SOCIETAS ET IVRISPRVDENTIA

SOCIETAS ET IURISPRUDENTIA

Medzinárodný internetový vedecký časopis zameraný na právne otázky v interdisciplinárnych súvislostiach

International Scientific Online Journal for the Study of Legal Issues in the Interdisciplinary Context

Vydáva Právnická fakulta Trnavská univerzita v Trnave

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Editoriál k letnej edícii SOCIETAS ET IURISPRUDENTIA 2024

Ctení čitatelia, vážení priatelia,

dovoľte, aby som Vám predstavila druhé číslo dvanásteho ročníka SOCIETAS ET IURISPRUDENTIA, medzinárodného internetového vedeckého časopisu zameraného na právne otázky v interdisciplinárnych súvislostiach.

Časopis SOCIETAS ET IURISPRUDENTIA vychádza pod záštitou Právnickej fakulty Trnavskej univerzity v Trnave a tematicky sa zameriava najmä na spoločensky významné prierezové súvislosti otázok verejného práva a súkromného práva na národnej, nadnárodnej, ako aj medzinárodnej úrovni, pričom prijíma a publikuje výhradne pôvodné, doposiaľ nepublikované príspevky. Jeho cieľom je poskytovať podnetnú a inšpiratívnu platformu pre vedecké a celospoločensky prínosné riešenia aktuálnych právnych otázok a ich komunikáciu na úrovni najmä odbornej právnickej, ale aj zainteresovanej širokej občianskej verejnosti v kontexte ich najširších interdisciplinárnych spoločenských súvislostí, a to nielen na národnej, ale aj na regionálnej a medzinárodnej úrovni.

Časopis vychádza v elektronickej on-line podobe pravidelne štyrikrát ročne, a to v termínoch 31. marec, 30. jún, 30. september a 31. december, pričom ponúka priestor pre publikáciu príspevkov v podobe samostatných vedeckých štúdií, ako aj cyklov vedeckých štúdií, esejí zamýšľajúcich sa nad aktuálnou spoločenskou témou alebo dianím, recenzií publikácií vzťahujúcich sa na hlavné zameranie časopisu, a taktiež informácií, ako aj správ súvisiacich so základným poslaním časopisu.

Webová stránka časopisu SOCIETAS ET IURISPRUDENTIA ponúka čitateľskej verejnosti informácie v bežnom grafickom rozhraní, a súbežne aj v grafickom rozhraní Blind Friendly pre zrakovo hendikepovaných čitateľov paralelne v slovenskom a anglickom jazyku. V oboch jazykoch zabezpečuje redakcia časopisu i spätnú komunikáciu prostredníctvom svojej osobitnej e-mailovej adresy. Zároveň webová stránka časopisu ponúka čitateľom vďaka uplatneniu dynamického responzívneho webdizajnu možnosť pristúpenia a prehliadania z akéhokoľvek zariadenia umožňujúceho prenos informácií prostredníctvom globálnej siete internet.

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radí prvá štúdia ponúka čitateľom veľmi komplexný a podrobný komparatívny pohľad na kľúčové a mimoriadne aktuálne otázky objasňujúce uplatnenie byrokratických aktérov verzus legitímnych aktérov pri výbere dočasných prezidentov pri obsadzovaní dvojitého uvoľneného miesta prezidenta a viceprezidenta z pohľadu legislatív platných v rôznych krajinách sveta. Nasledujúca štúdia dôkladne analyzuje, sprehľadňuje a príkladne vysvetľuje problematiku typických online dohôd a zmlúv a súvisiacich právnych výziev, ktorým čelia spotrebitelia, pričom sa osobitne zameriava na právny režim platný v tejto právnej oblasti v Južnej Afrike. Tretia štúdia sa venuje veľmi podrobnému systematickému objasneniu, ako aj hĺbkovej analýze a komplexnej syntéze otázok dualizmu dcérskych spoločností v práve obchodných spoločností v Indonézii, pričom sa sústreďuje na aktuálne riešenia právnej nezávislosti a ekonomickej závislosti dcérskych spoločností v skupine spoločností. V poradí posledná štúdia predstavuje systematické a hĺbkové vymedzenie a objasnenie kľúčových otázok spájajúcich sa s postavením a uplatňovaním právnych obyčajových pravidiel v rozvodovom systéme hinduistického spoločenstva na Bali.

V súvislosti s vydaním druhého čísla dvanásteho ročníka časopisu SOCIETAS ET IURISPRUDENTIA by sme veľmi radi informovali všetkých jeho čitateľov, prispievateľov aj priaznivcov, že časopis je registrovaný v Adresári časopisov s otvoreným prístupom (Directory of Open Access Journals, DOAJ), ako aj v medzinárodných vedeckých databázach Crossref, ERIH PLUS a Index Copernicus International a požiadal o registráciu v ďalších medzinárodných vedeckých databázach. Súčasne by sme veľmi radi informovali aj o tom, že do okamihu vydania nového čísla časopisu zaznamenali jeho webové stránky celkom 152 krajín návštev (v abecednom poradí):

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Pri príležitosti vydania druhého čísla dvanásteho ročníka časopisu by som sa veľmi rada úprimne poďakovala všetkým prispievateľom, ktorí doň aktívne prispeli a podelili sa tak s čitateľmi o svoje vedomosti, skúsenosti či nevšedné pohľady na problematiku právnych otázok, a rovnako tiež vedeniu Právnickej fakulty Trnavskej univerzity v Trnave, všetkým priateľom, kolegom, zamestnancom Právnickej fakulty i rektorátu Trnavskej univerzity v Trnave za ich podporu a podnetné rady, a napokon tiež členom redakčnej rady časopisu a redakčnému tímu.

Verím, že časopis SOCIETAS ET IURISPRUDENTIA poskytne podnetnú a inšpiratívnu platformu pre komunikáciu na úrovni odbornej aj občianskej verejnosti, a rovnako tiež pre vedecké a celospoločensky prínosné riešenia aktuálnych právnych otázok v kontexte ich najširších interdisciplinárnych spoločenských súvislostí, a to nielen na národnej, ale aj na regionálnej a medzinárodnej úrovni.

V mene celej redakčnej rady a redakcie časopisu SOCIETAS ET IURISPRUDENTIA

s úctou,

Jana Koprlová

Trnava 30. jún 2024

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Editorial for Summer Edition of the SOCIETAS ET IURISPRUDENTIA 2024

Dear readers and friends,

let me introduce the second issue of the twelfth volume of SOCIETAS ET IURISPRUDENTIA, an international scientific online journal for the study of legal issues in the interdisciplinary context.

The journal SOCIETAS ET IURISPRUDENTIA is issued under the auspices of the Faculty of Law of the Trnava University in Trnava, Slovakia, and it thematically focuses mainly on socially relevant interdisciplinary relations connected with issues of public law and private law at the national, transnational and international levels, while accepting and publishing exclusively original, hitherto unpublished contributions. Its aim is to provide a stimulating and inspirational platform for scientific and society-wide beneficial solutions to current legal issues and their communication at the level of primarily legal experts, but also the interested general public in the context of their broadest interdisciplinary social relations, in like manner at the national, regional and international levels.

The journal is issued in an electronic on-line version four times a year, regularly on March 31st, June 30th, September 30th and December 31st, and it offers a platform for publication of contributions in the form of separate papers and scientific studies as well as scientific studies in cycles, essays on current social topics or events, reviews on publications related to the main orientation of the journal and also information or reports connected with the inherent mission of the journal.

The website of the journal SOCIETAS ET IURISPRUDENTIA offers the reading public information in the common graphical user interface as well as in the blind-friendly interface designed for visually handicapped readers, both parallel in the Slovak as well as English languages. In both languages the journal's editorial office provides also feedback communication through its own e-mail address. At the same time, the website of the journal offers readers due to the use of dynamic responsive web design accession and browsing by using any equipment that allows transmission of information via the global Internet network.

The current, second issue of the twelfth volume of the journal SOCIETAS ET IURISPRUDENTIA offers a total of four separate scientific studies. The very first study offers readers a very comprehensive and de-

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tailed comparative view of the key and extremely topical issues explaining the application of bureaucratic actors versus legitimate actors in the choice of Interim Presidents in filling the double vacant position of the President and the Vice President from the point of view of legislations valid in different countries of the world. The following study thoroughly analyses, clarifies and exemplarily explains the issue of typical online agreements and contracts and the associated legal challenges confronting consumers, with a particular focus on the legal regime applicable in this area of law in South Africa. The third study concentrates on a very detailed systematic clarification as well as in-depth analysis and comprehensive synthesis of subsidiary dualism issues in the Indonesian corporate law, focusing on current solutions to the juridical independence and economic dependence of subsidiaries in a group of companies. The final study presents systematic and thorough qualifying and clarifying of the key questions related to the position and application of legal customary rules in the divorce system of the Hindu community in Bali.

In relation to the release of the second issue of the twelfth volume of the journal SOCIETAS ET IURISPRUDENTIA we are pleased to inform all its readers, contributors as well as fans that the journal has been registered in the Directory of Open Access Journals (DOAJ) as well as in international scientific databases Crossref, ERIH PLUS and Index Copernicus International and applied for registration in other international scientific databases. At the same time, we would like to inform that till the date of the new issue, the journal's websites had recorded a total of 152 countries of visits (in alphabetical order):

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85. Malta
86. Mauritius
87. Mexico
88. Moldova
89. Mongolia
90. Morocco
91. Mozambique
92. Myanmar
93. Namibia
94. Nepal
95. New Caledonia
96. New Zealand
97. Nicaragua
98. Nigeria
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119. Singapore
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141. Uganda
142. Ukraine
143. United Arab Emirates
144. United Kingdom
145. United States of America
146. Uruguay
147. Uzbekistan
148. Venezuela
149. Vietnam
150. Yemen
151. Zambia
152. Zimbabwe

On the occasion of launching the second issue of the twelfth volume of the journal, I would be delighted to sincerely thank all the contributors who have contributed in it actively and have shared with the readers

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their knowledge, experience or extraordinary views on legal issues as well as the top management of the Faculty of Law of the Trnava University in Trnava, all friends, colleagues, employees of the Faculty of Law, the rector's administration at the Trnava University in Trnava for all support and suggestive advices and, finally, also the members of journal's editorial board and the editorial team.

I believe that the journal SOCIETAS ET IURISPRUDENTIA provides a stimulating and inspirational platform for communication both on the professional level and the level of the civic society as well as for scientific and society-wide beneficial solutions to current legal issues in context of their broadest interdisciplinary social relations, in like manner at national, regional and international levels.

On behalf of the entire editorial board and editorial office of the journal SOCIETAS ET IURISPRUDENTIA,

Yours faithfully,

Jana Koprlová

Trnava, Slovakia, June 30th, 2024

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Bureaucratic Actors vs Legitimate Actors: Explaining the Choice of Interim Presidents in Filling the Dual Vacance of the President and the Vice President

Febriansyah Ramadhan
Setyo Widagdo
Aan Eko Widiarto
Riana Susmayanti

Abstract: *One of the difficult situations in government occurs due to the double vacancy of the President and Vice President offices. The country's constitution must navigate this vacuum by providing for an Interim President to temporarily lead the government until a new President and Vice President are elected. In the constitutions of various countries, there are two models of Interim President, some give mandate to bureaucratic actors (Prime Ministers/Ministers) and some give mandate to legitimate actors (legislature of House of Representatives/Senate) to step up as Interim President. This paper aims to explain these two models in terms of filling public positions and presidentialism settings. The results of this study will be able to showcase the strengths and weaknesses of bureaucratic actors and legitimate actors when serving as Interim President, which supported with experience from various countries. With the help of socio-legal methods, this paper closes the theoretical gap in the constitutional and political law literature which has not explained these two models. Our paper shows that both have advantages in different aspects: the bureaucrat actor is superior in terms of policy because he was involved in the previous Government Cabinet, while the legitimate actor is superior in terms of politics because he has democratic legitimacy and was elected by the people and political parties. What is a weakness for one actor, becomes an advantage for the other.*

Key Words: *Constitutional Law; Constitution; Interim President; President; Power Vacancy; Presidentialism; Parliamentarism; Bureauctaric Actor; Legitimate Actor.*

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Introduction

There are times when the government is faced with a difficult situation, one of which is the double vacancy of the President and Vice President either for constitutional reasons (death, resignation, dismissal) or unconstitutional reasons such as a coup. For constitutional reasons, the question is, who will be the substitution when there is a double vacancy for the President and Vice President? Linz was not specific enough to answer this question, he just wanted to ensure that the presidential constitution must provide an automatic succession process to avoid parliamentary domination in dealing with such vacancy.[1] Linz did not explain the various ideal options for Interim President in handling the vacancy.

Interim President is commonly used in constitutional law and political science literature, meaning an official appointed temporarily to substitute the President due to the double vacancy of the President and Vice President. The concept is similar to *"An officer ad interim: is one appointed to fill a temporary vacancy, or to discharge the duties of the office during the absence or temporary incapacity of its regular incumbent."*[2] Several historical governments deal with the double vacancy of President and Vice President with various conditions. Sudan, South Korea, Indonesia, Argentina, Poland and the United States show a history of different governments in dealing with this situation. There are those who give mandate to bureaucratic actors (prime ministers/ministers) and there are those who give mandate to legitimate actors (legislators-Chairmen of the House of Representatives/Senate) to take position as Interim Presidents.

When a government crisis occurred (2021) in Sudan due to a military coup, Prime Minister Abdalla Hamdok together with Military General Abdul Fatah collegially became the Interim President. President Park Gyeun-hye, who was impeached in 2016 due to a corruption scandal, was immediately replaced by Prime Minister Hwang Kyo-ahn.[3] Indonesia,

[1] LINZ, J. J. The Perils of Presidentialism. *Journal of Democracy* [online]. 1990, vol. 1, no. 1, pp. 51-69 [cit. 2024-05-02]. ISSN 1086-3214. Available at: https://doi.org/10.1353/jod.2005.0026.

[2] CAMPBELL BLACK, H. *Black's Law Dictionary: Definitions of the Terms and Phrases of American and English Jurisprudence, Ancient and Modern*. 4th ed. Saint Paul: West Publishing Company, 1968, p. 57.

[3] KIM, J. W. Korean Constitutional Court and Constitutionalism in Political Dynamics: Focusing on Presidential Impeachment. *Constitutional Review* [online]. 2018, vol. 4, no. 2, pp. 222-248 [cit. 2024-05-02]. ISSN 2548-3870. Available at: https://doi.org/10.31078/consrev423.

which maintained its sovereignty through the Emergency Government of the Republic of Indonesia (PDRI) 1948 – 1949, made Sjafruddin Prawinegara (Minister of Prosperity) the Chairman of PDRI since Soekarno and Hatta were captured by the Dutch during the Second Military Aggression.[4] In the transition from the old order to the new order (1966 – 1968), which was also accompanied by the double vacancy of President and Vice President, Soeharto, who at that time had military status, made himself the Interim President.[5]

Argentina, that faced a crisis in 2001, was also struck by a double vacancy of President and Vice President. Ramon Puerta, who was then Chairman of the Senate, took over as Interim President.[6] The Polish President who died in a plane crash in 2010 ultimately made the position vacant. Bronisław Komorowski, who at that time served as Marshal of the Sejm (legislature), stepped in as Interim President to succeed the government. He played an important role in continuing the government, especially appointing officials who also died at the same accident with the President.[7] The United States, which is claimed by various scholars as the mother of presidentialism, shows an interesting history, through the Presidential Succession Act of 1792, the United States handed over the position of President to the Chairman of the Senate which was later revised through the Presidential Succession Act of 1886 by delegating the Cabinet secretaries to succeed in the vacant position of the President. In the end, the United States, again, revised this rule through the Presidential Succession Act 1947 by making the Speaker of the House of Representatives to fill the vacant position of President. That rule is in effect to-

[4] ZED, M. *Somewhere in the Jungle: Pemerintah Darurat Republik Indonesia: Sebuah Mata Rantai Sejarah Yang Terlupakan*. 1st ed. Jakarta: Pustaka Utama Grafiti, 1997, p. 22. ISBN 979-444-399-9. Also see Von BENDA-BECKMANN, F. and K. von BENDA-BECKMANN. *Political and Legal Transformations of an Indonesian Polity: The Nagari from Colonisation to Decentralisation*. 1st ed. New York: Cambridge University Press, 2013, p. 61. Cambridge Studies in Law and Society. ISBN 978-1-107-03859-2.

[5] See HINDLEY, D. Indonesian Politics 1965-7: The September 30 Movement and the Fall of Sukarno. *The World Today* [online]. 1968, vol. 24, no. 8, p. 345 [cit. 2024-05-02]. ISSN 2059-7495. Available at: https://www.jstor.org/stable/40394159.

[6] JOUET, M. The Failed Invigoration of Argentina's Constitution: Presidential Omnipotence, Repression, Instability, and Lawlessness in Argentine History. *University of Miami Inter-American Law Review* [online]. 2008, vol. 39, no. 3, pp. 409-462 [cit. 2024-05-02]. ISSN 2328-4242. Available at: https://repository.law.miami.edu/umialr/vol39/iss3/2/.

[7] KULISH, N. Acting President in Poland Wins a Narrow Victory. In: *The New York Times* [online]. 2010-07-04 [cit. 2024-05-02]. Available at: https://www.nytimes.com/2010/07/05/world/europe/05poland.html.

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day but has never been implemented because the United States has never been faced with a double vacancy of President and Vice President.[8]

In the constitutional literature, the appointment of Interim President is the scope of 'presidential succession law', which conceptually is a set of rules that regulate the process of succession to the positions of President and Vice President outside the normal procedures for transferring power (such as general elections) due to a vacancy in the middle of a term of office. Richard Albert explained that the legal scope of presidential succession starts from the vacancy of the positions of President and Vice President, the officials who replace them, and up to the process of selecting a new President and Vice President to fill in the vacant positions.[9] This paper does not discuss the entire scope of presidential succession law, but is limited to whom will become Interim President to fill the double vacancy of President and Vice President.

There is a theoretical vacuum in discussing the official who becomes Interim President. There is not yet adequate literature with an actor approach to explain the advantages and disadvantages of each actor who should succeed as the Interim President, whether from bureaucrat actors or legitimate (legislative) actors who rise to become Interim President. Some scholars are limited in discussing these actors in the context of the United States government system, not in the context of the government system (especially the presidential) in general which has spread throughout the world with various modifications.

Ruth C. Silva,[10] Akhil Reed Amar and Vikram David Amar,[11] Calabresi[12] and Manning,[13] and Richard Albert[14] support the bureaucratic actor

[8] CALABRESI, S. G. The Political Question of Presidential Succession. *Stanford Law Review* [online]. 1995, vol. 48, no. 1, pp. 155-175 [cit. 2024-05-02]. ISSN 0038-9765. Available at: https://doi.org/10.2307/1229153. Also see CROCKETT, D. A. The Contemporary Presidency: Unity in the Executive and the Presidential Succession Act. *Presidential Studies Quarterly* [online]. 2004, vol. 34, no. 2, p. 394 [cit. 2024-05-02]. ISSN 1741-5705. Available at: https://doi.org/10.1111/j.1741-5705.2004.00050.x.

[9] See ALBERT, R. The Constitutional Politics of Presidential Succession. *Hofstra Law Review* [online]. 2011, vol. 39, no. 3, pp. 497-576 [cit. 2024-05-02]. ISSN 0091-4029. Available at: https://scholarlycommons.law.hofstra.edu/hlr/vol39/iss3/2/.

[10] SILVA, R. C. The Presidential Succession Act of 1947. *Michigan Law Review* [online]. 1949, vol. 47, no. 4, pp. 451-476 [cit. 2024-05-02]. ISSN 0026-2234. Available at: https://doi.org/10.2307/1284810.

[11] AMAR, A. R. and V. D. AMAR. Is the Presidential Succession Law Constitutional?. *Stanford Law Review* [online]. 1995, vol. 48, no. 1, pp. 113-139 [cit. 2024-05-02]. ISSN 0038-9765. Available at: https://doi.org/10.2307/1229151.

to become Interim President by considering the loyalty to the United States' strict separation of powers and avoids the awkwardness of legitimate actor to the executive Cabinet when he becomes Interim President and lead the executive because of differences in political party direction. Unfortunately, their explanation is not relevant enough to be used in various presidential countries which have been modified in various forms: such as the combination with multiparty and the massive fusion of presidentialism and parliamentarism that has occurred in other parts of the world.[15] The constitutional literature of the United States is also not relevant enough to be material for discourse in other countries because the model it uses is *'line succession'* where the successor to the President works until the end of the previous President's term of office, while all countries in the world use *'temporary presidential succession'* where the Interim President will work for a short duration (average 30 – 60 days) until the election of a new President and Vice President.

Referring to the various variations of Interim Presidents in several countries and the theoretical gaps regarding Interim President actors, this paper would like to discuss several issues: First, an explanation of bureaucrat actors and legitimate actors based on their roots from the perspective of filling public positions. The difference of roots in the appointment between the two will explain conceptually what is meant by bureaucratic actors and legitimate actors. Second, this paper explains the advantages and weaknesses of each actor in the presidentialism setting which is documented in an aggregate manner from various countries' experiences. This paper argues: bureaucratic actors and legitimate actors both have advantages and disadvantages when serving as Interim President. In terms of stability, legitimate actors have a much higher advantage than bureaucratic actors because their political capital is more established than bureaucratic actors. However, from a policy perspective,

[12] CALABRESI, S. G. The Political Question of Presidential Succession. *Stanford Law Review* [online]. 1995, vol. 48, no. 1, pp. 155-175 [cit. 2024-05-02]. ISSN 0038-9765. Available at: https://doi.org/10.2307/1229153.

[13] MANNING, J. F. Not Proved: Some Lingering Questions about Presidential Succession. *Stanford Law Review* [online]. 1995, vol. 48, no. 1, pp. 141-153 [cit. 2024-05-02]. ISSN 0038-9765. Available at: https://doi.org/10.2139/ssrn.2854357.

[14] ALBERT, R. The Fusion of Presidentialism and Parliamentarism. *The American Journal of Comparative Law* [online]. 2009, vol. 57, no. 3, pp. 531-578 [cit. 2024-05-02]. ISSN 2326-9197. Available at: https://doi.org/10.5131/ajcl.2008.0016.

[15] FRANKENBERG, G. Constitutional Transfer: The IKEA Theory Revisited. *International Journal of Constitutional Law* [online]. 2010, vol. 8, no. 3, pp. 563-579 [cit. 2024-05-02]. ISSN 1474-2659. Available at: https://doi.org/10.1093/icon/moq023.

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the bureaucrat actor is more favored because he was involved in the previous government. Ultimately, our paper provides a theoretical contribution to presidential succession law, in particular an explanation of the advantages and disadvantages of each actor who becomes Interim President which can be used as a reference in constitutional literature in several countries that use modified presidentialism, and no longer pure like the first generation of presidentialism in the United States.

Bureaucratic actor and legitimate actor: perspective on filling public positions

A country's government system does not have a strong relationship with who becomes Interim President. In countries where the President is elected by the people (presidentialism), some use bureaucrat actors and others use legitimate actors as Interim Presidents. South Korea, Mexico, Azerbaijan, South Africa, Chile and Indonesia are countries that use bureaucrat actors as Interim Presidents. Other than South Africa, these countries are presidentialism countries – with some modifications – with the President elected directly by the people.

Even though these countries want a President with a strong position and democratic legitimacy, they prefer to choose a bureaucratic actor to become Interim President. This pattern is no different from South Africa, which is characterized by parliamentarism – with the President elected by the National Assembly – which makes a bureaucrat actor the Interim President. Both presidentialism and its modification (semi-presidential) countries have no significant differences with parliamentarism in determining the Interim President.

The number of countries that use legitimate actors as Interim Presidents dominates more than those using bureaucratic actors, namely the United States, the Philippines, Poland, Romania, Algeria, Argentina, Brazil, France, Bulgaria, Angloa, Nigeria and Egypt. These countries are countries with the main style of presidentialism – the President is directly elected by the people – and countries with varieties of presidentialism/ semi-presidentialism with the model of employing the Prime Minister as head of government. Poland, Romania, France, Bulgaria and Egypt are countries that separate the President as head of state and the Prime Minister as head of government, although there is a prime minister in these countries, the Interim President is appointed from a legitimate actor who comes from legislative power, unlike South Korea who sets its Prime Minister to become the Interim President.

Table 1 Regulations of Interim President in the Constitutions of Various Countries

Regulations of Interim President in the Constitutions of Various Countries					
Countries	**President Election**	**Bureaucratic Actors Who Rose to be Interim President**	**Countries**	**President Election**	**Legitimate Actors Who Rose to be Interim President**
South Korea	Directly by People	1. Prime Minister 2. *State Council* (Article 71, Republic of Korea 1948, Rev. 1987 Constitution)	**The United States of America**	Directly by People	1. Speaker of the House of Representatives 2. Secretary of State 3. Secretary of the Treasury, dst. (Presidential Succesion Act 1947)
Azerbaijan	Directly by People	1. Prime Minister 2. Chairman of Milli Majlis (Articles 101 – 105, Azerbaijan 1995, Rev. 2016 Constitution)	**The Philippines**	Directly by People	1. Chairperson of Senat 2. Chairperson of the House of Representatives (Article 7 Paragraph (8), Philippines 1987 Constitution)
South Africa	National Assembly	1. Minister 2. Chairperson of National Assembly (Article 90, South Africa 1996, Rev. 2012 Constitution)	**Poland**	Directly by People	1. Chairperson of SEJM/*Marshal of the Sejm* (Legislature) 2. Chairperson of Senat/Marshal of the Senat (Legislature) (Articles 128 – 131, Poland 1997 Constitution)
Chile	Directly by People	Minister (Article 285, Chile 2022 Constitution)	**Romania**	Directly by People	1. Chairperson of Senat (Legislature) 2. Chief Deputy (Legislature) (Article 98, Romania 1991, Rev. 2003 Constitution)
Indonesia	Directly by People	Minister of Foreign Affair, Minister of Home Affair and Minister of Defence (Article 8 Paragraph (3), The 1945 Constitution of the Republic of Indonesia)	**Algeria**	Directly by People	1. *President of the Council of the Nation* 2. Chairperson of the Constitutional Court (Article 98, Algeria 2020 Constitution)
Mexico	Directly by People	Minister of Home Affair (Article 84, Mexico 1917, Rev. 2015 Constitution)	**Argentine**	Directly by People	1. *Presidente Provisorio del Senado* 2. *Presidente de la Cámara*/Ketua DPR 3. *Presidente de la Corte Suprema de Justicia*/Chair of the Supreme Court (in the Constitution, the substitution is the public official. No more explanation (in the Constitution) concerning what and who the public official is (Article 88). Further provision is stated in Ley 25.716 Acefalia Presidencial)
			Brazil	Directly by People	1. Chief Deputy 2. Chairperson of Senate 3. Chairperson of the Supreme Court (Article 80, Brazil 1988, Rev. 2017 Constitution)
			France	Directly by People	Chairperson of Senate (Article 7, France 1958, Rev. 2008, Constitution)
			Bulgaria	Directly by People	*Chairperson of the National Assembly* (Article 97, Bulgaria 1991, Rev. 2015 Constitution)
			Angola	Directly by People	Chairperson of the National Assembly (Article 132, Angola 2010 Constitution)

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Nigeria	Directly by People	Chairperson of Senate (Article 136, Nigeria 1999, Rev. 2011 Constitution)
Egypt	Directly by People	Chairperson of the House of Representatives (Article 160, Egypt 2014 Constitution)

Source: Independently analyzed by referring to Constitute. In: *ConstituteProject.org* [online]. 2024 [cit. 2024-05-02]. Available at: https://www.constituteproject.org/.

Bureaucratic actors and legitimate actors who rise to become Interim President are important figures who will continue the government, even if only temporarily, but their role takes over/is similar to the position of President and its duties and functions so that he needs political leadership capital to carry out his office.[16] The short duration of the Interim President's term of office also influences his leadership model in running the government, starting from the challenges faced, policies that need to be decided immediately, up to the cooperation between the Interim President and the legislature in carrying out certain affairs in the government.[17]

To clarify the map of the debate, we will elaborate it with an approach to the root of the actor filling the Interim President position. Several weaknesses in the government system will also color this study because they are automatically transferred to the Interim President who holds the government for a short period.[18] In the framework of filling public positions, Bagir Manan explains three mechanisms for filling public officials; election, appointment and a mixture of the two.[19] Public officials who become Interim Presidents are divided into two sources: public officials who are initially elected by the people directly/election through general elections such as the Chair of the Legislative/Chair of the Cham-

[16] SIMONTON, D. K. Presidential Leadership: Performance Criteria and Their Predictors. In: M. G. RUMSEY, ed. *The Oxford Handbook of Leadership* [online]. 1st ed. New York, NY: Oxford University Press, 2012, pp. 327-342 [cit. 2024-05-02]. Available at: ISBN 978-0-19-539879-3. https://doi.org/10.1093/oxfordhb/9780195398793.013.0019.

[17] SIMONTON, D. K. Presidential Leadership: Performance Criteria and Their Predictors. In: M. G. RUMSEY, ed. *The Oxford Handbook of Leadership* [online]. 1st ed. New York, NY: Oxford University Press, 2012, pp. 327-342 [cit. 2024-05-02]. Available at: ISBN 978-0-19-539879-3. https://doi.org/10.1093/oxfordhb/9780195398793.013.0019.

[18] See MOE, T. M. and M. CALDWELL. The Institutional Foundations of Democratic Government: A Comparison of Presidential and Parliamentary Systems. *Journal of Institutional and Theoretical Economics* [online]. 1994, vol. 150, no. 1, pp. 171-195 [cit. 2024-05-02]. ISSN 1614-0559. Available at: https://www.jstor.org/stable/40753031.

[19] MANAN, B. *Teori dan Politik Konstitusi*. 1st ed. Jakarta: Direktorat Jenderal Pendidikan Tinggi, Departemen Pendidikan Nasional, 2000, p. 42. ISBN 979-8439-26-0.

ber which we call legitimate actors and public officials who are initially appointed by the President and are part of the executive branch, which we call bureaucratic actors. Borrowing from Greenstein's opinion, *'actors'* in government administration are official figures/figures who are personalized with strength and power so that they are able to influence people/groups in their work arena.[20] Legitimate actor or bureaucratic actor who becomes Interim President is a figure who does not come from outside the government, so the influence of his power and authority in a particular work arena already exists.[21]

Legitimate actors who are legislative personnel are officials who are directly elected by the people using a proportional method who represent small portion of the entire region. Generally, these legitimate actors have affiliated with political parties before taking office (such as the House of Representatives) and are representatives of non-political party areas (such as the Regional Representatives Council).[22] Even though the scope of their work is in the context of general policy – such as legislation and the budget – each legislator also works specifically in government affairs through commissions in the legislative chamber to carry out these functions in certain areas of government. Legislative power as a consequence of the trias politica separation of powers forms its organizational mechanism as state power, which some formulate it as unicameral, bicameral and tricameral. Each model choice will be led by a chairman, in accordance with the specified models.[23]

[20] GREENSTEIN, F. I. *Personality and Politics: Problems of Evidence, Inference, and Conceptualization*. 1st ed. Chicago: Markham Publishing Company, 1969. 200 p.

[21] See BARBER, J. D. *The Presidential Character: Predicting Performance in the White House* [online]. 4th ed. New York: Routledge, 2017. 544 p. [cit. 2024-05-02]. ISBN 978-1-351-22370-6. Available at: https://doi.org/10.4324/9781351223706.

[22] HAMDANI, F. and A. FAUZIA. Legal Discourse: The Spirit of Democracy and Human Rights Post Simultaneous Regional Elections 2020 in the Covid-19 Pandemic Era. *Lex Scientia Law Review* [online]. 2021, vol. 5, no. 1, pp. 97-118 [cit. 2024-05-02]. ISSN 2598-9685. Available at: https://doi.org/10.15294/lesrev.v5i1.45887.

[23] RIADHUSSYAH, M., F. FARHAN, F. HAMDANI and L. A. N. KUSUMA. The Dignity of Democracy in the Appointment of Acting Regional Heads by the President: Legal Construction after the Constitutional Court Decision Number 15/PUU-XX/2022. *Jurnal Jurisprudence* [online]. 2022, vol. 12, no. 1, pp. 106-119 [cit. 2024-05-02]. ISSN 2549-5615. Available at: https://doi.org/10.23917/jurisprudence.v12i1.1044.

