union, ECOWAS (ECOMOG) and other donor or creditor countries to ensure peace in Africa. The question still remain that can peace and security be ensured and maintained in Africa where over 80% of its occupants are living in abject poverty, where there are no good leadership and people are afflicted with various diseases. It is therefore believed that the practice of good governance/democratic government reduces the occurrence of violent conflicts and ensures peace and security.

Furthermore, African Union and the New Partnership for Africa’s Development can do more in terms of ensuring peace and security in Africa if our teaming youths can be gainfully employed and there is remarkable improvement in the provision of social amenities in our continent. Various African countries must seriously tackling security challenges facing them like terrorism, proliferation of arms, poverty, unemployment, corruption, bad governance, neocolonialism, military incursion, diseases like HIV/AIDS and other forms of impediments to good governance. If this is not done, most of African resources will be expended on peace and security which will eventually be a mirage to accomplish.

Behavioural Economics and its Implications on Regulatory Law

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Summary: The aim of this article is to analyse the possible implications of behavioural economics on regulatory law and government policy. In order to do so it first introduces and in short describes the current trends in behavioural economics through a quick look into the aim and history of this relatively new and innovative field of economics. The article then analyses the combination of this field of study with law in the form of a rather specific field of study called behavioural law and economics. The analyses of the possible impact on government policies and the regulation in certain areas then follow and result in suggestions of further possible interactions between law and economics.

Keywords: Behavioural economics (BE), agents, behavioural law and economics (BLE), government policy, regulations

1 Introduction

In context with the aim of the article which is to analyse the impact of behavioural economics on regulatory law and government policies, the article is divided into several interconnected sections first of which is behavioural economics as an actual field of study. As a follow up of the findings it then seems necessary to provide further attention to the aspect of rationality, which is one of the core aspects of neoclassical mainstream economics and as BE is based on the criticism of this assumption it seems necessary to give space to rationality, difference between rationality and being rational, and introduces the core aspect of Behavioural economics which is the bounded rationality concept. Once the above mentioned aspects have been introduced the article then analyses the impact on law and policies today and leads to the analysis of concepts of Behavioural law and economics. It also discusses its negative effects which are mainly focused

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2 Further on abbreviated as BE.
3 Further on abbreviated as BLE.
on the idea of so called soft paternalism which seems to be the answer given by BLE. Consequently this provides a lot of room for regulatory law and government policy in order to guide agents to their most satisfactory choice but on the other hand interfere with the concept of the individuals’ or the agents’ free will as well as the ability to pursue what they believe is best for them. Hence quite controversial reception of such findings may often be expected.

2 Behavioural economics

As the name indicates, behavioural economics is a so called hybrid area of research that incorporates principles, concepts and ideas mainly from psychology but also from other social sciences like sociology, philosophy or politics into economic theory.

Simply put when referring to behavioural economics it is understood to have in mind the amalgamation of economics with psychology, but it could include the combination of economics with any other social science.

But is there a necessity to combine these different fields? And if so, for what purposes? It all comes from the idea of a so called rational agent. What is the rational agent? From the very birth of economics as a discipline and the conceptualisation of Adam Smith one of the key elements is the presumption that a man is rational and would try to maximise his resources.

Yet many challenges posed to mainstream economics have inspired contemporary behavioural economists to develop alternative models of choice that better explain why and in what contexts individuals might select courses of action or consumption alternatives, which are regarded as biased or even irrational.

One of the major problems of the so called main stream economics is the fact that it is based on the presumption of the rational agent. But unfortunately in real life there are many examples which seem to indicate that agents are irrational, that very often agents or in other words humans make decisions which appear at face value to contradict the principle that agents act in a rational way.

Behavioural economics tries to explain and ultimately to apply these findings into practice, that is why individuals frequently make irrational decisions and choices, and why and how their behaviour does not match the patterns predicted by neoclassical models.

4 Further on abbreviated as BE.
Behavioural economists replace the assumption of rationality with one of so-called bounded rationality, in which consumers’ actions are affected by their initial endowments, their tastes for fairness, their inability to appreciate future costs, their lack of self-control, and the general use of flawed heuristics.8

Behavioural economists try to make sense of the agent’s actions and take into account all these variables in order to predict various outcomes and impacts on the economy.

So where does Behavioural economics have its roots? In some respects it’s not as new as some might think and the birth of this academic discipline can be traced back to the mid twentieth century. It is the Michigan Institute of Social Research that has been credited as the place this discipline first took off.

Then the use of behavioural economics was initially popularized at the University of Michigan’s Institute of Social Research in the late 1940s, where George Katona understood behavioural economics as investigating economic behaviour.9

Though others have stated that the studies of Allias and Elsberg were the first in the field of behavioural economics. That takes us back to the years 1953 when Allais and 1961 when Elsberg came out with publications concerning the paradox of the rational choices on the notion of unclear decision theory. Yet it is only relatively recently that behavioural economics has really established itself as an alternative theory to the standard theory based on the criticism of the latter.

With the academic battle over the relative virtue of market versus governmental allocation of resources largely settled by the 1950s, economists devolved their efforts to extending the so called neoclassical frameworks to explain real-world phenomena observed in the markets.10

Basically as stated above BE was developed as a reaction to the inadequacies of the neoclassical model which is rather an important building stone of mainstream economics. But what exactly is the neo–classical model? What does it assume? Why should it be criticized?

Wikipedia11 defines it as a branch of economics that studies the allocation of scarce resources between competing uses and users, based on principles of market equilibrium and profit maximization.

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11 http://en.wikipedia.org/wiki/Neoclassical_economics
According to the neoclassical model then, people and companies are always assessing the value of the things that they do and try to maximize the profit they get from it. But some researchers have questioned if this is actually the case that people are only interested in furthering their own economic wealth.

The studies of Rabin contradict the assumption that people work only in their own interest, not caring about what he calls social goals. In his paper he presented a model that accounts for the so called element of integrity, that is, the readiness of people to sacrifice their own materialistic well-being to help someone who is kind or punish one who is not, although the model does suggest that behaviour implications are greatest when the material consequences are not too significant.\textsuperscript{12}

So perhaps we are not as egocentric as the neoclassical model would have us believe and there are other more complex reasons for our behaviour than the maximization of our own utilities. Rabin was not the only researcher to discover other motivations behind an individual’s behaviour other than the maximisation of their resources.

The studies of Fehr and Schmidt confirm that there is a fraction of people who are also motivated by fairness considerations and that the classical theory of the homo oeconomicus with purely egotistical motives is not observed in real life.\textsuperscript{13}

Thus the above mentioned studies question the fundamental basis of the neoclassical model which logically led some to explain the other possible motivations of people and why they act the way that they do in a certain situation. This eventually led to the birth of a new field of research, behavioural economics.

Behavioural economics offers more realistic explanations of human decisions and macroeconomic processes than the neoclassical approach. It is rapidly invading other areas of life such as psychology and entering the economic realm.\textsuperscript{14}

As briefly stated the BE is a mix of economics, psychology and the social sciences. But what makes BE separate from Psychology and other social sciences?

Behavioural economists came to define themselves across sub-disciplinary lines in the 1990s and 2000s. First, behavioural economics became defined as economics on the basis of its use of mathematical modelling. This use of math-

\textsuperscript{13} Ibid.
ematics was something that defined behavioural economics as economics, and therefore as different from psychology.\textsuperscript{15}

The core of current behavioural economics is Kahneman and Tversky’s prospect theory. They state that in creating the theory they deliberately proceed as conservatively as possible. Kahneman and Tversky created a combination of neoclassical economics and cognitive psychology, and their approach has remained the approach of all researchers in the field.\textsuperscript{16}

The prospect theory departs from the neoclassical model in that it argues that people weigh the potential losses and gains rather than the final outcome. There has been a fair amount of research in this particular area and the article will look into later.

\textbf{3 Bounded rationality}

As already outlined a key element of neoclassical economics is the idea of a rational agent acting rationally to maximise his own economic gains. But how is rationality defined?

Rationality is defined as acting so as to maximize subjective expected value, and the implicit assertion is that persons should act so as to maximize their self-interest over the time horizon they can encompass. Not doing so is defined as irrational.\textsuperscript{17}

But is someone acting altruistically irrational? It seems to be a sad state of affairs that helping someone in trouble and expecting no gain from it is considered irrational.

Economic rationality can be characterized by self-interested goals or not. Behaving altruistically is not always equivalent to behaving irrationally.\textsuperscript{18}

So the concept of rationality itself is not stable as it is evolving with contemporary theories.

Thus, it will be proved that the words rational and rationality do not possess the same meaning.\textsuperscript{19}

Reality is different because many risk their safety to get instant gratification. However, in the acceptance of von Mises the individual is rational because it acts in order to satisfy their needs.\textsuperscript{20}

\begin{itemize}
  \item \textsuperscript{17} Ibid.
  \item \textsuperscript{19} Ibid.
  \item \textsuperscript{20} MAHA, L., DIACON, P, DONICI, G. Liberalisation and regulation in the financial crisis – is behavioural economics a solution? Theoretical and Applied Economics. Vol. 20, no. 3,
As economists began to observe situations where people seemed to be acting differently they began to ask themselves why. What are the reasons behind such behaviour? Is it irrational? This led to the concept of bounded rationality.

Bounded rationality is the idea proposed by Herbert Simon became one of the pylons on which behavioural economies is set. This idea advocates that rationality of people is a priori limited by given factors like access to information, their finite amount of time, and the cognitive limitations of their mind.\(^{21}\)

Economists began to make allowances and to understand that man was not perfect and there were internal and external influences which affected his behaviour.

March and Simon are the first to have questioned the assumption of absolute rationality by introducing the concept of bounded rationality. They indicate that the rationality of an agent is limited by three factors and consequently, they substitute the goal of maximizing the expected utility by that of satisfaction meaning that the individual does not take an optimal decision but rather a satisfactory decision. The three key factors of bounded rationality are: \(^{22}\)

1. the assumption that the information is incomplete
2. the assumption of what they refer to as individual motivations
3. the assumption that the actors’ capacities are limited

So the agent is determined to seek satisfaction for his wants rather than using his resources to their maximum effect. Sometimes his satisfaction may be short sighted or short lived.

Main stream economics assumes that people are rational, patient, forward thinking, and proficient at decision making, thereby making choices that maximize their utility by which they mean the benefits a person derives from a good or service. However, we know that individuals often have difficulty making wise choices, especially when faced with decisions that involve uncertainty, trade-offs between current and future costs and benefits, or significant complexity. \(^{23}\)

BE examines the implications for decision-making of agents when actors suffer from biases documented in the psychological literature. BE scholars replace the assumption of rationality by bounded rationality in which the agents’ actions are affected by their initial endowments, their tastes for fairness, their inability


to appreciate future costs, their lack of self-control, and the general use of flawed heuristics.\textsuperscript{24}

From the perspective of BE we can accept the idea of a rational individual if we reformulate it and accept that the homo oeconomicus of neoclassical taught, when seeking to maximize utility, does not seek to achieve the highest possible monetary compensation at the end of the day, but the highest satisfaction possible.\textsuperscript{25}

\textbf{4 The impact of behavioural economics on policy today}

The emerging field of BE seeks to develop more precise theory on the behaviour of economic agents. The recent success of this new approach shows the gap between economic theory and reality can take time to fill.\textsuperscript{26}

As stated in previous chapters over time the neoclassical view of the world has become less attractive as it seems to fail to explain certain situations or events. Economists have begun to appreciate that people are less predictable or do not act in the way the model suggests.

Standard economic models exclude emotions because they are too complex, unruly and ephemeral. But today, the behavioural economists add a psychology dimension to the traditional economic model to take account of emotions and human irrationality.\textsuperscript{27}

The economic events will never be really understood unless confronted with the fact that their causes are largely mental in nature. This assumption stands in opposition to the neoclassical approach, which postulates that human beings are unrestrained in their optimal decisions, self-control, plans, intentions, ability to overcome problems, internal barriers and profit calculations.\textsuperscript{28}

At the core of behavioural economics is the conviction that increasing the realism of the psychology underlying economic analysis will improve the field of economics on its own terms—generating theoretical insights, making better predictions of field phenomena, and suggesting better policy.\textsuperscript{29}


\textsuperscript{27} Ibid.


So it would appear that BE may be able to give us useful insights into the human mind which may help guide policy makers in making better decisions, or at least more economically efficient decisions.

The financial crisis has provided new impetus to behavioural economics, in the search for an explanation for events which would seem to constitute massive falsifying evidence to a body of theory which presumed markets to be efficient and equilibrating.\(^\text{30}\)

So the mainstream view of the economy seemed at the very least to be suspect, and obviously politicians also need to convince the electorate that they are in control and that lessons have been learnt and that there is an alternative to avoid such a situation in the future, i.e. BE.

Among others, BE became an important source of inspiration for a number of advisors and bureaucrats in the new Obama administration that came into power in January 2009.\(^\text{31}\)

The Obama administration is not the only one to call in behavioural economists to help in policy making decisions. The British Prime Minister David Cameron has also set up his own group of advisors which include behavioural economists.

Although BE may seem to many to be able to answer the failings of neoclassical assumptions it is not without fault.

There has been a range of critiques of BE on the grounds that it can provide ex post explanations for behaviour, but falls short on prediction.\(^\text{32}\)

The usefulness of a theory or model that can tell us why something has happened after it has happened is arguably limited. Yes it is nice to know why something happened but stopping it from happening again or predicting and taking preventative action is surely more important. One strength of BE is that its findings are and can be proved in experiments where conditions are controlled and monitored, but this can also be seen as a weakness.

Many behavioural economic studies were conducted as experiments under lab conditions. This method is preferred by scientists because it allows extraneous variables to be controlled. However, extensive reliance on lab studies has led some critics to suggest that behavioural economics’ key findings may apply only


– or at least much more strongly – under the artificial conditions of the lab, and not in the field.\textsuperscript{33}

One other significant fault is like the neoclassical model it fails to explain some occurrences.

We know, for example, that various political, psychological, and social factors lead to certain actors engaging in the behaviour of suicide bombing, which cannot be justified by any form of the neoclassical model but which also cannot be explained or predicted by any existing model provided by BE, unless the concept of subjective utility is arbitrarily expanded.\textsuperscript{34}

This is a problem for BE as it cannot answer some of the problems that the neoclassical model could not answer either and as a consequence perhaps it is reliant on a model which is already flawed and thus will always be left wanting.

Behavioural economics, as the field stands today, consists of standard neoclassical economics with several psychological factors grafted on to account for some, though by no means all, of the failures of the neoclassical model. The result is an ad hoc collection of concepts and factors that are basically disconnected, standalone concepts.\textsuperscript{35}

There are also other problems with BE. It may be caused by its relatively new prominence or the fact that it is based on a flawed model but there are some new concepts which are contradictory or at the very least the relationship between the elements is unclear.

The key thesis of BE being the systematic biases that are built into people’s choices which prevent utility maximization is subject to different interpretations. One can hold that these systematic limitations are found in all people, are congenital or even wired in a universalistic interpretation, or that they are found only among some people or that one and the same person can sometimes optimize and at other times cannot. BE would benefit if this important issue would be clarified.\textsuperscript{36}

5 Introduction of Behavioural Law and Economics\textsuperscript{37}

With the emergence of BE it was only a matter of time before law would be combined with it in some way as the two fields are inter related.

\textsuperscript{35} Ibid.
\textsuperscript{37} Further on abbreviated as BLE.
It should be observed that comparative law scholars are in effect already capitalizing on research in behavioural economics by using this research’s insights on how people actually behave – as opposed to mere hypothesized behaviour – as a basis for evaluating the effectiveness or efficiency of supranational rules and doctrines.\(^{38}\)

It seems natural that learning about an agents economic behaviour might have some useful spin offs, especially in the regulation of the financial industry as a result of the financial crisis for example.

Emerging close on the heels of behavioural economics over the past thirty years has been the BLE movement, which explores the legal and policy implications of cognitive biases. \(^{39}\)

As has been mentioned before the Obama administration has been quick to see the advantages of BE and consequently of BLE.