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Bureaucratic actors who were appointed by the President are part of the President's prerogative to run the administration.[24] Politically, the appointment of bureaucrat actors by the President cannot be separated from the consequences of building a coalition before the general election – especially in a presidential system – where the President can totally determine the government structure/*winner takes all*.[25] To be more specific, Djahadi Hanan said that the President has total liberty to determine the government beyond the coalition of political parties in determining the distribution of coalitional goods in forming and ensuring the smooth running of the government.[26]

Specific expertise is another consideration that influences the President in appointing bureaucratic actors to support his administration, such as experience in public office/political careers, local bureaucratic experience and policy-related expertise.[27] Considerations for appointments of bureaucratic actors tend to no longer be political in nature – legitimacy/people's sovereignty – because the political element has been represented by the President as the personification of people's sovereignty.[28] Ministers are appointed to help the President carry out certain affairs in government, a minister is not appointed to lead all areas, but rather specifically certain areas in government.

In world government experience, the President's choice in appointing ministers generally combines the interests of the coalition and also the expert Cabinet. There are ministers who are experienced and expert

[24] ARIYANTO, B. and R. M. KAFRAWI. Orderly Principles of State Administration in Selecting Ministers. *Legality: Jurnal Ilmiah Hukum* [online]. 2022, vol. 30, no. 1, pp. 12-28 [cit. 2024-05-02]. ISSN 2549-4600. Available at: https://doi.org/10.22219/ljih.v30i1.15868.

[25] LIJPHART, A. Democracy in the 21st Century: Can We Be Optimistic?. *European Review* [online]. 2001, vol. 9, no. 2, pp. 169-184 [cit. 2024-05-02]. ISSN 1474-0575. Available at: https://doi.org/10.1017/S1062798701000163; and ARSIL, F. *Teori Sistem Pemerintahan: Pergeseran Konsep dan Saling Kontribusi antar Sistem Pemerintahan di Berbagai Negara*. 1st ed. Depok: Rajawali Pers, 2017, p. 114. ISBN 978-602-425-078-2.

[26] HANAN, D. Petugas Partai versus Presidensialisasi Politik. In: *SINDOnews.com* [online]. 2023-07-10 [cit. 2024-05-02]. Available at: https://nasional.sindonews.com/read/1148515/18/petugas-partai-versus-presidensialisasi-politik-1688972822.

[27] OUYANG, Y., E. T. HAGLUND and R. W. WATERMAN. The Missing Element: Examining the Loyalty-competence Nexus in Presidential Appointments. *Presidential Studies Quarterly* [online]. 2017, vol. 47, no. 1, pp. 62-91 [cit. 2024-05-02]. ISSN 1741-5705. Available at: https://doi.org/10.1111/psq.12346.

[28] CROCKETT, D. A. The Contemporary Presidency: Unity in the Executive and the Presidential Succession Act. *Presidential Studies Quarterly* [online]. 2004, vol. 34, no. 2, pp. 394-411 [cit. 2024-05-02]. ISSN 1741-5705. Available at: https://doi.org/10.1111/j.1741-5705.2004.00050.x.

in certain fields and serve as ministers in accordance with their fields, but there are also ministers who occupy certain ministries for political coalition reasons so that there is no correlation between the minister's background and the ministry he leads. Alexiadou said that the combination model in filling ministerial positions ultimately gave rise to three ministerial characters, namely loyalists, partisans and ideologues.

Loyalist ministers have the character of being loyal to the leader of their supporting party because they have the motive of being a job hunter, partisan ministers are party leaders who take position in the Cabinet to increase their political capital and ideologue ministers have the character of being committed to producing policies in accordance with their expertise so that they play an important role in decision making.[29] With such diverse characters, the composition of the Government Cabinet truly becomes a means of contestation of various characters and objectives which at any time can give rise to political resistance within the executive.[30]

If the Interim President comes from bureaucratic actor, then from the beginning the President has chosen and by himself determined who will replace him at any time if the President and Vice President offices become vacant. In the history of the United States, President Harry S. Truman criticized this, according to him the President should not appoint his own successor. Democratic nuances dominated Truman's attitude because he emphasized that the President's leadership must be someone who was *'elected'*.[31] Through special message to the Congress on June 19, 1945, Truman said: *"I do not believe that in a democracy this power should rest with the Chief Executive. Insofar as possible, the office of the President should be filled by an elective officer."*

The message was sent two months after President Franklin D. Roosevelt died on April 12 1945, and Truman, who was then his deputy,

[29] ALEXIADOU, D. Ideologues, Partisans, and Loyalists: Cabinet Ministers and Social Welfare Reform in Parliamentary Democracies. *Comparative Political Studies* [online]. 2015, vol. 48, no. 8, pp. 1051-1086 [cit. 2024-05-02]. ISSN 1552-3829. Available at: https://doi.org/10.1177/0010414015574880.

[30] GREENSTEIN, F. I. *Personality and Politics: Problems of Evidence, Inference, and Conceptualization*. 1st ed. Chicago: Markham Publishing Company, 1969. 200 p.

[31] FEERICK, J. D. *From Failing Hands: The Story of Presidential Succession*. 1st ed. New York: Fordham University Press, 1965, p. 205.

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stepped in to become President.[32] Roosevelt's death was an event that prompted Truman to send a message to the Congress urging revision of the Presidential Succession Act of 1886 which made a bureaucratic actor to be Interim President.[33] Apart from democratic reasons, Truman avoided uncertain political speculation, because it was open to the possibility that the succeeding minister was not an expert in a particular matter but came from the president's coalition, conversely he could be an expert in a particular field but not from the president's coalition which did not have a strong political capital. Truman's special message was one of the driving forces behind the issuance of the Presidential Succession Act of 1947, which finally changed the Interim President from a bureaucratic actor to a legitimate actor in the United States and is in effect to this day. Ultimately, the construct sparked a long debate in United States academic discourse. The root of the problem that has triggered the debate is because the United States does not recognize Interim governments, meaning that the successor will serve until the end of his remaining term of office so that the Interim President is seen as equal to the President who has a strategic position.

There are two divided blocks of thought: Akhil Reed Amar and Vikram David Amar,[34] Steven G. Calabresi[35] and John F. Manning[36] are in the groups that reject the Interim President by a legitimate actor with their *'modern originalism'* approach.[37] They argue that congressional in-

[32] KALLENBACH, J. E. The New Presidential Succession Act. *American Political Science Review* [online]. 1947, vol. 41, no. 5, pp. 931-941 [cit. 2024-05-02]. ISSN 1537-5943. Available at: https://doi.org/10.2307/1950197.

[33] FEERICK, J. D. Presidential Inability: Filling in the Gaps. *Politics and the Life Sciences* [online]. 2014, vol. 33, no. 2, pp. 11-36 [cit. 2024-05-02]. ISSN 1471-5457. Available at: https://doi.org/10.2990/33_2_11.

[34] AMAR, A. R. and V. D. AMAR. Is the Presidential Succession Law Constitutional?. *Stanford Law Review* [online]. 1995, vol. 48, no. 1, pp. 113-139 [cit. 2024-05-02]. ISSN 0038-9765. Available at: https://doi.org/10.2307/1229151.

[35] CALABRESI, S. G. The Political Question of Presidential Succession. *Stanford Law Review* [online]. 1995, vol. 48, no. 1, pp. 155-175 [cit. 2024-05-02]. ISSN 0038-9765. Available at: https://doi.org/10.2307/1229153.

[36] MANNING, J. F. Not Proved: Some Lingering Questions about Presidential Succession. *Stanford Law Review* [online]. 1995, vol. 48, no. 1, pp. 141-153 [cit. 2024-05-02]. ISSN 0038-9765. Available at: https://doi.org/10.2139/ssrn.2854357.

[37] They are often referred to as the 'Stanford Trilogy' which takes its approach of modern originalism centered on texts presented in a professional, structure-oriented, and historically competent manner by center-right commentators (including libertarians) and center-left commentators (including communitarians). See TILLMAN, S. B. *Legislative Officer*

volvement in the double vacancy line of succession is unconstitutional because the Speaker of the House of Representatives does not fall into the category of 'officials' referred to in the United States Constitution. John Fortier and Norman Ornstein provided support for different reasons which focused on political nuances where the Speaker of the House of Representatives tended to find it difficult because he had to adapt to the executive party which could be the party of the Speaker of the House of Representatives.[38] John Fortier and Norman Ornstein openly expressed their support for the secretary of state as the ideal figure who was first in the line of succession. Crockett sees that from the other side, the Speaker of the House of Representatives who rose to office during the previous President's term tends to find it difficult to adjust to the continuity of previous policies. If he succeeds, he will continue well with the previous President's Cabinet, but to the extreme, if he fails, then he has the opportunity to dismantle the previous President's Cabinet.[39]

Seth Barret Tillman opposes the view of modern originalism which rejects congressional involvement in the line of succession by starting an explanation of his disappointment with Amar's analysis which is considered to fail to differentiate and explain between *'officials'* and *'officials of the United States'* as written in the United States Constitution.[40] By using an intraterxtualism approach, he assesses that the Congress falls into the category of *'officials'* referred to in the United States Constitution by broadening the interpretive lens and connecting it with the functional duties of each office.[41] We also assess that Calabresi's stance against the Congress being at the first in the line of succession is influenced by his loyalty to the president's pattern of exclusive, unitary executive-style power: he does not want any expansion of power and also does not want

Succession to the Presidency [online]. 2010, pp. 1-29 [cit. 2024-05-02]. Available at: https://doi.org/10.2139/ssrn.978878.

[38] FORTIER, J. C. and N. J. ORNSTEIN. Presidential Succession and Congressional Leaders. *Catholic University Law Review* [online]. 2004, vol. 53, no. 4, pp. 993-1014 [cit. 2024-05-02]. ISSN 0008-8390. Available at: https://scholarship.law.edu/lawreview/vol53/iss4/5/.

[39] CROCKETT, D. A. The Contemporary Presidency: Unity in the Executive and the Presidential Succession Act. *Presidential Studies Quarterly* [online]. 2004, vol. 34, no. 2, pp. 394-411 [cit. 2024-05-02]. ISSN 1741-5705. Available at: https://doi.org/10.1111/j.1741-5705.2004.00050.x.

[40] TILLMAN, S. B. *Legislative Officer Succession to the Presidency* [online]. 2010, pp. 1-29 [cit. 2024-05-02]. Available at: https://doi.org/10.2139/ssrn.978878.

[41] TILLMAN, S. B. *Legislative Officer Succession to the Presidency* [online]. 2010, pp. 1-29 [cit. 2024-05-02]. Available at: https://doi.org/10.2139/ssrn.978878.

the executive to depend on any other power.[42] To see it more broadly, in the next section we will describe the strengths and weaknesses of each actor.

Bureaucratic actor

Despite Truman's doubts, the advantage of bureaucratic actor who rose to become Interim President is his understanding and professionalism in government affairs because he was part of the government before becoming Interim President. As someone who has direct contact with the government, bureaucratic actor understands and masters the daily needs and problems of government in certain situations so that he can decide on policies within a certain time scale appropriately and rapidly. He has a good memory about certain issues related to policy so that he can decide correctly and succeed in maintaining policy continuity.[43] Crockett said that the Interim President who used to be bureaucratic actors was much more effective because he succeeded in maintaining *'The Centrality of Energy'* in the executive branch of power.[44] According to him, the main essence of government is effective administration, while democratic government is the opening door to the running of the government, beyond that, what is to be achieved are goals for the wider community itself. Crockett rejected Truman's views which prioritized democratic aspects over effective government,[45] he quipped that the Speaker of the House of

[42] See some of his works – CALABRESI, S. G. and S. B. PRAKASH. The President's Power to Execute the Laws. *The Yale Law Journal* [online]. 1994, vol. 104, no. 3, pp. 541-665 [cit. 2024-05-02]. ISSN 0044-0094. Available at: https://doi.org/10.2307/797113, also see YOO, Ch. S., S. G. CALABRESI and A. J. COLANGELO. The Unitary Executive in the Modern Era, 1945 – 2004. *Iowa Law Review*. 2005, vol. 90, no. 2, pp. 601-732. ISSN 0021-0552. Rejection over Calabresi who deeply obsessed with unitary executive also has been expressed by Ackerman. See ACKERMAN, B. The New Separation of Powers. *Harvard Law Review* [online]. 2000, vol. 113, no. 3, pp. 633-729 [cit. 2024-05-02]. ISSN 2161-976X. Available at: https://doi.org/10.2307/1342286.

[43] See FORTIER, J. C. and N. J. ORNSTEIN. Presidential Succession and Congressional Leaders. *Catholic University Law Review* [online]. 2004, vol. 53, no. 4, pp. 993-1014 [cit. 2024-05-02]. ISSN 0008-8390. Available at: https://scholarship.law.edu/lawreview/vol53/iss4/5/.

[44] CROCKETT, D. A. The Contemporary Presidency: Unity in the Executive and the Presidential Succession Act. *Presidential Studies Quarterly* [online]. 2004, vol. 34, no. 2, pp. 394-411 [cit. 2024-05-02]. ISSN 1741-5705. Available at: https://doi.org/10.1111/j.1741-5705.2004.00050.x.

[45] CROCKETT, D. A. The Contemporary Presidency: Unity in the Executive and the Presidential Succession Act. *Presidential Studies Quarterly* [online]. 2004, vol. 34, no. 2, pp. 394-411 [cit. 2024-05-02]. ISSN 1741-5705. Available at: https://doi.org/10.1111/j.1741-5705.2004.00050.x.

Representatives who works on different type of work from the executive, was difficult to adapt to and need some much more time.

Crockett believes that democratic nuances are actually already represented if the legal rules regulate so, while the Congress' decisions are the personification of democratic elements so that if a bureaucratic actor takes office then he automatically has strong legitimacy. The bureaucratic actor who is always favored to become Interim President is the secretary of state. Indonesia also made the foreign minister as Interim President who works collegially with the minister of home affairs and the minister of defense. In the United States, this proposal is always put forward behind discussions of the 3-term Presidential Succession Act. The foreign minister is considered to play a key role in United States foreign policy, starting from formulating diplomatic strategies to maintain national security, promoting economic interests and strengthening bilateral and multilateral relations. The secretary of state also exerts great influence in the economic sector because he collaborates with the department of commerce on international trade policy including negotiating trade agreements, promoting United States interests and overcoming trade barriers. In matters of crisis and conflict, the foreign minister is an important locomotive among other state agencies/institutions to formulate policies that can resolve/reduce international tensions through negotiations, diplomacy and sanctions.[46]

The United States foreign relations, which is the main job of the United States Minister of Foreign Affairs, is carried out in collaboration with many departments/ministries. This is what makes the Minister of Foreign Affairs has a high level of popularity. The Minister of Foreign Affairs also has a high position in the political party structure so he plays an important role in controlling the party within the executive.[47] It is not surprising that the history of United States Presidents shows that six United States Presidents were former foreign ministers.[48]

[46] MAKOWER, H. United States Economic Policy and International Relations. *The Economic Journal* [online]. 1953, vol. 63, no. 250, pp. 450-452 [cit. 2024-05-02]. ISSN 1468-0297. Available at: https://doi.org/10.2307/2227155.

[47] RANKIN, R. S. Presidential Succession in the United States. *The Journal of Politics* [online]. 1946, vol. 8, no. 1, pp. 44-56 [cit. 2024-05-02]. ISSN 1468-2508. Available at: https://doi.org/10.2307/2125607.

[48] AMAR, A. R. and V. D. AMAR. Is the Presidential Succession Law Constitutional?. *Stanford Law Review* [online]. 1995, vol. 48, no. 1, pp. 113-139 [cit. 2024-05-02]. ISSN 0038-9765. Available at: https://doi.org/10.2307/1229151.

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Amar believes that the rise of bureaucratic actors is a choice based on structural arguments regarding the constitution which faithfully separates power strictly from the legislative branch of power.[49] The separation of powers is designed to perform different jobs and purposes such as responsiveness to the will of the people, protection of rights and freedoms, national security and defense, and good law enforcement. The three branches of government are structured differently to make the fulfillment of these functions more effective.[50] Amar supports Madison's opinion which states that actors in the Cabinet are very capable of holding concurrent positions as ministers and Interim President, thereby distancing the presidential government structure from the parliamentary model a la Robert Walpole in the 18th Century England, who served as a member of the Parliament at the same time as head of ministry (executive).[51] Madison's opinion also became the basic argument behind the formulation of the Presidential Succession Act of 1886 which made a bureaucratic actor the Interim President.[52]

Calabresi stated that the bureaucratic actor who rose to become Interim President was a form of loyalty to the strict separation of powers and rejected the executive's dependence on the legislature as mandated by the constitution, so that the legitimacy capital obtained by the bureaucratic actor was sourced from the mandate of the constitution which must be obeyed consistently.[53] Recently, Richard Albert provided support for Amar and Calabresi, considering that the separation of powers should also be interpreted as a separation of personnel. According to him, the separation of powers and the presidential system are synonyms,

[49] AMAR, A. R. and V. D. AMAR. Is the Presidential Succession Law Constitutional?. *Stanford Law Review* [online]. 1995, vol. 48, no. 1, pp. 113-139 [cit. 2024-05-02]. ISSN 0038-9765. Available at: https://doi.org/10.2307/1229151.

[50] TULIS, J. K. *The Rhetorical Presidency*. 1st ed. Princeton, NJ: Princeton University Press, 1987. 209 p. ISBN 0-691-07751-7.

[51] AMAR, A. R. and V. D. AMAR. Is the Presidential Succession Law Constitutional?. *Stanford Law Review* [online]. 1995, vol. 48, no. 1, pp. 113-139 [cit. 2024-05-02]. ISSN 0038-9765. Available at: https://doi.org/10.2307/1229151.

[52] AMAR, A. R. and V. D. AMAR. Is the Presidential Succession Law Constitutional?. *Stanford Law Review* [online]. 1995, vol. 48, no. 1, pp. 113-139 [cit. 2024-05-02]. ISSN 0038-9765. Available at: https://doi.org/10.2307/1229151.

[53] CALABRESI, S. G. The Political Question of Presidential Succession. *Stanford Law Review* [online]. 1995, vol. 48, no. 1, pp. 155-175 [cit. 2024-05-02]. ISSN 0038-9765. Available at: https://doi.org/10.2307/1229153.

one requires the other.[54] According to him, although the early history of the United States Constitution/the Founding Theory of Separation does not show a strict separation of powers, it still guarantees that each power has autonomous independence in exercising power.[55]

The question is whether the scenario envisioned by Calabresi can be fully realized in a country with the reality of massive political fragmentation. There are several weaknesses when a bureaucratic actor becomes Interim President. First, the non-legitimacy of the people and the crisis of political support. The burden and responsibility of the Interim President is to succeed governing effectively and stably. Simonton called the bureaucratic actor who rose to become Interim President *'the Accidental President'* who led in an unintentional way and did not have political legitimacy, making his performance lower than that of the President.[56] Simonton put it to the extreme: *"The performance of such accidental chief executives is noticeably inferior to that of duly elected Presidents."*[57]

There is a tendency when a bureaucratic actor becomes Interim President, it is more difficult to perform. An Interim President who does not receive the people's vote and is labeled as an assistant to the previous President is a figure who does not reflect the sovereignty of the people so that every step taken tends not to reflect the will of the people at large and is suspected of being a policy solely oriented towards the interests of the Interim President. The personnel of the Cabinet actors in carrying out the Interim President role will interact with the political issues when he takes office.[58] He is a figure who was never expected to emerge as a pub-

[54] ALBERT, R. The Fusion of Presidentialism and Parliamentarism. *The American Journal of Comparative Law* [online]. 2009, vol. 57, no. 3, pp. 531-578 [cit. 2024-05-02]. ISSN 2326-9197. Available at: https://doi.org/10.5131/ajcl.2008.0016.

[55] ALBERT, R. The Constitutional Politics of Presidential Succession. *Hofstra Law Review* [online]. 2011, vol. 39, no. 3, pp. 497-576 [cit. 2024-05-02]. ISSN 0091-4029. Available at: https://scholarlycommons.law.hofstra.edu/hlr/vol39/iss3/2/.

[56] SIMONTON, D. K. Presidential Leadership: Performance Criteria and Their Predictors. In: M. G. RUMSEY, ed. *The Oxford Handbook of Leadership* [online]. 1st ed. New York, NY: Oxford University Press, 2012, pp. 327-342 [cit. 2024-05-02]. Available at: ISBN 978-0-19-539879-3. https://doi.org/10.1093/oxfordhb/9780195398793.013.0019.

[57] SIMONTON, D. K. Presidential Leadership: Performance Criteria and Their Predictors. In: M. G. RUMSEY, ed. *The Oxford Handbook of Leadership* [online]. 1st ed. New York, NY: Oxford University Press, 2012, pp. 327-342 [cit. 2024-05-02]. Available at: ISBN 978-0-19-539879-3. https://doi.org/10.1093/oxfordhb/9780195398793.013.0019.

[58] FIEDLER, F. E. The Leadership Situation and the Black Box in Contingency Theories. In: M. M. CHEMERS and R. AYMAN, eds. *Leadership Theory and Research: Perspectives and Directions*. 2nd ed. San Diego: Academic Press, 1993, pp. 1-28. ISBN 0-12-170609-5.

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lic official who holds the highest government power, was not predicted and escaped public attention when the previous President appointed him only as a minister. As a result, his relationship with society was never established intentionally. He also never represented the community which gave him the authority to become a government leader so it is difficult for him to gain recognition and legitimacy, especially if the bureaucratic actor is categorized as an ideological minister who does not obtain any political support from the political party because he has never been affiliated and has no electoral base.[59]

The issue of the legitimacy of bureaucratic actors as Interim President will be more clearly visible in countries that institutionalize democracy with a President who is directly elected by the people. The constitution creates a culture and character of society that gives high trust to the President through the election of the President. Such scenarios establish traditions and habits for selecting capable and popular executive leaders.[60] This has a direct impact on the bureaucratic actor because he will be questioned about the trust and authority of the people directly which he does not have.[61] Such a problem was once raised against Adolfo Rodríguez Saá who was suspected of creating a conspiracy scenario to thwart the elections in Argentina when he was in the position of Interim President. In the end Adolfo fell. As a person who comes from a bureaucratic background, he does not have sufficient political support and legitimacy to face a conspiracy scenario that aims to bring him down.[62]

Second, the potential for bureaucratic actors to fail in leading the Cabinet. Fabian Burkhardt raised the President's concerns about the *'in-*

[59] ALEXIADOU, D. Ideologues, Partisans, and Loyalists: Cabinet Ministers and Social Welfare Reform in Parliamentary Democracies. *Comparative Political Studies* [online]. 2015, vol. 48, no. 8, pp. 1051-1086 [cit. 2024-05-02]. ISSN 1552-3829. Available at: https://doi.org/10.1177/0010414015574880.

[60] See LINZ, J. J. The Perils of Presidentialism. *Journal of Democracy* [online]. 1990, vol. 1, no. 1, pp. 51-69 [cit. 2024-05-02]. ISSN 1086-3214. Available at: https://doi.org/10.1353/jod.2005.0026.

[61] KANE, J. and H. PATAPAN. *The Democratic Leader: How Democracy Defines, Empowers, & Limits Its Leaders* [online]. 1st ed. Oxford: Oxford University Press, 2012. 207 p. [cit. 2024-05-02]. ISBN 978-0-19-173907-1. Available at: https://doi.org/10.1093/acprof:oso/9780199650477.001.0001.

[62] OSTIGUY, P. *Argentina's Double Political Spectrum: Party System, Political Identities, and Strategies, 1944 – 2007* [online]. 1st ed. Notre Dame: The Helen Kellogg Institute for International Studies, 2009. 97 p. [cit. 2024-05-02]. Working Paper, no. 361. Available at: https://doi.org/10.7274/26126032.v1.

capable of directing and monitoring its own agents',[63] which could also happen and be experienced by the Interim President. During the Interim President's leadership, the potential for *'bureaucratic resistance'* from within the Cabinet will occur.[64] The Cabinet formed based on a pre-electoral coalition gives its loyalty to the previous President to build the government, while the bureaucratic actor is a figure who also never has an emotional bond of leader/follower with his coalition. The situation becomes even more difficult if it turns out that the bureaucratic actor is not a loyalist/partisan minister who comes from an ideological minister and therefore has no political relationship with the President's coalition. In countries with political fragmentation due to multipartyism, it has the potential to occur because the loyalty of a Cabinet that is prepared based on a pre-electoral coalition is between the coalition and the elected President, which of course cannot be automatically transferred to the Interim President. In a dual-party system like the United States, this might not happen, because the concern is indeed towards the Interim President who comes from the Congress (Chairman of the House of Representatives) will not be able to adapt to the continuity of the executive ruling party which could be in opposition.[65]

In this case, Tyler emphasized that there is a close relationship between the position (the Interim President) and the political group in the Cabinet that supports him. If the political group provides good support, it will have a positive influence on the position, conversely if there is no good support from the political group on the basis that the person is not their partisan, then it will lead to negative influence on the position.[66] Fraud calls it the mutual *'illusion of love'* between followers and leaders.

[63] BURKHARDT, F. Institutionalising Authoritarian Presidencies: Polymorphous Power and Russia's Presidential Administration. *Europe-Asia Studies* [online]. 2021, vol. 73, no. 3, p. 498 [cit. 2024-05-02]. ISSN 1465-3427. Available at: https://doi.org/10.1080/09668136.2020.1749566.

[64] INGBER, R. Bureaucratic Resistance and the National Security State. *Iowa Law Review* [online]. 2018, vol. 104, no. 1, pp. 139-221 [cit. 2024-05-02]. ISSN 0021-0552. Available at: https://ilr.law.uiowa.edu/print/volume-103-issue-6/bureaucratic-resistance-and-the-national-security-state.

[65] FORTIER, J. C. and N. J. ORNSTEIN. Presidential Succession and Congressional Leaders. *Catholic University Law Review* [online]. 2004, vol. 53, no. 4, pp. 993-1014 [cit. 2024-05-02]. ISSN 0008-8390. Available at: https://scholarship.law.edu/lawreview/vol53/iss4/5/.

[66] TYLER, T. R. and E. A. LIND. A Relational Model of Authority in Groups. *Advances in Experimental Social Psychology* [online]. 1992, vol. 25, pp. 115-191 [cit. 2024-05-02]. ISSN 0065-2601. Available at: https://doi.org/10.1016/s0065-2601(08)60283-x.

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This perception is very important for them to feel a sense of shared attachment and their willingness to obey the leader.[67] This also makes the leader have a high level of trust so that he is able to be firm in controlling the Cabinet.[68]

The problem becomes even more complicated if before the simultant vacancy of the President and Vice President offices there is a strong internal and external division in the Cabinet, as in the history of the United States. Thomas Jefferson, who was then serving as secretary of state, was promoted by one faction of the Congress as the first in line of succession for Interim President – in opposition – with another faction who promoted Alexander Hamilton, who was then serving as secretary of the treasury, as first in line for succession to Interim President. To avoid divisions affecting the Cabinet's performance, the Presidential Succession Act 1792 finally gave the choice of Interim President to the Speaker of the House of Representatives.[69] The Cabinet divisions have also occurred in Indonesia, namely in the Ali Sastro Amijoyo Cabinet (1957) which was caused by tensions between the PNI and Masyumi.[70] Next, the seconds leading up to the ouster of President Soeharto began with internal turmoil in the Cabinet which began to abandon political support for Suharto.[71]

Apart from within, external political interference from the legislature – in the form of excessive horizontal control[72] – will very strongly

[67] TYLER, T. R. and E. A. LIND. A Relational Model of Authority in Groups. *Advances in Experimental Social Psychology* [online]. 1992, vol. 25, pp. 115-191 [cit. 2024-05-02]. ISSN 0065-2601. Available at: https://doi.org/10.1016/s0065-2601(08)60283-x.

[68] KELLER, J. W. Leadership Styles of Political Executives. In: R. B. ANDEWEG, R. ELGIE, L. HELMS, J. KAARBO and F. MÜLLER-ROMMEL, eds. *The Oxford Handbook of Political Executives* [online]. 1st ed. Oxford, UK: Oxford University Press, 2020, pp. 481-500 [cit. 2024-05-02]. ISBN 978-0-19-184676-2. Available at: https://doi.org/10.1093/oxfordhb/9780198809296.013.18.

[69] AMAR, A. R. and V. D. AMAR. Is the Presidential Succession Law Constitutional?. *Stanford Law Review* [online]. 1995, vol. 48, no. 1, pp. 113-139 [cit. 2024-05-02]. ISSN 0038-9765. Available at: https://doi.org/10.2307/1229151.

[70] PENDERS, C. L. M. ed. *Milestones on My Journey: The Memoirs of Ali Sastroamijoyo, Indonesian Patriot and Political Leader*. 1st ed. St. Lucia: University of Queensland Press, 1979, p. 283. ISBN 0-7022-1206-7.

[71] SURYADINATA, L. A Year of Upheaval and Uncertainty: The Fall of Soeharto and Rise of Habibie. In: D. SINGH and J. FUNSTON, eds. *Southeast Asian Affairs* [online]. 1st ed. Singapore: Institute of Southeast Asian Studies, 1999, pp. 111-127 [cit. 2024-05-02]. ISBN 978-981-230-689-0. Available at: https://doi.org/10.1355/9789812306890-010.

[72] MICHAELS, J. D. Of Constitutional Custodians and Regulatory Rivals: An Account of the Old and New Separation of Powers. *New York University Law Review* [online]. 2016, vol. 91, no. 2, pp. 227-291 [cit. 2024-05-02]. ISSN 2766-0834. Available at: https://www.

disrupt the activities of the Interim President, especially if it turns out that the Interim President is not part of the parliamentary majority coalition. Presidents who do not come from a parliamentary majority are generally faced with blocking presidential initiatives driven by the party/coalition that loses the presidential election. All situations, deficiencies in the government system, tensions between powers from the previous regime will become an *'iceberg effect'* which is passed down to the Interim President, who in Richard Albert's language is *'seeping into the succession regime'*.[73] Even more ironic, the Interim President is not supported by the power of an absolute majority (like the President) so he will fail to face the blocking from the Parliament.[74] The ability of bureaucratic actors to collaborate with the Parliament will be the key to the running of government. This ability is difficult to have, especially if bureaucratic actors do not have legitimacy and strong political support.[75] Cash provides a more specific explanation in his thesis about *'the isolated presidency'* with the case of an unelected President facing a divided government and facing a lot of opposition from political party factions and excessive control from the Parliament so that he works like a paralyzed official who only relies on constitutional authority, which he possesses without adequate political support.[76]

External political interference is difficult to be clearly identified, because it is integrated into the system engineered by the constitution. This external disturbance is an institutional implication of the design choices in the agreed constitution and works on the resulting rules.[77] They usual-

nyulawreview.org/issues/volume-91-number-2/of-constitutional-custodians-and-regulatory-rivals-an-account-of-the-old-and-new-separation-of-powers/.

[73] ALBERT, R. The Constitutional Politics of Presidential Succession. *Hofstra Law Review* [online]. 2011, vol. 39, no. 3, pp. 497-576 [cit. 2024-05-02]. ISSN 0091-4029. Available at: https://scholarlycommons.law.hofstra.edu/hlr/vol39/iss3/2/.

[74] MAINWARING, S. and M. S. SHUGART. Juan Linz, Presidentialism, and Democracy: A Critical Appraisal. *Comparative Politics* [online]. 1997, vol. 29, no. 4, pp. 449-471 [cit. 2024-05-02]. ISSN 2151-6227. Available at: https://doi.org/10.2307/422014.

[75] ODEGARD, P. H. Presidential Leadership and Party Responsibility. *The ANNALS of the American Academy of Political and Social Science* [online]. 1956, vol. 307, no. 1, pp. 66-81 [cit. 2024-05-02]. ISSN 1552-3349. Available at: https://doi.org/10.1177/000271625630700108.

[76] CASH, J. T. *The Isolated Presidency* [online]. 1st ed. New York, NY: Oxford University Press, 2023. 258 p. [cit. 2024-05-02]. ISBN 978-0-19-766980-8. Available at: https://doi.org/10.1093/oso/9780197669778.001.0001.

[77] See NEGRETTO, G. L. Constitution-making and Institutional Design. The Transformations of Presidentialism in Argentina. *European Journal of Sociology* [online]. 1999, vol. 40,

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ly work through one or both major parties, each of which has competing interests with the other party.[78] In a country with a multiparty presidential setting, this potential is highly possible because external political interference is well institutionalized through the *'dual legitimacy'* feature which makes the Parliament a competitor of the President in government.[79] Interim Presidents with bureaucratic backgrounds ultimately create an increasingly antagonistic relationship with the Parliament which distances them from stable democratic consolidation between powers. Brazil in 1964 provides a lesson in how antagonistic relationships give birth to paralysis and not achieving their respective agendas.[80]

Third, difficulties in dealing with non-governmental forces. There are two scenarios that have the potential to occur and involve the military returning to the political arena of government, namely the sharpening of legislative relations with the executive (Interim President) and the military taking the role of mediator in these relations; and national/international crisis situations in the defense sector. In the first scenario, the antagonistic relationship between the legislature and the Interim President creates an unstable political situation for the government. Keller calls this as *'situations are illdefined'*,[81] where the Interim President's relationship is in a position that is affiliated with or opposed to the previous regime.[82] If it is indicated that the Interim President is opposing/leaning towards the previous political regime or there are other factors that increases the bad relationship with the legislature, then in that condition

no. 2, pp. 193-232 [cit. 2024-05-02]. ISSN 1474-0583. Available at: https://doi.org/10.1017/s0003975600007451.

[78] DAHL, R. A. Reflections on Opposition in Western Democracies. *Government and Opposition* [online]. 1965, vol. 1, no. 1, pp. 7-24 [cit. 2024-05-02]. ISSN 1477-7053. Available at: https://doi.org/10.1111/j.1477-7053.1965.tb00362.x.

[79] LINZ, J. J. The Perils of Presidentialism. *Journal of Democracy* [online]. 1990, vol. 1, no. 1, pp. 51-69 [cit. 2024-05-02]. ISSN 1086-3214. Available at: https://doi.org/10.1353/jod.2005.0026.

[80] MAINWARING, S. Presidentialism in Latin America. *Latin American Research Review* [online]. 1990, vol. 25, no. 1, pp. 157-179 [cit. 2024-05-02]. ISSN 1542-4278. Available at: https://doi.org/10.1017/S0023879100023256.

[81] KELLER, J. W. Leadership Styles of Political Executives. In: R. B. ANDEWEG, R. ELGIE, L. HELMS, J. KAARBO and F. MÜLLER-ROMMEL, eds. *The Oxford Handbook of Political Executives* [online]. 1st ed. Oxford, UK: Oxford University Press, 2020, pp. 481-500 [cit. 2024-05-02]. ISBN 978-0-19-184676-2. Available at: https://doi.org/10.1093/oxfordhb/9780198809296.013.18.

[82] SKOWRONEK, S. *The Politics Presidents Make: Leadership from John Adams to Bill Clinton*. 2nd ed. Cambridge, MA: The Belknap Press of Harvard University Press, 1997. 546 p. ISBN 0-674-68937-2.

the military has the opportunity to take a role as a mediator between the two or facilitate the desires between the two.

Linz called the military's position in this situation as *'poder moderador'* which dragged the military back into the arena of national politics (praetorianism).[83] Recently, Egypt's experience explains this. President Mohammed Morsi, who was supported by the Ikhwanul Muslimin, proposed a pro-Islamic constitution. This proposal was strongly opposed by Egypt's liberal-secular forces by boycotting the Constituent Assembly. Tensions between the Parliament and the President are increasing and liberal-secular forces are lobbying the military to overthrow democratically elected President Mohamed Morsi.[84]

Even though the military has returned to its professional duties in defense matters, informally, opportunities to influence the government can still occur. Nordlinger identifies the level of military involvement in politics at three levels, namely moderators (not being full rulers but having great power to protect the status quo), guardians (participating in direct control of the government) and rulers (dominating power).[85] The situation becomes even more complicated if the military sees that its loyalty to the President has ended, marked by the vacancy of the previous President's position. This will further facilitate confrontation against the Interim President, who on the other hand has low political support.

The second scenario is an Interim President who does not make quick, responsive decisions in a national/international crisis. In the case of implementing presidential duties, bureaucratic actors who are not used to dealing with pressure and national/international crisis situations – or in the case of Indonesia where decisions must be made collegially – quick decisions are difficult to take.[86] When the Interim President is

[83] LINZ, J. J. The Perils of Presidentialism. *Journal of Democracy* [online]. 1990, vol. 1, no. 1, pp. 51-69 [cit. 2024-05-02]. ISSN 1086-3214. Available at: https://doi.org/10.1353/jod.2005.0026. Also see STEPAN, A. and C. SKACH. Constitutional Frameworks and Democratic Consolidation: Parliamentarianism versus Presidentialism. *World Politics* [online]. 1993, vol. 46, no. 1, pp. 1-22 [cit. 2024-05-02]. ISSN 1086-3338. Available at: https://doi.org/10.2307/2950664.

[84] MIETZNER, M. How Indonesia Won a Constitution. *Journal of Democracy* [online]. 2014, vol. 25, no. 2, pp. 171-175 [cit. 2024-05-02]. ISSN 1086-3214. Available at: https://doi.org/10.1353/jod.2014.0023.

[85] NORDLINGER, E. A. *Soldiers in Politics: Military Coups and Governments*. 1st ed. Englewood Cliffs, NJ: Prentice-Hall, 1977. 224 p. ISBN 0-13-822163-4.

[86] See KELLER, J. W. Leadership Styles of Political Executives. In: R. B. ANDEWEG, R. ELGIE, L. HELMS, J. KAARBO and F. MÜLLER-ROMMEL, eds. *The Oxford Handbook of Political Ex-*

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faced with a defense crisis, what the armed forces need is a immediate and measured response to the faced critical situation in a short time.[87] This condition can trigger the military to take actions outside its authority and in the name of national interests.[88] A more extreme situation could occur, where the military takes power in the name of national interests. Sudan in 2021 shows the experience of how this happens, where Prime Minister Abdalla Hamdok – who became Interim President – was overthrown by the military under General Abdul Fattah and took over the government.[89]

Other than the example of the Interim President of Sudan, the fourth President of the United States, James Medison, entered the White House at a time when international turmoil was so great and faced a military leadership that was so *'war-sick'* and aggressive in fighting Britain. Barber, who viewed Madison as someone who did not like confrontation, finally fell into the pressure of the army generals to take aggressive steps. General Jackson's victory at New Orleans ultimately saved Madison's reputation in the history of United States Presidents.[90]

An Interim President who is faced with a crisis must take extraordinary actions to handle the crisis quickly and accurately. This is the basic logic favored by the presidential system.[91] An Interim President who does not have sufficient legitimacy and experience in state affairs, relatively give rise to conflicting opinions and attitudes, one of which is with

ecutives [online]. 1st ed. Oxford, UK: Oxford University Press, 2020, pp. 481-500 [cit. 2024-05-02]. ISBN 978-0-19-184676-2. Available at: https://doi.org/10.1093/oxfordhb/9780198809296.013.18.

[87] See BOIN, A., P. 't HART and F. van ESCH. Political Leadership in Times of Crisis: Comparing Leader Responses to Financial Turbulence. In: L. HELMS, ed. *Comparative Political Leadership* [online]. 1st ed. Basingstoke: Palgrave Macmillan, 2012, pp. 119-141 [cit. 2024-05-02]. ISBN 978-1-137-26491-6. Available at: https://doi.org/10.1057/9781137264916_6.

[88] See MARIJAN, K. *Sistem Politik Indonesia: Konsolidasi Demokrasi Pasca-Orde Baru*. 5th ed. Jakarta: Kencana, 2016, p. 262. ISBN 978-602-8730-16-7.

[89] Militer Sudan Kudeta Pemerintahan Transisi. In: *Deutsche Welle* [online]. 2021-10-25 [cit. 2024-05-02]. Available at: https://www.dw.com/id/militer-sudan-kudeta-pemerintahan-transisi/a-59615407.

[90] BARBER, J. D. *The Presidential Character: Predicting Performance in the White House* [online]. 4th ed. New York: Routledge, 2017. 544 p. [cit. 2024-05-02]. ISBN 978-1-351-22370-6. Available at: https://doi.org/10.4324/9781351223706.

[91] PIPER, J. R. "Situational Constitutionalism" and Presidential Power: The Rise and Fall of the Liberal Model of Presidential Government. *Presidential Studies Quarterly* [online]. 1994, vol. 24, no. 3, pp. 577-594 [cit. 2024-05-02]. ISSN 1741-5705. Available at: https://www.jstor.org/stable/27551285.

the military leadership.[92] This condition triggers non-governmental forces such as the military to take over the government to function as state instruments to carry out strategic steps that are *'judged'* to save national sovereignty and security. Interim Presidents who are haunted by a crisis of legitimacy tend to find it difficult to deal with situations like this. Mainwaring believes that the entry of the military junta through the coup door is the only way to get rid of a President – as well as an Interim President – who is incompetent and unpopular.[93]

Military intervention cannot be separated from an unstable political atmosphere. The military has more freedom to enter political territory in countries that are classified as weak (weak states), in conditions of instability and has political decay. Even in countries with an established government system such as the United States, disputes between military officials and the President also occur, as in the United States. General McChrystal, through his public statements, had a dispute with President Obama's policies, which he was eventually replaced and his position was succeeded by General Petraeus in 2010.[94] Theoretically, Hamdi Muluk also said, the dispute occurred because of the Armed Forces General's negative and incompetent assessment of the President.[95] In an atmosphere like this, the military has the reason that their entry into the political arena is *'to create stability, order and legitmacy'*.

Legitimate actor

The next official nominated for Interim President is the legitimate actor who comes from legislative personnel. Generally, in the constitutions of several countries in the world, the person is the chairman of one of the chambers in the legislature, such as the Chairman of the House of Representatives, Chairman of the Senate or a combination of the two (such as the Chairman of the People Consultative Assembly in Indonesia). The legitimate actor will be the Interim President until a new President and

[92] ROISMAN, S. Presidential Law. *Minnesota Law Review* [online]. 2021, vol. 105, no. 3, p. 1269 [cit. 2024-05-02]. ISSN 0026-5535. Available at: https://minnesotalawreview.org/article/presidential-law/.

[93] MAINWARING, S. Presidentialism in Latin America. *Latin American Research Review* [online]. 1990, vol. 25, no. 1, pp. 157-179 [cit. 2024-05-02]. ISSN 1542-4278. Available at: https://doi.org/10.1017/S0023879100023256.

[94] GATES, R. M. *Duty: Memoirs of a Secretary at War*. 1st ed. New York: Alfred A. Knopf, 2014. 618 p. ISBN 978-0-307-95947-8.

[95] MULUK, H. Demokrasi Presidensial dan Kepemimpinan Presidensial: Sebuah Assesmen Awal. *Prisma*. 2016, vol. 35, no. 3, pp. 104-114. ISSN 3048-3875.

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Vice President are elected or serve until the end of the remaining term of office of the previous President like in the United States. In contrast to bureaucratic actors, legitimate actors have superior political legitimacy because they are directly elected by the people.

Being an official directly elected by the people is the main advantage of a legitimate actor because this kind of constitutional design is seen as a symbol that has succeeded in maintaining the identity of the republic and the nuances of democratization in the political structure of government. This advantage is useful as capital for his leadership as Interim President – particularly – regarding Interim President's immunity from external political interference such as excessive horizontal/vertical control from any party. In taking certain policy actions, legislative political support tends to be well guaranteed. The appointment of an Interim President in a presidential system is a sign that the safety valve in the form of the 'fixed term' of the President's term of office in presidentialism has been breached,[96] which means that within the limits of reasonable circumstances, political tension between the two powers has the potential to increase. Legitimate actors have the advantage of resolving and normalizing government conditions and stability compared to bureaucratic actors.

James H., who participated in formulating the Presidential Succession Act of 1792 in the United States, considered that officials who came from the people and were elected by the people occupied the highest hierarchy of the basic principles of government in the United States, so it was very natural that it annulled the principle of separation of powers. He said: *"away the choice from the people,* […] *thus violating the first principle of a free elective Government."*[97] The separation of powers between the executive and the legislature, both of which are directly elected by the people, must be read as an alternative method if one of the powers meet an unexpected condition from the aspect of democratization, so that the inclusion of legislative personnel in the executive is part of an

[96] MAINWARING, S. and M. S. SHUGART. Juan Linz, Presidentialism, and Democracy: A Critical Appraisal. *Comparative Politics* [online]. 1997, vol. 29, no. 4, pp. 449-471 [cit. 2024-05-02]. ISSN 2151-6227. Available at: https://doi.org/10.2307/422014.

[97] See FEERICK, J. D. *From Failing Hands: The Story of Presidential Succession*. 1st ed. New York: Fordham University Press, 1965. 368 p.

effort to maintain democratic nuances in the executive body and keep it away from officials who are not chosen by the people.[98]

The worship of democratization by shifting the position of legitimate actors received criticism from Calabressi because the weight of his representation was considered artificial and lower because he only represented a small portion of regions compared to the President who was supported by an absolute majority.[99] Calabresi's criticism is a classic issue that has continued to be discussed since the beginning of the formulation of the Presidential Succession Act of 1792 in the United States until today.[100] Kallenbach denies this, and according to him political support for legitimate actors cannot be seen with such a narrow lens. He is of the opinion that legitimate actors have political capital that is also equal to that of the President. According to him, the legitimate actor is the leader of one of the chambers so that his election as chairman of that chamber offsets the weakness of his small representation from the region.[101] The voting for chamber leader is generally determined by considerations of seniority, basic knowledge and experience regarding parliamentary politics and his relationship with the executive and loyalty to political parties.[102]

In this way, the legitimate actor gets three votes at once: a small vote from the region, a majority vote in the chamber that elects him as leader and the political party's full support for him. The legitimate actor who rises to become Interim President is part of a *'series'* of the roles and responsibilities of legislative power in carrying out its authority as an institution that inaugurates and dismisses the President. In the state ceremonial process, the President is inaugurated before the legislature – that personified – as the people's sovereign. In dismissal, generally the legisla-

[98] FEERICK, J. D. *From Failing Hands: The Story of Presidential Succession*. 1st ed. New York: Fordham University Press, 1965. 368 p.

[99] CALABRESI, S. G. The Political Question of Presidential Succession. *Stanford Law Review* [online]. 1995, vol. 48, no. 1, pp. 155-175 [cit. 2024-05-02]. ISSN 0038-9765. Available at: https://doi.org/10.2307/1229153.

[100] RANKIN, R. S. Presidential Succession in the United States. *The Journal of Politics* [online]. 1946, vol. 8, no. 1, pp. 44-56 [cit. 2024-05-02]. ISSN 1468-2508. Available at: https://doi.org/10.2307/2125607.

[101] KALLENBACH, J. E. The New Presidential Succession Act. *American Political Science Review* [online]. 1947, vol. 41, no. 5, pp. 931-941 [cit. 2024-05-02]. ISSN 1537-5943. Available at: https://doi.org/10.2307/1950197.

[102] KALLENBACH, J. E. The New Presidential Succession Act. *American Political Science Review* [online]. 1947, vol. 41, no. 5, pp. 931-941 [cit. 2024-05-02]. ISSN 1537-5943. Available at: https://doi.org/10.2307/1950197.

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ture is the final decider in the process of impeaching the President/Vice President. From this approach, legal responsibility arises by the legislature which expands its area of responsibility – not just for dismissal – but also to the vacancy of the President's office which is the *'impact'* of the dismissal.

In addition to supporting political legitimacy, the inclusion of legitimate actor as Interim President is also favored because it acts as an outsider to the executive who is not involved to problems within the internal of the executive. There are several scenarios for this, such as systematic violations of the law involving some/all Cabinet members and natural conditions that cause the government to be paralyzed. In the first scenario, the President who steps down due to legal violations (such as corruption) involving internal executive causes a decline in public trust in actors within the executive. The bureaucratic actor who rises to become Interim President will always be interrupted with distrust and minimum support because he is accused of being an *'old actor'* from a regime that was considered corrupt and maintained the status quo.[103] Legitimate actors are favored in handling this situation because they are outsider to the executive and are able to oversee the transition from the old regime to a new, more democratic regime.

The second scenario is a natural condition that occurs within the executive, such as the mass death of important actors in the executive starting from the President to his ranks of ministers while carrying out state duties, such as in the most recent case of handling the case of COVID-19 infectious disease outbreak or when going on either an abroad or domestic trip together and experienced an accident. This situation can leave several positions in the government to be vacant and legitimate actors as outsider to the executive play an important role in returning the situation to normal.

Poland taught an important lesson about this, in 2010 Bronislaw Komorowski, who at that time served as Marshal of the Sejm, became Interim President replacing the Polish President Lech Kaczyński who died in a plane crash on April 10, 2010, not only President Lech Kaczyński,

[103] See ANWAR, D. F. The Habibie Presidency: Catapulting towards Reform. In: E. ASPINALL and G. FEALY, eds. *Soeharto's New Order and Its Legacy: Essays in Honour of Harold Crouch* [online]. 1st ed. Canberra: ANU Press, 2010, pp. 99-117 [cit. 2024-05-02]. Asian Studies Series. ISBN 978-1-921666-47-6. Available at: https://doi.org/10.22459/snol.08.2010.07.

several government officials also died in that incident.[104] The appointment of Bronislaw Komorowski as Interim President played an important role in restoring the government because he was an actor from outside the executive who had strong political capital to overcome critical conditions. Bronislaw Komorowski appointed Jacek Michałowski to replace Władysław Stasiak, the deceased Head of the Presidential Chancellery. He then appointed retired General Stanisław Koziej as head of the National Security Bureau replacing the late Aleksander Szczygło. He also nominated Marek Belka, former Minister of Finance and Prime Minister (2004 – 2005) of the left-wing government, to become President of the National Bank of Poland replacing the late Sławomir Skrzypek.[105]

Even though superior in terms of their legitimacy and role since they are from the outside of the executive, legitimate actors are considered weak in function. This is because they are an actor who are from the outside of the executive so they have no involvement in any policies being prepared/planned by the previous President. They have to adapt to a new type of work which very different from their previous areas of works which was limited to formulating general policies within a legislative framework: legislative functions, budget functions and supervisory functions.

Even though the scope of their work is in the context of general policy – such as legislation and the budget – each legislator also works on particular areas in government affairs through commissions in the legislative chamber to carry out check and balance functions in certain areas of government. Legislative actors will be faced with specific issues in the areas of government that they have to deal with. The situation becomes even more complicated if it turns out that the legitimate actors entering the executive do not come from the same/opposite political party, thereby potentially increasing political tension between the leader and his Cabinet. This is the main weakness and criticism of the United States model, because the legitimate actor served for a long time until the re-

[104] KULISH, N. Acting President in Poland Wins a Narrow Victory. In: *The New York Times* [online]. 2010-07-04 [cit. 2024-05-02]. Available at: https://www.nytimes.com/2010/07/05/world/europe/05poland.html.

[105] KURSKA, J. Quo vadis, Polonia?. *La Vie des idées* [online]. 2016-06-22 [cit. 2024-05-02]. ISSN 2105-3030. Available at: https://laviedesidees.fr/Quo-vadis-Poloniae.html.

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mainder of the previous President's term of office expired and was deemed to have failed to maintain the continuity of government policy.[106]

This weakness arises because the United States using a *'line succession'* model so that legitimate actors serve until the end of the President's term of office. This model is significantly different from the majority of constitutions of the world countries which use a *'temporary'* model where the legitimate actor who rises to the role of Interim President only serves for a short duration (30 – 60 days), rather than spending the remainder of the President's term of office. Thus, the functional concerns addressed to legitimate actors are not relevant to countries outside the United States.

Concerns about the succession of government are more appropriately pinned on the newly elected President and Vice President who apparently do not come from a political party or a combination of political parties that supported the previous President.[107] Likewise, in countries that implement special elections using the method of direct election by the people, it turns out that the newly elected President and Vice President are different from the previous political parties, so that in a short period of time – completing the remainder of the previous President's term – the potential for an overhaul to the internal government structure and its policies is more likely to happen.

The very worrying weakness actually exists from the personal aspects of the legitimate actors, such as work performance related to age. This became the attention of the United States when President Kennedy was shot dead and *'line succession'* again became an issue discussed in the United States politics.[108] Even though they still had a Vice President who replaces Kennedy, the next official in the line of succession (Speaker of the House of Representatives) is in the spotlight because he is right behind the Vice President's line of succession. The Speaker of the House of Representatives, John W. McCormack, who is 70, and President pro

[106] FEERICK, J. D. *From Failing Hands: The Story of Presidential Succession*. 1st ed. New York: Fordham University Press, 1965. 368 p.

[107] To fill the vacant positions of the new President and Vice President, Indonesia used an indirect election model given to the People Consultative Assembly. Only political parties/ political associations that were ranked number 1 and 2 in the previous general election have the right to nominate candidates to the People Consultative Assembly for election. See Article 8 Paragraph (3) of the 1945 Constitution of the Republic of Indonesia.

[108] FEERICK, J. D. *From Failing Hands: The Story of Presidential Succession*. 1st ed. New York: Fordham University Press, 1965. 368 p.

tempore Carl Hayden, whose 80, are both next in line, were the targets of sharp criticism. Their ability to act as President – if necessary – came under serious scrutiny and various groups called for them to step down from office so that someone more suitable in the line of succession could replace them.[109]

Concluding remarks

The presented paper has documented the various advantages and disadvantages of the two models of Interim Presidents – filled with bureaucratic actor and legitimate actor – by relying on aggregations that assemble and analyze various histories of world government. The United States as the mother of presidentialism is not well established enough to be the main reference because it is the only country that implements *'line succession'* where the successor to the President works until the remainder of the previous President's term of office expires. Meanwhile, various countries use different models, namely *'temporary presidential succession'* where the Interim President works for a very short time limit (30 – 60 days). This difference ultimately makes the logic and perspective of the Interim President different because he worked for such a short time with the government's uncertain political situation.

This paper does not make a choice as to which is more ideal as an Interim President, whether someone who comes from a bureaucratic actor or a legitimate actor. The legitimate actor is superior in terms of politics and stability because he has several levels of votes from the people and political parties so that he is confident in leading the government for a short period. The bureaucratic actor is favored in terms of professionalism and ability to make policies because he comes from within the previous government and has a good record in working on problems and situation. What is a weakness for one actor, becomes an advantage for another actor. The position of our paper is to fill the theoretical void regarding the explanation of each actor to fill the Interim President which has not been widely explained and explored by scholars, both constitutional and political scholars. Because there is no answer as to which is ideal between the two (bureaucratic actors and legitimate actors), this paper really opens up opportunities for further research to determine the choice

[109] FEERICK, J. D. *From Failing Hands: The Story of Presidential Succession*. 1st ed. New York: Fordham University Press, 1965. 368 p.

between these two actors by contextualizing them in certain countries with each unique government settings and political dynamics.

References

ACKERMAN, B. The New Separation of Powers. *Harvard Law Review* [online]. 2000, vol. 113, no. 3, pp. 633-729 [cit. 2024-05-02]. ISSN 2161-976X. Available at: https://doi.org/10.2307/1342286.

ALBERT, R. The Constitutional Politics of Presidential Succession. *Hofstra Law Review* [online]. 2011, vol. 39, no. 3, pp. 497-576 [cit. 2024-05-02]. ISSN 0091-4029. Available at: https://scholarlycommons.law.hofstra.edu/hlr/vol39/iss3/2/.

ALBERT, R. The Fusion of Presidentialism and Parliamentarism. *The American Journal of Comparative Law* [online]. 2009, vol. 57, no. 3, pp. 531-578 [cit. 2024-05-02]. ISSN 2326-9197. Available at: https://doi.org/10.5131/ajcl.2008.0016.

ALEXIADOU, D. Ideologues, Partisans, and Loyalists: Cabinet Ministers and Social Welfare Reform in Parliamentary Democracies. *Comparative Political Studies* [online]. 2015, vol. 48, no. 8, pp. 1051-1086 [cit. 2024-05-02]. ISSN 1552-3829. Available at: https://doi.org/10.1177/0010414015574880.

AMAR, A. R. and V. D. AMAR. Is the Presidential Succession Law Constitutional?. *Stanford Law Review* [online]. 1995, vol. 48, no. 1, pp. 113-139 [cit. 2024-05-02]. ISSN 0038-9765. Available at: https://doi.org/10.2307/1229151.

ANWAR, D. F. The Habibie Presidency: Catapulting towards Reform. In: E. ASPINALL and G. FEALY, eds. *Soeharto's New Order and Its Legacy: Essays in Honour of Harold Crouch* [online]. 1st ed. Canberra: ANU Press, 2010, pp. 99-117 [cit. 2024-05-02]. Asian Studies Series. ISBN 978-1-921666-47-6. Available at: https://doi.org/10.22459/snol.08.2010.07.

ARIYANTO, B. and R. M. KAFRAWI. Orderly Principles of State Administration in Selecting Ministers. *Legality: Jurnal Ilmiah Hukum* [online]. 2022, vol. 30, no. 1, pp. 12-28 [cit. 2024-05-02]. ISSN 2549-4600. Available at: https://doi.org/10.22219/ljih.v30i1.15868.

ARSIL, F. *Teori Sistem Pemerintahan: Pergeseran Konsep dan Saling Kontribusi antar Sistem Pemerintahan di Berbagai Negara*. 1st ed. Depok: Rajawali Pers, 2017. 298 p. ISBN 978-602-425-078-2.

BARBER, J. D. *The Presidential Character: Predicting Performance in the White House* [online]. 4th ed. New York: Routledge, 2017. 544 p. [cit. 2024-05-02]. ISBN 978-1-351-22370-6. Available at: https://doi.org/10.4324/9781351223706.

BOIN, A., P. 't HART and F. van ESCH. Political Leadership in Times of Crisis: Comparing Leader Responses to Financial Turbulence. In: L. HELMS, ed. *Comparative Political Leadership* [online]. 1st ed. Basingstoke: Palgrave Macmillan, 2012, pp. 119-141 [cit. 2024-05-02]. ISBN 978-1-137-26491-6. Available at: https://doi.org/10.1057/9781137264916_6.

BURKHARDT, F. Institutionalising Authoritarian Presidencies: Polymorphous Power and Russia's Presidential Administration. *Europe-Asia Studies* [online]. 2021, vol. 73, no. 3, pp. 472-504 [cit. 2024-05-02]. ISSN 1465-3427. Available at: https://doi.org/10.1080/09668136.2020.1749566.

CALABRESI, S. G. and S. B. PRAKASH. The President's Power to Execute the Laws. *The Yale Law Journal* [online]. 1994, vol. 104, no. 3, pp. 541-665 [cit. 2024-05-02]. ISSN 0044-0094. Available at: https://doi.org/10.2307/797113.

CALABRESI, S. G. The Political Question of Presidential Succession. *Stanford Law Review* [online]. 1995, vol. 48, no. 1, pp. 155-175 [cit. 2024-05-02]. ISSN 0038-9765. Available at: https://doi.org/10.2307/1229153.

CAMPBELL BLACK, H. *Black's Law Dictionary: Definitions of the Terms and Phrases of American and English Jurisprudence, Ancient and Modern*. 4th ed. Saint Paul: West Publishing Company, 1968. 1882 p.

CASH, J. T. *The Isolated Presidency* [online]. 1st ed. New York, NY: Oxford University Press, 2023. 258 p. [cit. 2024-05-02]. ISBN 978-0-19-766980-8. Available at: https://doi.org/10.1093/oso/9780197669778.001.0001.

Constitute. In: *ConstituteProject.org* [online]. 2024 [cit. 2024-05-02]. Available at: https://www.constituteproject.org/.

Constitution of the Republic of Indonesia [1945].

CROCKETT, D. A. The Contemporary Presidency: Unity in the Executive and the Presidential Succession Act. *Presidential Studies Quarterly* [online]. 2004, vol. 34, no. 2, pp. 394-411 [cit. 2024-05-02]. ISSN 1741-5705. Available at: https://doi.org/10.1111/j.1741-5705.2004.00050.x.

DAHL, R. A. Reflections on Opposition in Western Democracies. *Government and Opposition* [online]. 1965, vol. 1, no. 1, pp. 7-24 [cit. 2024-05-02]. ISSN 1477-7053. Available at: https://doi.org/10.1111/j.1477-7053.1965.tb00362.x.

FEERICK, J. D. *From Failing Hands: The Story of Presidential Succession*. 1st ed. New York: Fordham University Press, 1965. 368 p.

FEERICK, J. D. Presidential Inability: Filling in the Gaps. *Politics and the Life Sciences* [online]. 2014, vol. 33, no. 2, pp. 11-36 [cit. 2024-05-02]. ISSN 1471-5457. Available at: https://doi.org/10.2990/33_2_11.

FIEDLER, F. E. The Leadership Situation and the Black Box in Contingency Theories. In: M. M. CHEMERS and R. AYMAN, eds. *Leadership Theory and Research: Perspectives and Directions*. 2nd ed. San Diego: Academic Press, 1993, pp. 1-28. ISBN 0-12-170609-5.

FORTIER, J. C. and N. J. ORNSTEIN. Presidential Succession and Congressional Leaders. *Catholic University Law Review* [online]. 2004, vol. 53, no. 4, pp. 993-1014 [cit. 2024-05-02]. ISSN 0008-8390. Available at: https://scholarship.law.edu/lawreview/vol53/iss4/5/.

FRANKENBERG, G. Constitutional Transfer: The IKEA Theory Revisited. *International Journal of Constitutional Law* [online]. 2010, vol. 8, no. 3, pp. 563-579 [cit. 2024-05-02]. ISSN 1474-2659. Available at: https://doi.org/10.1093/icon/moq023.

GATES, R. M. *Duty: Memoirs of a Secretary at War*. 1st ed. New York: Alfred A. Knopf, 2014. 618 p. ISBN 978-0-307-95947-8.

GREENSTEIN, F. I. *Personality and Politics: Problems of Evidence, Inference, and Conceptualization*. 1st ed. Chicago: Markham Publishing Company, 1969. 200 p.

HAMDANI, F. and A. FAUZIA. Legal Discourse: The Spirit of Democracy and Human Rights Post Simultaneous Regional Elections 2020 in the Covid-19 Pandemic Era. *Lex Scientia Law Review* [online]. 2021, vol. 5, no. 1, pp. 97-118 [cit. 2024-05-02]. ISSN 2598-9685. Available at: https://doi.org/10.15294/lesrev.v5i1.45887.

HANAN, D. Petugas Partai versus Presidensialisasi Politik. In: *SINDO news.com* [online]. 2023-07-10 [cit. 2024-05-02]. Available at: https://nasional.sindonews.com/read/1148515/18/petugas-partai-versus-presidensialisasi-politik-1688972822.

HINDLEY, D. Indonesian Politics 1965-7: The September 30 Movement and the Fall of Sukarno. *The World Today* [online]. 1968, vol. 24, no. 8, pp. 345-356 [cit. 2024-05-02]. ISSN 2059-7495. Available at: https://www.jstor.org/stable/40394159.

INGBER, R. Bureaucratic Resistance and the National Security State. *Iowa Law Review* [online]. 2018, vol. 104, no. 1, pp. 139-221 [cit. 2024-05-02]. ISSN 0021-0552. Available at: https://ilr.law.uiowa.edu/print/volume-103-issue-6/bureaucratic-resistance-and-the-national-security-state.

JOUET, M. The Failed Invigoration of Argentina's Constitution: Presidential Omnipotence, Repression, Instability, and Lawlessness in Argentine History. *University of Miami Inter-American Law Review* [online]. 2008, vol. 39, no. 3, pp. 409-462 [cit. 2024-05-02]. ISSN 2328-4242. Available at: https://repository.law.miami.edu/umialr/vol39/iss3/2/.

KALLENBACH, J. E. The New Presidential Succession Act. *American Political Science Review* [online]. 1947, vol. 41, no. 5, pp. 931-941 [cit. 2024-05-02]. ISSN 1537-5943. Available at: https://doi.org/10.2307/1950197.

KANE, J. and H. PATAPAN. *The Democratic Leader: How Democracy Defines, Empowers, & Limits Its Leaders* [online]. 1st ed. Oxford: Oxford University Press, 2012. 207 p. [cit. 2024-05-02]. ISBN 978-0-19-173907-1. Available at: https://doi.org/10.1093/acprof:oso/9780199650477.001.0001.

KELLER, J. W. Leadership Styles of Political Executives. In: R. B. ANDEWEG, R. ELGIE, L. HELMS, J. KAARBO and F. MÜLLER-ROMMEL, eds. *The Oxford Handbook of Political Executives* [online]. 1st ed. Oxford, UK: Oxford University Press, 2020, pp. 481-500 [cit. 2024-05-02]. ISBN 978-0-19-184676-2. Available at: https://doi.org/10.1093/oxfordhb/9780198809296.013.18.