Regulatory policies in the United States are already being informed by BLE. President Obama issued an Executive Order requiring federal agencies to consider regulatory options that preserve what is referred to as freedom of choice for the public, and is now forming a so called Behavioural Insights Team to employ BLE work more broadly and systematically across the government. \(^{40}\)

The promise of BLE is to regulate so as to improve economic welfare by more closely aligning each individual’s actual choices with his true or unbiased preferences without reducing his liberty, at least as it is represented by the choices available to him.\(^{41}\)

BLE rather seeks to identify systematic departures from rational decision-making by empirical research and make policy recommendations based on these insights.\(^{42}\)

The argument is that people have a desire to do something but are stopped from doing so by some inbuilt biases which can be unveiled by BLE research. Even if an agent can understand that a certain course of action is not good for them they still continue with the action at their own detriment. Thus the idea

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of paternalistic regulation has begun to evolve. If the policy makers discover a certain weakness in their agents then it may be considered only fair and just to help those agents avoid making such mistakes.

Behavioural findings showing the failure of individual choice often point toward policy prescriptions that limit choice or mandate outcomes. But most proponents of BLE do not push analysis to this point and focus instead on light-touch regulatory tools that preserve wide scope for choice.\footnote{BUBB, R., PILDES, R.H. How behavioural economics trims its sails and why. \textit{Harward Law review} Vol. 127:1593, p. 1596, 2014.}

In a nutshell, psychological economist’s goal is to use behavioural conceptual tools to overcome individual cognitive limitations and/or emotional and affective dispositions that sometimes lead to distorted and even self-destructive patterns of behaviour.\footnote{MURAMATSU, R., FONSECA, P . Freedom of choice and bounded rationality: a brief appraisal of behavioural economists’ plea for light paternalism. \textit{Brazilian Journal of Political Economy}. Vol.32, no.3, p. 449. 2012.}

### 6 Analysis of selected findings

We are loss averse. Loss aversion refers to the tendency for people to prefer avoiding losses to acquiring gains. Studies suggest that losses are as much as twice as psychologically powerful as gains. Tversky and Kahnemann. They showed that people are generally risk averse when facing gains but risk seeking when facing losses. For instance, a penalty is a stronger incentive than a similar-sized reward.\footnote{RIEDEL, J., COLAO, R. Change is hard: The promise of behavioral economics. \textit{American Journal of Health Promotion}. Vol.28, no. 6, p. TAHP8, 2014.}

This could obviously have a big impact on BLE as it suggests that a policy where people are fined would be more effective than one where you are offered a reward. For instance if the policy wanted to encourage people to hand in their tax forms in on time a penalty for those handing the form late would be more effective than a reward to those handing it in on time. Other studies have also found that other people’s actions may impact on our own.

We are influenced by social forces. Individuals informed about the actions of others tend to conform to others behaviours.\footnote{Ibid.}

Also giving people too many choices may be a bad thing as they have too much information and fall back into the default position of doing nothing. An example of such behaviour is the case of optional healthcare insurance providing that the competitiveness in the market with personal healthcare insurance is not anyhow limited and hence in accordance with the idea of free market. In that case a large amount of people may fail to get insured simply because of the complexity and amount of choice. This could generally apply to the whole idea of the
free market that assumes that the agents have at their disposal all the available information which for quite obvious reasons is only a theoretical assumption. It not only fails to copy the reality but quite frankly it could be argued that it may not even be the most desired situation for the agents themselves and their decision making process. The fact that it may not be in their interest to get as much information as possible in order to make the desired decision because that could lead to the opposite effect; that is, not actually acting at all due to too much information. This tends to shake the findings on which economics is based.

Also called choice overload, as the number of choices expands people become overwhelmed and choose nothing, or select the default option.\textsuperscript{47}

These findings support public policies that are built on so called liberal choice architecture suggested by Thaler and Sunstein in 2008 which entails making organizational arrangements that help people make better choices, without requiring them to process information or learn to control their loss aversion or other emotions. \textsuperscript{48}

One of the impacts of BE and BLE reality is the argument that you can and should try to guide agents to the optimal decision helping them maximise their satisfaction as they are not capable of doing so themselves. Which again gives space and the impulse for government policies?

Soft paternalistic interventions are justified in terms of the view that the person towards whom we act paternalistically is not competent due to ignorance, irrational propensities, deficiencies in cognition and emotional dispositions.\textsuperscript{49}

It has been observed that small changes in wording or context can change agents’ actions. Thus small changes in laws and regulation which take into account these factors may be beneficial for the agent.

Behavioural economists offer compelling evidence that boundedly rational agents’ choices are influenced by small changes in context, default rules, legal and organizational rules and sensitive to framing effects and inertia. If this is so, we can conclude that boundedly rational individuals sometimes fail to make choices that are in their best interests. This gives room for attempts to overcome suboptimal behaviour by means of paternalistic measures.\textsuperscript{50}

But there is still the position maintained by rather few that any interference with an agents will is unacceptable even if it is in the agents best interest. The

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supposition is that if the state interferes though for the good of the agent, is it then the state who should determine what is good for the agent or when to act in the agents’ interest? These are just some of the problems which the paternalism debate brings up.

BLE often artificially and wrongly excludes more traditional regulatory tools, such as direct mandates, from its analysis of policy options. BLE sometimes fails to properly evaluate how its own regulatory tools actually function or ways in which actual individual behaviour suggests those tools should be modified or abandoned.51

Another criticism of BLE is that it does not properly evaluate the effect of its own regulatory tools and as mentioned in the previous paragraphs what is considered soft paternalism might in effect turn out to be something far stronger.

Behavioural insights themselves powerfully suggest that people stay with the status quo for all the reasons so central to BLE in the first place: people are inertial, passive, or under the impression that the default must represent the right choice, whether it does or not. As a result, these defaults function in practice, for many individuals, as effective mandates.52

Also if you accept that the state knows better than the agent is it not also suggesting that no one is allowed to make mistakes, must we always make the right decision? What is so wrong about making mistakes? Do we not learn from our failures?

Wright and others53 argue that so long as libertarian paternalism ignores the economic welfare and liberty value of allowing individuals the freedoms to err, it will fail to achieve its goals of increasing welfare without reducing liberty and will pose a significant risk of reducing both.

7 Conclusion

It can be claimed of many new theories that they did not live up to expectations but perhaps sometimes expectations are too high and too demanding. BE does not have all the answers to the neoclassical failures but given time it may provide useful insights into different areas of economic and legal life. After all BE is a relatively new field and it may take a while to establish itself and to iron out the wrinkles left by the neoclassical model.

52 Ibid
Behavioural economics is not a miracle solution that has the ability to replace Keynesian or liberalism, but its use can improve the theories and models of both schools of thought.\textsuperscript{54} 

BE has aimed at providing a more scientific basis for its theories which it tries to conduct in laboratory situations to give its theories a solid base which in itself is an achievement.

Given that many other social science findings have not been replicated either because no one has tried them or they did not pan out, behavioural economists deserve high marks in this regard.\textsuperscript{55}

It can clearly be seen that BE and BLE are considered to be the new and in fields of research attracting the majority of researchers attention. It is perhaps no wonder when you consider the inputs of Kahneman and Tversky who found that agents were loss adverse and risk seeking and all the associated implications for government policy this may have.

Predictably Irrational and Nudge thus elucidate the systematic and pervasive nature of irrationality and can inform policy in every legal field, ranging from consumer protection and environmental protection, through employment and health policies, to tax and financial regulation.\textsuperscript{56}

The implications of BE and BLE are wide and varied as with the case of soft paternalism it may sometimes be for the good and sometimes it may lead to further problems. But one thing is sure and that is it is currently influencing government policy around the world.

More recently, it suggests that, in a real world of boundedly rational agents, economics could help to improve the quality of their choices without any harm to autonomy and freedom of choice.\textsuperscript{57}

By understanding the ways in which individuals are susceptible to biases and flawed decision-making, law and policy can help improve individual and group behaviour.\textsuperscript{58}

The question though is how much will this soft paternalism penetrate into our lives and will we be able to make mistakes in the future? Only time will tell.

Mandatory mediation in family law issues with domestic violence – limits and experience from USA

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Summary: Mandatory mediation obliges parties to the dispute to firstly seek out alternative and amicable form of dispute resolution before addressing the court. This could prove suitable in family law disputes where the focus is on maintaining the relationships after the dispute is resolved in the best interest of children. However this presumption does not need to apply to all cases. Domestic violence is a phenomenon of family law for centuries. The impact of the abuse between partners is immense. The article focuses on conditions, upon which the mediation could be mandated, what are the key elements of successful mediation and what are the challenges of mandatory mediation in respect of these elements. The article analyzes provisions of acts that regulate mediation in various states of USA with focus on the most controversial regulation in California. At the end it debates the relation of mandatory mediation and right to fair trial.

Keywords: Mandatory mediation, domestic violence, family law, United States of America, California, good faith mediation, voluntariness, confidentiality, ADR, screening, best interest, right to fair trial

Opening remarks

Mandatory mediation seems to be an oxymoron. How can a process, that is based on its alterantiveness and voluntariness can be court-ordered and still successful? Has mediation become a sheep in wolf’s clothing? How does the rules for parties, court and the mediator change when the issue of domestic violence is present? What has been done and what can be changed? These are the issues mandatory mediation in family law faces. In the current Czech legal regulation, 3

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3 In the Czech Republic mediation is regulated in the Act No 2002/2012 Coll., Mediation Act. Procedural aspects are regulated by the Act No 99/1963 Coll., Civil Procedural Code,
the mediation in family law cases is not mandatory however it is regulated and strongly suggested. This article focuses on family mediation in various jurisdictions across United States of America with focus on mandatory mediation and regulation in California, which appears to be the most controversial and influential.

1 Introduction

Mediation is a mean of alternative dispute resolution rooted in our society even further then we may realize, however its focus on family disputes is fairly recent. In 1939 California started to provide some sort of marriage counseling firstly in order to conciliate the spouses. Due to the increase of custody cases, these services shifted toward custody and visitation mediation. Even though, the idea of offering conciliation services to the parties of contested family cases inspired several courts in California, Minnesota and Wisconsin in early 70s. They created so called Conciliation courts for custody as an alternative to adversary system. The reason behind choosing family matters as suitable issue for alternative and amicable dispute resolution is the question that is remaining after all the legal issues are settled – what is to happen next with the family. Mediation has thus been embraced for various reasons. It rejects an objectivist approach to conflict resolution and promises to consider disputes in terms of relationships and responsibility. The mediation is, at least in theory, cooperative and voluntary, not coercive, supporting parties and encouraging them to make their own decision. That decision is not tangled in rules of evidence or legalist notions of relevancy. The decision is thus based on context not abstract legal principle. And finally the emotions of parties are recognized and incorporated into the mediation process. It seems that the mediation is ideal way to resolve matrimonial and parental disputes, which are backed up by the studies that have shown that the mediation clients are more satisfied with their divorce outcomes than parties
using adversarial system and are more likely to obey the terms they have agreed upon.

2 Good faith standard of mediation

Proponents of mediation identify numerous advantages of mediation over the adversarial litigation, the most significant being flexible process, outcome in hands of the parties and achieving settlement that may save the parties time and money. The process of mediation is taking relationship into the account, promotes potential for self-determination and the opportunity for creative solutions. So the mediation as an alternative and amicable dispute resolution focuses on the interest of parties. However, when mediation became court annexed, court ordered and mandated, its goals started to change. Now the judges have their objective in mediation. Mediation brings possibility to facilitate settlements, reduce the case load and save costs for the courts and the parties. The need to define requirements for participation on mandatory mediation grew immanent, because the judges had begun to value its prospects and order mediation. One way of defying participation in mediation proceedings is through so called good faith standard.

When the mediation is mandated the level of participation in mediation, which should be by definition voluntary, is unclear. Recognizing this, court and legislatures sometimes refer to an obligation to mediate as an obligation in “good faith.” Mediation in bad faith would not only lead to obstructions but to possible abuse of mediation for obtaining evidence and disclosure of facts. The problem remains that the good faith obligation is not defined as well. The courts typically identify two essential components of good faith participation: an obligation to comply with required attendance at mediation and an obligation to prepare adequately for mediation. Both these requirements raise the issue of monitoring and enforcement. Where a good faith standard exists, courts may impose sanctions for its violation, including reduction of attorney’s and medi-
tor’s fees, dismissal or even criminal contempt.\textsuperscript{17} To monitor mediation is difficult. Many standards such as confidentiality and privacy need to be upheld and they do not allow for much oversight and control.\textsuperscript{18}

In situation such as mandatory mediation where it is understood that attendance and adequate preparation are minimum standard of obligation to mediate, domestic violence cases bring many issues that need to be taken into consideration in order to give good faith in mediation even a hope to succeed. Mere physical presence of victim of domestic violence in mediation session with her abuser could pose safety concerns about her wellbeing that may prevent the victim to fully participate in mediation or to attend mediation at all. To draft memoranda may be considered adequate preparation.\textsuperscript{19} The victim will contemplate whether to disclose the abuse and by not being truthful and honest, may interfere with adequacy of mediation. These implications of domestic violence into mediation create a legal issue that needs to be dealt with.

3 Situation in USA

The approach of the US courts towards mandatory mediation, or to usage of any form of alternative or amicable or therapeutic form of dispute resolution in family law matters, is different. Generally the courts recognize the role of therapeutic approach toward family relations however they state different standards for using out of the court settlement technics. One of the most popular is to deter proceedings for set period of time in order to allow parties to seek conciliation or therapy. These standards can be found in divorce proceeding as well as in custody proceedings. In 2003 forty-three states and the District of Columbia had legislation regulating family mediation, eleven out of those uniformly mandated mediation and California as the only one utilizes mediation without any exemptions.\textsuperscript{20} The issue of domestic violence is not recognized in all jurisdictions and is dealt with differently as will be shown further in the article.