KIM, J. W. Korean Constitutional Court and Constitutionalism in Political Dynamics: Focusing on Presidential Impeachment. *Constitutional Re-*

view [online]. 2018, vol. 4, no. 2, pp. 222-248 [cit. 2024-05-02]. ISSN 2548-3870. Available at: https://doi.org/10.31078/consrev 423.

KULISH, N. Acting President in Poland Wins a Narrow Victory. In: *The New York Times* [online]. 2010-07-04 [cit. 2024-05-02]. Available at: https://www.nytimes.com/2010/07/05/world/europe/05poland.html.

KURSKA, J. Quo vadis, Polonia?. *La Vie des idées* [online]. 2016-06-22 [cit. 2024-05-02]. ISSN 2105-3030. Available at: https://laviedesidees.fr/Quo-vadis-Poloniae.html.

LIJPHART, A. Democracy in the 21st Century: Can We Be Optimistic?. *European Review* [online]. 2001, vol. 9, no. 2, pp. 169-184 [cit. 2024-05-02]. ISSN 1474-0575. Available at: https://doi.org/10.1017/S1062798701000163.

LINZ, J. J. The Perils of Presidentialism. *Journal of Democracy* [online]. 1990, vol. 1, no. 1, pp. 51-69 [cit. 2024-05-02]. ISSN 1086-3214. Available at: https://doi.org/10.1353/jod.2005.0026.

MAINWARING, S. and M. S. SHUGART. Juan Linz, Presidentialism, and Democracy: A Critical Appraisal. *Comparative Politics* [online]. 1997, vol. 29, no. 4, pp. 449-471 [cit. 2024-05-02]. ISSN 2151-6227. Available at: https://doi.org/10.2307/422014.

MAINWARING, S. Presidentialism in Latin America. *Latin American Research Review* [online]. 1990, vol. 25, no. 1, pp. 157-179 [cit. 2024-05-02]. ISSN 1542-4278. Available at: https://doi.org/10.1017/S0023879100023256.

MAKOWER, H. United States Economic Policy and International Relations. *The Economic Journal* [online]. 1953, vol. 63, no. 250, pp. 450-452 [cit. 2024-05-02]. ISSN 1468-0297. Available at: https://doi.org/10.2307/2227155.

MANAN, B. *Teori dan Politik Konstitusi*. 1st ed. Jakarta: Direktorat Jenderal Pendidikan Tinggi, Departemen Pendidikan Nasional, 2000. 164 p. ISBN 979-8439-26-0.

MANNING, J. F. Not Proved: Some Lingering Questions about Presidential Succession. *Stanford Law Review* [online]. 1995, vol. 48, no. 1, pp. 141-153 [cit. 2024-05-02]. ISSN 0038-9765. Available at: https://doi.org/10.2139/ssrn.2854357.

MARIJAN, K. *Sistem Politik Indonesia: Konsolidasi Demokrasi Pasca-Orde Baru*. 5th ed. Jakarta: Kencana, 2016. 364 p. ISBN 978-602-8730-16-7.

MICHAELS, J. D. Of Constitutional Custodians and Regulatory Rivals: An Account of the Old and New Separation of Powers. *New York University Law Review* [online]. 2016, vol. 91, no. 2, pp. 227-291 [cit. 2024-05-02]. ISSN 2766-0834. Available at: https://www.nyulawreview.org/issues/volume-91-number-2/of-constitutional-custodians-and-regulatory-rivals-an-account-of-the-old-and-new-separation-of-powers/.

MIETZNER, M. How Indonesia Won a Constitution. *Journal of Democracy* [online]. 2014, vol. 25, no. 2, pp. 171-175 [cit. 2024-05-02]. ISSN 1086-3214. Available at: https://doi.org/10.1353/jod.2014.0023.

Militer Sudan Kudeta Pemerintahan Transisi. In: *Deutsche Welle* [online]. 2021-10-25 [cit. 2024-05-02]. Available at: https://www.dw.com/id/militer-sudan-kudeta-pemerintahan-transisi/a-59615407.

MOE, T. M. and M. CALDWELL. The Institutional Foundations of Democratic Government: A Comparison of Presidential and Parliamentary Systems. *Journal of Institutional and Theoretical Economics* [online]. 1994, vol. 150, no. 1, pp. 171-195 [cit. 2024-05-02]. ISSN 1614-0559. Available at: https://www.jstor.org/stable/40753031.

MULUK, H. Demokrasi Presidensial dan Kepemimpinan Presidensial: Sebuah Assesmen Awal. *Prisma*. 2016, vol. 35, no. 3, pp. 104-114. ISSN 3048-3875.

NEGRETTO, G. L. Constitution-making and Institutional Design. The Transformations of Presidentialism in Argentina. *European Journal of Sociology* [online]. 1999, vol. 40, no. 2, pp. 193-232 [cit. 2024-05-02]. ISSN 1474-0583. Available at: https://doi.org/10.1017/s0003975600007451.

NORDLINGER, E. A. *Soldiers in Politics: Military Coups and Governments*. 1st ed. Englewood Cliffs, NJ: Prentice-Hall, 1977. 224 p. ISBN 0-13-822163-4.

ODEGARD, P. H. Presidential Leadership and Party Responsibility. *The ANNALS of the American Academy of Political and Social Science* [online]. 1956, vol. 307, no. 1, pp. 66-81 [cit. 2024-05-02]. ISSN 1552-3349. Available at: https://doi.org/10.1177/000271625630700108.

OSTIGUY, P. *Argentina's Double Political Spectrum: Party System, Political Identities, and Strategies, 1944 – 2007* [online]. 1st ed. Notre Dame: The Helen Kellogg Institute for International Studies, 2009. 97 p. [cit. 2024-05-02]. Working Paper, no. 361. Available at: https://doi.org/10.7274/26126032.v1.

OUYANG, Y., E. T. HAGLUND and R. W. WATERMAN. The Missing Element: Examining the Loyalty-competence Nexus in Presidential Appointments. *Presidential Studies Quarterly* [online]. 2017, vol. 47, no. 1, pp. 62-91 [cit. 2024-05-02]. ISSN 1741-5705. Available at: https://doi.org/10.1111/psq.12346.

PENDERS, C. L. M. ed. *Milestones on My Journey: The Memoirs of Ali Sastroamijoyo, Indonesian Patriot and Political Leader*. 1st ed. St. Lucia: University of Queensland Press, 1979. 405 p. ISBN 0-7022-1206-7.

PIPER, J. R. "Situational Constitutionalism" and Presidential Power: The Rise and Fall of the Liberal Model of Presidential Government. *Presidential Studies Quarterly* [online]. 1994, vol. 24, no. 3, pp. 577-594 [cit. 2024-05-02]. ISSN 1741-5705. Available at: https://www.jstor.org/stable/27551285.

RANKIN, R. S. Presidential Succession in the United States. *The Journal of Politics* [online]. 1946, vol. 8, no. 1, pp. 44-56 [cit. 2024-05-02]. ISSN 1468-2508. Available at: https://doi.org/10.2307/2125607.

RIADHUSSYAH, M., F. FARHAN, F. HAMDANI and L. A. N. KUSUMA. The Dignity of Democracy in the Appointment of Acting Regional Heads by the President: Legal Construction after the Constitutional Court Decision Number 15/PUU-XX/2022. *Jurnal Jurisprudence* [online]. 2022, vol. 12, no. 1, pp. 106-119 [cit. 2024-05-02]. ISSN 2549-5615. Available at: https://doi.org/10.23917/jurisprudence.v12i1.1044.

ROISMAN, S. Presidential Law. *Minnesota Law Review* [online]. 2021, vol. 105, no. 3, pp. 1269-1343 [cit. 2024-05-02]. ISSN 0026-5535. Available at: https://minnesotalawreview.org/article/presidential-law/.

SILVA, R. C. The Presidential Succession Act of 1947. *Michigan Law Review* [online]. 1949, vol. 47, no. 4, pp. 451-476 [cit. 2024-05-02]. ISSN 0026-2234. Available at: https://doi.org/10.2307/1284810.

SIMONTON, D. K. Presidential Leadership: Performance Criteria and Their Predictors. In: M. G. RUMSEY, ed. *The Oxford Handbook of Leadership* [online]. 1st ed. New York, NY: Oxford University Press, 2012, pp. 327-342 [cit. 2024-05-02]. Available at: ISBN 978-0-19-539879-3. https://doi.org/10.1093/oxfordhb/9780195398793.013.0019.

SKOWRONEK, S. *The Politics Presidents Make: Leadership from John Adams to Bill Clinton*. 2nd ed. Cambridge, MA: The Belknap Press of Harvard University Press, 1997. 546 p. ISBN 0-674-68937-2.

STEPAN, A. and C. SKACH. Constitutional Frameworks and Democratic Consolidation: Parliamentarianism versus Presidentialism. *World Politics* [online]. 1993, vol. 46, no. 1, pp. 1-22 [cit. 2024-05-02]. ISSN 1086-3338. Available at: https://doi.org/10.2307/2950664.

SURYADINATA, L. A Year of Upheaval and Uncertainty: The Fall of Soeharto and Rise of Habibie. In: D. SINGH and J. FUNSTON, eds. *Southeast Asian Affairs* [online]. 1st ed. Singapore: Institute of Southeast Asian Studies, 1999, pp. 111-127 [cit. 2024-05-02]. ISBN 978-981-230-689-0. Available at: https://doi.org/10.1355/9789812306890-010.

TILLMAN, S. B. *Legislative Officer Succession to the Presidency* [online]. 2010, pp. 1-29 [cit. 2024-05-02]. Available at: https://doi.org/10.2139/ssrn.978878.

TULIS, J. K. *The Rhetorical Presidency*. 1st ed. Princeton, NJ: Princeton University Press, 1987. 209 p. ISBN 0-691-07751-7.

TYLER, T. R. and E. A. LIND. A Relational Model of Authority in Groups. *Advances in Experimental Social Psychology* [online]. 1992, vol. 25, pp. 115-191 [cit. 2024-05-02]. ISSN 0065-2601. Available at: https://doi.org/10.1016/s0065-2601(08)60283-x.

Von BENDA-BECKMANN, F. and K. von BENDA-BECKMANN. *Political and Legal Transformations of an Indonesian Polity: The Nagari from Colonisation to Decentralisation*. 1st ed. New York: Cambridge University Press, 2013. 499 p. Cambridge Studies in Law and Society. ISBN 978-1-107-03859-2.

YOO, Ch. S., S. G. CALABRESI and A. J. COLANGELO. The Unitary Executive in the Modern Era, 1945 – 2004. *Iowa Law Review*. 2005, vol. 90, no. 2, pp. 601-732. ISSN 0021-0552.

SOCIETAS ET IURISPRUDENTIA
2024, ročník XII., číslo 2, s. 19-59
https://sei.iuridica.truni.sk
ISSN 1339-5467

ZED, M. *Somewhere in the Jungle: Pemerintah Darurat Republik Indonesia: Sebuah Mata Rantai Sejarah Yang Terlupakan*. 1st ed. Jakarta: Pustaka Utama Grafiti, 1997. 355 p. ISBN 979-444-399-9.

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Typical Online Agreements and Associated Legal Challenges Confronting Consumers: A South African Perspective

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Abstract: *The emergence of the internet coupled with the rapid development in digital technology has revolutionalised the way things are done, including the economic activities of businesses and consumers. The ease and convenience offered via the electronic commerce platform has become a major motivation for its increasing use rather than visits to physical stores or places of business. Amidst the comfort, wider array of products and time saving benefits available to consumers in the digital marketplace, consumers are confronted with complex problems and challenges that offline consumers who interact with sellers' face to face do not experience. Although there is subsisting legislation that regulates online transactions and agreement in South Africa, this seems to be inadequate to address the adverse situations consumers are exposed to while contracting electronically. This paper discusses the common forms of online contracts and the concomitant legal challenges affecting consumers while concluding contracts online in the South African context. Questions such as 'which country's law will apply on online contracts in cross-border contracts' are some of the pertinent issues without clear cut answers. Divided into four parts, the first part deals with the legal principles regulating online contracts, part two tackles the validity of online contracts, part three deals with the legal challenges consumers face in online contracts in South Africa and the last part is the conclusion. The authors hope that this contribution would help stimulate the debate about online contracts with hopes of bringing the much-needed contractual certainty in this area of the law.*

Key Words: *Contract Law; Online Contract; Legal Principles; Consumers; Transactions; Consumer Challenges; Technology; E-Commerce; South Africa.*

Introduction

The emergence of modern technologies, particularly, the internet for commercial transactions has not only given rise to new business oppor-

tunities but has had a tremendous influence on how contracts are concluded. The impact of technology and the internet is manifested in the way the traditional paper-based contracts are gradually being replaced by electronic form contracts. Consumers in the digital age are increasingly purchasing items online than they do face to face given the convenience and enabled accessibility in online transactions in comparison to a visit to a physical store. This paper concerns itself with the three most common forms of online contracts, the legal framework that regulates these electronic contracts and the challenges confronting online consumers when concluding online contracts in the South African setting.

General principles of the South African common law governing contracts

A contract is a legal arrangement that binds the parties based on their mutual assent. Thus, the basic premise is that a contract is the result of "consenting minds", with each party free to accept or reject the other party's terms and conditions.[1] The courts normally decide whether an agreement has been reached by asking whether one contracting party has made an offer that was accepted by the other party. Under common law, offer and acceptance are two of the most fundamental components of contract creation.[2] For most contracts, offers and acceptances may be made orally or in writing, or they may be assumed from the actions of the contracting parties. Firstly, there must be consensus, which forms the basis of a contract in South African law. The parties must be aware of each of their corresponding intentions to contract. Legally, this is referred to as the meeting of the minds (*consensus ad idem*). Secondly, there must be a serious intention to form binding legal relations. The parties to an agreement must intend to create legal relations for that agreement to be legally binding. There must be understanding between the parties that serious and binding legal relations will result from their agreement.[3] Intention to establish legal relations between the parties is very central in establishing whether a contract has come into being when questions are raised around its existence. Based on the fundamentals of contract law,

[1] ABBOTT, K., N. PENDLEBURY and K. WARDMAN. *Business Law*. 6th ed. London: DP Publications, 1993, p. 97. ISBN 1-85805-050-2.

[2] ONG, J. P. The Enforceability of Digital Contract: A Comparative Analysis on Indonesia and New Zealand Law. *The Lawpreneurship Journal* [online]. 2021, vol. 1, no. 1, pp. 30-42 [cit. 2024-03-21]. ISSN 2807-7652. Available at: https://doi.org/10.21632/tlj.1.1.30-42.

[3] KAHN, E. *Contract and Mercantile Law through the Cases*. 1st ed. Cape Town: Juta, 1971, p. 183.

SOCIETAS ET IURISPRUDENTIA
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consensus exists where parties are mutually aware of one another's intention. Regarding the terms and purpose of the transaction, consensus makes both parties obtain clarity and assurance.[4] To determine if there was true agreement between the contracting parties, the court may examine how the intentions of the respective parties were displayed through their conduct. The phrase 'lack of *animus contrahendi*' (intention to be contractually bound) is used to describe cases in which, it ought to have been clear to the offeree that the offer was not intended to be taken seriously. To determine serious intention, the South African courts adopt the principle of *iusta causa*, which means that if it can be shown that the agreement is made seriously and deliberately with an intention to be bound, it will be enforceable.[5] This approach differs from the English law which applies the doctrine of valuable consideration, where the contract is not considered valid unless the other party gives, promises or does something valuable in return. Thirdly, there must be reality of consent. If there is no genuine agreement, and the contract does not represent a true and free meeting of the minds, it may be rendered void at the election of the aggrieved party. Parties to the contract should have freely consented to enter the contract. In addition to the reality of consent requirement, the parties to the contract must have capacity to contract. Capacity to contract connotes the power to enter into legally binding agreement. It refers to competence in the eyes of the law to have rights and duties; perform juristic acts; incur civil or criminal liability for wrongdoing and be a party to litigation. Generally, any juristic or natural person has complete and unrestricted control over his or her affairs and has full contractual capacity. However, there are certain persons who either have limited capacity or no capacity to conclude contracts, mainly due to their age (level of maturity), their state of mind or their lifestyle. Practical examples are the following: minors, who are unmarried natural persons under the age of 18 years have to be assisted by either their par-

[4] NWABUEZE, C. J. Reflections on Legal Uncertainties for E-Commerce Transactions in Cameroon. *The African Journal of Information and Communication* [online]. 2017, no. 20, pp. 171-180 [cit. 2024-03-21]. ISSN 2077-7213. Available at: https://doi.org/10.23962/10539/23499.

[5] See *Case of Conradie v. Rossouw*. 1919 AD 279. The judgment in the Appeal Court showed that it is not the idea of consideration in the English law that it required but the serious intention to conclude a contract and that this serious intention is no other than a reasonable cause as accepted in Roman-Dutch law.

ents or guardian;[6] married women,[7] although the Matrimonial Property Act[8] now stipulates that married women have the same contractual capacities as married men; persons that are mentally ill; intoxicated persons; prodigals; an insolvent person; persons convicted of a crime involving dishonesty and an alien enemy.[9] The contract must also contain certain and definite terms. It must not be vague with the effect that the court is unable to work out its meaning or what the intentions of the parties are. An agreement is void if its terms are so uncertain that the court cannot determine what a party must do. This uncertainty may be in the form of vague and indefinite language; failure to agree on material provisions; granting to a party unlimited choice whether to perform or not; agreement to agree; or indefinite duration. Furthermore, the contract must be lawful. Courts, however, recognise agreements reached between people as binding and enforceable, based on the principle of 'sanctity of contract'. Agreements that are contrary to law (statute or common law) or morality or against social or economic values will not be enforced. Only lawful agreements are binding as contracts. The contract must also be possible to perform. This means that a contract must be physically and legally capable of being executed or carried out. There can be no contract if the contract is not physically capable of being when the contract is first made as the law does not enforce impossibilities. It is important to note that the impossibility must not be the fault of either party to the contract, otherwise the party will be liable on the contract. Another requirement for a valid contract is the aspect of formalities. The general rule is that no special formalities are needed for making an enforceable contract. Valid contracts can be made orally or in writing. It could also be implied from the conduct of the parties or a combination of both. However, there are a few exceptions to this rule, particularly where statutes have prescribed various formalities for different categories of agreements. Some of these types of agreements include: an agreement to sell land must be in writ-

[6] HAVENGA, P., M. HAVENGA, E. HURTER, R. KELBRICK, E. MANAMELA, T. MANAMELA, H. SCHULZE and Ph. STOOP. *General Principles of Commercial Law*. 7th ed. Claremont: Juta, 2010, p. 69. ISBN 978-0-7021-8514-4.

[7] Marriage has certain patrimonial consequences which are linked to a chosen marital regime, which could be in or out of community of property. The patrimonial consequences that emanate from the chosen marital regime can have an effect on the capacity to act by a married woman.

[8] *Matrimonial Property Act No. 88* [1984].

[9] SCOTT, J. and S. CORNELIUS, eds. *The Law of Commerce in South Africa*. 3rd ed. Cape Town: Oxford University Press, 2020, pp. 68-69. ISBN 978-0-19-075348-1.

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ing;[10] the sale or lease of land for a period of more than three years must be in writing;[11] an oral antenuptial contract is valid between the parties but must be signed in front of a notary, and registered within three months to be valid against a third party; donations, learnership contracts and leases of rights to minerals require written formalities.[12]

Validity of online contracts under South African law

The steady increase in the use of the internet and information communication technology for commercial activities, brought to the fore a worldwide uncertainty as to how and whether contracts concluded electronically can be accepted as valid and enforceable.[13] Governments of several nations, as well as the United Nations Commission on International Trade Law (UNCITRAL), demanded that globally recognized universal electronic transactions laws be drafted to close this legal loophole. In keeping with its central and coordinating role within the United Nation's (UN) system in addressing legal issues related to the digital economy, UNCITRAL prepared a suite of legislative texts to enable and facilitate the use of electronic means to engage in commercial activities.[14]

Akin to the situation in other advanced nations, prior to the enactment of the statute regulating online transactions and communications in South Africa, there were a lot of legal uncertainty on the validity of electronic contracts and the treatment of equivalent of aspects that are necessary in traditional contracts, such as 'writing' and 'signature' that signifies consent. To alleviate the difficulties and ambiguity around electronic transactions and address the legal concerns raised by electronic agree-

[10] As provided for in *Alienation of Land Act No. 68* [1981].
[11] *Property Time-sharing Control Act No. 75* [1983].
[12] PAPADOPOULOS, S. and S. SNAIL ka MTUZE. *Cyberlaw@SA: The Law of the Internet in South Africa*. 4th ed. Pretoria: Van Schaik, 2022, p. 90. ISBN 978-0-627-03795-5.
[13] SNAIL, S. Electronic Contracts in South Africa – A Comparative Analysis. *Journal of Information, Law & Technology* [online]. 2008, no. 2, pp. 1-24 [cit. 2024-03-21]. ISSN 1361-4169. Available at: https://warwick.ac.uk/fac/soc/law/elj/jilt/2008_2/snail; and SADUAL, M. K. Electronic Contracts: Legal Issues and Challenges. *International Journal of Research and Analytical Reviews* [online]. 2021, vol. 8, no. 3, pp. 793-798 [cit. 2024-03-21]. ISSN 2348-1269. Available at: https://ijrar.org/papers/IJRAR21C2209.pdf.
[14] *UNCITRAL Model Law on Electronic Commerce* [1996], which is based on the fundamental principles of non-discrimination against the use of electronic means, functional equivalency, and technology neutrality, is the most widely enacted text. It establishes rules for the equal treatment of electronic and paper-based information as well as the legal recognition of electronic transactions and processes. Further guidelines for the usage of electronic signatures may be found in *UNCITRAL Model Law on Electronic Signatures* [2001].

ments in South Africa, the legislature enacted the Electronic Communications and Transactions Act 2002 (ECT Act). The ECT Act which is mainly based upon both UNICITRAL Model Laws on E-Commerce[15] was promulgated to facilitate and regulate electronic communications and transactions that are in the interest of the public. The Act thus governs online and electronic contracts. Unless explicitly prohibited, it applies to electronic transactions (commercial and non-commercial) and data transmissions.

According to South African law, there are no special prerequisites for the establishment of online contracts. As it is with traditional contracts, contracts formed electronically are binding and enforceable provided all the requirements recognised by law for a valid contract are present. Digital agreements made over the internet or via electronic communications, such as email, SMS or other forms of data messages, have similar legal validity as the traditional paper-based and oral contracts and must comply with the essential requirements. Thus, the same substantive legal criteria, such as an offer, acceptance, consensus, lawfulness, serious intention, and capacity to contract, that apply to the physical world contracts also apply to digital contracts, notwithstanding the exclusion of physical contact between the parties. In the context of online agreements for example, a contract will be formed where a consumer makes an offer online by placing an order and the website supplier (seller) accepts the offer. In practical terms, when a consumer places a product in the virtual "basket" or "shopping cart" for payment, he is making an offer under an electronic contract. Acceptance on the other hand occurs when the seller agrees to sell the product in accordance with the offer made by the customer who added the item to his shopping cart.

Although these modalities align with the general legal principles that underpin the formation of contracts, there are problematic issues that are peculiar to the electronic environment that may cast doubts on the validity of online contracts. One of such is the aspect of consent. Based on South African law, the electronic environment makes provision for various ways to signify consent, either by way of clicking on icons or continued browsing a webpage. Literature however suggests that the that reali-

[15] SNAIL, S. L. South African E-Consumer Law in the Context of the ECT Act (Part 1). *Juta's Business Law* [online]. 2007, vol. 15, no. 1, pp. 40-46 [cit. 2024-03-21]. ISSN 1996-210X. Available at: https://doi.org/10520/ejc52577.

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ty of consent requirement is difficult to ascertain.[16] Given the 'take it or leave it' nature of the e-commerce contracts, the consumer, as the weaker party, would not have the opportunity to bargain, instead, the consumer would usually have to decide whether to accept the unjust and unreasonable terms or to permanently forgo the product or service. Another peculiarity in contracting online is the aspect of capacity to contract. In the e-commerce environment, determining the capacity of individuals to contract is challenging due to the absence of a face-to-face engagement. This makes it nearly impossible for the seller to determine the legitimacy of the person who clicked on the agreement terms and conditions of the online contract. There is therefore the possibility of unassisted minors or other consumers with legal disability entering online contracts by simply clicking the 'I agree' button or certain images signifying acceptance to the terms.

Notwithstanding that similar contractual principles governing conventional contracts apply to online contracts, the Act imposes obligations on the operators (suppliers) to provide consumers with an opportunity to evaluate the full electronic transaction, make any necessary corrections, and withdraw from the transaction before placing any order. If the supplier does not give the consumer this chance to assess the contents of a transaction, the Act allows the consumer to terminate the transaction within 14 days after obtaining the products or services covered by the transaction.[17] This particular provision aim to protect online consumers who are in a more precarious situation compared to their offline counterparts given the absence of physical interaction with the supplier. The virtual nature of online contracts do not afford consumers the opportunity to inspect the goods physically or visit the business premises of the supplier as would have been the case in a brick-and-mortar or physical stores environment. Thus, the risk factor in the e-commerce environment is comparatively high with regards to matters revolving around product quality, defective orders, payment security, data security, e-contract enforceability, insufficient information disclosure and rights enforcement of

[16] Van DEVENTER, S. Problems Relating to the Formation of Online Contracts: A Comparative Perspective. *The South African Law Journal* [online]. 2022, vol. 139, no. 1, p. 33 [cit. 2024-03-21]. ISSN 1996-2177. Available at: https://doi.org/10.47348/salj/v139/i1a2; and PAPADOPOULOS, S. Are We about To Cure the Scourge of Spam? A Commentary on Current and Proposed South African Legislative Intervention. *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* [online]. 2012, vol. 75, no. 2, pp. 223-240 [cit. 2024-03-21]. ISSN 1682-4490. Available at: https://doi.org/2263/20824.

[17] *Electronic Communications and Transactions Act No. 25* [2002], Section 43(3).

individual rights. All the obligations in this provision are expected to be fulfilled by the supplier to ensure the consumer is well informed and not prejudiced by virtue of concluding the contract. In addition there are other requirements imposed on suppliers selling products or services available for purchase, rental, or exchange to natural people under the Act include providing end users or consumers with specific information about the operator and the goods or services.[18] As provided for in the ECT Act, electronic contracts are legally equivalent to paper-based contracts, and one type of contract is not given advantage over the other.[19] Notwithstanding the fact that South African law gives legal backing to electronic offer and acceptance between two parties, there exists some uncertainty regarding the legal significance of the offer and acceptance in a digitised form created between two parties, for example, whether the information on a website may be considered to be a legitimate offer as opposed to a mere invitation to do business; or the act of continued browsing on a webpage can be construed as acceptance. More importantly, there is also a recognition of unique challenges and risks consumers are confronted with, given that consumers are generally considered the weaker party in contract arrangements, particularly in the virtual environment where electronic agreements are involved.

Legal challenges consumers' face in online contracts in South Africa

Notwithstanding the progress made in developing rules to facilitate online contracts and the existing case law, the South African legal framework that governs electronic agreements is still at a budding stage compared to other advanced countries like Australia, Germany, the United Kingdom (UK) and the United States. Although South Africa has produced a couple of groundbreaking litigations as well as a body of case law on electronic communications and transactions,[20] these resources are not as widespread as the legal process demands.[21] This therefore necessitates

[18] *Electronic Communications and Transactions Act No. 25* [2002], Section 43(1).
[19] *Electronic Communications and Transactions Act No. 25* [2002], Section 22.
[20] *Case of Jafta v. Ezemvelo KZN Wildlife* [2008-07-01]. Judgement of the Labour Court of South Africa, 2008, D204/07; *Case of Spring Forest Trading 599 CC v. Wilberry (Pty) Ltd t/a Ecowash and Another* [2014-11-21]. Judgement of the Supreme Court of Appeal of South Africa, 2014, 725/13; and *Case of Global & Local Investments Advisors (Pty) Ltd v. Fouche* [2020-03-18]. Judgement of the Supreme Court of Appeal of South Africa, 2020, 71/2019.
[21] SNAIL, S. L. South African E-Consumer Law in the Context of the ECT Act (Part 1). *Juta's Business Law* [online]. 2007, vol. 15, no. 1, p. 40 [cit. 2024-03-21]. ISSN 1996-210X. Available at: https://doi.org/10520/ejc52577.

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consulting foreign law and case law studies for guidance. Some of the issues and potential challenges related to online consumer issues in the South African context are discussed in the section below.

1 Jurisdictional issues and choice of applicable law for cross border transactions

One of the major challenges that consumers face while concluding online contracts relates to issues around jurisdiction over cross border transactions. Due to the global nature of online agreements, with no physical territorial borders, consumers can contract with suppliers in another country or territory. South African consumers, like their counterparts in other countries, engage in transactions on international websites. Given the cross-border nature of these transactions, different laws are applicable to consumers trading activities in their physical location. Problems therefore may arise in the event of a dispute arising between the parties and ascertaining which court and law will govern the contract in addition to where and how judgment will be enforced.[22] A South African consumer for example, who enters into an online contract with a supplier in another country whose server is located outside that country will be confronted with uncertainty on where the contract can be said to have been concluded and the court's jurisdiction to hear and settle any conflict that may arise from the contract. Unwitting consumers may find themselves in a situation where they may have to file a lawsuit in a foreign jurisdiction and are then subject to foreign law. Determining the court jurisdiction and the legal systems that will be applicable to settle disputes that may arise from the purchase of goods or use of the services across geographical borders is a potential challenging issue. Although several efforts and initiatives have been made *via* national and international bodies and instruments, questions still arise on the effectiveness of these online dispute resolution mechanisms. In the context of South Africa, there has been expression of doubts as to whether any substantial cross-border complaint would ever be pursued against such overseas online suppliers who do not have a physical presence in South Africa.[23] To tackle this exigent issue, website merchants have been advised to include

[22] De VILLERS, M. R. H. *Consumer Protection under the Electronic Communications and Transactions Act 25 of 2002*. 1st ed. Johannesburg, SA: University of Johannesburg, Department of Mercantile Law, 2004, p. 157.

[23] PAPADOPOULOS, S. and S. SNAIL ka MTUZE. *Cyberlaw@SA: The Law of the Internet in South Africa*. 4th ed. Pretoria: Van Schaik, 2022, p. 90. ISBN 978-0-627-03795-5.

a 'choice of jurisdiction' clause[24] or forum selection clauses in the online contract where both parties are allowed to choose the geographical location of the court that will preside over the matter in the event of a disagreement. Likewise, other advanced countries have devised ways to tackle consumers dispute issues arising from cross border online transactions approaches. As an example, The US Courts developed "effects test" to assist to establish jurisdiction in e-commerce consumer disputes.[25] Here, if a defendant wilfully causes injury to forum members, states may exercise their jurisdiction. In the United Kingdom, preference is given to the residence or domicile of consumers over the dwelling place of suppliers. Consumers are given preference with regards to the choice of a convenient court location, with the rationale that the supplier who is already operating in his place of business, is better empowered to travel to the forum of the consumer.[26] This is considered fair and an effective mechanism in protecting the rights of the consumer. In the same vein, there is the Brussels I Recast[27] that offers guidelines that courts in Member States of the European Union employ to decide whether they have jurisdiction over disputes involving several European Union nations. In the South African setting, jurisdiction remains a thorny issue with no clear-cut solutions on matters revolving around consumer disputes in online international transactions. There is still lack of clarity with regards to the specific place of jurisdiction for settlement of disputes in cross border contracts in South Africa. Similarly, there is no South African court judgment

[24] Van DEVENTER, S. Regulating Substantively Unfair Terms in Online Contracts. *Stellenbosch Law Review* [online]. 2021, vol. 32, no. 3, p. 518 [cit. 2024-03-21]. ISSN 1996-2193. Available at: https://doi.org/10.47348/slr/2021/i3a8.

[25] *Case of Calder v. Jones* [1984-03-20]. Opinion of the Supreme Court of the United States, 1984, 465 U.S. 783 serves as the foundation for this. States may use their jurisdiction when the offender willfully causes injury to forum members. In this case, a citizen of California filed a lawsuit in California Superior Court against a resident of Florida, alleging that the latter authored defamatory remarks about her in a well-known national newspaper. The Court determined that California bore most of the damages in terms of the respondent's personal anguish and the damage to her professional image in order to establish that jurisdiction was appropriate.

[26] OAKLEY, R. L. Fairness in Electronic Contracting: Minimum Standards for Non-negotiated Contracts. *Houston Law Review* [online]. 2005, vol. 42, no. 4, pp. 1041-1105 [cit. 2024-03-21]. ISSN 0018-6694. Available at: https://houstonlawreview.org/article/4789-fairness-in-electronic-contracting-minimum-standards-for-non-negotiated-contracts.

[27] Regulation (EU) No. 1215/2012 (often referred to as "Brussels I Recast") will take effect. It repeals and substitutes Regulation No. 44/2001 (also referred to as "Brussels I") regarding jurisdiction and the recognition and enforcement of decisions in Civil and commercial cases.

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that specifically deals with the jurisdictional issues of online contracts although courts are allowed to consider foreign law where such legal disputes arise.[28] Due to this legal gap, suggestions have been made to review the existing legislation, particularly the ECT Act, to align with the United Kingdom's approach in granting jurisdiction to the place of residence of the consumer with regards to international agreement disputes.

2 Contract formation

Although the ECT Act has brought about validity to e-contracts in South Africa, it is devoid on how the fundamental principles governing formation of online contracts should be applied to this class of contracts. Flowing from this is the difficulty in confirming whether the prerequisites for a valid or legally enforceable contract has been met in practice. Despite the recognition of electronic transactions and measures taken to address the validity of electronic data message and transactions, the Act neither provides a definition of electronic contract (e-contract) nor provides explanation on how it is formed. Due to this omission and vagueness, e-contracts may be viewed differently, and in some instances, may even be incorrectly construed.

With regards to the common 'wrap' agreements, namely, shrink wrap, click wrap (web-wrap) and browse wrap agreements that are concluded over the internet, critical issues persist in relation to the procedure for conclusion of contract particularly regarding the forms of expression of assent in online contract formation. Shrink wrap contracts are a form of licensing arrangement where the contract's terms and conditions, typically present on the plastic or documentation of the goods bought by the consumer, are enforced.[29] A click-wrap agreement is concluded by means of a party to the contract clicking on words or an image stating "I agree" or "I agree to be bound by the terms and conditions", indicating agreement or consent to the particular terms and conditions. A browse wrap on the other hand is an agreement where the user is not

[28] Section 2 of the South African Constitution contains the Supremacy clause and adds that when interpreting South African law, foreign law may be taken into account as well as international law.

[29] GAUR, A. E-Contracts, Legal Issues and Challenges Involved: An Overview. *Journal of Emerging Technologies and Innovative Research* [online]. 2021, vol. 8, no. 1, pp. 404-410 [cit. 2024-03-21]. ISSN 2349-5162. Available at: https://www.jetir.org/papers/JETIR2101054.pdf; and SAINI, N. and A. P. BHANU. Conflict of Laws in E-Contracts. *Multicultural Education* [online]. 2021, vol. 7, no. 10, pp. 761-763 [cit. 2024-03-21]. ISSN 1068-3844. Available at: https://doi.org/10.5281/zenodo.5610164.

required to click on words or image, but the mere use of the website constitutes assent to the terms and conditions associated with the contract. Usually, web operators add a hyperlink at the bottom of individual webpages, and the contract conditions are only revealed when the hyperlink is activated. A consumer's act of going past the home page of the website or continued browsing is construed as resulting in a contractual relationship. Thus, browse wrap have elicited concerns about its enforceability because of the absence of clarity on whether a user has positively agreed to the terms of the contract. These situations consequently raise questions on the enforceability of these forms of online contracts. In addition, these forms of agreement leave little or no room for consumers to negotiate or make an input to the terms and conditions of the website owner or supplier as would have been the case in the physical world, leaving prospective consumers with no option than to accept or decline the contract. This uncertainty, amplified by little case law in South Africa and even less legislation addressing the legitimacy of these forms of contracts has a potential of disadvantaging the consumers. The various forms of expressing one's intent to be contractually bound by electronic means and when they become enforceable is also not accommodated in the ECT Act. Thus, there is still uncertainty as to whether an act of clicking an icon on a vendor's website or mere viewing or scrolling a webpage would qualify as legally recognizable acts signifying one's intent to be contractually bound, particularly where terms were unilaterally imposed by the supplier. These highlighted gaps are detrimental to the interest of the consumers while purchasing goods and services online as they are not afforded the opportunity to make an input or modify the terms of the contract.

3 Lack of consistency in the enforceability of online contracts

Another area of concern for consumers relates to the gaps and legal uncertainties on enforceability of online agreements. As online contracts take on the characteristics of the typical standard form or adhesion contracts where the terms are unilaterally imposed by the vendor, there is lack of clarity on whether clicking an icon or agreement button for standard form online contract constitutes an intention to be legally bound or an invitation to do business. There are no specific provisions in the ECT Act that address the enforceability of click-wrap, browse-wrap, and shrink-wrap contracts. To bridge the lacuna, South African courts apply the contract formation rules which require the contractual party to have

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actual or constructive knowledge of the contract's terms and conditions prior to utilising the website or other product.[30] The effect of this is that all reasonable measures must have been taken to bring the terms and conditions to the contracting party's attention before acceptance is made by the other contracting party.[31]

In the practical sense, it means that each dispute brought before the court will be treated on the facts of the individual cases, by considering different factors such as whether the consumer was given notice of the terms before clicking on the 'I agree' button, whether the terms were visible on the web page, the location or position of the terms amongst others. This could result in different outcomes for similar online consumer situations. The lack of consistency could be detrimental to the consumer who may not intend to be bound.

4 Unfair and deceptive practices

Unfair and deceptive practices by online merchants or suppliers are part of the concerns identified in literature that negatively affect consumers.[32] These inequitable practices by online vendors range from misleading and unfair advertising, unfair contract terms, informational requirements and rights of withdrawal, product safety and liability, warranties to fraudulent or unethical trade practices.[33] A typical unfair situation is where an online supplier indicates as part of the terms and conditions, that it 'reserves the right to modify the displayed online terms at any time without giving notice to the consumer'[34] Consumers are consequently directed to

[30] PISTORIUS, T. Formation of Internet Contracts: An Analysis of the Contractual and Security Issues. *SA Mercantile Law Journal*. 1999, vol. 11, no. 2, pp. 282-299. ISSN 1015-0099; and PISTORIUS, T. Contract Formation: A Comparative Perspective on the Model Law on Electronic Commerce. *Comparative and International Law Journal of Southern Africa* [online]. 2002, vol. 35, no. 2, pp. 129-156 [cit. 2024-03-21]. ISSN 2522-3062. Available at: https://doi.org/10520/aja00104051_178.

[31] Based on *Case of Kempston Hire (Pty) Ltd v. Snyman*. 1988 (4) SA 465 (T) at 468 H.

[32] FRANCO, C. E. and S. B. REGI. Advantages and Challenges of E-Commerce Customers and Businesses: In Indian Perspective. *International Journal of Research – Granthaalayah* [online]. 2016, vol. 4, no. 3, pp. 7-13 [cit. 2024-03-21]. ISSN 2350-0530. Available at: https://doi.org/10.29121/granthaalayah.v4.i3se.2016.2771.

[33] PAPADOPOULOS, S. and S. SNAIL ka MTUZE. *Cyberlaw@SA: The Law of the Internet in South Africa*. 4th ed. Pretoria: Van Schaik, 2022, p. 77. ISBN 978-0-627-03795-5.

[34] MORINGIELLO, J. M. and J. E. OTTAVIANI. Online Contracts: We May Modify These Terms at Any Time, Right?. In: *American Bar Association* [online]. 2016-05-20 [cit. 2024-03-21]. Available at: https://www.americanbar.org/groups/business_law/resources/business-law-today/2016-may/online-contracts/.

the new terms without any explanation for the changes. Given that online suppliers utilise standard form (adhesion) where the website owner unilaterally imposes the terms of the contract on consumers, any change in the terms is tantamount to a unilateral modification which may be prejudicial to the consumer.

Another aspect that could be detrimental to the consumer relates to clauses limiting liability inserted by suppliers. A limitation of liability clause limits the amount and forms of compensation that one party can seek from the other where harm results from the contract.[35] In essence, a limitation of liability clause is used to mitigate risks in a contract. It limits one party's responsibility and minimizes the chance of the other side filing a claim, otherwise the financial claim by the other party that suffers a loss arising from the contract will be limitless. In contract law in general, clauses limiting either party's liability are usually contentious. In the online marketplace, this becomes more vexatious since the supplier is the sole drafter of the terms, due to the standard form nature of online agreements. There is a tendency by the supplier to avoid or limit liability significantly which may be detrimental to the consumer. Hence, in most jurisdictions, there is a greater restriction on limitation of liability clauses for online agreements to ensure fairness. Where the court finds the limitation of liability to be unreasonable, it will not be binding on the consumer.

These challenges associated with online contracting can result in consumers losing trust in e-commerce which would ultimately hamper the development and growth in e-commerce. It is submitted that this can only be addressed by developing comprehensive rules that tackle the risks and challenges to which consumers are exposed.[36]

[35] SCOTT, J. and S. CORNELIUS, eds. *The Law of Commerce in South Africa*. 3rd ed. Cape Town: Oxford University Press, 2020, p. 105. ISBN 978-0-19-075348-1.

[36] ROHENDI, A. Perlindungan Konsumen dalam Transaksi E-Commerce Perspektif Hukum Nasional dan Internasional [Consumer Protection in the E-Commerce: Indonesian Law and International Law Perspective]. *Ecodemica* [online]. 2015, vol. 3, no. 2, p. 476 [cit. 2024-03-21]. ISSN 2528-2255. Available at: https://doi.org/10.31294/jeco.v3i2.34. For example, *United Nations Guidelines for Consumer Protection* [2016] has been identified as the most recent global measure which addresses the consumer protection issues in broad terms.

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5 Lack of data protection

One of the frequent challenges experienced by consumers, identified in literature, in recent times, is lack of data protection. Since most transactions require exchange of information between the parties, such as contact details, banking information and identity numbers, these personal data of consumers can be exploited for criminal activities such as fraudulent schemes, identity theft, credit card piracy, illegal funds transfer and other similar criminal practices. It is worthy of note that despite the creation of international instruments that facilitate the recognition and validation of electronic transactions such as the UNCITRAL Model Law and Electronic Communication Convention, it is only of recent that there have been global attempts to tackle online consumer protection issues.[37]

Thus, the risk factor in the e-commerce environment is comparatively high with regards to matters revolving around product quality, payment security, data security, e-contract enforceability, insufficient information disclosure and individual rights enforcement.

6 Unfair contract terms

Generally, contract terms are provisions in a contract that set out the parties' respective rights and duties. Terms inform the parties on what they are required to do under the contract. Online contracts are usually in the form of standard form agreements which are usually prone to abuse from the drafting party. Unlike the traditional way most contracts are concluded, there are no opportunities for negotiations or input from the consumer in arriving at the terms of the contract. In addition, the terms are often hidden or difficult to locate on the webpage, written in a language that is too technical for an average consumer to decipher and also extraordinarily lengthy. As a result, online contracts can operate unfairly on consumers given the one-sided input of the drafting party and the other peculiar characteristics. Some of the common attributes of online contracts that present as obstacles to consumers are those which include terms that limit the rights of consumers in order to mitigate the

[37] ROHENDI, A. Perlindungan Konsumen dalam Transaksi E-Commerce Perspektif Hukum Nasional dan Internasional [Consumer Protection in the E-Commerce: Indonesian Law and International Law Perspective]. *Ecodemica* [online]. 2015, vol. 3, no. 2, p. 476 [cit. 2024-03-21]. ISSN 2528-2255. Available at: https://doi.org/10.31294/jeco.v3i2.34.

business risk of suppliers.[38] For example, terms that prevent a consumer from claiming damages or obtaining remedies in court. These terms, referred to as 'shield terms' aim to prevent consumer action and protect the drafting party. Another category of online contracts is the one which includes terms that eliminate the rights of the consumer (referred to as 'sword terms') while some terms aim to draw additional information from consumers that has nothing to do with the transaction (referred to as 'crook terms').

7 Lack of security of online payments

Online and mobile payments include those made using an active personal account. Online payment systems now come in a variety of forms due to technological advancements, including credit cards, debit cards, contactless payment methods, mobile payments, smart cards, digital wallets, electronic cash, and check systems, and more. The usage of mobile devices by customers for e-commerce payment transactions has been growing along with technological advancements,[39] particularly with the larger user base of mobile phones.[40] Prior research indicates that mobile payment methods provide their clients a variety of benefits, including location-free access,[41] a wide range of purchasing options, an easier alternative to cash payments, and rapid interaction with their financial resources. Notwithstanding these benefits, prior studies highlight security risks consumers are exposed to that revolve around privacy concerns.[42] Consumer data

[38] Van DEVENTER, S. Regulating Substantively Unfair Terms in Online Contracts. *Stellenbosch Law Review* [online]. 2021, vol. 32, no. 3, p. 518 [cit. 2024-03-21]. ISSN 1996-2193. Available at: https://doi.org/10.47348/slr/2021/i3a8.

[39] *UNCTAD Annual Report 2017: So Much Done, So Much To Do* [online]. 1st ed. Geneva: United Nations Conference on Trade and Development, 2018. 113 p. [cit. 2024-03-21]. Available at: https://unctad.org/publication/unctad-annual-report-2017.

[40] BEZHOVSKI, Z. The Future of the Mobile Payment as Electronic Payment System. *European Journal of Business and Management* [online]. 2016, vol. 8, no. 8, p. 127 [cit. 2024-03-21]. ISSN 2222-2839. Available at: https://iiste.org/Journals/index.php/EJBM/article/view/29473.

[41] LAUKKANEN, T. and J. LAURONEN. Consumer Value Creation in Mobile Banking Services. *International Journal of Mobile Communications* [online]. 2005, vol. 3, no. 4, p. 325 [cit. 2024-03-21]. ISSN 1741-5217. Available at: https://doi.org/10.1504/ijmc.2005.007021.

[42] BEZHOVSKI, Z. The Future of the Mobile Payment as Electronic Payment System. *European Journal of Business and Management* [online]. 2016, vol. 8, no. 8, p. 127 [cit. 2024-03-21]. ISSN 2222-2839. Available at: https://iiste.org/Journals/index.php/EJBM/article/view/29473; and EDWARDS, L. Consumer Privacy, On-line Business and the Internet: Looking for Privacy in All the Wrong Places. *International Journal of Law and Information*

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can be accessed and misused by unauthorised third parties without the consumer's knowledge or consent. Consequently, fraudulent commercial practices such as identity theft, data theft, hacking of suppliers' website, unlawful interception of the payment process and other security risks result from these prejudicial situations that consumers are confronted with while transacting online at the pre-purchase stage.[43]

Conclusions

This paper has discussed the legal framework regulating online contracts in South Africa drawing from common law and legislative instruments. Three common ways in which contracts are concluded in the online environment were also identified, namely, shrink wrap, click-wrap, and browse-wrap contracts. Furthermore, legal issues centred on the challenges consumers are confronted with have been highlighted. As it is with the traditional contracts, the intention of the parties to form legal relations is critical in arriving at a conclusion that a contract has been formed in the online environment. Only mistakes relating to a substantial fact, legal rule, or concept will result in a lack of agreement. In determining the validity of online contracts, it has been established that those digital agreements made over the internet or through internet protocols, such as email, SMS, or other forms of data messages, possess the same legal standing as the traditional paper-based and oral contract and must comply with the essential requirement. To address the identified legal challenges confronting consumers in the e-commerce environment, there is a need for interventions that can strengthen and effectively safeguard the rights of online consumers. Government through the legislature should take appropriate steps to amend and regularly update the current legislation and regulatory actions to keep up with emerging technology and the accompanying problems they pose to online consumers. In addition, government should take steps to impose regulations on internet-based business operations, particularly regarding standard terms (adhesion) contracts so that some of the unconscionable provisions can be prescribed and standardized to prevent consumer exploitation. Finally,

Technology [online]. 2003, vol. 11, no. 3, pp. 226-250 [cit. 2024-03-21]. ISSN 1464-3693. Available at: https://doi.org/10.1093/ijlit/11.3.226.

[43] MALLAT, N. Exploring Consumer Adoption of Mobile Payments – A Qualitative Study. *The Journal of Strategic Information Systems* [online]. 2007, vol. 16, no. 4, p. 413 [cit. 2024-03-21]. ISSN 1873-1198. Available at: https://doi.org/10.1016/j.jsis.2007.08.001; and STAVROU, A. *Mission Impossible?: E-Security in South Africa's Commercial and Financial Sectors*. 1st ed. Pretoria: Institute for Security Studies, 2002. 115 p. ISBN 1-919913-10-6.

regulatory agencies and consumer organizations should take a more active role in implementing legal rules and methods, to prevent business providers from including unfair conditions in online contracts. Consumers interacting in the e-commerce sector will gain confidence from the implementation of these proposed measures to safeguard their rights in the online contracting environment.

References

ABBOTT, K., N. PENDLEBURY and K. WARDMAN. *Business Law*. 6th ed. London: DP Publications, 1993. 478 p. ISBN 1-85805-050-2.

Alienation of Land Act No. 68 [1981].

BEZHOVSKI, Z. The Future of the Mobile Payment as Electronic Payment System. *European Journal of Business and Management* [online]. 2016, vol. 8, no. 8, pp. 127-132 [cit. 2024-03-21]. ISSN 2222-2839. Available at: https://iiste.org/Journals/index.php/EJBM/article/view/29473.

Case of Calder v. Jones [1984-03-20]. Opinion of the Supreme Court of the United States, 1984, 465 U.S. 783.

Case of Conradie v. Rossouw. 1919 AD 279.

Case of Global & Local Investments Advisors (Pty) Ltd v. Fouche [2020-03-18]. Judgement of the Supreme Court of Appeal of South Africa, 2020, 71/2019.

Case of Jafta v. Ezemvelo KZN Wildlife [2008-07-01]. Judgement of the Labour Court of South Africa, 2008, D204/07.

Case of Kempston Hire (Pty) Ltd v. Snyman. 1988 (4) SA 465 (T) at 468 H.

Case of Spring Forest Trading 599 CC v. Wilberry (Pty) Ltd t/a Ecowash and Another [2014-11-21]. Judgement of the Supreme Court of Appeal of South Africa, 2014, 725/13.

Constitution of the Republic of South Africa.

Council Regulation (EC) No. 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters. OJ EC L 12, 2001-01-16, pp. 1-23.

De VILLERS, M. R. H. *Consumer Protection under the Electronic Communications and Transactions Act 25 of 2002*. 1st ed. Johannesburg, SA:

University of Johannesburg, Department of Mercantile Law, 2004. 203 p.

EDWARDS, L. Consumer Privacy, On-line Business and the Internet: Looking for Privacy in All the Wrong Places. *International Journal of Law and Information Technology* [online]. 2003, vol. 11, no. 3, pp. 226-250 [cit. 2024-03-21]. ISSN 1464-3693. Available at: https://doi.org/10.1093/ijlit/11.3.226.

Electronic Communications and Transactions Act No. 25 [2002].

FRANCO, C. E. and S. B. REGI. Advantages and Challenges of E-Commerce Customers and Businesses: In Indian Perspective. *International Journal of Research – Granthaalayah* [online]. 2016, vol. 4, no. 3, pp. 7-13 [cit. 2024-03-21]. ISSN 2350-0530. Available at: https://doi.org/10.29121/granthaalayah.v4.i3se.2016.2771.

GAUR, A. E-Contracts, Legal Issues and Challenges Involved: An Overview. *Journal of Emerging Technologies and Innovative Research* [online]. 2021, vol. 8, no. 1, pp. 404-410 [cit. 2024-03-21]. ISSN 2349-5162. Available at: https://www.jetir.org/papers/JETIR2101054.pdf.

HAVENGA, P., M. HAVENGA, E. HURTER, R. KELBRICK, E. MANAMELA, T. MANAMELA, H. SCHULZE and Ph. STOOP. *General Principles of Commercial Law*. 7th ed. Claremont: Juta, 2010. 540 p. ISBN 978-0-7021-8514-4.

KAHN, E. *Contract and Mercantile Law through the Cases*. 1st ed. Cape Town: Juta, 1971. 1050 p.

LAUKKANEN, T. and J. LAURONEN. Consumer Value Creation in Mobile Banking Services. *International Journal of Mobile Communications* [online]. 2005, vol. 3, no. 4, pp. 325-338 [cit. 2024-03-21]. ISSN 1741-5217. Available at: https://doi.org/10.1504/ijmc.2005.007021.

MALLAT, N. Exploring Consumer Adoption of Mobile Payments – A Qualitative Study. *The Journal of Strategic Information Systems* [online]. 2007, vol. 16, no. 4, pp. 413-432 [cit. 2024-03-21]. ISSN 1873-1198. Available at: https://doi.org/10.1016/j.jsis.2007.08.001.

Matrimonial Property Act No. 88 [1984].

MORINGIELLO, J. M. and J. E. OTTAVIANI. Online Contracts: We May Modify These Terms at Any Time, Right?. In: *American Bar Association*

[online]. 2016-05-20 [cit. 2024-03-21]. Available at: https://www.americanbar.org/groups/business_law/resources/business-law-today/2016-may/online-contracts/.

NWABUEZE, C. J. Reflections on Legal Uncertainties for E-Commerce Transactions in Cameroon. *The African Journal of Information and Communication* [online]. 2017, no. 20, pp. 171-180 [cit. 2024-03-21]. ISSN 2077-7213. Available at: https://doi.org/10.23962/10539/23499.

OAKLEY, R. L. Fairness in Electronic Contracting: Minimum Standards for Non-negotiated Contracts. *Houston Law Review* [online]. 2005, vol. 42, no. 4, pp. 1041-1105 [cit. 2024-03-21]. ISSN 0018-6694. Available at: https://houstonlawreview.org/article/4789-fairness-in-electronic-contracting-minimum-standards-for-non-negotiated-contracts.

ONG, J. P. The Enforceability of Digital Contract: A Comparative Analysis on Indonesia and New Zealand Law. *The Lawpreneurship Journal* [online]. 2021, vol. 1, no. 1, pp. 30-42 [cit. 2024-03-21]. ISSN 2807-7652. Available at: https://doi.org/10.21632/tlj.1.1.30-42.

PAPADOPOULOS, S. and S. SNAIL ka MTUZE. *Cyberlaw@SA: The Law of the Internet in South Africa*. 4th ed. Pretoria: Van Schaik, 2022. 527 p. ISBN 978-0-627-03795-5.

PAPADOPOULOS, S. Are We about To Cure the Scourge of Spam? A Commentary on Current and Proposed South African Legislative Intervention. *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* [online]. 2012, vol. 75, no. 2, pp. 223-240 [cit. 2024-03-21]. ISSN 1682-4490. Available at: https://doi.org/2263/20824.

PISTORIUS, T. Contract Formation: A Comparative Perspective on the Model Law on Electronic Commerce. *Comparative and International Law Journal of Southern Africa* [online]. 2002, vol. 35, no. 2, pp. 129-156 [cit. 2024-03-21]. ISSN 2522-3062. Available at: https://doi.org/10520/aja00104051_178.

PISTORIUS, T. Formation of Internet Contracts: An Analysis of the Contractual and Security Issues. *SA Mercantile Law Journal*. 1999, vol. 11, no. 2, pp. 282-299. ISSN 1015-0099.

Property Time-sharing Control Act No. 75 [1983].

Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters. OJ EU L 351, 2012-12-20, pp. 1-32.

ROHENDI, A. Perlindungan Konsumen dalam Transaksi E-Commerce Perspektif Hukum Nasional dan Internasional [Consumer Protection in the E-Commerce: Indonesian Law and International Law Perspective]. *Ecodemica* [online]. 2015, vol. 3, no. 2, pp. 474-488 [cit. 2024-03-21]. ISSN 2528-2255. Available at: https://doi.org/10.31294/jeco.v3i2.34.

SADUAL, M. K. Electronic Contracts: Legal Issues and Challenges. *International Journal of Research and Analytical Reviews* [online]. 2021, vol. 8, no. 3, pp. 793-798 [cit. 2024-03-21]. ISSN 2348-1269. Available at: https://ijrar.org/papers/IJRAR21C2209.pdf.

SAINI, N. and A. P. BHANU. Conflict of Laws in E-Contracts. *Multicultural Education* [online]. 2021, vol. 7, no. 10, pp. 761-763 [cit. 2024-03-21]. ISSN 1068-3844. Available at: https://doi.org/10.5281/zenodo.5610164.

SCOTT, J. and S. CORNELIUS, eds. *The Law of Commerce in South Africa*. 3rd ed. Cape Town: Oxford University Press, 2020. 638 p. ISBN 978-0-19-075348-1.

SNAIL, S. Electronic Contracts in South Africa – A Comparative Analysis. *Journal of Information, Law & Technology* [online]. 2008, no. 2, pp. 1-24 [cit. 2024-03-21]. ISSN 1361-4169. Available at: https://warwick.ac.uk/fac/soc/law/elj/jilt/2008_2/snail.

SNAIL, S. L. South African E-Consumer Law in the Context of the ECT Act (Part 1). *Juta's Business Law* [online]. 2007, vol. 15, no. 1, pp. 40-46 [cit. 2024-03-21]. ISSN 1996-210X. Available at: https://doi.org/10520/ejc52577.

STAVROU, A. *Mission Impossible?: E-Security in South Africa's Commercial and Financial Sectors*. 1st ed. Pretoria: Institute for Security Studies, 2002. 115 p. ISBN 1-919913-10-6.

UNCITRAL Model Law on Electronic Commerce [1996].

UNCITRAL Model Law on Electronic Signatures [2001].

UNCTAD Annual Report 2017: So Much Done, So Much To Do [online]. 1st ed. Geneva: United Nations Conference on Trade and Development, 2018. 113 p. [cit. 2024-03-21]. Available at: https://unctad.org/publication/unctad-annual-report-2017.

United Nations Guidelines for Consumer Protection [2016].

Van DEVENTER, S. Problems Relating to the Formation of Online Contracts: A Comparative Perspective. *The South African Law Journal* [online]. 2022, vol. 139, no. 1, pp. 32-77 [cit. 2024-03-21]. ISSN 1996-2177. Available at: https://doi.org/10.47348/salj/v139/i1a2.

Van DEVENTER, S. Regulating Substantively Unfair Terms in Online Contracts. *Stellenbosch Law Review* [online]. 2021, vol. 32, no. 3, pp. 518-542 [cit. 2024-03-21]. ISSN 1996-2193. Available at: https://doi.org/10.47348/slr/2021/i3a8.

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Dualism of Subsidiaries in Indonesia: Between Juridical Independence and Economic Dependence of Subsidiaries in a Group of Companies

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Abstract: *In the limited liability company law currently in force in Indonesia, holding company and subsidiaries in the form of limited liability companies are seen as independent and separate legal entities, where each company has the right to independently carry out legal actions in accordance with the company's interests. This differs from the concept of "group of companies" which consists of a collection of legally independent companies, where the subsidiaries are controlled by the holding company. This kind of concept raises fundamental questions considering that there is a contradiction between the principle of independence possessed by the company as an independent legal entity on one hand, and the reality of control by the holding company over its subsidiaries as a unitary economic entity. To answer this kind of problem, our paper offers a systematic explanation based on a normative and case approach to the company's legal regime in Indonesia. This paper argues that the contradiction between the principle of independence and the reality of control by a parent company over its subsidiaries as an economic unit has the potential to prevent subsidiaries from moving independently based on their own business interests. The amount of control authority that the holding company has over its subsidiaries – as this paper will show – must be exercised by taking into account several things, including: the control does not conflict with legal regulations, does not cause losses to the subsidiaries, and does not harm the interests of the third parties as the limitation of control by the holding company.*

Key Words: *Company Law; Corporate Law; Company's Legal Regime; Group of Companies; Independence of Subsidiary Company; Control of Holding Company; Indonesia.*

Introduction

The objectives of the activities carried out by a company, in general, is to make a profit.[1] In order to maintain the existence of the company and be able to compete with other companies, one strategy that can be carried out by the company is to expand its business and renew or restructure its company. One way of expanding this business can be done through the formation of a group of companies, where the formation or development of a group of companies itself cannot be separated from the business realities that happen when business management through the formation of a group of companies is considered to provide more economic benefits compared to a single company. In this regard, A. Goto revealed that the motivation to form a group of companies stems from an understanding that a group of companies is a coalition of companies that pursue common interests through a system that coordinates decisions made by the companies that join as members in it.[2]

The phenomenon of groups of companies is very common as the development of companies in the modern era in various countries. However, not all countries have regulations that specifically regulate the existence of groups of companies. In England, although there are no regulations that specifically regulate groups of companies, regulations regarding the existence of holding companies and subsidiaries are regulated in the Article 1162 of the Company Act 2006.[3] Apart from that, there is a doctrine in company law, namely the "shadow director" doctrine, which can be applied in the construction of a group of companies in the context of "wrongful trading" where the holding company in *de facto* exercises control as regulated in the Article 214 of the *Insolvency Act* 1986.[4] This is different from Germany, as stated by K. J. Hopt, who already has regulations that specifically regulate groups of companies in the 1965 Aktiengesetz that divides groups of companies into two forms, namely contrac-

[1] BROSCH, N. Corporate Purpose: From a 'Tower of Babel' Phenomenon towards Construct Clarity. *Journal of Business Economics* [online]. 2023, vol. 93, pp. 567-568 [cit. 2024-04-29]. ISSN 1861-8928. Available at: https://doi.org/10.1007/s11573-023-01137-9.

[2] GOTO, A. Business Groups in a Market Economy. *European Economic Review* [online]. 1982, vol. 19, no. 1, p. 61 [cit. 2024-04-29]. ISSN 1873-572X. Available at: https://doi.org/10.1016/0014-2921(82)90005-8.

[3] *Company Act 2006* [The United Kingdom].

[4] *Insolvency Act 1986* [The United Kingdom].

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tual groups of companies and *de facto* groups of companies.[5] In connection with this, until the time this paper was written, Indonesia did not yet have laws and regulations that specifically regulate groups of companies. The regulatory framework for groups of companies in Indonesia still uses the Limited Liability Company Law as regulated in Law Number 40 of 2007 concerning Limited Liability Companies as amended by Law Number 6 of 2023 concerning Stipulation of Government Regulations in Lieu of Law Number 2 of 2022 concerning Enactment of Work Creation Law Bill into Law (hereinafter referred to as the "UUPT"). Even though amendments have been made to the UUPT, the provisions in the UUPT are still limited to regulating limited liability companies and do not yet regulate groups of companies.

The existence of groups of companies and the single form company approach in limited liability company law has not yet regulated the existence of groups of companies consisting of two or more companies in the form of limited liability companies which considered to be companies, each of which is separate as an independent legal entity. The current limited liability company law considers that a limited liability company is a separate legal subject from the personal legal subject who is the founder or shareholder of the company (separate and distinct from its owner). This is in accordance with the doctrine of corporate separate legal personality, which essentially states that a company, in this case a company, has a personality that different from the person who created it. This doctrine became known as the doctrine of *separate legal entity*.[6] On the other hand, from an economic perspective, a group of companies is a single unity,[7] where the holding company as the central leader of the group of

[5] HOPT, K. J. Groups of Companies – A Comparative Study on the Economics, Law and Regulation of Corporate Groups. *ECGI – Law Working Paper No. 286/2015* [online]. 2015, p. 10 [cit. 2024-04-29]. Available at: https://ssrn.com/abstract=2560935.

[6] WAQAS, M. and Z. REHMAN. Separate Legal Entity of Corporation: The Corporate Veil. *International Journal of Social Sciences and Management* [online]. 2016, vol. 3, no. 1, p. 2 [cit. 2024-04-29]. ISSN 2091-2986. Available at: https://doi.org/10.3126/ijssm.v3i1.13436; BUDUSTOUR, Y. and L. BUDUSTOUR. *The Doctrine of Separate Legal Personality and It's Significance in International Business* [online]. 2023, p. 2 [cit. 2024-04-29]. Available at: https://doi.org/10.2139/ssrn.4384050; and HIDAYAT, M. H. Badan Hukum, Separate Legal Entity dan Tanggung Jawab Direksi dalam Pengelolaan Perusahaan. *National Journal of Law* [online]. 2019, vol. 1, no. 1, p. 68 [cit. 2024-04-29]. ISSN 2686-2778. Available at: https://doi.org/10.47313/njl.v1i1.673.