In Arizona prior to filing for dissolution of marriage, either spouse may ask the court to order mediation for the purposes of a reconciliation to save the marriage or to obtain an amicable settlement and avoid further litigation. After


\textsuperscript{18} See California Supreme Court decision from September 7\textsuperscript{th} 2001, \textit{Foxgate Homeowners’ Ass’n v. Bramalea California Inc.}, S087319.


dissolution of marriage has been filed, either spouse may request that the dissolution of marriage proceedings be transferred to the Conciliation Court for mediation. In addition, if one spouse denies that the marriage is irretrievably broken the court may delay the case for up to 60 days and order the spouses to attend a conciliation conference. Another required delay of 60 days occurs after the service of papers on the respondent spouse before any hearing may be held for dissolution of marriage.\textsuperscript{21}

At the request of either spouse or their attorney, or at the discretion of the court in Colorado, the court may appoint a marriage counselor in any dissolution of marriage or legal separation proceeding and delay the proceedings for 30 to 60 days to allow for counseling. In cases concerning child support and custody a court may appoint an arbitrator to resolve these disputes between parents.\textsuperscript{22}

In Louisiana in such cases the court may require the parents to submit to the mediation.\textsuperscript{23}

In a contested divorce, the court in Delaware may delay the proceedings for 60 days to allow the spouses to seek counseling or order a mediation conference. If the parent has a history of domestic violence, he or she may be required to attend additional intensive so called “parenting education” courses.\textsuperscript{24} In West Virginia if the divorce involves a minor child, the court will order the parents to attend a parent education class to educate parents about the effects of divorce and custody disputes on children and teach parents methods to help children minimize their trauma.\textsuperscript{25}

In Hawaii in contested divorce proceedings where there are allegations of spousal abuse, the court shall not require a party alleging the spousal abuse to participate in any component of any mediation program against the wishes of that party. If one of the spouses denies that there has been an irretrievable breakdown of the marriage, the court might delay the proceedings for 60 days and advise the spouses to seek counseling. However this provision of Hawaii code has been in the meantime repealed.\textsuperscript{26}

At the request of either spouse, or on the court’s own initiative, the court in Illinois may order a conciliation conference if it is felt that there is a prospect of reconciliation.\textsuperscript{27} If either spouse in Iowa requests, or on the court’s own initia-

\textsuperscript{21} Title 25, Chapter 3, Article 2, Section 25-312, 25-316, 25-329 and Article 7, Section 25-381.01 and following of Arizona Revised Statutes Annotated.
\textsuperscript{22} Title 14, Section 14-10-110, 14-10-123.7, 14-10-128.5 and 14-12-106 of Colorado Revised Statutes.
\textsuperscript{23} Article 131 of Louisiana Civil Code Annotated and Article 9, Section 351 of Louisiana Revised Statutes Annotated.
\textsuperscript{24} Title 13, Chapter 15, Articles 1507 and 1517 of Delaware Code Annotated.
\textsuperscript{25} Chapter 48 Article 9, Section 48-9-104 of West Virginia Code.
\textsuperscript{26} Title 31, Chapter 580, article 580-41.5 and repealed article 580–42 of Hawaii Revised Statutes.
\textsuperscript{27} Chapter 5, Section 404 of Illinois Compiled Statutes Annotated.
tive, the spouses may be ordered to participate in conciliation procedures for a period of 60 days.\textsuperscript{28} The same rule for delaying the proceedings for 60 days upon disagreement of one spouse of irretrievability of the breakdown of the marriage applies in Kentucky. Moreover if the spouse requires it or on the court’s own initiative, a conciliation conference may be ordered by the court.\textsuperscript{29} In Missouri the delay of divorce proceedings can take from 30 to 180 days.\textsuperscript{30}

Different approach is used in Michigan, where family law mediation is regulated in the law but is used strictly on voluntary basis. The court will not stay the proceedings, merely announces that mediation services are available in all situations involving custody and visitation of children.\textsuperscript{31} Montana regulates that in case of divorce proceedings with minor children or one spouse denies that the marriage is irretrievably broken or one or even both spouses wish to attempt an amicable settlement of their differences, the court may delay the proceedings for 30 to 60 days and refer the spouses to one of the following specialists: a psychiatrist, a physician, an attorney, a social worker, a pastor or director of any religious denomination to which the spouses belong, or to any other person who is competent and qualified in personal counseling.\textsuperscript{32}

Instead of regulating time period for stay of proceedings, Ohio at the request of either spouse or on the court’s own initiative may order the spouses to undergo conciliation procedures for up to 90 days.\textsuperscript{33} In South Dakota the court may delay the proceedings when there is a reasonable possibility for reconciliation between the spouses.\textsuperscript{34} Similarly in Alaska the judge may order the spouses to submit to mediation if it is felt that a more satisfactory settlement may be achieved. The court will appoint a mediator.\textsuperscript{35} In Nebraska dissolution of marriage will not be granted until every reasonable effort for reconciliation has been made.\textsuperscript{36} Also the courts in New Hampshire may delay the proceedings if there is a reasonable chance at reconciliation and order the spouses to submit to marriage counseling. There are also provisions for voluntary marital mediation of issues involved in the divorce.\textsuperscript{37}

Within 90 days after the dissolution of marriage has been filed, either spouse or the attorney for any minor children may submit a request for conciliation to the clerk of the court in Connecticut. In this jurisdiction the approach becomes more directive, since after submitting the request, two mandatory counseling

\textsuperscript{28} Section 598.16 of Iowa Code Annotated.
\textsuperscript{29} Title 35, Chapter 403, Section 403.170 of Kentucky Revised Statutes.
\textsuperscript{30} Title 30, Chapter 452, Section 320 of Missouri Annotated Statutes.
\textsuperscript{31} Section 552.513 so called Friend of the Court Act of Michigan Compiled Laws Annotated.
\textsuperscript{32} Title 40, Chapter 3, Part 1, Section 3-121 and 3-124 of Montana Code Annotated.
\textsuperscript{33} Section 3105.091 and 3117.01 of Ohio Revised Code.
\textsuperscript{34} Title 25, Chapter 4, Section 25-4-17.2 of South Dakota Codified Laws.
\textsuperscript{35} Title 25, Chapter 24, Article 60, Section 25.24.060 of Alaska Statutes.
\textsuperscript{36} Chapter 42, Sections 360 and 808 of Revised Statutes of Nebraska.
sessions will be ordered. In Idaho there is a mandatory 20-day delay in the granting of all divorces, unless there is an agreement by the spouses. During this period, either spouse may request that there be a meeting held to determine if there is any practical chance for reconciliation. If there is determined to be a chance for reconciliation and there are minor children of the marriage, the court may delay the proceedings for up to 90 days for an attempt at reconciliation. In Kansas the mandatory delay used to be 60 days from the time the petition was filed until a final Decree of Divorce might be granted. In Utah there is a 90-day waiting period after filing for divorce before any hearing may be held. Upon the request of either or both of the spouses the court may refer both of the spouses to a domestic relations counselor. If child custody is involved, both parents must attend a course in the effects of divorce on children unless it is deemed to be unnecessary.

Maryland interestingly specifically declares that it is in the best interests of children that there will be mediated resolutions of parental disputes regarding custody. In cases where the custody of a child is in dispute, the court may order the parents to attempt to mediate that issue, unless there is a history of physical or sexual abuse of the child. One step further is mediation in Maine which is mandatory if one of the spouses denies that there are irreconcilable differences or it is a contested divorce and children are involved. In addition, at any time a court may order mediation. In Minnesota mediation may be ordered in cases in which the custody of children is contested, unless there is a history of spousal abuse or physical or sexual child abuse. The same rule applies for North Dakota. If child custody is a contested issue in North Carolina, the court may order the parents to submit to mandatory mediation of that issue. In Rhode Island in cases involving child custody or visitation, the court may direct the parents to participate in mediation in an effort to resolve any differences. There is an official Family Court counseling form which must be filed with the Complaint for Divorce.

Referring case to mediation due to its possible better outcome is further developed in South Carolina. The court may refer the spouses to a referee, who must make an honest effort to bring about reconciliation between the spouses. In such cases, no divorce may be granted unless certified by the judge or the referee

38 Title 46b, Chapter 53 and 53(a) of Connecticut General Statutes Annotated.
39 Title 32, Chapter 716 of Idaho Code.
40 Chapter 60, Article 16, Section 1608 repealed and transferred to Chapter 23, Article 3510 of Kansas Statutes Annotated.
41 Section 30-3-4, 30-3-16.2 and 30-3-18 of Utah Code Annotated.
42 Rule 9-205 of Maryland Rules.
43 Title 19-A, Sections 251 and 902 of Maine Revised Statutes Annotated.
44 Chapter 518, Section 518A.6 of Minnesota Statutes Annotated.
45 Volume 3A, Chapter 14-09.1-02 of North Dakota Century Code.
46 Chapter 50, Section 50-13.1 of General Statutes of North Carolina.
47 Title 15, Chapter 15-5-29 of General Laws of Rhode Island.
that the reconciliation efforts were unsuccessful. No final decree will be granted until 3 months after the initial filing of the complaint.48

It is the official policy of the state of Texas to promote amicable and non-judicial settlements of issues regarding children and families. Upon written agreement of the spouses or the court’s own decision, the court may refer the divorce proceeding to mediation. The mediated settlement of the case is binding if it is signed by the spouses, any attorneys of the spouses, and provides that the agreement is not subject to revocation. In addition, upon request, the court can order both spouses to consult a marriage counselor. If the counselor’s report indicates a reasonable expectation of reconciliation, the court can order further counseling for up to 60 additional days. If there has been a history of conflict and difficulties in resolving questions of access to any children, the court may order either parent to participate in counseling.49

The court in Wisconsin must inform the spouses of the availability of counseling services. Upon request or on the court’s own initiative, the court may order counseling and delay the divorce proceedings for up to 90 days. If custody of a child is a contested issue, mediation is required. If joint custody is requested, mediation may be required. In addition, the court may order parents in any child custody situation to attend an educational program on the effects of divorce on children.50

It is apparent that the family mediation is promoted across United States. Not only mediation is suggested, but also arbitration, conciliation and various forms of therapy. This speaks to general awareness and appreciation of alternative and amicable dispute resolution in family matters and to number of cases that will see the mediation. Domestic violence therefore might have a substantial role in resolving of them.

4 Domestic violence as an issue

Domestic violence is an issue old as the records of our history go. Often was the violence used as tool to keep discipline and show the power and superiority of men over the women.51 It was not until the latter half of the twentieth century that the society awakened to the problem of domestic violence and responded with protective law and programs.52 However the pervasiveness of this problem

48 Title 20, Chapter 3, Section 20-3-80, 20-3-90 and 20-7-850 of Code of Laws of South Carolina.
49 Chapter 5-102.0085, 5-153.010, 6.505 and 6.602 of Texas Codes Annotated, Family Code.
50 Section 767.081, 767.082, 767.083, 767.11 and 767.115 of Wisconsin Statutes Annotated.
is frighteningly well documented, with nearly one out of three women reporting physical or sexual abuse by a husband or boyfriend at some point in their lives.\textsuperscript{53} Actually, in the USA, a woman is beaten every 15 seconds.\textsuperscript{54} For mediation, a process that takes place after the dispute has occurred, valuable information is also the one about the violence increasing after the victim leaves the abuser.\textsuperscript{55} According to a study 50 to 80\% mandatory mediation cases involve domestic violence issue.\textsuperscript{56} This phenomenon is significant for regulating and approaching mandatory mediation.\textsuperscript{57}

All these numbers and facts have noteworthy impact on the psychological and psychic disposition of women escaping from battering relationship. These circumstances place them at disadvantage at the mediation bargaining table opening mandatory mediation in these cases to series of problems.

Effective mediation stands upon three pillars: the premise of voluntary participation, equal bargaining power and confidentiality.\textsuperscript{58} These pillars are however shaken in the context of mandatory mediation. Together with elements of self-determination and sense of empowering, for the parties of the mediation process, the mandatory mediation with domestic violence context does not need to be meeting the expectations.

The aspect of voluntariness is “at the heart of the mediation process,” because the parties, who reach their own solution, tend to be more satisfied and more likely to abide their agreement.\textsuperscript{59} Mandating the mediation by a court order takes the will and decision to mediate away from the parties. Thus the belief that


\textsuperscript{55} According to one study of domestic homicides, 75\% of the victims had ended or stated an intention to end the relationship at the time of their death. See MURPHY, Russell. People v. Cahill: domestic violence and the death penalty debate in New York [online]. thefreelibrary.com, 22\textsuperscript{nd} September 2005 [cit. 10\textsuperscript{th} December 2015]. Available on <http://www.thefreelibrary.com/People+v.+Cahill%3a+domestic+violence+and+the+death+penalty+debate+in...-a0135000781>.


\textsuperscript{57} Since the number of cases where the victim of domestic violence is a woman, I would be referring to women as the battered party throughout the article, because the objective of this article is not gender equality but equality of the parties in front of the mediator.


the parties are more emotionally vested in success of their personally formulated agreements cannot apply if the participation is not voluntary.\textsuperscript{60}

In cases of domestic violence, in process of mediation that should emphasize individual freedom and minimize state coercion, the state itself is putting the victim into position where lack of the power and lack of the control on the part of the victim is reinforced. The victim is counting on the state to support her in her position, empower her through the adversary judicial system, not to take away the last shreds of ground she stands on. Mediation decreases victim’s chances to be successful and, moreover, it promotes her abuser as unchallenged and all controlling patriarch.\textsuperscript{61}

Reaching mutual agreement, as the goal of the mediation, entails premise that the parties had equal bargaining power and were able to advocate their positions effectively with mediator serving as both neutral facilitator of communication between parties and “balancer” of power between them.\textsuperscript{62} This appears to be problematic when the parties have history of abuse among themselves. Here the informality of mediation fails the parties. Adversarial system benefits from precise checks and balances that mediation does not have. Therefore the mediation creates a constant risk of overreaching and dominance by the more knowledgeable, powerful or less emotional party.\textsuperscript{63}

Unbalance is especially presented in abusive relationship. The nature of abuse is characterized by the batterer’s total control and position of power used to dominate the victim.\textsuperscript{64} For example Californian family law code tries to recognize and ameliorate the problem of imbalance in art. 3162 by stating standards of mediation practice. The standards include conducting mediation in such manner as to equalize power relationship between the parties.\textsuperscript{65} Unfortunately there are no further guidelines how one can accomplish the equalization. Skilled mediator may succeed in balancing out the slight power balance between the parties. It is highly unlikely the mediator will be capable of undoing the lasting effects of fundamental power imbalance that exists in battered relationship.\textsuperscript{66}

\bibitem{65} California Family Code Section 3162 b) (3) states: The conducting of negotiations in such a way as to equalize power relationships between the parties.
\bibitem{66} DUNNINGAN, Alana. Restoring Power to the Powerless: The Need to Reform California’s
The parties need to have trust in the mediation as a process that is capable of keeping neutrality and confidentiality. Neutrality of mediator is severely disturbed in models of mediation that allows the mediator to form a recommendation for a judge, when mediation is not successfully over. In that case the parties do not need to concentrate on reaching decision during mediation session, they may influence mediator to favor them at court to, actually, get judgment that is enforceable without any issues.67 The key decision on neutrality of mediator in so called recommending mediation is case McLaughlin vs. Superior Court from 1983.68

In McLaughlin the petitioner challenged the respondent court’s mediation policy that allowed mediators to make a recommendation to a court but prohibited their cross-examination by parties. The court held in McLaughlin that the policy was unconstitutional as a violation of due process and directed that the respondent court only receive a recommendation from the mediator if the parties are guaranteed right to have the mediator testify and cross-examined him or her concerning the recommendation. Parties may however wave those rights. But when they do call the mediator to cross-examination, he may be required to testify to some information gained from the victim during a separate session. The victim can under the pressure of possible revelation of sensitive information agree to mediator’s recommendation or risk his testimony when calling him on the stand.

In cases of domestic violence the implications of McLaughlin case create a dilemma for battered women. It opens the legislation to dangerous precedent because, according to the statutes, mediation should be confidential.69 Under current situation the women, who would want to come forward about the abuse, need to think twice and consider possible discovery of implicating information about her abuser through the mediator.70

Another issue connected to the domestic violence in mediation cases is protection of the best interest of the children.71 Since the mandatory mediation is

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69 California Family Code Section 3177 states: Mediation proceedings pursuant to this chapter shall be held in private and shall be confidential. All communications, verbal or written, from the parties to the mediator made in the proceeding are official information within the meaning of Section 1040 of the Evidence Code.
71 Best interest of the child is a leading legal principle of family law. See art. 3 of the Convention on the Rights of the Child.
presented in cases involving care of children, it is not only presumed but regulated by the law that the mediation should be the optimal mean of achieving decision in their best interest.\footnote{California Family Code Section 3161 states: The purposes of a mediation proceeding are as follows: (a) To reduce acrimony that may exist between the parties. (b) To develop an agreement assuring the child close and continuing contact with both parents that is in the best interest of the child, consistent with Sections 3011 and 3020. (c) To effect a settlement of the issue of visitation rights of all parties that is in the best interest of the child.} 

However the situation may be complicated when the domestic abuse is involved. If the abuse is never addressed the abuser may sit at the mediation table and freely negotiate his custody and visitation rights to the children. Since mediation does not operate with standard checks and balances and with no guardian over rights of children, the mediation is fundamentally contradictory and detrimentally inconsistent with legislation aiming to protect the child.\footnote{DUNNINGAN, Alana. Restoring Power to the Powerless: The Need to Reform California’s Mandatory Mediation for Victims of Domestic Violence. University of San Francisco Law Review, 2003, Vol 37, p. 1050.} Also the psychological effect of being forced to be raised by an abusive parent has to be taken into the consideration. And it is not only about the possible psychical abuse, just by observing one parent being violent with other one has a life changing impact on a child.