[7] BACHMID, M. Liability of the Holding Company for Unlawful Actions in Group Companies: (Case Study of Supreme Court Decision Number 89 PK/Pdt/2010 concerning Violations

companies can provide instructions to subsidiaries in order to achieve the collective goals of the group of companies.

This is different from the single company approach as adopted in the UUPT which views holding company and subsidiaries as independent legal entities and each company should have the right to independently carry out legal actions in accordance with the interests of the company, but in a group of companies consisting of legally independent companies, there are subsidiaries controlled by the holding company.[8] Even though the existence of a group of companies can make a positive contribution to the development of the economic sector and has been developing for a long time in Indonesia, there are no regulations that specifically regulate the relations between holding company and subsidiaries in the development of a group of companies. This condition causes the single company approach as regulated in the UUPT continue to be used and views subsidiaries as independent legal entities, without looking at the relationship that exists between the holding company and subsidiaries in the group of companies. This is in accordance with the opinion expressed by A. S. Achmad & A. A. Indradewi that based on the UUPT, the relationship between a holding company and subsidiaries in a group of companies is no more and no less than the relationship between a company and its shareholders, where any form of special relationship between a holding company and subsidiaries will not give rise to direct responsibility to the holding company for actions taken by its subsidiaries.[9] In fact, this can be denied, where several studies show that subsidiaries as part of a group of companies lose their independence in making business decisions. Sulistiowati revealed that in a group of companies, the holding company is the shareholder and central leader in the group of companies, where as the central leader, the holding company has the power to con-

of Distribution). *Unram Law Review* [online]. 2021, vol. 5, no. 1, p. 30 [cit. 2024-04-29]. ISSN 2549-2365. Available at: https://doi.org/10.29303/ulrev.v5i1.134.

[8] ARTSIDAKIS, S., Y. THALASSINOS, T. PETROPOULOS and K. LIAPIS. Optimum Structure of Corporate Groups. *Journal of Risk and Financial Management* [online]. 2022, vol. 15, no. 2, p. 1 [cit. 2024-04-29]. ISSN 1911-8074. Available at: https://doi.org/10.3390/jrfm15020088.

[9] ACHMAD, A. S. and A. A. INDRADEWI. Hubungan Hukum antar Perusahaan dalam Sistem Perusahaan Grup Ditinjau dari Undang-Undang Nomor 40 Tahun 2007 Tentang Perseroan Terbatas. *Jurnal USM Law Review* [online]. 2021, vol. 4, no. 2, p. 481 [cit. 2024-04-29]. ISSN 2621-4105. Available at: https://doi.org/10.26623/julr.v4i2.3912.

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trol its subsidiaries in order to achieve common goals as a single economic entity.[10]

Furthermore, T. Kishita & N. Hayashi revealed that in the context of a pure holding company, there are several factors that influence the extent of control by the holding company over its subsidiaries, namely: (1) the holding company's control over its subsidiaries will be greater, if the holding company has subsidiaries that carry out business activities which geographically and/or industrially close; (2) the holding company's control will be stronger if the holding company has subsidiaries that run businesses with similar technology; and (3) conversely, the holding company's control over its subsidiaries will be different if the holding company and subsidiaries operate in different industries.[11] Then according to D. Palombo, if a group of companies is a multinational company, usually there is a holding company that exercises direct or indirect control over the subsidiary. In this context, the holding company is domiciled in a different country from its subsidiaries, where he gave the example of the holding company being in England, while the subsidiaries are in Bangladesh, India, China and Brazil. This condition causes the legal responsibilities of the holding company and subsidiaries to be regulated based on the national laws where the company is located. This happens because being trapped in the national dimension, the law fails to capture the fundamental aspects of multinational businesses, since even though they are conglomerates of different domestic entities, they act as a single economic entity in the international arena.[12] This then creates a conflict between the principle of independence that a company should have as an independent legal entity and the actual control of the holding company over its subsidiaries as a single economic entity. In connection with this, we consider that the provisions in the UUPT are inappropriate to be applied for groups of companies and express our support for several stud-

[10] SULISTIOWATI. Extension of Parent Company's Liability against Third Parties of Subsidiary Company. *Mimbar Hukum* [online]. 2011, p. 45 [cit. 2024-04-29]. ISSN 2443-0994. Available at: https://doi.org/10.22146/jmh.16156.

[11] KISHITA, T. and N. HAYASHI. Parental Control on Subsidiaries in Corporate Groups with a Pure Holding Company. *Review of Integrative Business and Economics Research* [online]. 2019, vol. 8, no. 3, p. 47 [cit. 2024-04-29]. ISSN 2304-1013. Available at: http://gmpriber.com/uploads/3/4/9/8/34980536/riber_8-3_03_s18-214_43-53.pdf.

[12] PALOMBO, D. The Duty of Care of the Parent Company: A Comparison between French Law, UK Precedents and the Swiss Proposals. *Business and Human Rights Journal* [online]. 2019, vol. 4, no. 2, p. 266 [cit. 2024-04-29]. ISSN 2057-0201. Available at: https://doi.org/10.1017/bhj.2019.15.

ies which show the reality of control carried out by holding company over its subsidiaries within a group of companies, hence there is a need to limit holding company's control over its subsidiaries.

This paper is divided into four parts. First, it begins by discussing the development of groups of companies in Indonesia, by observing that although there are no statutory regulations that specifically regulate groups of companies, in reality the existence of groups of companies has existed as part of development of companies in Indonesia. Second, we will discuss the position of subsidiaries as limited liability companies, which are legal entities that equated with a person who should have independence in carrying out their business activities. Third, after looking at the legal independence that subsidiaries should have, it will describe the reality in the group of companies which shows the holding company's control over its subsidiaries. Fourth, the case that occurred in Indonesia was based on a court decision which has permanent legal force, where in this case it shows the existence of control by the holding company over the business activities of its subsidiaries. This description will be accompanied by criticism regarding the potential loss of independence that subsidiaries should have in carrying out their business activities, since there are no regulations regarding the limits of control by the holding company over its subsidiaries in making business decisions.

Results and Discussion

1 Group of companies in Indonesia

In order to maintain the existence of the company and be able to compete with other companies, one strategy that can be carried out by the company is to expand its business and renew or restructure its company. One way of expanding business can be done through the formation of a group of companies, where the formation or development of a group of companies itself cannot be separated from the business realities that occur when business management through the construction of a group of companies is considered to provide more economic benefits compared to a single company. In connection with this, K. Samphantharak states that the benefits that can be obtained through the formation of a group of companies come from flexibility in the composition of ownership and the limited liability in case a member of the group of companies goes bankrupt, therefor bankruptcy that happen on one of the members has no im-

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pact towards the other members of the group of companies.[13] Furthermore, through the formation of a group of companies, the holding company as the central leader in the group of companies obtains several benefits, for example improving cash flow management, reducing the volume of invested capital, improving the holding company's negotiating position, and diversifying risks (reducing liability risk).[14] Meanwhile, in our opinion, one of the benefits that can be obtained through the formation of a group of companies is creating a new market, where companies that become member of a group of companies can carry out transactions between each other.

There are various reasons for establishing a group of companies, one of the most important reasons is development of company. At some point, a company might reach a size that makes it impossible (or at least difficult) to manage. To continue operating and competing in the market, companies must decide on a decentralized type of management, where one popular way to overcome this problem is to separate the various components of the company into independent economic entities and create a holding structure on this basis. This solution addresses the problems associated with excessive management concentration while allowing further coordination of the activities of the (now legally independent) subsidiary entities with the parent entity's influence on the subsidiary's decision making.[15] In this regard, as explained previously, legally the existence of this group of companies has not been explicitly regulated in Indonesian laws and regulations. Even though there is no formal legitimacy in the provisions of statutory regulations, in practice there are many groups of companies in Indonesia, where the existence of the first group of companies in Indonesia has existed since the end of the 19th Century with the formation of Oei Tiong Ham Concern. Oei Tiong Ham Concern

[13] SAMPHANTHARAK, K. *The Choice of Organization Structure: Business Group versus Conglomerate* [online]. 2007, pp. 5-6 [cit. 2024-04-29]. Available at: https://doi.org/10.2139/ssrn.975549.

[14] FICBAUER, D. and M. REŽŇÁKOVÁ. Holding Company and Its Performance. *Acta Universitatis Agriculturae et Silviculturae Mendelianae Brunensis* [online]. 2014, vol. 62, no. 2, p. 336 [cit. 2024-04-29]. ISSN 2464-8310. Available at: https://doi.org/10.11118/actaun201462020329.

[15] GAJEWSKI, D. The Holding Company as an Instrument of Companies' Tax-financial Policy Formation. *Contemporary Economics* [online]. 2013, vol. 7, no. 1, p. 77 [cit. 2024-04-29]. ISSN 2300-8814. Available at: https://doi.org/10.5709/ce.1897-9254.75.

(OTHC) is a conglomerate founded by a Chinese businessman born in Semarang, Oei Tiong Ham in 1893.[16]

Company development as the reason for the formation of subsidiary as described previously, occurred in one of the largest group of companies in Indonesia, namely PT Astra International Tbk., which was founded in Jakarta in 1957 as a general trading company under the name Astra International Inc. which then in 1990, the name was changed to PT Astra International Tbk. Astra then developed its business in various sectors, including automotive; financial services; heavy equipment, mining, construction & energy; agribusiness; infrastructure and logistics; information technology; and property. Until now, Astra has developed into a group of companies that carries out business operations spread throughout Indonesia, managed through 270 subsidiaries, joint ventures and associated entities, and supported by 198,203 employees (Astra Group Profile).[17] A similar condition happened to PT Bakrie & Brothers Tbk, which was founded in 1942,[18] that established a simple trading business which later developed into a group of companies in Indonesia. Related to this, there are several benefits that can be obtained through the formation of a group of companies:[19]

a. Separation of assets and liabilities. Company's assets cannot be claimed by other companies, nor is the liability on the poor financial performance of one company to be carried by another company, even though they are part of the same group of companies.
b. Diverse investment opportunities. Investors can assess the performance of each company that is part of a group of companies, so that they can make the right investment decisions. Apart from that, investors' liabilities are also limited since the performance of one compa-

[16] FAKHRIANSYAH, M. Bisnis Raja Gula Dunia dari Semarang Ini Hancur dalam Semalam. In: *CNBC Indonesia* [online]. 2023-07-06 [cit. 2024-04-29]. Available at: https://www.cnbcindonesia.com/entrepreneur/20230705123014-25-451513/bisnis-raja-gula-dunia-dari-semarang-ini-hancur-dalam-semalam.

[17] About Astra. In: *PT Astra International Tbk* [online]. 2024 [cit. 2024-04-29]. Available at: https://www.astra.co.id/about-astra.

[18] History. In: *Bakrie & Brothers* [online]. 2024 [cit. 2024-04-29]. Available at: https://bakrie-brothers.com/discover-bakrie/history/.

[19] PAI, V. Group Companies – Analysis of the Concept and Its Implication in India, UK, and US with Special Reference to Inter Corporate Transactions of Small Companies under Companies Act, 2013 – Thresholds and Exemptions: A Cross-jurisdictional Analysis. *Journal of Legal Research and Juridical Sciences* [online]. 2022, vol. 1, no. 2, pp. 79-80 [cit. 2024-04-29]. ISSN 2583-0066. Available at: https://jlrjs.com/wp-content/uploads/2022/01/10.-Vedanta-Pai.pdf.

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ny will not have an impact on other companies even though they are members of the same group of companies.

c. Loans and guarantees. Companies can obtain loans from other companies that are members of the same group of companies with lower interest rates than loans from banks and other financial institutions. In addition, one company can be a guarantor for debts belonging to other companies that are part of a group of companies.
d. Better management. Each company is a separate legal entity, but within a group of companies, decentralization can be carried out to create a better control and coordination over each company's operations and governance.
e. Company sales. A company may be established in a group structure with the aim of being sold in the future. This does not interfere with the functioning of other companies and the funds from the sale can be distributed among members within the group.
f. Tax benefits. Often time in various jurisdictions, there are certain tax exemptions for transactions between members of a group of companies, hence the companies not only will obtain profit from the transaction but also at a lower cost than usual.
g. Centralized asset management. The holding company can own property or intellectual property that can be rented or licensed to other companies that are part of the same group of companies.

Even though the existence of a group of companies has not been explicitly regulated, the existence of a holding company can be established by forming a new company, taking over shares (acquisition) or by separation as regulated in the UUPT.[20] Furthermore, according to M. Fuady, the process of forming a group of companies can be carried out using three procedures, namely (1) residual procedure: the original company is divided according to each business sector, where then the original company becomes a holding company that owns shares in the split company and other companies if any, (2) full procedures: in the residual process the holding company is an independent company that has just been formed or an independent company that already existed and is still under the same ownership (affiliated) or through an acquisition carried out by companies that are not related to each other, and (3) programmed procedures: In programmed procedures, the established company is founded and prepared from the beginning to become a holding company in the

[20] *Law No. 40 of 2007 concerning Limited Liability Companies* [Republic of Indonesia] [2007-08-16].

construction of a group of companies, so that when the company expands or develops its structure it will be accompanied by the formation of new companies or acquiring other existing companies.[21]

2 Position of subsidiary company as an independent legal entity

Limited liability company is a legal entity,[22] therefor a subsidiary company in the form of a limited liability company which is part of a group of companies is an independent legal entity. The significance of a limited liability company as a legal entity is that the limited liability company has rights, obligations and assets in its own name that separate from those of its shareholders or management, where the founders or shareholders also have limited liability. This is different from the form of unlimited liability in sole partnership and partnership.[23] Apart from that, according to the basic principles of law, a business entity with the form of a legal entity has the privilege and authority to run its business, acquire and own assets, carry out transactions, and can make lawsuits and be sued in its own name, where this does not apply to companies that not a legal entity. As a legal entity, the subsidiary company in the form of a limited liability company obtains legal entity status based on a ministerial decision regarding ratification of legal entity in the form of company,[24] where the characteristic of a limited liability company as a legal entity according to Agus Budiarto as quoted by M. S. Prabowo & Y. Z. Umami is by the separation of assets of a limited liability company with its founders, have its

[21] FUADY, M. *Hukum Perusahaan: Dalam Paradigma Hukum Bisnis*. 1st ed. Bandung: PT Citra Aditya Bakti, 2018, p. 84. ISBN 978-979-491-132-7.

[22] PURANTO, H. Y. Juridical Review of Individual Companies and Limited Liability Companies. *Jurnal Cakrawala Hukum* [online]. 2022, vol. 13, no. 3, p. 263 [cit. 2024-04-29]. ISSN 2598-6538. Available at: https://doi.org/10.26905/idjch.v13i3.6086.

[23] BLAIR, E. S., T. M. MARCUM and F. F. FRY. The Disproportionate Costs of Forming LLCs vs. Corporations: The Impact on Small Firm Liability Protection. *Journal of Small Business Strategy* [online]. 2009, vol. 20, no. 2, pp. 26-27 [cit. 2024-04-29]. ISSN 2380-1751. Available at: https://libjournals.mtsu.edu/index.php/jsbs/article/view/127; and LASNITA, F. A. and M. A. R. UTAMA. Authorized Failure: How is Company Status?. *Indonesian Journal of Advocacy and Legal Services* [online]. 2020, vol. 2, no. 2, pp. 230-231 [cit. 2024-04-29]. ISSN 2686-2611. Available at: https://doi.org/10.15294/ijals.v2i2.37721.

[24] BUTAR BUTAR, E. Juridic Review On-line Approval of the Deed of Establishment of a Limited Company through Sisminbakum. *Journal of Law Science* [online]. 2020, vol. 2, no. 2, p. 62 [cit. 2024-04-29]. ISSN 2684-9658. Available at: https://doi.org/10.35335/jls.v2i2.1617.

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own goals and interests, have its own management, and being able to carry out legal actions in their own name.[25]

In connection with the characteristics of a limited liability company as a legal entity as described above, a subsidiary in the form of a limited liability company should have its own objectives and interests and have independence in making business decisions. Based on the principle of independence of legal entity, then legally in principle (conventionally), the holding company does not have the legal authority to interfere with the management and policies of its subsidiaries, where according to M. Fuady in legal theory (conventionally), the involvement of holding company who is also a shareholder in a subsidiary is only possible in the following terms:[26]

a. through directors and commissioners appointed by the holding company as long as it does not conflict with the company's articles of association;
b. through contractual relationships as long as it does not conflict with the company's articles of association.

Legal entities must have their own objectives that are clearly formulated. Even though they sometimes intersect, the goals of a legal entity are not the personal goals of its members. Strictness in the formulation of the objectives of a legal entity is highly necessary to distinguish it from the personal objectives of its members. In addition, since a legal entity's legal actions are always executed by its person (management), clearly formulating its objectives is a necessity.[27] However, it is also important to look at the independence possessed by the subsidiary, which is interpreted as the extent to which the subsidiary can maintain its independence as a legal entity that independent from influence or interference that can be carried out by the holding company as the central leader in the group of companies as well as the shareholder in the subsidiary.

[25] BUDIARTO, A. *Kedudukan Hukum dan Tanggung Jawab Pendiri Perseroan Terbatas* [The Legal Position and the Responsibility of Limited Liability Founders]. 1st ed. Jakarta: Ghalia Indonesia, 2002. 234 p. ISBN 979-450-415-7; and PRABOWO, M. S. and Y. Z. UMAMI. The Existence of a Company in the Society and Its Legality in Indonesian Law. *Journal of Private and Commercial Law* [online]. 2018, vol. 2, no. 1, p. 44 [cit. 2024-04-29]. ISSN 2599-0306. Available at: https://doi.org/10.15294/jpcl.v2i1.13962.

[26] FUADY, M. *Hukum Perusahaan: Dalam Paradigma Hukum Bisnis*. 1st ed. Bandung: PT Citra Aditya Bakti, 2018, p. 133. ISBN 978-979-491-132-7.

[27] BUDIONO, A. R. *Pengantar Ilmu Hukum*. 1st ed. Malang: Bayumedia Publishing, 2005, p. 63. ISBN 979-3695-48-X.

3 Reality in the control of subsidiary by holding company

A company is said to be independent if it is not influenced and controlled by other entities.[28] The independence that a subsidiary should have as an independent legal entity is in conflict with the existence of its holding company in the group of companies. In a group of companies, the holding company has the duality of being a shareholder in the subsidiary company and being the central leader of the group of companies.[29] However, based on the applicable provisions in the UUPT, it only looks at the existence of the holding company as a shareholder in the subsidiary company, this happens because the UUPT does not yet regulate the existence and relationship between the holding company and subsidiaries in the group of companies.

According to F. A. Gevurtz, the relationship between a holding company and a subsidiary is a relationship where one company has all or part of the controlling shares in another company or through joint ownership where the same individual, entity or cohesive group has a controlling interest which is then called as corporate group or affiliated corporations,[30] in this paper are called group of companies. The role of the holding company as a central leader in the group of companies illustrates the possibility of the holding company in exercising its rights in the form of direction to its subsidiaries which are decisive in nature, with the holding company's influence in the group of companies being able to reduce the rights or dominate the rights of other companies (subsidiaries). This is in line with the opinion of Bonbright and Means who define a holding company as a company that has a position to control or significantly influence the management of one or more other companies, through ownership of shares in that company.[31]

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[28] MOISEJEVAS, R. and D. URBONAS. Problems Related to Determining of a Single Economic Entity under Competition Law. *Yearbook of Antitrust and Regulatory Studies* [online]. 2017, vol. 10, no. 16, p. 109 [cit. 2024-04-29]. ISSN 2545-0115. Available at: https://doi.org/10.7172/1689-9024.yars.2017.10.16.5.

[29] BADRIYAH, S. M., S. MAHMUDAH and M. DJAIS. Legal Impacts from the Bankruptcy of Subsidiary Company to Holding Company as the Corporate Guarantor. *IOP Conference Series: Earth and Environmental Science* [online]. 2018, vol. 175, no. 1, p. 5 [cit. 2024-04-29]. ISSN 1755-1315. Available at: https://doi.org/10.1088/1755-1315/175/1/012214.

[30] GEVURTZ, F. A. Groups of Companies. *The American Journal of Comparative Law* [online]. 2018, vol. 66, no. 1, p. 181 [cit. 2024-04-29]. ISSN 2326-9197. Available at: https://doi.org/10.1093/ajcl/avy015.

[31] ECHANIS, E. S. Holding Companies: A Structure for Managing Diversification. *Philippine Management Review* [online]. 2009, vol. 16, p. 1 [cit. 2024-04-29]. ISSN 2094-3393. Available at: https://journals.upd.edu.ph/index.php/pmr/article/view/1794.

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The holding company is considered to carry out the function of central leadership with the authority of the holding company to control subsidiary companies collectively as a management unit (R. S. Devi).[32] The control exercised by the holding company over subsidiary companies is a fact, where the holding company has an interest in exploiting all the resources in its possession in order to achieve the interests of the group of companies as an economic unit. In the business competition law that applies in the European Union, there is a doctrine known as "single economic entity." Unfortunately, this doctrine does not generally apply in company law even though there is the potential for holding company control over subsidiaries for the benefit of the entire group of companies as an economic unit. The fact of control carried out by the holding company also reflects the business reality of a group of companies which have the character of an economic unit, where, in this regard, Sulistiowati believes that in general the degree of control from the holding company over its subsidiary companies can be divided into two, as follows:[33]

a. The degree of control is the domination of the holding company over its subsidiary company, when the holding company gives instructions that must be carried out by the subsidiary company, thereby causing all management of the subsidiary company to be aimed at the interests of the group of companies. It is as if the subsidiary company has lost its independence to exercise its own management for the interests of the concerned subsidiary company.
b. On the other hand, the degree of control is the influence of the holding company on its subsidiary companies, when the holding company formulates strategic policies to support the management of the subsidiary company, while the subsidiary company has independence in managing the company's daily operational activities.

4 Cases in Indonesia

One case that shows the reality of control carried out by the holding company over its subsidiary companies that are members of the group of companies can be seen in the case of PT Effem Foods Inc. and PT Effem

[32] DEVI, R. S. Status Hukum dan Tanggung Jawab Anak Perusahaan PT (Perseroan Terbatas) dalam Suatu Kelompok Perusahaan. *Jurnal Ilmiah Kohesi* [online]. 2020, vol. 4, no. 1, pp. 86-87 [cit. 2024-04-29]. ISSN 2655-4429. Available at: https://kohesi.sciencemakarioz.org/index.php/JIK/article/view/113.

[33] SULISTIOWATI. *Tanggung Jawab Hukum pada Perusahaan Grup di Indonesia*. 1st ed. Jakarta: Erlangga, 2013, p. 37. ISBN 978-602-241-752-1.

Indonesia against PT Smak Snak which has been examined and decided by the Supreme Court at the Judicial Review level. In this case PT Effem Foods Inc. is the holding company while PT Effem Indonesia is a subsidiary, where the shares of PT Effem Indonesia is owned by PT Effem Foods Inc. as the holding company by as much of 90 % and the remaining 10 % is owned by Effem Inc. which is also an affiliate company of PT Effem Foods Inc.[34]

This case started when PT Smak Snack which is the sole distributor of PT Effem Foods Inc. based on the distribution agreement, feels disadvantaged by the actions taken by PT Effem Foods Inc. and PT Effem Indonesia. This action began when PT Effem Foods Inc. established a subsidiary company, namely PT Effem Indonesia. In 1999 when the distribution agreement was still in effect, PT Effem Foods Inc. appointed PT Effem Indonesia to market its products in Indonesia without notification and approval from PT Smak Snack. Next PT Effem Foods Inc. and PT Effem Indonesia in various ways began to diminish the role of PT Smak Snack as the sole distributor who usually imports products directly from PT Effem Foods Inc., but since 2001 PT Smak Snack must purchase products from PT Effem Indonesia. Other than that the area of product distribution for PT Smak Snack, which originally covered the entire territory of Indonesia, began to be narrowed down unilaterally by PT Effem Foods Inc., became only for the area of South Jakarta, Bogor and Bali, even then PT Smak Snack as the sole distributor was asked to become a mere distributor under the multi-distributor system.[35]

Even in May 2003, PT Effem Indonesia sent notifications to several customers of PT Smak Snack, where PT Effem Indonesia asks customers to register the products under the name of PT Effem Indonesia so that PT Effem Indonesia can send goods directly to customers. In this notification PT Effem Indonesia also stated that this request by PT Effem Indonesia to its customers is a follow-up to the agreement between PT Effem Indonesia and PT Smak Snack, even though in fact the statement made by PT Effem Indonesia is totally misleading, because PT Smak Snack never gave approval to PT Effem Indonesia.[36]

PT Effem Indonesia without approval from PT Smak Snack, has also sent notifications to several customers stating that starting April 1, 2004,

[34] *Decision of the Supreme Court of the Republic of Indonesia Ref. No. 89 PK/Pdt/2010.*
[35] *Decision of the Supreme Court of the Republic of Indonesia Ref. No. 89 PK/Pdt/2010.*
[36] *Decision of the Supreme Court of the Republic of Indonesia Ref. No. 89 PK/Pdt/2010.*

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product distribution for the Jabotabek area which usually was carried out by PT Smak Snack, will be taken by PT Effem Indonesia. Until at last, PT Effem Indonesia even unilaterally stopped product procurement and subsequently several large-scale customers with significant contribution to PT Smak Snack's revenue (key accounts), for example Carrefour, Makro, Hero Supermarket, Matahari, Indo Group and Alfa Group, which are usually managed by PT Smak Snack was unilaterally transferred to to PT Effem Indonesia without approval from PT Smak Snack and ultimately managed directly by PT Effem Indonesia.[37] In this case, the Supreme Court in its decision stated that it rejected the request for judicial review submitted by PT Effem Foods Inc. and PT Effem Indonesia, so that the Supreme Court's decision at the Judicial Review level strengthens the judge's decision at the previous level which essentially punished PT Effem Foods Inc. and PT Effem Indonesia to be jointly and severally responsible for paying the losses suffered by PT Smak Snack.

The unlawful acts committed by PT. Effem Indonesia which caused losses to PT. Smak Snak shows the control carried out by PT. Effem Foods Inc. as the holding company for PT. Effem Indonesia as a subsidiary in making business decisions, so in this case PT. Effem Indonesia as a subsidiary company seems to have lost its independence in making business decisions. The degree of control exercised by the holding company over the subsidiary company as described above, shows that in the construction of a group of companies the holding company can influence the subsidiary company through the formulation of strategic policies to support the management of the subsidiary company, even the holding company can dominate the subsidiary company which causes the subsidiary company to seem as losing its independence. This is absolutely contrary to the provisions in the UUPT, where all company organs, including shareholders, commissioners and directors, exercise their authority solely in the interests of the company.

This also shows that the reality in the construction of a group of companies allows the holding company as the central leader in the group of companies to be involved in making business decisions for subsidiary companies, and the holding company can even dominate through controlling and coordinating all subsidiary companies as an economic unit, where this issue is still not covered in the UUPT regulations. The dominance of the holding company in controlling the subsidiary company, so

[37] *Decision of the Supreme Court of the Republic of Indonesia Ref. No. 89 PK/Pdt/2010.*

that the subsidiary company seems to have lost its independence, gives rise to legal problems related to the independence that the subsidiary company in the form of a limited liability company should have as a legal entity to follow or not follow instructions from the holding company.

Conclusions

The results of the research show that subsidiaries in the form of limited liability companies should have independence in making business decisions, where business decisions must be taken based on their interests, because basically the reason for establishing a company is to gain profit. In this case the business decisions taken by the subsidiary company should aim to provide benefits for the subsidiary. Apart from that, the provisions of the UUPT also regulate that shareholders, directors and commissioners who are organs of a limited liability company have the obligation to carry out all their authority and responsibilities in the interests of the limited liability company.

However, in groups of companies there is great potential for interference from holding company in the business decisions taken by its subsidiaries. It then creates a conflict between the principle of independence that a company should have as an independent legal entity and the reality of control exercised by the holding company over its subsidiaries, where the UUPT which is the legal basis for limited liability companies in Indonesia does not yet cover this issue. This is because the UUPT does not yet regulate the existence and relationship between holding company and subsidiary companies within a group of companies, and views holding company only as shareholders in subsidiaries.

The reality of the holding company's involvement in its subsidiaries is demonstrated in the case as described in the discussion, where the holding company exercises control over its subsidiaries, so that the subsidiaries only become agents of the holding company and lose their independence. In this case it is also seen that the abuse of control authority carried out by the holding company caused losses to third parties and was an unlawful act. Based on this, we are of the opinion that the amount of control authority that the holding company has over its subsidiaries should be implemented by taking into account several things, including: 1) the control does not conflict with the law; 2) does not cause losses to subsidiaries; and 3) does not harm the interests of third parties. These three things can be used as limits in exercising the control by the holding company over its subsidiaries. This thinking can be applied as the basis

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for the formation or renewal of the UUPT as an effort to reform company law in Indonesia.

References

About Astra. In: *PT Astra International Tbk* [online]. 2024 [cit. 2024-04-29]. Available at: https://www.astra.co.id/about-astra.

ACHMAD, A. S. and A. A. INDRADEWI. Hubungan Hukum antar Perusahaan dalam Sistem Perusahaan Grup Ditinjau dari Undang-Undang Nomor 40 Tahun 2007 Tentang Perseroan Terbatas. *Jurnal USM Law Review* [online]. 2021, vol. 4, no. 2, pp. 470-483 [cit. 2024-04-29]. ISSN 2621-4105. Available at: https://doi.org/10.26623/julr.v4i2.3912.

ARTSIDAKIS, S., Y. THALASSINOS, T. PETROPOULOS and K. LIAPIS. Optimum Structure of Corporate Groups. *Journal of Risk and Financial Management* [online]. 2022, vol. 15, no. 2, pp. 1-16 [cit. 2024-04-29]. ISSN 1911-8074. Available at: https://doi.org/10.3390/jrfm15020088.

BACHMID, M. Liability of the Holding Company for Unlawful Actions in Group Companies: (Case Study of Supreme Court Decision Number 89 PK/Pdt/2010 concerning Violations of Distribution). *Unram Law Review* [online]. 2021, vol. 5, no. 1, pp. 29-42 [cit. 2024-04-29]. ISSN 2549-2365. Available at: https://doi.org/10.29303/ulrev.v5i1.134.

BADRIYAH, S. M., S. MAHMUDAH and M. DJAIS. Legal Impacts from the Bankruptcy of Subsidiary Company to Holding Company as the Corporate Guarantor. *IOP Conference Series: Earth and Environmental Science* [online]. 2018, vol. 175, no. 1, pp. 1-8 [cit. 2024-04-29]. ISSN 1755-1315. Available at: https://doi.org/10.1088/1755-1315/175/1/012214.

BLAIR, E. S., T. M. MARCUM and F. F. FRY. The Disproportionate Costs of Forming LLCs vs. Corporations: The Impact on Small Firm Liability Protection. *Journal of Small Business Strategy* [online]. 2009, vol. 20, no. 2, pp. 23-41 [cit. 2024-04-29]. ISSN 2380-1751. Available at: https://libjournals.mtsu.edu/index.php/jsbs/article/view/127.

BROSCH, N. Corporate Purpose: From a 'Tower of Babel' Phenomenon towards Construct Clarity. *Journal of Business Economics* [online]. 2023, vol. 93, pp. 567-595 [cit. 2024-04-29]. ISSN 1861-8928. Available at: https://doi.org/10.1007/s11573-023-01137-9.

BUDIARTO, A. *Kedudukan Hukum dan Tanggung Jawab Pendiri Perseroan Terbatas* [The Legal Position and the Responsibility of Limited Liability Founders]. 1st ed. Jakarta: Ghalia Indonesia, 2002. 234 p. ISBN 979-450-415-7.

BUDIONO, A. R. *Pengantar Ilmu Hukum*. 1st ed. Malang: Bayumedia Publishing, 2005. 194 p. ISBN 979-3695-48-X.

BUDUSTOUR, Y. and L. BUDUSTOUR. *The Doctrine of Separate Legal Personality and It's Significance in International Business* [online]. 2023, pp. 1-8 [cit. 2024-04-29]. Available at: https://doi.org/10.2139/ssrn.4384050.

BUTAR BUTAR, E. Juridic Review On-line Approval of the Deed of Establishment of a Limited Company through Sisminbakum. *Journal of Law Science* [online]. 2020, vol. 2, no. 2, pp. 60-68 [cit. 2024-04-29]. ISSN 2684-9658. Available at: https://doi.org/10.35335/jls.v2i2.1617.

Company Act 2006 [The United Kingdom].

Decision of the Supreme Court of the Republic of Indonesia Ref. No. 89 PK/Pdt/2010.

DEVI, R. S. Status Hukum dan Tanggung Jawab Anak Perusahaan PT (Perseroan Terbatas) dalam Suatu Kelompok Perusahaan. *Jurnal Ilmiah Kohesi* [online]. 2020, vol. 4, no. 1, pp. 84-98 [cit. 2024-04-29]. ISSN 2655-4429. Available at: https://kohesi.sciencemakarioz.org/index.php/JIK/article/view/113.

ECHANIS, E. S. Holding Companies: A Structure for Managing Diversification. *Philippine Management Review* [online]. 2009, vol. 16, pp. 1-12 [cit. 2024-04-29]. ISSN 2094-3393. Available at: https://journals.upd.edu.ph/index.php/pmr/article/view/1794.

FAKHRIANSYAH, M. Bisnis Raja Gula Dunia dari Semarang Ini Hancur dalam Semalam. In: *CNBC Indonesia* [online]. 2023-07-06 [cit. 2024-04-29]. Available at: https://www.cnbcindonesia.com/entrepreneur/20230705123014-25-451513/bisnis-raja-gula-dunia-dari-semarang-ini-hancur-dalam-semalam.

FICBAUER, D. and M. REŽŇÁKOVÁ. Holding Company and Its Performance. *Acta Universitatis Agriculturae et Silviculturae Mendelianae Brunensis* [online]. 2014, vol. 62, no. 2, pp. 329-337 [cit. 2024-04-29]. ISSN 2464-8310. Available at: https://doi.org/10.11118/actaun201462020329.

FUADY, M. *Hukum Perusahaan: Dalam Paradigma Hukum Bisnis*. 1st ed. Bandung: PT Citra Aditya Bakti, 2018. 380 p. ISBN 978-979-491-132-7.

GAJEWSKI, D. The Holding Company as an Instrument of Companies' Tax-financial Policy Formation. *Contemporary Economics* [online]. 2013, vol. 7, no. 1, pp. 75-82 [cit. 2024-04-29]. ISSN 2300-8814. Available at: https://doi.org/10.5709/ce.1897-9254.75.

GEVURTZ, F. A. Groups of Companies. *The American Journal of Comparative Law* [online]. 2018, vol. 66, no. 1, pp. 181-211 [cit. 2024-04-29]. ISSN 2326-9197. Available at: https://doi.org/10.1093/ajcl/avy015.

GOTO, A. Business Groups in a Market Economy. *European Economic Review* [online]. 1982, vol. 19, no. 1, pp. 53-70 [cit. 2024-04-29]. ISSN 1873-572X. Available at: https://doi.org/10.1016/0014-2921(82)90005-8.

HIDAYAT, M. H. Badan Hukum, Separate Legal Entity dan Tanggung Jawab Direksi dalam Pengelolaan Perusahaan. *National Journal of Law* [online]. 2019, vol. 1, no. 1, pp. 65-80 [cit. 2024-04-29]. ISSN 2686-2778. Available at: https://doi.org/10.47313/njl.v1i1.673.

History. In: *Bakrie & Brothers* [online]. 2024 [cit. 2024-04-29]. Available at: https://bakrie-brothers.com/discover-bakrie/history/.

HOPT, K. J. Groups of Companies – A Comparative Study on the Economics, Law and Regulation of Corporate Groups. *ECGI – Law Working Paper No. 286/2015* [online]. 2015, pp. 1-34 [cit. 2024-04-29]. Available at: https://ssrn.com/abstract=2560935.

Insolvency Act 1986 [The United Kingdom].

KISHITA, T. and N. HAYASHI. Parental Control on Subsidiaries in Corporate Groups with a Pure Holding Company. *Review of Integrative Business and Economics Research* [online]. 2019, vol. 8, no. 3, pp. 43-53 [cit. 2024-04-29]. ISSN 2304-1013. Available at: http://gmp-riber.com/uploads/3/4/9/8/34980536/riber_8-3_03_s18-214_43-53.pdf.

LASNITA, F. A. and M. A. R. UTAMA. Authorized Failure: How is Company Status?. *Indonesian Journal of Advocacy and Legal Services* [online]. 2020, vol. 2, no. 2, pp. 223-242 [cit. 2024-04-29]. ISSN 2686-2611. Available at: https://doi.org/10.15294/ijals.v2i2.37721.

Law No. 40 of 2007 concerning Limited Liability Companies [Republic of Indonesia] [2007-08-16].

MOISEJEVAS, R. and D. URBONAS. Problems Related to Determining of a Single Economic Entity under Competition Law. *Yearbook of Antitrust and Regulatory Studies* [online]. 2017, vol. 10, no. 16, pp. 107-125 [cit. 2024-04-29]. ISSN 2545-0115. Available at: https://doi.org/10.7172/1689-9024.yars.2017.10.16.5.

PAI, V. Group Companies – Analysis of the Concept and Its Implication in India, UK, and US with Special Reference to Inter Corporate Transactions of Small Companies under Companies Act, 2013 – Thresholds and Exemptions: A Cross-jurisdictional Analysis. *Journal of Legal Research and Juridical Sciences* [online]. 2022, vol. 1, no. 2, pp. 78-97 [cit. 2024-04-29]. ISSN 2583-0066. Available at: https://jlrjs.com/wp-content/uploads/2022/01/10.-Vedanta-Pai.pdf.

PALOMBO, D. The Duty of Care of the Parent Company: A Comparison between French Law, UK Precedents and the Swiss Proposals. *Business and Human Rights Journal* [online]. 2019, vol. 4, no. 2, pp. 265-286 [cit. 2024-04-29]. ISSN 2057-0201. Available at: https://doi.org/10.1017/bhj.2019.15.

PRABOWO, M. S. and Y. Z. UMAMI. The Existence of a Company in the Society and Its Legality in Indonesian Law. *Journal of Private and Commercial Law* [online]. 2018, vol. 2, no. 1, pp. 33-46 [cit. 2024-04-29]. ISSN 2599-0306. Available at: https://doi.org/10.15294/jpcl.v2i1.13962.

PURANTO, H. Y. Juridical Review of Individual Companies and Limited Liability Companies. *Jurnal Cakrawala Hukum* [online]. 2022, vol. 13, no. 3, pp. 262-271 [cit. 2024-04-29]. ISSN 2598-6538. Available at: https://doi.org/10.26905/idjch.v13i3.6086.

SAMPHANTHARAK, K. *The Choice of Organization Structure: Business Group versus Conglomerate* [online]. 2007, pp. 1-6 [cit. 2024-04-29]. Available at: https://doi.org/10.2139/ssrn.975549.

SULISTIOWATI. Extension of Parent Company's Liability against Third Parties of Subsidiary Company. *Mimbar Hukum* [online]. 2011, pp. 40-58 [cit. 2024-04-29]. ISSN 2443-0994. Available at: https://doi.org/10.22146/jmh.16156.

SULISTIOWATI. *Tanggung Jawab Hukum pada Perusahaan Grup di Indonesia*. 1st ed. Jakarta: Erlangga, 2013. 198 p. ISBN 978-602-241-752-1.

WAQAS, M. and Z. REHMAN. Separate Legal Entity of Corporation: The Corporate Veil. *International Journal of Social Sciences and Management* [online]. 2016, vol. 3, no. 1, pp. 1-4 [cit. 2024-04-29]. ISSN 2091-2986. Available at: https://doi.org/10.3126/ijssm.v3i1.13436.

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The Position of Legal Customary Rules in the Divorce System of the Hindu Community in Bali

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Abstract: *Marriage is a legal act that is recognized by the Indonesian state. However, divorce in a marriage is expected today and is no exception in Indonesia. Divorce is determined in Act Number 1 of 1974 concerning Marriage. This research wants to contribute to family law in the divorce system for the Hindu community in Bali, seeing that there is no position against legal customary rules and Hinduism, which in Article 39 determines the validity of a divorce. This research focuses on library research with a descriptive-analytical way and statute approach. The result of this study is that in Balinese legal customary divorce process, there should be strong reasons, as contained in the Vedic Scriptures, such as the Garuda Purana, to take divorce steps. The divorce system that indigenous people in Bali can carry out is the palas perabian system and continues with the mapegat sot sacred ceremony. The legal consequences of divorce in the Hindu community in Bali do not affect the status and position of the child because the Hindu community in Bali adheres to a patrilineal family system (purusa). The legal consequences related join property (gunakaya), whether inherited property from the husband or inherited property of the wife from the parental gift (tetatadan), will return to each party in the event of a divorce.*

Key Words: *Family Law; Marriage Law; Marriage; Divorce; Balinese Legal Customary Rules; Bali; Indonesia.*

Introduction

Indonesia is a legal state as stipulated in Article 1 Paragraph (3) of the 1945 Constitution of the Republic of Indonesia.[1] This provision automatically explains that the actions of each citizen are determined by a system

[1] *Constitution of the Republic of Indonesia* [1945].

called law. Where the law is embodied in law in the implementation related to realizing social order in the lives of citizens. Related to social order in a society's life, one of the things determined by the state in the life of the state is a legal act called marriage. Marriage in a hierarchical manner is stipulated in Article 28 B Paragraph (1), which stipulates that everyone has the right to continue their offspring through a legal marriage. In general, marriage is part of civil law as stipulated in the Civil Code (from now on KUHPer), specifically in the first book, chapter 4, part 1.[2] Subsequently, in 1974, provisions regarding marriage were promulgated specifically in Act Number 1 of 1974 Marriage (hereinafter referred to as the "Marriage Law"), where the law determines how the marriage rules must be carried out to be legal before the state and also legal by the religious rules and beliefs of every community.

Marriage in terms of Balinese legal customary rules has the terms *kerab*, *nganten*, *wiwaha* or *pawiwahan*, *ngerangat*, and *matemu tangan*. The validity of a marriage under Balinese legal customary rules is if the marriage has gone through a ceremony called *byakaon pasaapan*, where the implementation of this ceremony is led by a Hindu priest (*Pinandita*) and *Prajuru Adat* (traditional administrators) as witnesses and does not forget where the marriage has fulfilled all the requirements – specified in the marriage law.

Indonesian positive law in determining marriage is determined in the Marriage Law where in its provisions there is automatically a definition of marriage specified in Article 1, which stipulates that marriage is an inner and outer bond between a woman and a man as husband and wife to form a happy and healthy family, eternal based on God Almighty. Balinese legal customary rules define marriage as a bond between *sekala* (real) and *niskala* (belief). More specifically, marriage in the Hindu law is specified in the Rg Veda in Skanda 10 Chapter 8 Verse 47, namely *"samanjantu vissve devah samapo hrdayani nau sammatarisva sandhata samudestri dadhatu nau."* Where this verse says that "May God give strength in this marriage, where this marriage is carried out with joy and sincerity, as clear as water. May Lord Matarisvan, Dhata, Destri grant protection in this marriage." In addition, Philippe Rivault and Luc Sordon explained *wiwaha*, namely "to maintain, to uplift (*dharma*). The vivahasamskara, by its purifying influence, helps one to understand the goal of marriage, which should enable husband and wife to live peacefully and

[2] *Act No. 23 of 1847 on the Civil Code* [Republic of Indonesia].

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purify themselves, as well free their children from ignorance and all misidentifications of the soul with the body."[3] It can be underlined that the meaning of the word peacefully and purify in the Hindu marriages, which have magical religious elements, aims to get pure peace in forming an eternal and holy household based on the One Godhead. This is in line with the definition of marriage in the Marriage Law.

Marriage, as described above, must have been determined in the past. This can be seen from the explanation of marriage in the Rg Veda, the Holy Book of Hinduism, the oldest religion. Thus, of course, today's marriage has experienced dynamics both from fulfilling biological needs in sexual relations and the purpose of marriage which aims to establish good relations. However, in its development in this era of globalization, society often ignores the meaning of marriage, namely forming an eternal family based on the One Godhead. It can be interpreted simply that society puts aside the religious element in marital relations, marked by divorce, which always occurs yearly. This divorce phenomenon is increasing with the Covid-19 outbreak that hit the community, especially in Bali, Indonesia. Based on data from the Central Statistics Agency, the divorce rate in Indonesia continued to increase from 2015 to 2020, which initially increased to 5.89 % or 3.9 million people, then increased to 6.4 %. Or 4.7 million people. Especially in the Java-Bali area, what was initially at 4.6 % rose to 9.1 %.[4] If we look at the data on the owners of divorce certificates in Denpasar, in 2020, there will be 5,063 people. In addition, a study from Libertan Gonzales and Tarja K. Viitanen explained that in European countries that legalized divorce with a one-sided divorce system, there was an increase in the number of divorces which averaged two divorces per 1,000 people annually.[5]

The Marriage Law stipulates divorce in Articles 38 to 41. The provisions in Article 38 letter b stipulate that the decision is a marriage, one of which is divorce. Moreover, the validity of a divorce can only be done before the court, following the provisions of Article 39 of the Marriage Law.

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[3] RIVAULT, Ph. and L. SORDON. *The Book of Samskaras: Purificatory Rituals for Successful Life*. 1st ed. New Delhi: Bhaktivedanta Book Trust Internastional, 1997, p. 39.

[4] Divorce Data 2020. In: *BPS – Statistics Indonesia* [online]. 2024 [cit. 2024-03-28]. Available at: https://www.bps.go.id/en; and *Denpasar Regency Population and Civil Registration Service* [2020].

[5] GONZÁLEZ, L. and T. K. VIITANEN. The Effect of Divorce Laws on Divorce Rates in Europe. *European Economic Review* [online]. 2009, vol. 53, no. 2, pp. 127-138 [cit. 2024-03-28]. ISSN 1873-572X. Available at: https://doi.org/10.1016/j.euroecorev.2008.05.005.

This stipulation regarding divorce raises a legal problem, namely the vagueness or the obscurity of the norm, which is more precisely the incomplete norm. The incompleteness of the norm is because Articles 38 to 41 do not place the religious law and beliefs of the parties wishing to divorce. The provisions of this divorce article are inconsistent with Article 2 regarding the validity of a marriage based on each party's religious law and beliefs.

For this reason, this research is significant to provide legal certainty for the Hindu community in Bali regarding the procedures for implementing divorce and is also expected to prevent divorce. Based on the above provisions, the problem can be formulated: What is the form of the divorce process for the Hindu community in Bali? Furthermore, what are the legal consequences of implementing divorce in Balinese legal customary?

Marriage is an inner and outer bond between a man and a woman as husband and wife to form an eternal family. In addition, marriage also aims to establish good relations between communities. In the life of the Balinese indigenous people, marriage has a nostalgic purpose, namely carrying out traditional obligations by performing ceremonies for debts to ancestors. For this reason, it is essential to conduct this study to prevent divorce and also provide an understanding of the correct divorce process following the legal procedures of Hinduism and Balinese customs. In addition, it is hoped that this study can help the Hindu community in Bali understand the legal consequences of implementing divorce in Bali.

Marriage positively impacts human development by building family clan relations and giving offspring. However, having a positive impact, there is a negative impact in a marriage if the marriage is not based on an agreement between the parties, which results in a divorce between the husband and wife. Divorce in a marriage will have legal consequences, especially for women in Bali.

Divorce, in general, will result in legal consequences for the parties to the divorce. The consequences of divorce law within the scope of the Balinese legal customary community are very complex, especially when there are castes in society that make the Balinese traditional family system very complex, especially in a marriage and divorce. In a study conducted by I. Made Artana entitled Rights and Obligations of Women Who Have Descended Caste Due to Divorce, according to Balinese legal cus-

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tomary rules, in the result of divorce from a husband and wife where the position of the wife has a higher *Wangsa* (caste) than her husband, the woman will not accept again in her original home because previously the woman had been declared *nyerod* (descended caste). This study uses empirical legal research methods to examine the legal reality that applies in society. The conclusion of this study focuses on the family's agreement in returning the caste of women after divorce, where the agreement of the woman's family is followed by the right to joint property and child custody.[6] The legal consequences of post-divorce effect not only women but also the children of the husband and wife. In the research of Putu Ayu Devi Kardila and colleagues entitled The Position of the Mulih Daha Woman in the family and the Legal Consequences on Children in the Mengwitani Traditional Village, where this study states that women who return to their original homes due to divorce, the status of these women are referred to as *mulih daha* (returning girl). This study uses empirical legal research methods where the results indicate that women who are *mulih daha* have no right to claim back their inheritance rights from their home of origin. Meanwhile, the legal consequences of children who are brought by women back to their original homes with *mulih daha* status are the same as other children based on Act Number 35 of 2014 on Amendments to Act Number 23 of 2002 concerning Legal Protection for Children.[7] Post-divorce produces legal consequences for the parties, but it is also necessary to pay attention to the causes of a divorce. Besides that, legal actions, namely marriage and divorce are universal legal acts, meaning each country has its own rules for marriage and divorce. In Martina Purna Nisa Jaliasyah's research entitled Critical Review of Domestic Violence as Reason for Divorce (Comparison of Divorce Law in Indonesia, Malaysia, and the Maldives), it is stated that the phenomenon of domestic violence always increases every year, and this act is used as one of the reasons for divorce. This research, which uses a descriptive-analytical

[6] ARTANA, I. M. Hak dan Kewajiban Perempuan Yang Sudah Turun Kasta Akibat Perceraian Menurut Hukum Adat Bali. *Yustitia* [online]. 2021, vol. 15, no. 1, pp. 105-112 [cit. 2024-03-28]. ISSN 2797-4170. Available at: https://doi.org/10.62279/yustitia.v15i1.709.

[7] KARDILA, P. A. D., I. N. P. BUDIARTHA and I. W. RIDENG. Kedudukan Perempuan Mulih Daha dalam Keluarga dan Akibat Hukum Terhadap Anak di Desa Adat Mengwitani. *Jurnal Konstruksi Hukum* [online]. 2021, vol. 2, no. 3, pp. 605-609 [cit. 2024-03-28]. ISSN 2809-9648. Available at: https://doi.org/10.22225/jkh.2.3.3665.603-607; and MURTIAWAN, I. W. E. P., I. N. P. BUDIARTHA and D. G. SUDIBYA. Hak Memelihara Anak setelah Putusnya Perkawinan karena Perceraian Menurut Hukum Adat Bali. *Jurnal Analogi Hukum* [online]. 2020, vol. 2, no. 1, pp. 93-97 [cit. 2024-03-28]. ISSN 2716-2680. Available at: https://doi.org/10.22225/ah.2.1.1630.93-97.

library research method with a normative juridical approach, results in the finding that domestic violence is accommodated as a reason for divorce in family law in Indonesia, Malaysia, and the Maldives. However, there is a difference in the right to file for divorce.[8]

Based on the above study, it can be concluded that divorce has a cause and produces a legal effect. However, all the research above focuses on the material and formal legal point of view of positive law in Indonesia and other countries. Therefore, it is inevitable that this study is different from the research above. This research will focus on divorce from the legal customary perspective and the nature of the legal customary, namely religious magic related to the divorce process and the legal consequences of divorce for the Hindu community in Bali.

Methods

This study will focus on the library research method using a descriptive analysis method with a statute approach. The primary legal sources of this study consist of the 1945 Constitution of the Republic of Indonesia, the Marriage Law, and Government Regulation Number 9 of 1975 concerning the Implementation of Act Number 1 of 1974 concerning Marriage. In addition, secondary legal sources of this study consist of books, magazines, scientific journals, and scientific articles. The tertiary legal sources in this study include dictionaries and websites. The above legal materials will be compiled systematically, researched, and processed in a descriptive analysis.

Discussion and results

Dissolution of marriage in Indonesian positive law

Ontbinding des huwelijks is a term for the dissolution of marriage in the Civil Code (BW), which is specified in Chapter X where this chapter is divided into three parts, namely Article 199 of the dissolution of marriage in general, Articles 200 – 206 b of the dissolution of marriage after separating the table and bed, and Articles 207 – 232 a provide for marital divorce. Furthermore, it is determined in the Civil Code that the cause of the dissolution of a marriage is due to death, the husband or wife has not

[8] NISA, M. P. Critical Review of Domestic Violence as Reason for Divorce (Comparison of Divorce Laws in Indonesia, Malaysia and the Maldives). *Al-Ihkam: Jurnal Hukum dan Pranata Sosial* [online]. 2021, vol. 16, no. 1, pp. 1-23 [cit. 2024-03-28]. ISSN 2442-3084. Available at: https://doi.org/10.19105/al-lhkam.v16i1.4292.

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been present in domestic life for ten years, there is a judge's decision after the table and bed are separated.

Hilman Hadikusuma explained that general fundamental problems could lead to divorce in the household, such as adultery, leaving the residence together in bad faith, being subject to imprisonment for five years or a heavier sentence, and severe injury or abuse by a husband. Wife or the wife to the husband where this act can endanger the safety of his soul and body.[9] Not only with the above grounds a husband or wife can file a divorce suit, but acts that exceed reasonable limits such as rude insults that are consistently carried out. Article 38 of the Marriage Law determines three reasons for the termination of a marriage, including death, divorce, and court decisions. In the case of the dissolution of the marriage due to divorce, the plaintiff should have sufficient reasons to separate or not be able to live together in harmony as a semi-wife. The elucidation of Article 39, Paragraph 2 of the Marriage Law concretely explains the reasons that can be used as a basis for divorce, such as adultery, being a gambler, or things that are difficult to carry out in rehabilitation, one party leaves the other for two consecutive years, speaks without the permission of the other party or leaves without reason, one of the parties is imprisoned for five years or the law is heavier, there is severe abuse, there is an illness or disability of one of the spouses which causes the obligation as husband or wife to fail. These ongoing disputes make no hope of living in harmony in the household.

The reasons used in divorce have various types. The reasons specified in the marriage law outline the general reasons for a plaintiff who wishes to file for divorce. However, it can be seen that the essence of breaking up or dissolving a marriage using a divorce process has an essential characteristic, namely an unkind attitude to each other which causes no harmony in the scope of the married couple's household, as explained by Martina Purna Nisa that "destructive behavior in a domestic circle is believed to cause the breakdown of a household."[10]

[9] HADIKUSUMA, H. *Hukum Perkawinan Indonesia: Menurut: Perundanan, Hukum Adat, Hukum Agama*. 3rd ed. Bandung: Mandar Maju, 2007, p. 150. ISBN 979-538-239-X.

[10] NISA, M. P. Critical Review of Domestic Violence as Reason for Divorce (Comparison of Divorce Laws in Indonesia, Malaysia and the Maldives). *Al-Ihkam: Jurnal Hukum dan Pranata Sosial* [online]. 2021, vol. 16, no. 1, pp. 1-23 [cit. 2024-03-28]. ISSN 2442-3084. Available at: https://doi.org/10.19105/al-lhkam.v16i1.4292.

The term of divorce in Balinese legal customary rules

Divorce is part of the marriage law, where marriage generally adheres to each party's religious and legal customary. A thought arises about divorce, which has only been regulated concretely in the marriage law. However, in the legal customary order, it is still widespread regarding divorce, especially in the social life of the Hindu community in Bali. As explained by Hilman Hadikusuma, the rules regarding marriage and divorce in customary law are strongly influenced by the religion adopted by the orthodox community concerned.[11] Maybe people with Islamic religious beliefs have KHI (Islamic Law compilation) in the regulation of family law, especially related to divorce. However, it differs from the Hindu community in Bali, which adheres to a patrilineal culture that does not recognize divorce in their understanding of domestic life. However, when referring to the theory described by Ter Haar, namely the *Beslissingenleer* theory, where the formation of customary is the decisions of customary functionaries such as kings, and village heads (*Bendesa adat*),[12] then, of course, the term and meaning of divorce in the Hindu community in Bali can be seen from Balinese legal customary, which until now is lived and believed by the Balinese indigenous people.

Divorce under Balinese legal customary rules is generally known in *awig-awig*, namely *nyapian*, but more commonly called palas. In other terms, the dissolution of a marriage because the spouse of a wife dies, the woman has the status of a *balu*, or, in common parlance, a widow. Another term in Wayan P. Windia's book states that in Balinese legal customary, divorce can be termed as *palas makurenan*, *pegat mekurenan*, where the term has the meaning that the breakup of the marital relationship between husband and wife.[13]

Forms of the traditional divorce process in the Hindu society in Bali

Divorce is part of the marriage law, where the divorce will occur if there is a marriage. Although actually, divorce is not something that is expected in a marriage. To understand the form of the divorce process in indigenous peoples in Bali, it is necessary to understand the purpose of mar-

[11] HADIKUSUMA, H. *Hukum Perkawinan Indonesia: Menurut: Perundanan, Hukum Adat, Hukum Agama*. 3rd ed. Bandung: Mandar Maju, 2007. 203 p. ISBN 979-538-239-X.
[12] BZN, B. T. H., F. TENGKER and B. D. NUGROHO. *Asas-Asas & Tatanan Hukum Adat.* 1st ed. Bandung: Mandar Maju, 2011. 211 p. ISBN 978-979-538-371-0.
[13] WINDIA, W. P. *Mapadik: Orang Biasa Kawin Biasa Cara Biasa di Bali.* 2nd ed. Denpasar: Udayana University Press, 2015. 275 p. ISBN 978-602-294-079-1.

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riage in Balinese legal customary. Marriage under Balinese legal customary rules has a purpose for *sekala* (real) and *niskala* (belief).[14] The purpose of traditional Balinese marriage is to fulfill the biological needs of the husband and wife, to continue the responsibility (*swadarma*) of parents and ancestors, to the family and society (village/*banjar*/traditional village), and to give birth to children. The purpose of marriage based on *niskala* (belief) is closely related to magical religious elements where marriage. Balinese indigenous people believe that marriage is a sacred ceremony to pay debts to their ancestors called *tri rna*. *Tri rna* consists of *Dewa rna* (debt to God Almighty), *Pitra rna* (living debt to parents and ancestors), and *Rsi rna* (debt of knowledge to spiritual teachers or school teachers).[15]

For this reason, the three debts must be carried out through a formal process (*upakara*), which is carried out following the rules of the Hindu religious philosophy (*tatwa*) and also with good ethics (*susila*). The explanation above can explain that marriage is a solemn act and has a religious element in its implementation. As explained by I. Made Arta in his research that marriage has a profound philosophical meaning in the life of the Balinese indigenous people. There are three essential aspects, namely *dharma sampati* (carrying out obligations correctly), *praja* (giving birth to offspring), and *rati* (fulfilling biological needs).

Tatwa, morals, and ceremonies outline the implementation of marriage in Bali. From the three aspects above, the divorce process in Balinese customary law should follow the above aspects, which of course, start from the philosophy of Hinduism (*tatwa*) regarding divorce. From a philosophical perspective, Hinduism does not recognize divorce in a marriage. However, in some of the Vedanta (Hindu religious scriptures) reviews, there are several reviews about the reasons for breaking up a marriage. The Garuda Purana explains that *"aṣṭe mṛte pravrajite klībe vā patite patau, pañcasvāpatsu nārīṇāṃ patiranyo vidhīyate"*. The verse in the Puranas above means that if a husband does not leave without a cause and his whereabouts cannot be traced, dies, is sick, which causes he cannot produce offspring (impotence) or has a trait that is detrimental to his wife, in these five essential matters, a wife can leave her husband

[14] WINDIA, W. P. *Mapadik: Orang Biasa Kawin Biasa Cara Biasa di Bali.* 2nd ed. Denpasar: Udayana University Press, 2015. 275 p. ISBN 978-602-294-079-1.
[15] ARTATIK, I. G. A. K. Konversi Agama dalam Kajian Hukum Hindu. *Hukum dan Kebudayaan* [online]. 2020, vol. 1, no. 1, pp. 16-25 [cit. 2024-03-28]. ISSN 2722-3817. Available at: https://ejournal.unhi.ac.id/index.php/hkb/article/view/676.

and remarry.[16] It can be seen from the meaning of the verse above that the verse determines the reasons for a woman to break up the marriage. These reasons also follow the reasons for filing a divorce in the explanation of Article 39 of the Marriage Law. Another reason in the Vedic scriptures for divorce can be seen from the provisions contained in the Sarasamuscaya Scriptures in Verse 429. It is determined that *"anathivanmanusyana bhayā paribhavāt tathā maryādāyāmamaryādāh striyastistanti bhartsu."* This means that women sometimes look obedient to their husbands because they are afraid of being tortured by their husbands or afraid of being hurt, for a husband should not hurt him with torture.[17] A woman can also apply for the dissolution of marriage or divorce for reasons in domestic relations that are consistently inconsistent with the treatment of her husband, who consistently uses verbal abuse that can disturb the wife's psychology, as explained in the elucidation of Article 39 d which stipulates that the husband's partner, the wife, can file for divorce on the grounds of cruel treatment. This provision is also stipulated in the book Manawa Dharmasastra in Article 58, namely *"jamayo yani gehani capantya patri Pujitah, tani krtyahatanewa winasyanti samtarah"*. The article above explains that where in the household a woman is not respected correctly, there is an insult in the form of cursed words, and the family will be destroyed as if supernatural powers destroyed it. Another reason for divorce, as stipulated in the Marriage Law, is committing adultery. The philosophical provisions for adultery in Hinduism are stipulated in Article 353 of the Manawa Dharmasastra, which determines *"tatsamuttho hi lokasya jayate wansamkarah, yena mulaharo dharmah sarwanasaya kalpate"*. Where the meaning of this article is that adultery will cause the birth of mixed colors between humans, then it will cause sin that spreads to the roots of life and causes destruction in human life.[18]

Based on the explanation of the Vedanta holy book above, in the case of divorce, the parties can use strong reasons to avoid sin and create harmony in their lives. However, it should be noted that the reasons

[16] DUTT, M. N. *The Garuda Mahapuranam: Text with English Translation & Notes: Volume I*. 1st ed. New Delhi: New Bharatiya Book Corporation, 2007. 602 p. ISBN 978-81-8315-073-6.

[17] KAJENG, I. N. *Sarasamuccaya: Dengan Teks Bahasa Sansekerta dan Jawa Kuna*. 1st ed. Surabaya: Paramita, 1994. 380 p. ISBN 979-9044-16-2.

[18] KAJENG, I. N. *Sarasamuccaya: Dengan Teks Bahasa Sansekerta dan Jawa Kuna*. 1st ed. Surabaya: Paramita, 1994. 380 p. ISBN 979-9044-16-2; and SUDHARTA, T. R. and G. PUDJA. *Manawa Dharmasastra (Manu Dharmasastra): Atau Weda Smrti: Compendium Hukum Hindu*. 1st ed. Denpasar: Upada Sastra, 1995. 288 p. ISBN 979-8325-99-0.

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based on religious law should not be used to seek personal gain in which the marriage can be maintained, only to satisfy the personal desires of sacred marriage, which results in the marriage being seen as having no magical religious element. For this reason, it is necessary to have ethics (morals) in Balinese customary law for the Hindu community to implement divorce. Where the ethics in the divorce process will control and monitor the divorce filing process whether it is necessary to divorce or the marriage can still be maintained.

Ethics (*susila*) is an essential part of the implementation of a process of traditional and religious activities in the life of indigenous peoples, as in the theory of effectiveness from Soerjono Soekanto, who explains that one of the factors for the law to be effective is how the role of law enforcers in carrying out legal orders optimally and well, where law enforcers must have a mentality or personality as an essential role to maximize the function of the law.[19] This study where ethics, in this case, is how the role of law enforcement in carrying out the search process properly and correctly, where the law enforcers referred to in this study are traditional village administrators (*prajuru adat*) in Bali who should understand tatwa or legal rules religion and also legally positive in Indonesia in resolving the divorce issue. By understanding the *tatwa* of the marriage law in Hinduism, the customary administrators should be able to carry out the divorce process properly. Divorce in Indonesian positive law has indeed been stipulated in Articles 38 to 41 of the Marriage Law, where the validity of a divorce is contained in Article 39 and the stage of the divorce process, it is continued in Government Regulation Number 9 of 1975 concerning the Implementation of Act Number 1 of 1974 concerning Marriage. Article 39 explicitly stipulates that divorce is carried out before the court, and the stage of its implementation has been explicitly determined in government regulations. However, the provisions in the implementation of divorce above do not give a position to religious law and people's beliefs. This is a problem for traditional administrators in resolving divorce cases within the scope of adat (legal customary), especially in Bali.