5 California

California took the lead in American family law reform in 1981, by California Senate Bill 961, and mandated mediation of custody and visitation disputes. The main argument behind adoption of the law was that mediation was more efficient and cost-effective than litigation. Also the mediation was intended to reduce acrimony between parties and lead to an agreement that assures the children close and continuing contact with both parents.\footnote{See further analyzis of the California Senate bill available on <http://www.leginfo.ca.gov/pub/09-10/bill/sen/sb_0951-1000/sb_961_cfa_20100420_172538_sen_comm.html>.}

It seems that this jurisdiction is the most developed one in respect to mandatory mediation in family law matters. The opposite may be closer to the true. According to the Californian legal regulations the law will not exempt victims of domestic violence from requirement to mediate. Instead, California allows mediator to meet with the parties separately at the request of party alleging domestic violence.\footnote{California Family Code Section 3181 states:(a) In a proceeding in which mediation is required pursuant to this chapter, where there has been a history of domestic violence between the parties or where a protective order as defined in Section 6218 is in effect, at the request of the party alleging domestic violence in a written declaration under penalty of perjury or protected by the order, the mediator appointed pursuant to this chapter shall meet with the parties separately and at separate times. (b) Any intake form that an agency charged with providing family court services requires the parties to complete before the}
person or attorney during mediation, but the mediator has power to exclude them.\textsuperscript{76} The California Family Code, further “CFC”, regulates the mandatory mediation in art. 3161, while also outlines its purpose. That should be reaching the agreement that will be in the best interest of the children and that would alleviate conflict between the parties.\textsuperscript{77}

Contrary to the popular belief the victim’s fear and denial are not assuaged by the separate mediation meetings. These separate meetings need to protect the confidentiality of each party’s time of arrival, departure and meeting with Family Court Services.\textsuperscript{78} Separate meetings may provide for the battered woman’s immediate safety and offset some pressure and coercion she might feel in the direct presence of the batterer, but the victim’s fear of retaliation and kidnapping and her reluctance to assert her wishes cannot be expected to dissipate suddenly once she is out of the abuser’s presence. California is trying to argue that the separate meetings realistically alleviate all problems based on the premise like if the victim of domestic violence no longer fears her batterer when she leaves home.\textsuperscript{79}

In California when there is no mediation agreement, the judge will hear the case and decide the outcome. There are two different philosophies in respect of using mediation in court proceeding. The mediation can be “confidential” or “recommending/evaluate”.\textsuperscript{80} The confidential model prohibits the mediator to make any recommendations to the court as to the preferred outcome of any commencement of mediation shall state that, if a party alleging domestic violence in a written declaration under penalty of perjury or a party protected by a protective order so requests, the mediator will meet with the parties separately and at separate times.

\textsuperscript{76} California Family Code Section 3182 states: (a) The mediator has authority to exclude counsel from participation in the mediation proceedings pursuant to this chapter if, in the mediator’s discretion, exclusion of counsel is appropriate or necessary.(b) The mediator has authority to exclude a domestic violence support person from a mediation proceeding as provided in Section 6303.


\textsuperscript{78} California Family Code Section 3170 states: (a) If it appears on the face of a petition, application, or other pleading to obtain or modify a temporary or permanent custody or visitation order that custody, visitation, or both are contested, the court shall set the contested issues for mediation. (b) Domestic violence cases shall be handled by Family Court Services in accordance with a separate written protocol approved by the Judicial Council. The Judicial Council shall adopt guidelines for services, other than services provided under this chapter, that courts or counties may offer to parents who have been unable to resolve their disputes. These services may include, but are not limited to, parent education programs, booklets, video recordings, or referrals to additional community resources.


unresolved issue, mediator merely submits to the court the list of issues that need to be addressed. Under the recommending model the mediators may be asked to make recommendation to the court on the unresolved issue.\(^8\) In the later model, the mediator is obliged to inform parties that he may occupy the role of mediator and evaluator.\(^9\) Under the CFC the local courts have the discretion to use either of these models.\(^10\)

### 6 US experience

The choice presented in California today and in some other states is between an adversary process with totally powerful legal actors, in which clients never speak for themselves (and often do not know what is going on), and a mediation process in which they are entirely on their own and unprotected.\(^11\) In Colorado, where mediation is at court's discretion, the court cannot send parties to mediation when one of the parties claims to have been a victim of physical or psychological abuse. In 1996 Supreme Court of Colorado addressed the issue whether to create an exception to mandatory mediation where a history of domestic violence was alleged in Pearson vs District Court of Colorado.\(^12\) In Florida mandatory mediation is prohibited if the court finds out there has been a history of domestic violence that would compromise the mediation process.\(^13\)

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83 California Family Code Section 3183 (a) states: Except as provided in Section 3188, the mediator may, consistent with local court rules, submit a recommendation to the court as to the custody of or visitation with the child, if the mediator has first provided the parties and their attorneys, including counsel for any minor children, with the recommendations in writing in advance of the hearing. The court shall make an inquiry at the hearing as to whether the parties and their attorneys have received the recommendations in writing. If the mediator is authorized to submit a recommendation to the court pursuant to this subdivision, the mediation and recommendation process shall be referred to as "child custody recommending counseling" and the mediator shall be referred to as a "child custody recommending counselor." Mediators who make those recommendations are considered mediators for purposes of Chapter 11 (commencing with Section 3160), and shall be subject to all requirements for mediators for all purposes under this code and the California Rules of Court. On and after January 1, 2012, all court communications and information regarding the child custody recommending counseling process shall reflect the change in the name of the process and the name of the providers.
85 Colorado Supreme Court decision from September 23rd 1996, *Paerson vs. District Court*, 924 P 2d 512.
86 Chapter 44, Section 44.102 c) of Florida Statutes states: In circuits in which a family mediation program has been established and upon a court finding of a dispute, shall refer to mediation all or part of custody, visitation, or other parental responsibility issues as
Mediation mandatory on custody or visitation in North Carolina may be waived for good causes, which include allegation of abuse, neglect and substance abuse, allegations of abuse or neglect of minor child, allegations of severe psychological, psychiatric or emotional problems. 87 In providing for exemptions, it takes into account the frequent connection between domestic violence and a broad range of other behaviors. For example the women may avoid the mediation on mere allegation of alcoholism. This is important because of strong connection between alcohol abuse and spousal violence. 88 If battered women deny or minimize their abuse or are afraid to come forward with direct allegations, either to protect themselves or their children, they have the alternative to make true allegations of the drug or alcohol abuse under the North Carolina legislation resulting in avoidance of mediation. 89

As mentioned above Hawaii maintains a mandatory mediation policy but allows an exemption for spousal abuse. In case of domestic violence, the mediation shall not proceed unless “authorized by the victim of alleged family violence”. 90 This approach is however not ideal because all the decisive power is vested in a party that suffers from emotional distress and may have experienced threatening by the abuser. Possible solution is to include pretrial therapy session.

7 Screening for domestic violence

It is undisputed that domestic violence appears in family law mediation. In order to spot case involving abuser and battered party, California relies on intake forms that the parties are filling in before mediation. According to Californian law 91 it is not mandatory for the parties to fill in the forms or to be truthful in them, as well as there is no real obligation for court to review the intake form before start of mediation. The victims do not want to be labeled as victims and are potentially afraid of retaliation. There is high risk that the women will not allege domestic violence in intake form or in any other source of screening device or even if she does disclose the abuse, the court might not regard it. Screening for domestic violence presents one the basic mandatory mediation issues that severely lack legal regulation.

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87 Section 50-13.1 (c) of North Carolina General Statute.
88 One study found out that as many as 93% of men committing violence on their wives were alcoholics. See FLANZER, Jerry P. Alcohol abuse causes domestic violence. In ROLEFF, Tamara I (ed.). Domestic Violence: Opposing Viewpoints. San Diego: Greenhaven Press, 2000, p. 54–60. Same goes for drug abuse.
90 Title 31, Chapter 580, article 580-41.5 (a) – (b) (1) of Hawaii Revised Statutes.
91 Section 5215 (f) (2) (e) (3) of California Revised Statute.
Even when screening before mediation fails, there must be comprehensive measure in place to guarantee that the separate meetings will take place before mediation begins and will serve their purpose.\textsuperscript{92}

8 Solutions for mandatory mediation in family matters with domestic violence

The fundamental change that should be made especially in California, which is falling behind, but as a general rule for any jurisdiction regulating this issue is in reformulating its legislation to provide for optional exemptions to mandatory mediation, allowing victims to decide for themselves if they want to mediate or formally adjudicate.\textsuperscript{93} Giving back the battered women a possibility to make decision form themselves is empowering and reassuring of their rights and control over their destiny. There will still be possibility to mediate privately, if the parties choose to. Public adjudication has its importance in some cases where social awareness needs to be raised or where important legal question is to be discussed.

In California the mediator has unchallengeable authority to exclude counsel as well as domestic violence support person from a mediation proceeding. The counsel or the support person are both in place to stand up for the battered women since no one has done that for quite some time. Those who work with battered women have discovered that if the victim has someone with her for moral support during any proceedings, she gains courage to confront the situation as for what she wants. The presence of others may interfere somewhat with the process of mediation but without such assistance the resulting agreement may not reflect her concerns.\textsuperscript{94} The ideal model for presence of third person on side of the battered woman is contained in Hawaiian legislation, where the victim can bring a support person whose presence cannot be challenged.\textsuperscript{95}


\textsuperscript{95} Article 580-41.5, Battered spouses; exemption from mediation in divorce proceedings, of Hawaii Revised Statutes states: (a) In contested divorce proceedings where there are allegations of spousal abuse, the court shall not require a party alleging the spousal abuse to participate in any component of any mediation program against the wishes of that party. (b) A mediator who receives a referral or order from a court to conduct mediation shall screen for the occurrence of family violence between the parties. A mediator shall not engage in mediation when it appears to the mediator or when either party asserts that family violence has occurred unless: (1) Mediation is authorized by the victim of the alleged family violence; (2) Mediation is provided in a specialized manner that protects the safety of the
McLaughlin case opened a dangerous door in mediation with domestic violence issue. In such proceedings the abandonment of recommendation model is highly recommended. It will eliminate the issue of corruption of confidentiality and neutrality of mediation and would allow mediation to be what it was meant to be, an alternative, out of court solution.

The issue of domestic violence needs to be addressed before the start of the mediation by comprehensively identifying the victim of domestic abuse. The issue of proper screening is one that is most neglected in all US states. Not all states screen for domestic violence and among those that do screen, it is typically by written or oral questionnaire. The average number of questions referring to potential domestic abuse is 3 and a half.\textsuperscript{96}

Some examples of such questions may be: Do you have concerns about engaging in mediation as a way to resolve the legal and/or parenting disputes in your case? With possible answers no concerns or a Few concerns or many concerns with space provided for written comments. Other examples are: Has the other party ever acted in ways that frighten you? Are the two of you able to talk to each other without arguing? Are you able to speak your mind and express your point of view to the other party? When you speak your mind and express your point of view to the other party, does the other party become angry and threatening or intimidating? Has the other party ever threatened to hurt you or members of your family? Has the other party ever destroyed your property or that of your children intentionally? Does the other party swear or call you demeaning names during arguments? Has the other party ever threatened to take your children and stop you from seeing them? Has the other party ever threatened to hurt her/himself? Do you ever become afraid for yourself or others

based on the looks from or actions of the other party? Has the other party ever hit, shoved, or pushed you? If the other party has ever used physical force against you, have your children been present? Have you or anyone else ever called the police because of problems in your home? Have you or any family member ever sought medical treatment as a result of an injury caused by the other person? Have your children ever been taken into protective custody by the police, child protection services, or the court? Are you afraid that if you agree to mediation, the other person might retaliate or hurt your children because of what you say in mediation sessions? Have you or the other party ever sought a Protective Order that involved the other party at any time in any place?97

Once identified, the victims can be properly channeled to therapy, where they can safely consider whether mediation is in their best interest.98 Thus the screening procedure needs to be comprehensive, coherent and consistent. Mere questionnaire that could be disregarded cannot provide for thorough testing. More preferable would be in-person interviews that are also considered most effective.99 Methodical testing does not speak only to the therapeutic aspect of mediation, but to its essential component, adequate preparation for mediation as part of good faith mediation obligation explained above.

To improve on quality of screening extra training needs to be provided for person responsible to do the screening in respect to evaluation skills to recognize history of abuse in behavior of the parties. In order to have such effective session, confidentiality needs to be accounted for as well. The burden to recognize that a victim of domestic violence is party to the possible mediation proceedings should lie on the State rather than on the battered woman.100 After such screening the women could be divided into several categories: first category includes cases with no control or abuse indicators, where no or minimal emotional abused occurred such as name calling or put-downs unassociated with a pattern of control and cases with one or two isolated incidents of physical confrontation that do not create a controlling pattern. These cases are deemed to be likely to


99 In in-person interview one is more likely to overcome their hesitation to reveal the abuse. Also a lot of information can be told from the nonverbal cues. ZYLSTRA, Alexandria. Mediation and Domestic Violence: a Practical Screening Method for Mediators and Mediation Program Administrations. Journal of dispute resolution, 2001, Vol. 2001, Issue 2, p. 271.

benefit from mediation. The other category will be composed of cases that are recommended to be excluded from the mediation. These are the cases when one or both parties are unable to negotiate and there are indicators of potential serious harm to one of the parties, the abuser continues to have control over the other party, abuser accepts no responsibility for violence and the last cases are those of abuser convicted of violent crime, trying to obtain a weapon or with violent or suicidal fantasies. And of course there should be no mediation if the battered party does not wish batterer to know that she has disclosed information about the abuse.101

As already mentioned above in situations where former partners or spouses have to agree on legal questions concerning themselves and their children, even before any rule or statute can be applied, the emotions and psyche of the parties need to be addressed and accounted for. Only after that they might have chance to come up with a rational decision and agreement. This can prove difficult with parties with no history of abuse whatsoever, more so in complicated relationship of abuser and abused. Therapeutic intervention therefore should be in place not only for the battered party but for the batterer as well. In short-term the therapy will facilitate a more fair mediation process for the battered women and will help assure future wellbeing of the children. In the long – term will the intervention serve as socially responsible program that addresses the issues of domestic violence.102 The therapist will assess whether the mediation is in the best interest of the victim and will offer help to overcome all of the emotions. To reduce the cost of these sessions there is a possibility to combine the individual therapy with group sessions. The therapy for batterer should focus on ensuring safety of victim and children through the process of mediation. In the long-term the goal is to promote safety and best interest of the children, to change abuser’s behavior and to learn to negotiate and to compromise fairly. To ensure batterer’s presence at therapy sessions one can be inspired by legislature in Louisiana where if a parent has a history of family violence, supervised visitation is allowed only if the parent has participated in and completed a treatment program.103

9 Conclusion

Although mediation can be useful and empowering, it presents some serious procedural dangers that need to be addressed, rather than ignored. In mediation the emphasis in not on who is right and who is wrong.104 Mediation is more con-

103 Section 364 Annex 9 of Louisiana Revised Statutes.
104 FOLBERG, Jay. Divorce Mediation – A Workable Alternative. In DAVIDSON, Howard et
cerned with how the parties will resolve the conflict and create a plan than with their personal histories. Thus the mediation not only assures that the abuser’s actions will go unpunished and unaccounted for, it also perpetuates the privatization of a problem that has traditionally been kept out of the public consciousness.

Divorce mediation is defined as a “non-therapeutic process by which the parties together, with the assistance of a neutral resource person or persons, attempt to systematically isolate points of agreement and disagreement, explore alternatives and consider compromises for the purpose of reaching a consensual settlement of issues relating to their divorce or separation.” This definition comes across as idyllic. In family law mandatory mediation not much idyllic is.

Undoubtedly mandatory mediation offers new possibilities for conflict resolution that is in best interest of parties involved. But when some service is court mandated, court annexed and mandatory, the service needs to meet high standards of quality.