Today there are still many traditional administrators, especially customary heads in Bali (*Bendesa adat*), who are still confused in carrying out this divorce process, both in terms of customary administration and

[19] SIMANJUNTAK, B. and FL Y. P. AMBORO. Efektivitas Hukum Tindakan Penagihan Kartu Kredit dalam Aktivitas Perbankan di Kota Batam. *Jurnal Komunitas Yustisia* [online]. 2021, vol. 4, no. 3, pp. 997-1015 [cit. 2024-03-28]. ISSN 2722-8312. Available at: https://doi.org/10.23887/jatayu.v4i3.43739.

especially in terms of divorce ceremonies which until now are rarely found in the divorce ceremony process. This study will help to contribute to the completion of Article 39 regarding the divorce process in adat, which begins with a philosophical (*tatwa*) and progresses to an ethical (*susila*) stage. Ethics interpreted here are the stages of a divorce settlement in Balinese customary law, there is a divorce settlement called *palas perabian*. This study will outline how the form of the process of resolving the dissolution of marriage due to divorce using the *palas perabian* method will be followed by the ceremonial stage (*upakara*).

Palas parabian is defined as a sincere and sincere divorce where the process of breaking up the marriage is carried out in front of the customary management (*adat*) and announced to the existing indigenous peoples. The parties will not dispute the use of assets (marital property). In addition, this process is also carried out openly and sincerely in terms of child custody, where the husband and wife agree that the child will continue to follow his biological father as the kinship system adopted is the patrilineal system known in Bali as *purusa*. The initial ethics in the *palas parabian* divorce process will begin with *repotan* (report) to the customary management by one of the parties who will divorce the husband or wife. The customary head (*Bendesa adat*) will explain the consequences faced after the divorce, where the effects are the social status in the family and society. This is where the role of the customary head is to provide an understanding of the nature of marriage and how the agreement's impact starts from religious law (*tatwa*) and is supported by applicable laws and regulations. The customary head will remind again that maintaining a marriage will be nobler than going through a divorce, for that the adat will decide to give the husband and wife an opportunity and their family to think again with a clear mind regarding the implementation of this divorce for three weeks.

After three weeks, if the husband and wife pair, the husband and wife agree to continue to divorce, the customary head will explain that the divorce process from the *Palas Parabian* must be carried out sincerely and sincerely without questioning the marital property and child custody which will fall directly to the husband and wife. The *purusa* (male), where this process will be closed with a *mapegat sot* ceremony and announced to the traditional village community. After that, the party submitting the *repotan* (report) is asked to put the substance of the above agreement in the form of a written statement on behalf of the divorced, married couple and approved by both parents of the divorced husband

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and wife or their representative. Furthermore, the letter will be copied and recorded in the traditional village bookkeeping to assist the customary management (adat) regarding the administration of recording indigenous peoples. This statement letter is also legalized and signed by the customary head (*Bendesa adat*) to facilitate the husband and wife in the divorce process before the court. Furthermore, the customary administrator will direct the husband and wife to carry out the *mapegat sot* ceremony (*upakara*), which will be led by a Hindu priest (*Pinandita or Pemangku*).

Mapegat sot etymologically means that *mapegat*, *pegat*, or *megat* means breaking up family ties or love relationships. In addition, *mapegat* also means a ceremony to break family ties with deceased relatives or ancestors. *Sot* or *sotan* means ordinance. Based on the explanation above, it can be interpreted that mapegat sot means a formal process in breaking the inner and outer ties with the family, both real (*sekala*) and not real or belief (*niskala*). This mapegat sot procession will be led by a pinandita or stakeholder, held at the *mrajan* temple from the male side, and witnessed by both families. In practice, the woman will do *matur piuning* (pray) to apologize to the ancestors and inform them that the husband and wife will separate. The woman will leave the *purusa* (male) family, which means severing family ties with the man. After this ceremonial procession is complete, the traditional administrator will perform kasobyahang to the local indigenous community in a village meeting or *banjar*. With this process, the divorce between husband and wife is considered legally and legally. After going through this process, the customary administrator can provide a legal statement of divorce based on the customary village, which is used for the divorce process in litigation or before the court.[20]

It should be emphasized that the *palas parabian* divorce process is a development of the *palas pada lasia* divorce method, which Wayan P. Windia fully describes in his book entitled *Mapadik: Orang Biasa Kawin Biasa Cara Biasa di Bali*. Of course, the concept of *palas perabian* divorce is one method that can be an option in the divorce process under Balinese legal customary rules for the Hindu community. The *palas parabian* divorce process is expected to contribute to completing Article 39 regarding the validity of a divorce so that it can provide a position for the

[20] PARTAMI, N. L., I. M. SUDIANA, I. N. SUKAYANA and I. A. M. PURWIATI. *Kamus Bali-Indonesia*. 3rd ed. Denpasar: Balai Bahasa Bali, 2016. 830 p. ISBN 978-979-685-550-6.

religious law and beliefs of every community in Indonesia, especially the Hindu community in Bali. *Palas parabian* divorce is not a concept that has no legal basis. This concept is based on Article 2 of the Marriage Law, which states the validity of a marriage based on the laws of each religion and belief. Departing from the article, it can be seen that the validity of a marriage is determined by the law of each religion and belief, and divorce should be determined based on the law of each religion and belief.

For this reason, *Palas parabian* divorce offers a solution to the divorce process based on *tatwa*, decency, and the Hindu religious ceremonies. It should be emphasized that the Palas parabian divorce process is not a method that makes it easier for a husband and wife to divorce. Instead, this method aims to try to maintain the marriage of the Hindu community in Bali because Hinduism does not recognize divorce. In addition, it is hoped that the *palas parabian* divorce can help the day-to-day management (*adat*) determine the *swadarma* (obligations) of the customary village community after the divorce.

The legal consequences of divorce for the Hindus in Bali

Chapter 2.51 Bhagavad-gita explains the term *karma-jam buddhiyuktah*, which means there will be an outcome or reaction whenever there is an action. In another explanation, it is explained that if someone misbehaves, the result will be harmful, and vice versa.[21] Likewise, divorce is the breakup of a marriage where the act of divorce will produce a legal consequence of the divorce.

Soerjono Soekanto explained that a divorce is a legal event that results in or eliminates rights and obligations. It was further described that divorce is closely related to legal actions in the form of responsibility to other parties.[22] The other parties referred to are descendants or children and property. Regarding the legal consequences involving the child, it is more about determining how the child's custody status is related to property, and it is more about a joint marital property (not inheritance). The legal consequences of divorce have occurred since the pre-marital period. In the study of Alit Bayu, Chrisna Widetrya et al. explained that

[21] BHAKTIVEDANTA SWAMI PRABHUPADA, A. C. *Bhagavad-Gita Menurut Aslinya: Jawaban Segala Pertanyaan*. 1st ed. Denpasar: Hanuman Sakti, 2007. 128 p. ISBN 978-979-9384-23-2; and BHAKTIVEDANTA SWAMI PRABHUPADA, A. C. *Krsna: Sumber Kebahagiaan*. 1st ed. Denpasar: Hanuman Sakti, 2006. 34 p. ISBN 979-9384-13-3.

[22] SOEKANTO, S. *Hukum Adat Indonesia*. 15th ed. Jakarta: Rajawali Pers, 2016, p. 238. ISBN 979-421-058-7.

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legal consequences had existed before the marriage was carried out, such as in the case of the application relationship, which is the relationship between the parents of the family of the prospective husband and wife (*rasan tuha*).[23] Juridically, the legal consequences of a divorce are determined in the Marriage Law, which also concerns children and property.

Regarding children, the Marriage Law stipulates that in the event of a divorce, both the father and mother are still obliged to maintain and educate their children. If there is a dispute in terms of control over the child, the court will decide on this. This provision is stipulated in Article 41, letters a, b, and c. According to Article 37, in terms of the distribution of joint property, the law gives power and authority to the divorced party regarding what rules will be used (religious law or other beliefs) in the distribution of joint property. If there is no agreement, the judge can take over regarding the distribution of joint assets due to the dissolution of the marriage due to divorce with consideration of a good sense of justice.[24]

The dissolution of a marriage due to divorce in customary law will generally determine the status of the husband and wife. Hilman Hadikusuma explained that divorce would have legal consequences for the husband and wife on the maintenance, education, and status of children to their families and relatives, as well as joint assets, inherited assets, gifts/gifts, inheritance/relics. It is further emphasized that everything in the consequences of divorce in customary law is based on legal customary rules that apply in each legal customary area. Most importantly, there is no uniformity between one legal customary community and another.[25] In the scope of Balinese customary law, the legal consequences of divorce for husband and wife are the status of being ex-husband and ex-wife or in Balinese customary law called *nyapian*. In their explanation, Wayan P. Windia and I. Ketut Sudantra explained that this *nyapian* status would impact their obligations in society as *krama banjar* (citizens of banjar) and *krama desa* (citizen of the village). In their obligations as village

[23] WIDETYA, A. B. Ch., R. SULISTYARINI and R. D. PURU HT. Akibat Hukum Perceraian Terhadap Kedudukan Perempuan dari Perkawinan Nyerod Beda Kasta Menurut Hukum Kekerabatan Adat Bali. *Brawijaya Law Student Journal* [online]. 2015, pp. 1-18 [cit. 2024-03-28]. Available at: http://hukum.studentjournal.ub.ac.id/index.php/hukum/article/view/871.

[24] HADIKUSUMA, H. *Hukum Perkawinan Indonesia: Menurut: Perundanan, Hukum Adat, Hukum Agama*. 3rd ed. Bandung: Mandar Maju, 2007. 203 p. ISBN 979-538-239-X.

[25] HADIKUSUMA, H. *Hukum Perkawinan Indonesia: Menurut: Perundanan, Hukum Adat, Hukum Agama*. 3rd ed. Bandung: Mandar Maju, 2007. 203 p. ISBN 979-538-239-X.

manners, the Balinese customary law community carries out a ritual or activity to keep the environment clean to prepare a place for the gods and the ancestors/families who have died. This is what is called *ngayah desa*. V. E. Korn explained that during the religious rituals performed by *krama desa* or *krama banjar*, they arrange offerings to *Batara* and honor, dance, and sing to the gods and ancestors.[26] The ritual activity above is called *swadarma*, which is still carried out by the divorced man or ex-husband in the *banjar*/custom village. For the ex-wife, in general, they will return to their parent's house and have recovered status (go back/return to being a girl). With the status of *mulih daha*, the rights and obligations of the woman's parents will automatically return.[27] It should be underlined that a woman to return to her parent's house and have *mulih daha* status must be with the agreement of the woman's family and be well received by her family.

The legal consequences of divorce based on Balinese legal customary rules do not affect the status and position of the child. This is because the Balinese legal customary community adheres to a patrilineal kinship system, or in Balinese legal customary, it is called the *purusa* system. Balinese legal customary rules adhere to a patrilineal system or fatherhood system, where the fatherhood system in Bali sees a woman who will become the wife enter the husband's family. Likewise, his children will be related to his father's family and have no direct relationship with his mother's family. This is also emphasized if a husband and wife divorce based on *the palas pada lasia*, where both parties between husband and wife divorce sincerely without questioning child custody, where child custody will automatically fall to the male family.[28]

The position of marital property in Balinese customary law is seen from the intrinsic property of each party. Be it the inheritance from the husband or the wife's intrinsic property due to the rules (given by parents), and it will return to each party in the event of a divorce. *Harta Gunakaya* (joint property) experiences dynamics in its distribution related to justice between husband and wife. In the past, in the case of the dis-

[26] KORN, V. E. *Hukum Adat Bali (Het Adatrecht Van Bali)*. 1st ed. Denpasar: Udayana University Press, 2017, p. 143. ISBN 978-602-294-229-0.
[27] WINDIA, W. P. and I. K. SUDANTRA. *Pengantar Hukum Adat Bali*. 1st ed. Denpasar: Lembaga Dokumentasi dan Publikasi Fakultas Hukum Universitas Udayana, 2006. 194 p. ISBN 979-99485-1-7.
[28] WINDIA, W. P. *Mapadik: Orang Biasa Kawin Biasa Cara Biasa di Bali*. 2nd ed. Denpasar: Udayana University Press, 2015. 275 p. ISBN 978-602-294-079-1.

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tribution of *Gunakaya* assets due to divorce, the judge *Raad Kertha* (customary court) would examine the truth in settlement of the divorce between the husband and wife. Right and wrong are very concerned in settlement of this distribution of *Gunakaya* property. In the Poerwa Agama manuscript, it is determined that if the husband is guilty of a divorce, the assets of *Gunakaya* will be divided into three parts, two parts for the husband, and one part for the wife.[29] However, nowadays, customary judges no longer see right or wrong in the settlement of the distribution of *Gunakaya* property. Still, as long as it can be proven that the joint property is indeed common property (*gunakaya*), the property will be divided equally.

Conclusions

The termination of a marriage in positive law in Indonesia is determined in the Civil Code in Chapter X and also in the Marriage Law in Article 38. As for the dissolution of a marriage due to divorce, it should be based on solid reasons as specified in the explanation of Article 39, Paragraph 2. The term divorce under Balinese legal customary rules is known as *nyapian*, *pegat mekurenan*, or *palas mekurenan*. Philosophically, Hinduism (*tatwa*) generally does not recognize divorce in the Hindu marriage law. However, suppose the dissolution of the marriage is indeed required. In that case, it can use the rules in the Vedic Scriptures which determine the reasons for the separation of a husband and wife, such as in the Garuda Purana, Sarasamuscaya, and the Manawa Dharmasastra, where in essence, there are solid reasons for the separation of husband and wife relationships. Namely, there is no good faith from one of the partners and the presence of very severe disease. Ethically (*susila*), the divorce process of the Hindu community in Bali carries out a divorce process with the *palas parabian* system, where this process will be continued with the function of the *mapegat sot* ceremony (*upakara*). The legal consequences of divorce based on Balinese legal customary rules do not affect the status and position of the child. This is because the Balinese legal customary community adheres to a patrilineal kinship system, or in Balinese legal customary, it is called the *purusa* system. Other legal consequences in a joint property (*gunakaya*), be it inheritance from the hus-

[29] WINDIA, W. P. and I. K. SUDANTRA. *Pengantar Hukum Adat Bali*. 1st ed. Denpasar: Lembaga Dokumentasi dan Publikasi Fakultas Hukum Universitas Udayana, 2006, p. 144. ISBN 979-99485-1-7.

band or the wife's intrinsic property due to the arrangement (given by parents), will return to each party in the event of a divorce.

References

Act No. 1 of 1974 concerning Marriage [Republic of Indonesia] [1974-01-02; 2003].

Act No. 23 of 1847 on the Civil Code [Republic of Indonesia].

ARTANA, I. M. Hak dan Kewajiban Perempuan Yang Sudah Turun Kasta Akibat Perceraian Menurut Hukum Adat Bali. *Yustitia* [online]. 2021, vol. 15, no. 1, pp. 105-112 [cit. 2024-03-28]. ISSN 2797-4170. Available at: https://doi.org/10.62279/yustitia.v15i1.709.

ARTATIK, I. G. A. K. Konversi Agama dalam Kajian Hukum Hindu. *Hukum dan Kebudayaan* [online]. 2020, vol. 1, no. 1, pp. 16-25 [cit. 2024-03-28]. ISSN 2722-3817. Available at: https://ejournal.unhi.ac.id/index.php/hkb/article/view/676.

BHAKTIVEDANTA SWAMI PRABHUPADA, A. C. *Bhagavad-Gita Menurut Aslinya: Jawaban Segala Pertanyaan*. 1st ed. Denpasar: Hanuman Sakti, 2007. 128 p. ISBN 978-979-9384-23-2.

BHAKTIVEDANTA SWAMI PRABHUPADA, A. C. *Krsna: Sumber Kebahagiaan*. 1st ed. Denpasar: Hanuman Sakti, 2006. 34 p. ISBN 979-9384-13-3.

BZN, B. T. H., F. TENGKER and B. D. NUGROHO. *Asas-Asas & Tatanan Hukum Adat*. 1st ed. Bandung: Mandar Maju, 2011. 211 p. ISBN 978-979-538-371-0.

Constitution of the Republic of Indonesia [1945].

Denpasar Regency Population and Civil Registration Service [2020].

Divorce Data 2020. In: *BPS – Statistics Indonesia* [online]. 2024 [cit. 2024-03-28]. Available at: https://www.bps.go.id/en.

DUTT, M. N. *The Garuda Mahapuranam: Text with English Translation & Notes: Volume I*. 1st ed. New Delhi: New Bharatiya Book Corporation, 2007. 602 p. ISBN 978-81-8315-073-6.

GONZÁLEZ, L. and T. K. VIITANEN. The Effect of Divorce Laws on Divorce Rates in Europe. *European Economic Review* [online]. 2009, vol. 53, no. 2, pp. 127-138 [cit. 2024-03-28]. ISSN 1873-572X. Available at: https://doi.org/10.1016/j.euroecorev.2008.05.005.

HADIKUSUMA, H. *Hukum Perkawinan Indonesia: Menurut: Perundanan, Hukum Adat, Hukum Agama*. 3rd ed. Bandung: Mandar Maju, 2007. 203 p. ISBN 979-538-239-X.

KAJENG, I. N. *Sarasamuccaya: Dengan Teks Bahasa Sansekerta dan Jawa Kuna*. 1st ed. Surabaya: Paramita, 1994. 380 p. ISBN 979-9044-16-2.

KARDILA, P. A. D., I. N. P. BUDIARTHA and I. W. RIDENG. Kedudukan Perempuan Mulih Daha dalam Keluarga dan Akibat Hukum Terhadap Anak di Desa Adat Mengwitani. *Jurnal Konstruksi Hukum* [online]. 2021, vol. 2, no. 3, pp. 605-609 [cit. 2024-03-28]. ISSN 2809-9648. Available at: https://doi.org/10.22225/jkh.2.3.3665.603-607.

KORN, V. E. *Hukum Adat Bali (Het Adatrecht Van Bali)*. 1st ed. Denpasar: Udayana University Press, 2017. 332 p. ISBN 978-602-294-229-0.

MURTIAWAN, I. W. E. P., I. N. P. BUDIARTHA and D. G. SUDIBYA. Hak Memelihara Anak setelah Putusnya Perkawinan karena Perceraian Menurut Hukum Adat Bali. *Jurnal Analogi Hukum* [online]. 2020, vol. 2, no. 1, pp. 93-97 [cit. 2024-03-28]. ISSN 2716-2680. Available at: https://doi.org/10.22225/ah.2.1.1630.93-97.

NISA, M. P. Critical Review of Domestic Violence as Reason for Divorce (Comparison of Divorce Laws in Indonesia, Malaysia and the Maldives). *Al-Ihkam: Jurnal Hukum dan Pranata Sosial* [online]. 2021, vol. 16, no. 1, pp. 1-23 [cit. 2024-03-28]. ISSN 2442-3084. Available at: https://doi.org/10.19105/al-lhkam.v16i1.4292.

PARTAMI, N. L., I. M. SUDIANA, I. N. SUKAYANA and I. A. M. PURWIATI. *Kamus Bali-Indonesia*. 3rd ed. Denpasar: Balai Bahasa Bali, 2016. 830 p. ISBN 978-979-685-550-6.

RIVAULT, Ph. and L. SORDON. *The Book of Samskaras: Purificatory Rituals for Successful Life*. 1st ed. New Delhi: Bhaktivedanta Book Trust Internastional, 1997. 328 p.

SIMANJUNTAK, B. and FL Y. P. AMBORO. Efektivitas Hukum Tindakan Penagihan Kartu Kredit dalam Aktivitas Perbankan di Kota Batam. *Jurnal Komunitas Yustisia* [online]. 2021, vol. 4, no. 3, pp. 997-1015 [cit. 2024-03-28]. ISSN 2722-8312. Available at: https://doi.org/10.23887/jatayu.v4i3.43739.

SOEKANTO, S. *Hukum Adat Indonesia*. 15th ed. Jakarta: Rajawali Pers, 2016. 382 p. ISBN 979-421-058-7.

SUDHARTA, T. R. and G. PUDJA. *Manawa Dharmasastra (Manu Dharmasastra): Atau Weda Smrti: Compendium Hukum Hindu*. 1st ed. Denpasar: Upada Sastra, 1995. 288 p. ISBN 979-8325-99-0.

WIDETYA, A. B. Ch., R. SULISTYARINI and R. D. PURU HT. Akibat Hukum Perceraian Terhadap Kedudukan Perempuan dari Perkawinan Nyerod Beda Kasta Menurut Hukum Kekerabatan Adat Bali. *Brawijaya Law Student Journal* [online]. 2015, pp. 1-18 [cit. 2024-03-28]. Available at: http://hukum.studentjournal.ub.ac.id/index.php/hukum/article/view/871.

WINDIA, W. P. and I. K. SUDANTRA. *Pengantar Hukum Adat Bali*. 1st ed. Denpasar: Lembaga Dokumentasi dan Publikasi Fakultas Hukum Universitas Udayana, 2006. 194 p. ISBN 979-99485-1-7.

WINDIA, W. P. *Mapadik: Orang Biasa Kawin Biasa Cara Biasa di Bali*. 2nd ed. Denpasar: Udayana University Press, 2015. 275 p. ISBN 978-602-294-079-1.

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Na recenzné konanie môžu byť odovzdané len príspevky obsahujúce všetky povinné súčasti v súlade s predpísanou štruktúrou príspevku. Pred odovzdaním príspevkov na recenzné konanie sa formálne preveruje pôvodnosť textov kontrolami náhodne vybraných reťazcov textov príspevkov prostredníctvom internetových vyhľadávačov.

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Title of Contribution in English:

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Autor príspevku:

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Key Words in English:

- prosíme uviesť kľúčové slová v anglickom jazyku, cca 10 výrazov *nevyžaduje sa v prípade angličtiny ako pôvodného jazyka*;

Abstrakt v pôvodnom jazyku:

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Information for Authors

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The journal SOCIETAS ET IURISPRUDENTIA thematically focuses mainly on social relevant interdisciplinary relations on the issues of public law and private law at the national, transnational and international levels. Its aim is to provide a stimulating and inspirational platform for scientific and society-wide beneficial solutions to current legal issues and their communication at the level of primarily legal experts, but also the interested general public in the context of their broadest interdisciplinary social relations, in like manner at the national, regional and international levels.

The journal SOCIETAS ET IURISPRUDENTIA offers a platform for publication of contributions in the form of:

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We are looking forward to your contribution!

Yours faithfully,

Team SOCIETAS ET IURISPRUDENTIA

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Etický kódex

Článok I. Všeobecné ustanovenia

Medzinárodný internetový vedecký časopis SOCIETAS ET IURISPRUDENTIA (ďalej len „časopis“) vydáva Právnická fakulta Trnavskej univerzity v Trnave a tematicky sa zameriava najmä na spoločensky významné prierezové súvislosti otázok verejného práva a súkromného práva na národnej, nadnárodnej, ako aj medzinárodnej úrovni. Jeho cieľom je poskytovať podnetnú a inšpiratívnu platformu pre vedecké a celospoločensky prínosné riešenia aktuálnych právnych otázok a ich komunikáciu na úrovni najmä odbornej právnickej, ale aj zainteresovanej širokej občianskej verejnosti v kontexte ich najširších interdisciplinárnych spoločenských súvislostí, a to nielen na národnej, ale aj na regionálnej a medzinárodnej úrovni.

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Zápis o výsledkoch recenzného konania sa vykonáva a archivuje na štandardizovaných formulároch.

Súhrnnú informáciu o výsledku recenzného konania, spolu s usmernením ohľadom ďalšieho postupu, obdržia predkladatelia príspevkov prostredníctvom e-mailovej odpovede bezodkladne po doručení vyhotovených recenzných posudkov redakcii časopisu a záverečnom posúdení výsledkov recenzného konania redakčnou radou.

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https://publicationethics.org/. Uvedené zásady a pravidlá publikačnej etiky sú záväzné pre autorov príspevkov, redakčnú radu časopisu, redaktorov a redakciu časopisu, recenzentov príspevkov, ako aj vydavateľa časopisu.

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Redaktori a redakčná rada časopisu aktívne vyvíjajú všetko úsilie smerujúce k predchádzaniu, a rovnako aj ku eliminácii rizika vzniku akýchkoľvek prípadov vedecky a publikačne neetického a akademicky nečestného konania všetkých participujúcich subjektov.

V prípade, že sa redaktori, redakčná rada alebo vydavateľ časopisu dozvedia o akomkoľvek prejave vedecky a publikačne neetických a akademicky nečestných výskumných praktík uplatnených v súvislosti s predloženým alebo už v časopise publikovaným príspevkom, redaktori alebo vydavateľ sa budú pri riešení a náprave zisteného skutkového stavu riadiť pokynmi Komisie pre publikačnú etiku (COPE) https://publicationethics.org/guidance, a to v súlade s prijatými zásadami a odporúčaniami platnými pre nasledovné oblasti:

- Odhalenia vedeckých a publikačne neetických alebo akademicky nečestných výskumných praktík a ich riešenie
  https://publicationethics.org/misconduct
- Autorstvo a prispievateľstvo
  https://publicationethics.org/authorship
- Sťažnosti a odvolania
  https://publicationethics.org/appeals
- Konflikt záujmov/konkurenčné záujmy
  https://publicationethics.org/competinginterests
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  https://publicationethics.org/intellectualproperty
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  https://publicationethics.org/management

- Recenzné konanie
  https://publicationethics.org/peerreview
- Diskusie a opravy po vydaní
  https://publicationethics.org/postpublication

Článok V. Nezávislosť a nestrannosť

Časopis je nezávislým a nestranným medzinárodným vedeckým internetovým periodikom.

Článok VI. Rozhodný právny poriadok

Časopis a všetky s ním súvisiace právne skutočnosti a právne úkony sa riadia právnym poriadkom Slovenskej republiky.

Trnava 31. december 2013

Code of Ethics

Article I. General Provisions

International scientific online journal SOCIETAS ET IURISPRUDENTIA (hereinafter only "journal") is published by the Faculty of Law at Trnava University in Trnava, and it thematically focuses mainly on social relevant interdisciplinary relations on the issues of public law and private law at the national, transnational and international levels. Its aim is to provide a stimulating and inspirational platform for scientific and society-wide beneficial solutions to current legal issues and their communication at the level of primarily legal experts, but also the interested general public in the context of their broadest interdisciplinary social relations, in like manner at the national, regional and international levels.

The journal's editorial office resides in premises of the Faculty of Law at Trnava University in Trnava in Kollárova Street No. 10 in Trnava, Slovakia.

The journal has the nature of a scientific peer-reviewed journal, which is issued in an electronic on-line version regularly four times a year on the official website of the journal https://sei.iuridica.truni.sk/international-scientific-journal/. Publication of the contribution texts will be provided exclusively in the bilingual Slovak-English standardized letterhead template of the journal, synchronously in the form of complete versions of individual journal numbers as well as in the form of single authors' contributions. Publication process follows in corresponding sections on the journal's official website.

The journal provides a stimulating and inspirational platform for communication both on the professional legal level and the level of the civic society, as well as for scientific and society-wide beneficial solutions to current issues mainly in the areas of public law and private law.

The website of the journal offers the reading public contributions in the common graphical user interface as well as in the blind-friendly interface, both parallel in the Slovak and the English languages. In all those languages the journal's editorial office provides also feedback communication.

Article II. Responsibility and Publication of Contributions

The journal accepts and publishes exclusively only original, hitherto unpublished contributions written as the own work by authors those are submitting the contributions for publication in the journal. Contributors are scientifically or pedagogically engaged in areas corresponding with the main orientation of the journal and they have completed adequate academic qualification, at least the second degree of academic education.

In accordance with the foregoing provision shall be automatically with the adequate justification rejected contributions those have been provably already published as well as contributions those constitute the merits of plagiarism or of unauthorized, respectively illegal interference with the copyright under the protection of the Copyright Act in force.

Information for authors published on the journal's website is binding. Contributions are accepted in the English, Slovak and Czech languages. Favouring the English language in contributions is welcome.

Responsibility for compliance with all prerequisites and requirements laid on contributions published in the journal have special supervisors within the journal's editorial board responsible for specific interdisciplinary sections in relation to the scientific aspects of contributions, editor in chief in relation to the formal aspects of contributions and executive editor in relation to the application of methodological, analytical and statistical questions in contributions.

Publication of contributions in the journal is realized exclusively without any contributor's claim for author's fee (royalty). Also, the processes of receiving, reviewing and publishing of contributions in the journal are carried out exclusively free of charge. Submission of contributions for publication understands the editorial office of the journal as a manifestation of the will of the authors, through which the authors all at once knowingly and voluntarily:

- express their own agreement with publication of submitted contribution in the journal;
- declare that the contribution presents their original, hitherto unpublished work;
- declare their own agreement with specifying their workplace and contact e-mail address in the section "Authors' Contact List".

Accepted can be only texts submitted for publication sent by their authors/co-authors directly and with their written permission for publi-

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cation; text submissions sent mediated through non-authors or non-co-authors of a submitted text delivered to the editorial office of the journal cannot be accepted for the following review procedure due to the absence of the author's/co-authors' consent.

Article III. Review Procedure

Reviewing the contributions for publication in the journal follows with a mutually anonymous (double-blind) review procedure realized independently and impartially by members of journal's editorial board and in well-founded cases also by recognized experts working in corresponding areas.

Only contributions containing all mandatory parts in accordance with the prescribed structure of the contribution may be submitted for review procedure. Before the contributions are submitted for review procedure, the originality of the texts is formally checked by checking randomly selected strings of the texts of the contributions through the Internet search engines.

Report on results of the review procedure is made and archived on standardized forms.

Comprehensive information on results of the review procedure, together with guidance on how to proceed with submitted contributions, will contribution's submitters receive through an e-mail answer immediately after receiving the reviewers' written opinions by the journal's editorial office and final judging the results of the review procedure by the editorial board.

Contributions will be with adequate written justification automatically rejected in cases, if:

- the contributor hasn't provably completed the entire university education, i.e. the academic qualification of the second degree;
- contribution provably doesn't comply with the minimum standards and standard criteria of scientific ethics, which are imposed and generally respected by the scientific public and scientific community in relation to contributions of the given category (studies, essays, reviews on publications, information or reports), whether in terms of extent, content, methodological assumptions, applied methodology and similarly, or in terms of a proper, complete and scientifically cor-

rect indicating all the bibliographic references according to current citation standard ISO 690.

Article IV. Declaration of Accession to Codes and Principles of Publication Ethics of the Committee on Publication Ethics

The journal fully exercises and observes codes and principles of publication ethics of the Committee on Publication Ethics (COPE) published on the website of the Committee on Publication Ethics https://publication-ethics.org/. Listed principles and guidelines of publication ethics are binding for contributors, journal's editorial board, journal's editors and editorial office, contribution reviewers as well as journal's publisher.

The journal rejects and strictly condemns any scientific and publishing unethical and academically dishonest practices, which include, among others, plagiarism, manipulation of citations or falsification, alteration, selective omission and fabrication of data and sources.

The editors and the Editorial Board of the journal actively make every effort to prevent as well as to eliminate the risk of any cases of scientifically and publicationally unethical and academically dishonest behaviour of all participating subjects.

In the event that the editors, the Editorial Board or the publisher of the journal are made aware of any manifestation of scientifically and publicationally unethical and academically dishonest research practices applied in connection with a submitted or already published paper in the journal, the editors or the publisher will follow the Committee on Publication Ethics's (COPE) guidance https://publicationethics.org/guidance in dealing with and correcting the revealed state of affairs, in accordance with the accepted principles and recommendations applicable to the following areas:

- Allegations of misconduct
  https://publicationethics.org/misconduct
- Authorship and contributorship
  https://publicationethics.org/authorship
- Complaints and appeals
  https://publicationethics.org/appeals
- Conflicts of interest/Competing interests
  https://publicationethics.org/competinginterests
- Data and reproducibility
  https://publicationethics.org/data

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- Ethical oversight
  https://publicationethics.org/oversight
- Intellectual property
  https://publicationethics.org/intellectualproperty
- Journal management
  https://publicationethics.org/management
- Peer review processes
  https://publicationethics.org/peerreview
- Post-publication discussions and corrections
  https://publicationethics.org/postpublication

Article V. Independence and Impartiality

The journal is an independent and impartial international scientific online journal.

Article VI. Determining Law

The journal and all the related legal facts and legal actions are governed by the law of the Slovak Republic.

Trnava, Slovakia, December 31st, 2013

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