Everybody has right to fair trial. That the trial in front of the judge is indeed fair, just, foreseeable, equal and approachable is ensured by several guarantees, rights, checks and balances. In the moment when mediation is mandatory and the parties cannot access the justice in narrow sense, unless they undergo their duty to mediate, the mediation should make sense to the proceedings. Mediation that has sense, it the one, that is well regulated and prepared. The obligation to mediate in good faith is an obligation on the side of the parties of the dispute, however to see to it that it is in fact in their best interest is an obligation of the state. Mandatory mediation is a challenge and responsibility as well. It is an oxymoron without doubt, however not sheep in wolf’s clothing when the conditions and requirements are properly set. At the end of the day the common objective is to resolve a dispute in a way that the parties would recognize and obey. There are situations when mediation is the right choice for the parties and the dispute, in other cases adjudication prevails. Either way, the process has to work and for the cases with domestic violence issue, mediation does not need to be the right approach at all.
Islamic Banking: Regulatory Background from the Czech Perspective

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Summary: The term “Islamic banking” denotes the banking services in compliance with Islamic law and is nowadays a rapidly expanding, global industry based on a traditional fourteen centuries old legal system. The European market is witnessing growing Shari’a-compliant assets especially in the last few years and even non-Muslim countries have been trying to find legal solutions to accommodate Islamic financial institutions. This new academic and business field is raising important issues that merit discussion and this text serves as a contribution to the debate. In the paper I am trying to depict the key and distinguishing features of the Islamic banking model and reflect its law regulation from the point of view of the Czech legislation in the light of the continuing growth and expansion of Islamic banking and finance. The main objective of this article is to find out whether the legal framework of the Czech Republic covers the practice of Islamic finance and also to consider and identify potential legal obstacles.

Keywords: Islam; banks; Shari’a; Czech Republic; Murabaha; Mudaraba; deposits; Czech National Bank; deposit guarantee scheme.

1 An alternative to conventional banking?

In September 2010, the *International Monetary Fund* (IMF) released a study comparing the performance of Islamic banks and conventional banks during the recent financial crisis, and found that Islamic banks, on average, showed stronger resilience during the global financial crisis. Islamic finance is one of the fastest growing segments of the global financial industry. In some countries, it has become systematically important and, in many others, it is too big to be ignored.
Today, the largest Islamic banks are located in the countries of the Gulf Cooperation Council (Bahrain, Kuwait, Oman, Qatar, Saudi Arabia, and the United Arab Emirates). The recent recession that affected the world economy as a whole revived the discussion on whether there is a suitable and viable alternative to the current methods of providing financial services based on ethical principles in the financial sector and how to implement ethical values into the banking business. The reason why Islamic institutions escaped the crisis relatively unscathed according to the IMF study is quite simple. Because many of the conventional practices that caused the financial freeze could ever pass through an approval process of any Islamic bank’s Shari’a Supervisory Board. Indeed, neither the securitization of subprime loans (which is a sale of debt) nor credit default swaps (which are the sale of promises and are rife with gharar) are acceptable.

The global demand for Islamic products is difficult to quantify, but during the recently held 10th annual meeting of the World Islamic Economic Forum 2015 in Dubai it was predicted that the global Islamic economy will double to be worth $3.4 trillion in the next four years, and shown that the sukuk (Islamic bond) market is growing by more than 10 percent a year. Because of this emerging strength, the global Islamic finance industry has moved into the mainstream of global business that no world business hub can ignore. The wider acceptance of the benefits of Islamic finance can be illustrated by how several non-Muslim countries have raised finance by using sukuk. Singapore, Hong Kong and the UK have all successfully raised money by issuing sukuk.

This growing popularity is further supported by 57 Muslim countries in the world. Here it’s necessary to point out that 1/3 of all Muslims represent a minority population (although sometimes very numerous) in their country of residence. That is one and a half billion people, which means every fifth person on this planet. This data might reflect an interesting market potential for

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Islamic banks or other companies with a different scope of business seeking to halalize (to make halal) their products in order to gain new customers.\textsuperscript{10}

1.1 Basic features of Islamic banks

While Islamic banks play roles similar to conventional banks, fundamental differences exist between the two models. The main distinction between Islamic and conventional banks is that the former operate in accordance with the rules of Sharia, the legal code of Islam. The central concept in Islamic banking and finance is justice, which is achieved mainly through the sharing of risk (Shiraka). Stakeholders are supposed to share profits and losses, charging interest is prohibited.\textsuperscript{11}

Altogether, it is an entirely different banking system built on totally divergent philosophical postulates related to respecting the precepts of Islamic law. The moral imperatives consist namely in avoiding Haram (prohibited products and activities like alcohol, pork, porn etc.), Riba (interest or increase), excessive risk (Gharar), as well as ban on speculative transactions and gambling (Maysir). Islamic financial institutions embrace the principle of sharing profit and loss (Shiraka) and reject interest as a cost for accepting and lending money. Within these constraints services of Islamic commercial banking are offered relying on Sharia-compliant contracts approved by a specialized (Sharia) Supervisory Board entrusted with the duty of directing, reviewing and supervising the bank’s activities to ensure compliance with Islamic values and principles.\textsuperscript{12}

1.2 Islamic financing

All Islamic contracts applied in the banking field are built on the legal and economic postulates of Islam that include fairness, socio-economic justice, and the principle of „real-asset-based“ transactions and financial instruments.\textsuperscript{13} Unlike in the conventional system where the bank pays interest for the received funds that are just lent at a higher interest rate to someone else, the Islamic doctrine relies on the idea of „no risk, no gain“ implying that if someone wishes to multiply his assets (which is a virtuous act in Islam), then he must undertake adequate efforts and eventually take responsibility for the losses incurred. Hence, although the religion prohibits interest, trading is allowed (the prophet Moham-
mad was a merchant himself) and profit as a return from business activities is allowed.14

The preferred models of financing in Islam are „equity-based“ which include investment partnerships (Shiraka) in the form of Mudaraba or Musharaka. Additionally, the „debt-based“ model of financing called Murabaha („credit sale with markup“) and the leasing contract Ijara („lease-to-purchase“) are also widely used and accepted.

1.3 Examples of Islamic banking contracts

Murabaha (sale on credit for a term) is the most popular and most common form of financing under Shari’a. As a financing technique, it involves a request by the client to the bank to purchase a certain item for him. The bank does that for a definite profit over the cost which is settled in advance. In fact Murabaha consists of two sales contracts: the first one between the owner of goods and the bank, and the second between the bank and its client for the sale of goods at a price plus an agreed profit margin for the bank. So it involves the purchase of goods by the bank in the first step which then re-sells them to the client at an agreed mark-up. Repayment is usually in installments.15

From the economic point of view such a financing operation usually equals to (interest bearing) conventional loan. But considering the fact that we talk about a purchase agreement and that trading is supported in Islam, therefore from the legal perspective are met the requirements contained in the famous Qur’anic verse 275 of the Surat Al-Baqara: „…but Allah hath permitted trade and forbidden usury“16. Nevertheless, some scholars have raised questions concerning the lawfulness of Murabaha because it involves aspects that resemble interest since some Islamic banks are often benchmarking their profit margin to LIBOR.

As another example of Islamic financing could be mentioned the Mudaraba contract that is based on a partnership in which one partner is the financier (the investor, or silent partner) and the other partner (the fund manager, or working partner) manages the financier’s investment in an economic activity. The second partner (often an entrepreneur) has expertise in applying the venture capital into the economic activities. Both parties agree in advance to a profit – and loss-sharing (PLS) ratio, any loss affects only the investor. Mudaraba contracts can also serve as a source of funds for an Islamic bank. When customers deposit money

and expect a return, they’re the investors (exclusively bearing the loss if any) and the bank is the fund manager or working partner that invests the depositors’ money according to *Shari’a* guidelines.\(^{17}\) Any kind of previous guarantees concerning the expected future returns is strictly prohibited.

### 2 Legal groundwork for the practice of Islamic banking

The European market is witnessing growing *Shari’a*-compliant assets especially in the last few years and we can observe that many countries have been trying to find a solution to accommodate the Islamic financial institutions. The growing Muslim population in Europe might be one of the reasons, leading to significant opportunities for entrepreneurs and investments.\(^{18}\) On the following pages my main objective is to find out whether the legal framework of the Czech Republic covers the practice of Islamic finance, and to consider and identify potential legal obstacles in Czech legislation from the point of view of Islamic banking services.

#### 2.1 Islam and banking in the Czech Republic: current situation

Despite the fact that there are almost 50 entities operating as a bank in the Czech Republic\(^ {19}\) (most of them being banks from other EU-countries that are making use of the European single banking license valid throughout all 28 member states of the Union), none of them can be classified as an Islamic bank or an institution offering at least some of the Islamic banking services through the „Islamic window” model. However, some of these institutions do provide Islamic services to their clients elsewhere in the world (e.g. *Citibank*).

First of all, there cannot be perceived apparently any pressure of the Czech customers on the banking institutions present at this central European market to offer any religiously based services. The Muslim community in the Czech Republic is numerically negligible compared with that of France, Germany or the UK for example. According to the Interior Ministry 11,235 Muslims are living in the country and form about 0.1 percent of the population of 10.5 million people, compared with 7.5 percent in France. The survey has found that not only

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Here it is necessary to point out that based on some estimates the country has even one of the least religious populations in the world, being the country with the third most atheistic population by percentage, behind only China and Japan.\footnote{ROHE, Mathias. Das islamische Recht: Geschichte und Gegenwart. 2., durchgesehen Auflage, München: C. H. Beck, 2009, p. 374. ISBN 978-3-406-57955-4.} According to the 2010 census, the number of people who listed their religion as „Knights of the Jedi“ (warriors of the „Star Wars“ films) actually exceeds that of the Muslims living in the country.\footnote{Czech News Agency. Czech Muslims are numerically negligible [online]. Praguepost, c2015 [20.10.2015]. Accessible from WWW: <http://www.praguepost.com/czech-news/43767-czech-muslims-are-numerically-negligible>.


After mentioning some hard data above it may appear that this central European country is way too far from implementing Shari‘a banking standards in the short term. Nevertheless, entrance of an Islamic bank in the long term cannot be excluded especially taking into account the ongoing immigration crisis in the EU mostly from Muslim states. Very significant are also efforts of the Czech government made to create a highly open financial system in the past few years (especially by reforming the regulatory environment: Act No. 89/2012 Coll., New Civil Code; Act No. 90/2012 Coll., on Commercial Companies and Cooperatives; Act No. 240/2013 Coll., on Management Companies and Investment Funds etc.) following the example of the Netherlands and Ireland. Islamic banking might also help boost Czech exports into Muslim countries.\footnote{Czech News Agency. Czech Muslims are numerically negligible [online]. Praguepost, c2015 [20.10.2015]. Accessible from WWW: <http://www.praguepost.com/czech-news/43767-czech-muslims-are-numerically-negligible>.


voices in the Czech legal theory\textsuperscript{25} and text of section 87 (1) of Act No. 91/2012 Coll., on Private International Law\textsuperscript{26}, must be the term „applicable law“ contained in this provision interpreted as meaning „state law“. This implicates that it is not allowed to choose a non-state law which means that the institute of choice of law in the Islamic finance contracts has a limited impact.

Also the well-known UK precedent delivered in the case of \textit{Shamil Bank of Bahrain v. Beximco Pharmaceutical} in 2004, said that non-state law is not allowed in the contract. The dispute arose out of two financing agreements (styled as \textit{Shari'a}-compliant) between an Islamic bank and two of the defendants that defaulted on their obligations and sought to avoid their enforcement on the ground that the agreements were for interest-bearing loans. Therefore invalid under \textit{Shari'a}, which categorically prohibits the payment and collection of interest. This argument might have been successful had \textit{Shari'a} applied.\textsuperscript{27}

This means that from the contractual perspective any Islamic finance contract must rely on a detailed wording. That’s not factually posing any significant inconvenience because even the Czech conventional banks are offering their clients standard form contracts with reference to extremely detailed Terms and Conditions that usually differ from the non-compulsory provisions of the Czech law.

\textbf{2.2.2 Business model of Islamic banks}

Second, under the current legal circumstances it’s also highly questionable if any Islamic bank could even be licensed by the Czech National Bank (CNB). Although the applicable Czech legislation has no ambition to impose some specific business model on the commercial banks, however, their business plan must be approved by the central bank as one of the conditions of issuance of the license as is specified by section 4 (5) (g) of Act No. 21/1992 Coll., on Banks\textsuperscript{28}, according to which for the licence to be granted „the bank must have a programme of operations proceeding from its proposed strategy of activities and based on realistic economic calculations“ and the provision 25c (3) (i) states that the CNB exercises review and evaluation focusing on „the business model of the bank“.


\textsuperscript{26} An unofficial translation into English is to be found at the following link: <http://www.czechlegislation.com/en/91-2012-sb>.


\textsuperscript{28} An unofficial translation into English is to be found at the following link: <http://www.cnb.cz/en/legislation acts/download/act_on_banks.pdf>.
The practice of Islamic finance is proving its profitability in other countries, so just a mere difference in functioning of Islamic banks compared to the conventional industry should not pose per se any reasonable limits which was confirmed by number of experts at the conference held in 2012 at the headquarters of the CNB in Prague. Unfortunately, the central bank’s officials refused to share their view on the Islamic banking model itself.\(^{29}\)

2.2.3 Two obligatory fields of banking business

Third, the banking license authorizes under the Czech law any bank (joint-stock company having its registered office established in the Czech Republic or a foreign bank having a branch in the country) which has been granted a banking licence to “accept deposits from the public” and to “provide loans”\(^{30}\). Here we encounter a problem resulting from the legal definitions of a deposit in this Act that shall mean “any funds entrusted to the bank that constitute an obligation of the bank to the depositor to repayment thereof” and of a loan meaning “funds in any form provided temporarily”. You can say anything about functioning of an Islamic bank but one thing is sure – its services are not based on depositing or temporal provision of funds. An Islamic bank actually does offer temporary interest-free loans (qard hasan) out of charitable reasons but that is not representative at all for its business model. The bank rather acts as a businessman and is trading with goods (not money) that is sold or leased and from which the bank generates profit (in the form of a “provision”, “fee”, or “rent”) or in the position of a business partner participates on real investments sharing gains (or possible losses) of such transactions.

However, the valid and effective legislation is prescribing to the banks to carry on obligatorily these two main banking activities (accepting deposits from the public and providing loans) referred to in paragraphs a) and b). Based on section 34 (2) (a) of Act No. 21/1992 Coll., on Banks, to the bank concerned might be its license withdrawn if it does not accept deposits from the public or provide loans for a period of 6 months.

2.2.4 Tax implications

From a tax perspective on the Islamic banking contract of Murabaha, which basically consists of two consecutive sales contracts, the trouble lies in the time gap between these two transactions during which the bank owns the object of purchase for a legal microsecond. If real property will be subject to such a way of financing, basically an obligation arises to pay twice the real estate transfer tax pursuant to the Statutory Measure of the Senate No. 340/2013 Coll., on Tax on Acquisition of Immovable Property.


1 (2) (a), (b) of Law No. 21/1992 Coll., on Banks.
It is possible to predict other complicated situations involving increased costs for Islamic banks that could become quite atypically value added tax payers\textsuperscript{31}. Also, in the case of a Murabaha contract including sale of consumer goods this time, the bank gets into the position of a businessman and its client acts as a consumer to whom the goods are sold. As a consequence, this contract would be covered by strict liability for any defects in terms of the provision 2940 of Act No. 89/2012 Coll., New Civil Code, which implements the European directive on consumer protection in the case of defective products\textsuperscript{32} and the bank (supplier) would have to provide compensation for damages.

2.2.5 Guaranteed returns and insurance of deposit claims

Finally, within the meaning of the Czech banking regulation, accepting deposits from the public is an expression of the banking monopoly on this activity and an essential feature distinguishing the banks from other businesses. However, in the system of Islamic finance (\textit{Shiraka} models of financing) are not allowed any guaranteed returns. On the contrary, the bank and its clients are sharing expected profit or possible loss according to a predetermined ratio, and the result of a co-financed investment can never be determined in advance. This raises questions related on the one hand to fulfillment of the rule contained in 1 (2) (a) of Law No. 21/1992 Coll., on Banks, stating that deposit „\textit{constitutes an obligation of the bank to the depositor to repayment}“ and, more importantly, on the other hand to \textit{Sharia}-compliance of the deposit insurance schemes.

The deposit insurance is a measure implemented in many countries to protect bank depositors even outside Europe (North America, many Asian countries etc.). This mechanism serves as an instrument of a financial system safety net that promotes financial stability and was introduced to the EU law by the directive on deposit guarantee schemes\textsuperscript{33} in 1994. Nowadays the new directive from 2014\textsuperscript{34} requires all 28 member states to have a deposit guarantee scheme for 100% of the deposited amount, up to 100,000 Euro per person (article 6 of the directive), and the same coverage level should apply to all depositors regardless of whether a member state’s currency is the Euro (article 20 of the preamble of the directive).

The EU legislation is encoded in section 41a and the following provisions of Law No. 21/1992 Coll., on Banks, stating that „\textit{insured shall be all claims arising from deposits, including interest accrued, held in the Czech currency or in a foreign currency, registered as credit balances on accounts or deposit books or evidenced by}"

\textsuperscript{31} Act No. 235/2004 Coll., on Value Added Tax.
a certificate of deposit". This act also provides the legal basis for the establishment of the Deposit Insurance Fund into which banks shall contribute (its sources consist mainly from contributions from the banks, that is 0.04 percent of the average volume of insured deposit claims for the relevant calendar quarter according to 41c (6)). In accordance with provision 41d (1) compensation for an insured deposit claim shall be paid from the Fund to an eligible person after the Fund receives notification in writing from the CNB that the bank is unable to meet its commitments to eligible persons under the legal and contractual conditions.

But again, such a deposit guarantee scheme is not a Sharia-compliant system. Participation in the deposit-claims insurance scheme according to the EU principles of deposit guarantee cannot be considered by any means to conform with Sharia that prohibits any kind of returns to be previously guaranteed based on the principle „no risk, no gain“. Islamic bank as the fund manager that invests the depositors’ money has no legal obligation (in the sense of Islamic law) to return the full value to its depositors. This is also factually impossible, because one cannot predict with absolute certainty the success of any risky investment that may result in loss or profit. The primary raison d’être of the Islamic banking principles is that the depositors, banks and financed clients should share their profits and potential losses in the typically preferred (and more risky) Shiraka models.

Unfortunately the EU member states shall ensure that the deposits are protected and make it binding for all banks on their territories. As a consequence, the Act No. 21/1992 Coll., on Banks, is penalizing non-participation in the deposit insurance system as an administrative offence based on 36e (5) (f), that means if a bank fails to participate in the deposit-claims insurance scheme or to contribute to the Deposit Insurance Fund to the extent laid down in the Act.

The situation described above was resolved in the UK when licensing the oldest Islamic bank in the EU, the Islamic Bank of Britain (today Masraf Al Rayan). Actually, the British Financial Services Authority did not accept a Sharia-compliant concept for a deposit, and in the course of its licensing procedure, the Islamic Bank of Britain fully agreed to the concept of a deposit entitling the depositor to a full refund of the deposit and is complying with the obligations under the EU directive to take part in the deposit guarantee scheme into which it also makes contributions. The Islamic Bank of Britain’s deposit contracts comprise a section stating that if the pool of funds returns a loss, the bank will, in line with the UK banking regulations and policy, offer to make good the depositor’s loss and the depositor will be entitled to the deposited resources to their full


36 The FSA was later on abolished with effect from 1 April 2013 due to its failures during the financial crisis and its responsibilities were then split between two new agencies: the Financial Conduct Authority and the Prudential Regulation Authority of the Bank of England according to the Financial Services Act 2012.
extent. Nevertheless, the depositor is entitled to refuse this offer, and the Shari'a Supervisory Board also advises that a depositor who accepts the offer by the Islamic bank to redress any shortfall is not acting in a Shari'a-compliant way.\footnote{KOVE, Anu. Current and Savings Deposits in Conventional and Islamic Retail Banking in the EU [online]. juridicainternational.eu, c2011 [24.10.2015]. Accessible from WWW: <http://www.juridicainternational.eu/index.php?id=14831>.


In this way, the Islamic banks operating in Britain are regulated „under the general powers“ based on the principle of „no obstacles, but no special favours“\footnote{KOVE, Anu. Current and Savings Deposits in Conventional and Islamic Retail Banking in the EU [online]. juridicainternational.eu, c2011 [24.10.2015]. Accessible from WWW: <http://www.juridicainternational.eu/index.php?id=14831>.

38 NETHERCOTT, Craig R; EISENBERG David M. Islamic finance: law and practice. Oxford: Oxford University Press, 2012, p. 56. ISBN 978-0-19-956694-5.}. Entitlement to the deposited resources to their full extent is an individual right and constitutes no obligation. In addition, the funds accumulated in the British Financial Services Compensation Scheme are created mostly by conventional banks so that clients of Islamic banks should not even voluntarily ask for them. Nevertheless, this changes nothing on the fact that Islamic banks operating in the UK have no regulatory exception. In order to offer their services on the British market they had to adapt to the EU regulatory regime and realize some doctrinal concessions such as participating in the deposit guarantee scheme that is inconsistent with the precepts of Islamic law.

2.3 Czech Republic on the way to halalization of its banking industry?

Examples from other European countries with developed financial systems like the UK, Luxemburg or most recently Germany are showing an increasing demand for Islamic financial services across Europe. And we also know that in the past few years legislation in the concerned states went through some regulatory changes (particularly in tax matters) with the arrival of this segment of financial services. The first Islamic bank to enter Germany’s banking sector was Kuveyt Türk Bank at the beginning of 2015\footnote{Erste islamische Bank erhält Lizenz in Deutschland [online]. welt.de, c2015 [24.10.2015]. Accessible from WWW: <http://www.welt.de/wirtschaft/article138673632/Erste-islamische-Bank-erhaelt-Lizenz-in-Deutschland.html>.} but already at the 2009 conference had expressed the then executive of Federal Financial Supervisory Authority (BaFin, the financial regulatory authority in Germany) his opinion on the overall conformity and readiness of the German regulatory environment to accommodate providers of the Islamic financial services.\footnote{KASEBERCK, Patrick. Islamic Banking. Kritische Evaluierung zur Einschätzung der Tauglichkeit für den deutschen Markt [online]. grin.com, c2013 [24.10.2015]. Accessible from WWW: <http://www.grin.com/de/e-book/214062/islamic-banking-kritische-evaluierung-zur-einschaetzung-der-tauglichkeit>.

Though the Czech Republic is characterized by a similar legal system like Germany, following the example of its bigger neighbour and welcoming an Islamic bank in the short term in Prague would not be smooth and easy under the current legislation out of the reasons explained above. Moreover, I have seri-
ous doubts about the meaningfulness of preparing the Czech legal order for the Islamic finance practice even in the future, especially given the absence of a thorough evaluation of the market potential of Islamic banks in the Czech Republic. Another aspects might be the relatively aloof attitude of the Czech citizens towards Islam and Muslims in general, as well as growing popularity of political movements such as „We Don’t Want Islam in the Czech Republic“ of which supporters are actually at least five times higher than the estimated number of all Muslims living in the Czech Republic. Thus, it seems that in the near future no *halalization* of the Czech banking industry is on the agenda.

3 Conclusion

Effort has been made to provide an overview of the current global status of the Islamic finance industry that is no longer confined to the Arab Gulf countries because it proves to be successful even in Europe. Subsequently, I tried to offer an explanation of the basic special requirements (*Halal*, *Riba*, *Gharar*, *Maysir*, *Shiraka*, *Shari’aa Supervisory Board*) for Islamic banks both in terms of defining and describing these principles as well as giving examples of various types of Islamic banking products focusing on *Murabaha* and *Mudaraba* that were examined from the Czech legal point of view on the previous pages.

In the light of the Islamic banking principles the Czech legal structure appears to be quite inflexible making it difficult or even impossible to fully implement the Islamic banking doctrine. As discussed above, these problems are related first of all to the fundamental feature of Islamic law as a non-state legal system, then particularly to the legal definition of deposits and loans in the Law No. 21/1992 Coll., on Banks, and thus presumably the non-fulfillment of the two main banking activities under the Czech banking license. Other issues are concerning some aspects of the consumer or tax law as well as *Shari’aa*-compliance of the deposit insurance schemes.

Yet the question remains whether it makes sense to adapt the regulatory environment for Islamic banking institutions following the example of some other European countries, especially when considering the absence of any prior thorough evaluation of the market potential of Islamic banks in the Czech Republic, as well as a relatively reserved attitude of the Czech citizens towards anything that has to do with Islam. Out of these reasons it rather appears that in the near future no *halalization* of the Czech banking industry will be on the agenda.

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Criminal Liability of Legal Persons in Case of Computer Crime: A European Union Response

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Summary: The contribution deals with the criminal liability of legal persons in case of computer crime. It is divided into three sections. The first section briefly introduces computer crime and relevant legislation of the European Union in the area of criminal law, which is the basis of that liability. While the second section is focused on provisions of criminal liability of legal persons, the third section is focused on sanctions for legal persons.

Keywords: criminal liability, legal persons, computer crime, Framework Decision 2001/413/JHA on combating fraud and counterfeiting of non-cash means of payment, Directive 2013/40/EU on attacks against information systems

1 Introduction

It is trite, but nonetheless true, to say that we live in a digital age. The proliferation of digital technology, and the convergence of computing and communication devices, has transformed the way in which we socialise and do business. While overwhelmingly positive, there has also been a dark side to these developments. Proving the maxim that crime follows opportunity, virtually every advance has been accompanied by a corresponding niche to be exploited for criminal purposes.  

The European Union has set itself the objective of maintaining and developing an Area of Freedom, Security and Justice. That concept has appeared as the

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1 The contribution was elaborated as a part of the research project VEGA ‘Súčasnosť a budúcnosť boja proti počítačovej kriminalite: kriminologické a trestnoprávne aspekty’ [transl.: Present and Future of Cyber-crime: Criminological and Criminal Aspects] No. 1/0231/15.
2 Dr. et JUDr. Libor Klimek, PhD. graduated from the Faculty of Law, Pan-European University, Bratislava, Slovak Republic. Since 2013 he has been a research worker at the Criminology Research Centre at the Faculty of Law, Pan-European University in Bratislava, Slovak Republic; email: libor.klimek@paneurouni.com / libor.klimek@yahoo.com
The general policy objective of the European Union is to ensure a high level of security through measures to prevent and combat crime. A crucial aspect of that field is criminal liability of legal persons.

The contribution deals with the criminal liability of legal persons in case of computer crime. It is divided into three sections. The first section briefly introduces computer crime and relevant legislation of the European Union in the area of criminal law, which is the basis of that liability. While the second section is focused on provisions of criminal liability of legal persons, the third section is focused on sanctions for legal persons.

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2 Computer Crime: A Brief Overview

Worldwide, the total cost of computer crime (also known as ‘cyber crime’\(^8\), ‘cybercrime’\(^9\), ‘cyber-crime’\(^10\), ‘high-tech crime’\(^11\), ‘virtual crime’\(^12\), or even ‘e-crime’\(^13\)) to society is significant. A recent report suggests that victims lose around 388 billion $ each year worldwide as a result of computer crime, making it more profitable than the global trade in marijuana, cocaine and heroin combined.\(^14\) The three-stage classification of computer-related has been known: crimes in which the computer or computer network is the target of the criminal activity – for example, hacking or malware; offences where the computer is a tool used to commit the crime – for example, child pornography or criminal copyright infringement; and crimes in which the use of the computer is an incidental aspect of the commission of the crime, however, the computer is not significantly implicated in the commission of the offence – for example, addresses found in the computer of a murder suspect, or phone records of conversations between offender and victim before a homicide.\(^15\)

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Nowadays, as argues the European Commission, no crime is as borderless as computer crime, requiring law enforcement authorities to adopt a co-ordinated and collaborative approach across national borders, together with public and private stakeholders alike. The Treaty on the Functioning of the European Union lists computer crime as one of the areas of particularly serious crime with a cross-border dimension.

Specific offences – including computer crime – are recognised as offences which are within the legislative competence of the European Union. The European Parliament and the Council of the European Union may, by means of directives (in the recent past framework decisions), establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis. Two legislative measures have been introduced in the European Union in order to combat and prevent computer crime, namely the Framework Decision 2001/413/JHA on combating fraud and counterfeiting of non-cash means of payment and the Directive 2013/40/EU on attacks against information systems.

First, the Framework Decision 2001/413/JHA on combating fraud and counterfeiting of non-cash means of payment introduced three types of offences, namely the offences related to payment instruments, the offences related to computers and the offences related to specifically adapted devices. Moreover, it establishes common rules on sanctions.

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17 Under Article 83(1) of the Treaty on the Functioning of the European Union as amended by the Treaty of Lisbon the areas of particularly serious crime with a cross-border dimension are ‘terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime’ (emphasis added).

18 Article 83(1) of the Treaty on the Functioning of the European Union as amended by the Treaty of Lisbon.


Second, the Directive 2013/40/EU on attacks against information systems establishes minimum rules concerning the definition of criminal offences and sanctions in the area of attacks against information systems. It also aims to facilitate the prevention of such offences and to improve co-operation between judicial and other competent authorities. The Directive introduced common definitions of the offences involved in attacks against information systems at the level of the EU, namely illegal access to information systems, illegal system interference, illegal data interference and illegal interception.

Besides harmonisation of elements of crimes and sanctions for naturals, the Framework Decision 2001/413/JHA on combating fraud and counterfeiting of non-cash means of payment and the Directive 2013/40/EU on attacks against information systems confirmed the liability of legal persons and sanctions for legal persons.

3 Criminal Liability of Legal Persons

Liability of legal persons for offences is an issue which has been coming and going on political agenda of the European Union.\textsuperscript{22} For example, as far as money laundering is concerned, the financial institutions through which money is laundered are frequently corporations or some other form of legal person. If money is laundered through such an organisation, it is often very difficult to identify an individual who is subjectively aware of what is going on and who can be held criminally responsible.\textsuperscript{23} A question which begs consideration is whether liability of legal persons should be governed by civil or criminal controls.\textsuperscript{24} As seen, besides harmonisation of elements of crimes and sanctions for naturals, European Union law has confirmed the liability of legal persons, in particular in case of European crimes – including computer crime.

The definitions of European offences, i.e. the description of conduct considered to be criminal, almost always cover the conduct of the main perpetrator, but also in most cases ancillary conduct such as instigating, aiding and abetting. Moreover, in some cases the attempt to commit the offence is also covered. Almost all European Union criminal law instruments include in the definition intentional conduct, but in some cases also seriously negligent conduct. Some instruments further define what should be considered as aggravating circumstances or mitigating circumstances for the determination of the sanction in a particular case.

Generally, European Union law covers offences committed by natural persons as well as by legal persons such as companies or associations. However, in existing legislation, the Member States of the European Union have always been left with the choice concerning the type of liability of legal persons for the commission of criminal offences, as the concept of criminal liability of legal persons does not exist in all national legal orders.

Under the Framework Decision 2001/413/JHA on combating fraud and counterfeiting of non-cash means of payment and the Directive 2013/40/EU on attacks against information systems measures should be taken to ensure that legal persons can be held liable for computer crime. Each Member State of the European Union shall take the necessary measures to ensure that legal persons can be held liable for offences committed for their benefit by any person, acting either individually or as a member of an organ of the legal person in question, who has a leading position within the legal person, based on one of the following: a power of representation of the legal person, an authority to take decisions on behalf of the legal person, or an authority to exercise control within the legal person.

In addition, in case of the Directive 2013/40/EU on attacks against information systems each Member State of the European Union shall take the necessary measures to ensure that legal persons can be held liable where the lack of supervision or control by a person has made possible the commission of the offence(s) for the benefit of that legal person by a person under its authority.

On the other hand, the criminal liability of legal persons shall not exclude criminal proceedings against natural persons who are perpetrators, instigators or accessories. Indeed, the relevant legislation is based on the criminal liability of natural persons as well as legal persons.

4 Sanctions for Legal Persons

As far as sanctions for legal persons are concerned, under the Framework Decision 2001/413/JHA on combating fraud and counterfeiting of non-cash means of payment and the Directive 2013/40/EU on attacks against information systems the Member States of the European Union shall take the necessary measures...
ures to ensure that a legal person held liable is punishable by 'effective, proportionate and dissuasive sanctions', which shall include criminal or non-criminal fines and may include other sanctions, such as, for example:

- exclusion from entitlement to tax relief or other benefits or public aid,
- temporary or permanent disqualification from the pursuit of commercial activities,
- placing under judicial supervision,
- a judicial winding-up order,
- temporary or permanent closure of establishments used for committing the offence.

As seen, European Union law requires the Member States of the European Union to take ‘effective, proportionate and dissuasive sanctions’ for a specific conduct. Effectiveness requires that the sanction is suitable to achieve the desired goal, i.e. observance of the rules; proportionality requires that the sanction must be commensurate with the gravity of the conduct and its effects and must not exceed what is necessary to achieve the aim; and dissuasiveness requires that the sanctions constitute an adequate deterrent for potential future perpetrators.

In should be noted that sometimes European Union law determines more specifically, which types and/or levels of sanctions are to be made applicable. Provisions concerning confiscation can also be included. It is not the primary goal of approximation to increase the respective sanction levels applicable in the Member States of the European Union, but rather to reduce the degree of variation between the national systems and to ensure that the requirements of ‘effective, proportionate and dissuasive sanctions’ sanctions are indeed met in all Member States.

5 Conclusion

No crime is as borderless as computer crime. The Treaty on the Functioning of the European Union lists computer crime as one of the areas of particularly serious crime with a cross-border dimension.

Specific offences – including computer crime – are recognised as offences which are within the legislative competence of the European Union. Two legislative measures have been introduced in the European Union in order to combat and prevent computer crime, namely the Framework Decision 2001/413/JHA


on combating fraud and counterfeiting of non-cash means of payment and the Directive 2013/40/EU on attacks against information systems.

Besides harmonisation of elements of crimes and sanctions for naturals, the Framework Decision 2001/413/JHA on combating fraud and counterfeiting of non-cash means of payment and the Directive 2013/40/EU on attacks against information systems confirmed the liability of legal persons and sanctions for legal persons. Measures should be taken in the Member States of the European Union to ensure that legal persons can be held liable for computer crime. In addition, they shall take the necessary measures to ensure that a legal person held liable is punishable by ‘effective, proportionate and dissuasive sanctions’, which shall include criminal or non-criminal fines and may include other sanctions.

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PREVIOUS WITNESS TESTIMONY AS IMMEDIATE OR URGENT ACTION AND ITS ADMISSIBILITY IN COURT

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Introduction

According to current Czech legislation, if there is a presumption (because of the lack of facts identified by the police authority) that a crime was committed and that it was committed by a suspect, are bodies of the criminal proceedings obliged to prosecute it under § 160 par. 1 Criminal Procedure Code. However there may be situations where, for some reasons, a person suspected of committing a crime cannot be served with the indictment and therefore prosecuted, but it is still necessary to carry out some of the evidence, because they could be destroyed or lost, and therefore they would not be presented before the court, or because this evidence couldn’t be repeated at hearing. These urgent or unrepeatable acts are dealt with in this paper.

Summary: The paper deals with the admissibility of witness testimony in the preliminary proceeding which could be read in court without right of the defence to hear or examine such a witness. This question is particularly interesting with regard to preserving the adversarial principle which is important for an objective assessment of the facts. The focus will be to answer the question of whether so obtained and executed evidence may stand as the main evidence of guilt especially with regard to Article 6,par. 1 and 3 (d) ECHR (right to obtain attendance and examination of witnesses). The arguments in this paper will be submitted supported by the case law of the Constitutional Court of the Czech Republic and the ECtHR. Contribution will also deal with British law and the applicability of the so-called Hearsay rule and the exceptions to this rule which can be applied in criminal proceedings.

Keywords: Adversarial principle; contradictory; fair trial; testimony; witness; urgent or unrepeatable act; admissibility of evidence; read testimony; absent witness; Hearsay rule.
able acts and in particular the applicability of the protocol of their implementation are set forth in § 160 par. 4 of the Criminal Procedure Code.\(^3\)

If the proof was obtained in a lawful manner, there will be a protocol of such a pursuance and this can be read in a court.\(^4\) But just reading the protocol on the implementation of an urgent or unrepeatable act may make a defendant feel as an interference with his protected rights or interests, because it may seem that such a process interferes with his right to a fair trial, with his rights to defined oneself, and that such a procedure leads to restriction of the adversarial principle and principle of direct proceeding, as one of the fundamental principles of criminal procedure and, by extension, the attributes of a democratic rule of law.\(^5\)

Some of the urgent or unrepeatable acts are directly enumerated by the Criminal Procedure Code in the ninth head the second par. (Procedure prior to the commencement of prosecution). Out of those that are expressly provided by the Criminal Procedure Code, the following text will address the examination of a witness by §158a of the Criminal Procedure Code, regulation of its course, the applicability of the Protocol on such questioning, and especially constitutional conformity of such evidence as main evidence, incriminating and convicting.

2 The Czech legislation

2.1 Examination of witnesses as urgent or unrepeatable act

According to § 158a of the Criminal Procedure Code, it is necessary for the identification of the offender to carry out urgent or unrepeatable act consisting e.g. questioning of a witness, if within the verification of certain facts suggest that a crime was committed. Such a questioning must be conducted solely on Order of the public prosecutor and in front of a judge. The presence of a prosecutor, who ordered the urgent or unrepeatable measure, however, is not required by law.\(^6\)

As also in the past the Constitutional Court on several occasions stated, the body that performs urgent or unrepeatable measure is obliged to thoroughly examine the conditions and facts, upon which is the act constituted as urgent or unrepeatable and explain its conclusion.\(^7\) Otherwise, if it would not be if substantiated in reviewable way, why the performance of an act (examination of

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4 § 211, par. 2, point b) of the Criminal Procedure Code.
6 But he usually participates in such acts.
witnesses) could not have been postponed to a later stage of the criminal proceedings, such a procedure would be found unconstitutional.\footnote{cf. finding of the Constitutional Court from the date 25. 8. 2008, sp. zn. IV. US 1780/07, published in the Collection of Judgments and Decisions N 147/50 Sb.}

This action takes place in the pre-prosecution stage of criminal proceedings when even accused cannot be on his own (or through his attorney) present at such an act, or to ask a witness further questions\footnote{ŠÁMAL, Pavel a kol. Trestní řád. Komentář. 7, vydání. Praha: C. H. Beck, 2013, p. 1224.}, therefore, to exercise their right to defence, arising from Art. 38 par. 2 of the Charter of Fundamental Rights and Freedoms (CRF) and Art. 6, par. 3, point. d) of the European Convention on Human Rights (ECHR). To guarantee the legality of this phase, the law requires that such action must be conducted in the presence of judge, only then could be the report on the interrogation of a witness later used as evidence in court. It could be noted that the Criminal Procedure Code does not require that the judge who present at the questioning of a witness in accordance with § 160 par 4 of the Criminal Procedure, to be, excluded from further stages of the case, respectively from performing acts of criminal proceedings. In my opinion, the presence of the judge at the questioning of a witness in pre-trial process as urgent or unrepeatable act is comparable to his procedural status as an authority that ordered the searched of house in pre-trial process, decided on detention or handed out an arrest warrant.

These above enumerated facts constitute a prerequisite for exclusion of the judge from further proceedings ex lege.\footnote{§ 30 par. 2, 3 of the Criminal Procedure Code.} However, if the purpose of the exclusion of the judges from other acts carried out in criminal proceedings should be securing the confidence of the parties and the public in the impartiality of the process of bodies involved in criminal proceedings, all the more should the list include the exclusion of the judge in the case of their pre-trial participation in the questioning of a witness\footnote{or recognition in § 30 par. 1 of the Criminal Procedure Code} conducted as urgent or unrepeatable act in accordance with § 158a of the Criminal Procedure Code. Current legislation does allow that the judge could be disqualified from deciding the case, if there are doubts about his partiality toward the merits of the present case, toward the parties involved in the case (directly affected)\footnote{Compare with PR 8/1997, p. 436.}, however, the subjective feeling of the judges about the condition for his or her exclusion is not in accordance with the case law decisive whether assessing the question of ability to carry out acts of criminal proceedings impartially.\footnote{Incorporating the fact that the judge took part in the interrogation of a witness or recognition under § 158a of the Criminal Procedure Code to the grounds for exclusion in § 30 par. 2 and 3 of the Criminal Code, should, in my opinion, prevent speculation and consideration of possible influence of judges by the result of such pre-trial actions and would.
facilitate the process of exclusion of the judge judges from further stages of the criminal proceedings.

Unrepeatable act will mostly be the interrogation of the underage witness – a person under fifteen years of age, person who has been injured on his health by the crime, who lost his or her property or that, at whose expense the offender has unjustly enriched, if it is a person who’s life is in danger, either because of very old age, or health condition, a person who is going abroad for a long period of time or a person who is a foreign national (or person without Czech citizenship and permanent residence permits in the Czech Republic). The order is issued by the prosecutor supervising the lawfulness of pre-trial proceedings in a particular case to the judge hearing the applications in area in which the state prosecutor, who issued the order, conducts his activities.\textsuperscript{14} The Criminal Procedure Code does not require certain form for a proposal so it can be inferred that such a proposal may be submitted not only in writing but also verbally, by phone or fax. In the latter cases it is necessary to make a note of this informal proposal in the report on the implementation of such an urgent or unrepeatable act. Judge hearing the application is also not entitled\textsuperscript{15} to review the nature of such testimony as an urgent or unrepeatable act and his authorization does not need to contain justification on what facts he came to the conclusion that the testimony must be performed before initiating the prosecution.

Interrogation is usually done by police and prosecutor at whose order the act takes place. Judge guarantees (by his or her presence) the rule of law, in the course of questioning intervenes only when necessary, in no case assumes the role of the police authority or prosecutor. His role is to impartially oversee the process of questioning from the point of view of legality, not the conduct evidence to the benefit or detriment of a person suspected of committing a crime. M. Fryšták wonders if in this stage the present judge should not already have a right to examine the order of the public prosecutor on the grounds that it might circumvent the law.\textsuperscript{16} I fully agree with this proposal, because at a later stage (in court), the court will have to deal with the conditions under which the interrogation was conducted, if they really and materially constituted urgent or unrepeatable act.

Another proposed right for a judge according again to M. Fryšták could be strengthening of the position of the judge in terms of intervention in the performed act from the material standpoint, including the right to question the witness.\textsuperscript{17} With this proposal I however could not agree. The judge has to provide

\textsuperscript{14} § 26 par. 2 of the Criminal Procedure Code
\textsuperscript{15} In contrast to e.g. The authorization to carry out a house search or search of other premises before the criminal prosecution as urgent or unrepeatable act.
\textsuperscript{17} Ibidem.
objective and impartial assurance of legality, his role is not to replace one of the parties, specifically the side of the defence. Although at this stage the accused could not have an attorney present (or do not even know that he is suspected of committing a crime), the judge cannot fill in the process for a missing party. Quite the contrary – he sees to it that the prosecutor and the police authority do not abuse such situation. Procedurally disadvantageous position of the defence can compensate by other means, as will be explained below.

2.2 Applicability of the read testimony in the court

If it the testimony was made under § 158a of the Criminal Procedure Code as an urgent or unrepeatable act, it will be possible (as mentioned) to read the protocol about it in court instead of re-examination of the witness, which is enabled by § 211 par. 2, point. b) of the Criminal Procedure Code. The accused has, however a right to examine witnesses who are testifying against him. The impossibility to examine or to have the witnesses examined by his attorney, to ask them supplementary questions in the trial, as well as to allow the court to, on the basis of direct observation of responses and reactions of the witness, independently evaluate their authenticity, is seen as a breach of the right to defence, by extension, the right to a fair trial, because Article 6 par.1, 3 point. b) ECHR defines among other things the right to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.”

The Czech Constitutional Court and also the European Court of Human Rights (ECtHR) have already dealt with constitutionality of § 211 par. 2 point b). They both have consistently ruled in previous decisions, that the fact that during the trial was the questioning of the witness conducted via reading of the protocol from the questioning of the absent witness does not automatically imply a breach of Art. 6 par. 1 and 3, points. d) of the Convention, especially if the legal representative of the accused was properly and timely informed about questioning of a witness in the investigative stage and yet this did not attend the interrogation. Art. 6 ECHR in fact allows the courts to base convictions on previous testimony under two conditions: if the fact that the witness was not confronted with the accused is the result of a real impossibility to find a witness, it must be established that the competent authorities have actively searched for the witness to enable such a confrontation. The second condition is that the questionable testimony cannot in no case represent the only convicting evidence for the accused.18

2.3 Admission read witness testimony in the judicature of the Czech Con-
In accordance to the limitations mentioned above, the Constitutional Court assessed the case, which concerned human trafficking for sexual purposes. In II. US 573/08 the testimonies of victims who have been a Romanian citizen were taken as an urgent or unrepeatable act because they claimed that they wanted to leave the Czech Republic and return back to Romania before initiating the prosecution. The Constitutional Court found no procedural mistake of courts on the question of the admissibility of these evidence (the attempt of trial subpoena failed because witnesses were already abroad), but especially because it was not the only incriminating evidence and it was necessary to take into account the priority of the need to protect the rights and freedoms of injured person in the mode of active duty of the Czech Republic, as set out in the International Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of another.

The necessity of the questioning of an absent witness not to serve as the only incriminating evidence of guilt, confirmed the ECtHR a few years later in exactly the same case, human trafficking for sexual purposes, of a Romanian citizens, who were questioned in the same way, and their testimony was used in the completely same manner as in the above case of the Constitutional Court. This was the case BREUKHOVEN against the Czech Republic and the ECtHR this time criticized the authorities responsible for criminal proceedings that they did not make reasonable efforts to ensure the presence of witnesses during the proceedings. ECtHR stressed that although the confrontation with the perpetrator could be bruising for victims of sexual offenses, states are obliged to take measures to offset the disadvantageous position of the defence. This rigorous assessment and finding of a violation of Article 6, par. 1 and 3 points. d) of the Convention stemmed mainly from the fact that the criminal offense in this case, the complainant established only using the testimony of witnesses mentioned that the defence was not able to hear.19

3. British model of the “Hearsay rule”

A variant of the admissibility of the read prior testimony are under the law of the United Kingdom called Hearsay, which have in the Anglo-American legal system a long tradition. Admissible in civil cases, however as to the applicability of the admissibility in the criminal proceedings, the general rule is for the hearsay testimonies to be inadmissible. The practice, on the other hand, eventually deducted the need to apply the “Hearsay rule” on criminal proceedings; the current doctrine speaks of “the exceptions to the Hearsay rule.”20 These exemptions

19 BREUKHOVEN against the Czech Republic, Grand Chamber judgment of 21 7. 2011, Application no. 44438/06, ECtHR 2011, § 46–58.
20 see e.g. JEFFERSON, Bernard. S. Declarations against Interest: An Exception to the Hearsay Rule. Harvard Law Review, 1944, vol. 58, No. 1, p. 1–69; SELIGMAN, Eustace. An
are regulated in the law, namely the Criminal Justice Act 2003 (CJA). Under § 114 of the CJA is as Hearsay considered any statement of the facts relevant to the criminal case that was made other than directly by the courts person that these facts directly perceived by his or her own senses. For the admissibility of such evidence in proceedings before a criminal court the British law sets conditions for its acceptability and usability. Therefore, in order for Hearsay to be used in criminal matters as well as it is according to § 114 of the CJA required that the admission is in the public interest, witness is objectively unable to attend the court proceedings, the evidence may be contained in a document that could not be issued to a court, or it is a testimony of someone else, indeed the “hearsay” testimony by the definition, the witness is unable to testify, etc.

British common law also establishes three principles that need to be respected as a prerequisite for admissibility of the Hearsay:

1. The judges have discretion to decide on the exclusion of the Hearsay evidence in the case, if the effect of such testimony presented such serious prejudice of the rights of the accused, that the disadvantageous position in the process would not be balanced by the probative value of the testimony,

2. In implementation of the Hearsay judge is obligated to inform the jury that it is the Hearsay evidence and to consider this fact when deciding the verdict,

3. If the jury concludes that the accused is guilty based on evidence obtained through Hearsay they must demonstrate by the other findings that the defendant’s guilt can be proved beyond reasonable doubt.

4 Shift of opinion in the case law of the ECtHR

4.1 Previous testimony and Hearsay rule

Revolution in considering the admissibility of read witness statements was caused by the decision of the ECtHR in the cases of Al-Khawaja and Tahery against the United Kingdom. In the first of these proceedings, doctor Al-Khawaja was convicted on two counts of indecent assault, the allegations related to his treatment of patients under hypnotherapy. The hearsay issue arose because one of the complainants committed suicide prior to the trial. Her testimony, however, the judge considered crucial, named her as the legally permitted exception to the Hearsay rule and as such he read it to the jury, which subsequently agreed to the guilt of the accused.
Al-Khawaja after an unsuccessful attempt to overturn the guilty verdict at the Court of Appeals applied to the European Court of Human Rights, where he asserted the violation of Article 6 par. 1, 3 point. d) of the Convention. The Strasbourg Court joined the case Al-Khawaja with another case based on the so-called Hearsay. In the case Tahery the accused was convicted on the basis of the read testimony of a witness from pre-trial proceedings, who refused to repeat testimony in court, reportedly due to fear for his live and health, as well as the life and health of his family. ECtHR in both cases reiterated the principle of the inadmissibility of a read testimony of a witness as single exclusive or decisive evidence indicative of guilt of the accused and found violations of the European Convention in Article 6.

On the proposal of the Government of the United Kingdom, however, the two joined cases were referred to the Grand Chamber, because the same question of the admissibility of the Hearsay faced the Supreme Court of the United Kingdom once again, this time in the case of Horncastle and others against the United Kingdom23, which was a combination of both previous cases. The accused in the Horncastle case were sentenced on the basis of the testimony of witnesses, out of whom two died before the main trial, the other two did not arrive in court because of the fear for their own lives and health. The British Supreme Court faced a difficult question: follow the existing case law of the ECtHR, as is clear from the Act on the Protection of Human Rights24, or decide the case according to the traditions of common law, which generally admit Hearsay as evidence? If they choose to follow the path of ECtHR case law, it would generally mean that the Hearsay should not be allowed which could represent a substantial breach of the legal theory of evidence with a long tradition in England, and such a huge change could lead to a considerable reduction in the efficiency of English criminal justice system.25

The British Supreme Court has therefore decided to go the way of tradition and apart from a convicting the accused in the case Horncastle and others against the United Kingdom, the Supreme Court of UK initiated judicial dialogue, where the United Kingdom through Lord Phillips pointed precisely to the diversity of evidence according to British common law and the nature of the process resulting in inability to identify which evidence is sole or decisive against a defendant.26

The result of this dialogue between the ECtHR and courts of the United Kingdom concerning admissibility of the Hearsay evidence was a reinterpretation of existing case law of the ECtHR, which is reflected not only in the case of Horncastle and others against the United Kingdom, but also in the decision of the Grand Chamber in the referred case Al-Khawaja and Tahery against the United Kingdom.  

The ECtHR has formulated new criteria for the assessment of the opposition in the field of Art. 6, par.3 point. d) of the Convention in the absence of the witness at the trial. It was noted that these objections can be evaluated from three aspects. Above all, it is necessary to examine whether the fact that the defence does not have the opportunity to hear, or have prosecution witness examined, given a compelling reason. If not, it should be observed as violations of the Convention regardless of what is the weight of such evidence at issue. If there is no questioning of a witness and an important reason for such action lacks, the statement of the witness in principle cannot be regarded as exclusive or decisive evidence of guilt. However, if it is admitted as evidence testimony of a witness whom the defence had the opportunity to listen, and this testimony constitutes “sole or decisive” evidence against the defendant, its admission as evidence will not automatically result in a breach of Article 6, par. 3 point. d). At the same time where a conviction is based solely or decisively on the evidence of absent witness, the Court must subject the proceedings to the most searching scrutiny. Because of the dangers of the admission of such evidence, constitute a very important factor in the proceedings as a whole. Decision rendered in such proceedings can be legal only if some guarantees are met, including the existence of strong procedural safeguards. The question in each case is whether there are sufficient counterbalancing factors in place, including measures that permit a fair and proper assessment of the reliability of that evidence to take place. This would permit a conviction to be based on such evidence only if is sufficiently reliable given its importance in the case.  

The Grand Chamber of the ECtHR after the abovementioned three-step test finally admitted that in the case of Al-Khawaja there was no infringement of the right to a fair trial because the prosecution was fair as a whole, whereas in the case Tahery against UK Article 6 had been breached.  

One could summarize the key for assessing the admissibility of the testimony of an absent witness would therefore now answer the question whether there was a compelling reason for the fact that the defendant had no opportunity to listen to and question the witness and to have them questioned, further what was the significance of such a testimony for the conviction of the accused, and finally,  

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27 See the Conclusion of judicial dialogue between ECtHR and UK courts on use of hearsay evidence, ECtHR 376 (2014) from 16th December 2014.
whether there have been given relevant procedural safeguards able to compensate for disadvantages arising for the accused from admitting such testimony.  

**4.2 Stealth / anonymous witness**

Testimonies of secret or anonymous witnesses create a specific type of witness testimonies. The accused is usually allowed to question or have the witness questioned or to be present at his interrogation, but only to the extent that does not endanger the disclosure of the identity of this witness. The ECtHR has repeatedly stated that it recognizes the need to implement these evidence because they are still one of the most effective methods to combat organized crime, but subsequent use of anonymous statements as evidence brings application problems of the need to balance the imbalance in the rights of to the defence with others procedural safeguards of a fair trial.

Such testimony could be used if the condition of subsidiarity (to anonymise witnesses only, when their protection could not be ensured otherwise) and proportionality (if there is indeed such a need to restrict the rights of the defence) is held. In such a case there is conflict between principle of fair and equitable process and reasonable effort to protect the public from the legislature upsurge in crime (especially organized crime) on the other hand. In case III. US 210/98, the Constitutional Court dealt with the admissibility of the questioning of two witnesses who bought drugs from the defendant (the complainant). Both witnesses were interrogated in secrecy, but always in the presence of defence counsel through a device in which their voice is transmitted into the next room, where he was present. In this case the defence counsel had the possibility of full intervention and, therefore, the Constitutional Court rejected the complaint as unfounded. This attitude of the Constitutional Court has shown its goodwill to accept the testimony of the secret witness, however, only in case where the secrecy was justified.

When we talk about a secret witness, of course we have to mention the secret agent – policeman. This police-agent, due to his profession, must remain secret in court. One of these cases was the decision in the case of Lüdi against Spain, where the ECtHR found a violation of Art. 6 par. 1 and 3 points. d) of the Convention. According to the complainant, all charges in his case were based solely on the report of a secret agent and records of telephone conversations between the complainant and the agent who acted as interested in buying drugs from the complainant. At no stage of the prosecution had accused the possibility to question or have the agent questioned. The Agent has never been summoned as a witness (the reason being the reported effort to preserve the anonymity of police agents and it particularly their ability to infiltrate circles of drug traffick-

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ers), which prevented the court to make their own opinion about the credibility of such witness. While the witness was a person in active service, whose function was known to the investigating judge, the accused also met the witness on several occasions (meetings for the purpose of drug trafficking), ie at least the physical appearance of the agent (though not his true identity) has already been known. Based on these facts, the ECtHR found the secret witness in proceedings before the court (as well as the inability to question him) as infringing Art. 6 par. 1 and 3 points. d) of the Convention.

Worth mentioning is certainly another decisions of the ECtHR, this time in the case Pesukic against Switzerland. In this case ECtHR comments on certain technical aspects of taking evidence from anonymous witnesses. In connection with this case, the question arose, whether the ECtHR has not deviated from its earlier case law and did not incline to moderate demands for questioning an anonymous witness, while admitting a higher (in this case, perhaps even to the extreme) restriction of the right to defence. Briefly it was the following facts: the complainant (Pesukic) was convicted for the crime of murder based on the testimony of an anonymous witness, who was questioned separately from the accused, and whose voice was modulated. The witness stated that the accused and the people close to pose a reasonable threat to his life, which the court found to be relevant and provide him with all possible procedural safeguards preventing his identification, including the possibility to leave some questions unanswered. The ECtHR therefore discussed the importance of such testimony, because according to its own previous cases, testimony of an anonymous witness cannot serve as the sole incriminating evidence. From the analysis of the judgment it is evident (among other also from the fact that the ECtHR proceeded to the next step of the so-called. Test Al-Khawaja), that even when the court does recognize the impact of their own decisions, this testimony was ultimately found to be evidence “having a significant impact”, thus the evidence is in this case essentially a key proof. V. Nejedly recognizes in this situation a baleful influence of the Grand Chamber judgment in the case of Al-Khawaja and Tahery against the United Kingdom having impact also on the questioning of secret witnesses, because in his opinion, the ECtHR would certainly have found a violation of the right to a fair trial, if not for the above mentioned decisions.31

After the ECtHR admitted this evidence, the court had to cope with the next step of the Al-Khawaja test, comparing the appropriateness of limiting the rights of the defence and balancing of procedural measures to address this discrepancy. Undoubtedly the fact that neither the applicant/accused nor his representative had the opportunity to question the witness and to observe and watch his immediate responses to the questions, notwithstanding the fact that most of the questions that the witness was asked, were not answered at all, represents a very sig-

31 NEJEDLÝ, Josef. Věc Pesukic proti Švýcarsku, anonymní svědek a právo vyslýchat svědky proti sobě. ASPI, cit. 18. 11. 2014.
significant interference with the right to defence. If we compare this case with, for example the Van Mechelen case, where it was found that an extreme violation of the rights of the accused to discuss the damning evidence is the situation where the witnesses (policemen) are during interrogation in the same room as the investigating judge, accused and their legal representatives, however, were dismissed from this room and communication could take place only using sound equipment, we have to admit that in the case was Pesukic was the interference with the rights to defence more significant.

It can be summarized that the ECtHR did not stretch with the need to compensate for the limitation of the rights to the defence with more favourable procedural conditions. Although the judgment is quite justified in detail, in this regard, the Court reconciled with the fact that a witness during the questioning could have been observed by all members of the jury and they were able to make up their own mind about his credibility, and that the witness was questioned directly by the presiding judge instead of a prosecutor. Apparently these facts were sufficient for ECtHR as a procedural safeguards and balance to the rights to defence.

Probably in an effort to establish the conditions under which it can be stated that the questioning of an anonymous witness still meets the requirements of a fair trial, established in the case Kok against the Netherlands, ECtHR formulated following criteria: the reasons for securing the identity of the witness, the weight of the evidence for a conviction and compensation for the limitations of the defence. The criteria are mostly similar to the admissibility criteria formulated in previous decision, namely Al-Khawaja and Tahery against the United Kingdom. Thus, we can conclude that the conditions for admission of the read testimony of a person who testified only in pre-trial proceedings are comparable to the admissibility of anonymous testimony as evidence. Based on these identified similarities I would add one more condition: assuming that anonymous testimony will pass the above-mentioned three-step test for the applicability is essential that the testimony does not stand by itself as the sole and exclusive proof of guilt of the accused, unless at the same time an adequate procedural compensation for disadvantages on the side of the defence is provided.

Other specific category is composed of testimonies taken before prosecution, for example the testimonies of victims of sexual offenses, especially when it comes to juvenile victims of or children. This issue is very sensitive, because here come into consideration the risks known as so called secondary victimization, a form of secondary psychological damage to the victims.

32 Judgment of the European Court of Human Rights Van Mechelen and others against the Netherlands dated 23. 4. 1997
33 Kok against the Netherlands, a decision on the unacceptability of 4. 7. 2000 Application no. 43149/98, ECtHR 2000-VI.
34 for more info see ŠČERBA, Filip. Oběť sexuálně motivovaného deliktu jako důkazní
5 Impact of decisions of the ECtHR on the case law on the Constitutional Court

In one of the first cases following the case of Al-Khawaja and Tahery against the United Kingdom the Constitutional Court complied with constitutional complaint in a retrial after the judgment of the European Court of Human Rights in the case Igor Tseber against Czech Republic (Pl. US 25/13). The Constitution Court partially annulled the criminal judgments of ordinary courts, according which the complainant was found guilty of a series of violent crimes, including battery, which he was supposed to cause to a person V.O. (injured party). The testimony of the injured party, whom the complainant allegedly had shot through the leg and who reportedly out of fear of vengeance did not attend the trial, was then read out in court, referring to the fact that the very testimony of a witness / injured party was conducted as an urgent act. Witness was at the time of questioning in serious condition treated in intensive care. The complainant objected, of course, that he had never had the opportunity to question the witnesses and that such evidence cannot be (with regard to the case law of the ECHR) sole or decisive evidence of guilt and is a violation of Article 6, par. 1 and 3 points. d) of the Convention.

In previous proceedings before the European Court for Human Rights, also in this case, where the complaints examined under the criteria of the Al-Khawaja test. From the perspective of the first criterion, namely whether in the present case there is a compelling reason for the fact that the witness could not be subjected to the questioning from the defence, the court concluded that for reading of the testimony of a witness was in this case given a compelling reason, because the court made attempts to find a witness and to summon him to the trial. Only when all the attempts failed, the presiding judge decided to take evidence by reading the testimony.

In assessing the second criterion ECtHR examined how far the disputed testimony influenced the decision to convict the complainant, therefore, whether the statement represented the exclusive or decisive evidence of guilt of the defendant. Although the European Court has confirmed that the courts took into account other evidence than just this controversial testimony, but the truthfulness of the claim that the injury was caused by a criminal offense of the complainant could be proved only by this testimony. Thus, the absent witness testimony represented a decisive proof of guilt because of other evidence only indirectly promoted or reinforced court’s confidence in the victim’s claims.

The third aspect, therefore, the need to consult on the fairness of the process as a whole, particularly with regard to the need to balance the disadvantageous position of the defence in cases where the testimony is read or in situations of
an absent witness, the ECtHR ruled that neither the presence of a judge at the questioning of a witness can be considered measures that would be able to compensate the absence of the accused in witness interrogation. Based on the above, the ECtHR ruled that in the case of complainant Tseber there was a violation of the right to a fair trial under Art 6, par. 1 and 3 points. d) of the Convention, which is reflected in the subsequent decision of the Constitutional Court, which, as stated above, upheld the constitutional complaint and annulled the previous rulings of the general courts.

6 Conclusion

Evidence in the form of reading the testimony of a witness, who had never been questioned by the defence in an adversarial hearing, constitutes undoubtedly noticeable interference with the rights of the defendant and such as is contrary to the requirements of adversarial proceedings. Given the need to determine as accurately as possible the actual facts of the case in the absence of other admissible evidence, even reading the record of the previous testimony of a witness who is absent due to objective reasons can be admitted and it necessarily does not constitute a violation of the right to a fair trial. The evolving judicature of the European Court of Human Rights even admits that the testimony of an absent witness could be used as sole or decisive evidence of guilt, and to assess whether the procedure does not cross beyond the right to a fair trial, was formulated three-step test. However, one cannot overlook that, although the evidence before the ordinary courts takes place entirely in accordance with the laws of the Czech Republic (namely the Criminal Procedure Code) application of § 211 par. 2 of the Criminal Procedure Code often creates violation of the right to a fair trial, specifically Art. 6, par. 1 and 3 points. d) of the Convention, even in strict compliance with all the mentioned steps called Al-Khawaja test. The question therefore arises whether the formulation of exceptions to the principle of adversarial and oral proceedings, as contained in § 211 par. 2 point, b) of the Criminal Procedure Code and the institute urgent or unrepeatable acts in accordance with § 158a of the Criminal Procedure Code are not themselves contrary to the European Convention on Human Rights? According to The ECtHR they are not, however, de lege ferenda, it would be probably appropriate to prevent any doubts about the admissibility of such evidence that by incorporating some sort of correction principle into the Criminal Procedure Code that would reflect the challenged provisions of the Convention. In its essence, this provision would preclude the general courts to convict an accused to a decisive extent on the testimony of a witness or witnesses who had not have the accused or his lawyer the opportunity to hear and question. The same would apply in the case of witnesses that the defence had an opportunity to question, but the interrogation was considerably hampered by keeping witnesses true identity secret. Another solution,
or rather the inspiration for the preservation of one own legislation may be seen in United Kingdom where was successfully preserved an institute that caused in terms of ECtHR constant judicature problems. England, however, defended his Hearsay, as to how will the Czech lawmaker react on is constant criticism from the ECtHR in connection with the planned re-codification of the Criminal Procedure, it is not clear yet.
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